



Elgar Encyclopedia of Comparative Law

Edited by Jan M. Smits

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Edited by

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Preface

Jan M. Smits

It is no exaggeration to state that in the last 20 years we have seen a true ‘comparative law explosion’: as a result of increasing globalization and Europeanization, comparative law has become more and more important. This is not only true for the scholarly discipline of comparative law as such (where the focus is usually on methodology), but it is also true for specific areas of the law. The feeling among many legal academics now is that one can no longer write about, for example, tort law or constitutional law without involving at least some comparative aspect. But the importance of comparative law is not restricted to legal science. Also in legal practice, to attack a legal problem with a comparative approach has become en vogue. Legislators increasingly make use of foreign law in drafting new legislation and in more and more countries courts draw inspiration from abroad as well.

All this is a fortunate development for those who believe in an international legal science. However, it is often difficult to find one’s way in the now massive amount of doctrinal writings on comparative law. There are no recent reference works available in which an attempt is made to take stock of the discipline. The purpose of this encyclopedia is to provide such a reference work. It does so by providing a general readership with easily accessible articles in which stock is taken of present-day comparative law scholarship.

In this alphabetically ordered book the reader will find four types of entries. First, it contains a collection of 37 articles on specific areas of the law (criminal law, administrative law and so on) and on specific topics (accident compensation, privacy and so on). The contributors of these entries were asked to shed light on the ‘comparative’ state of affairs in their area. Second, this volume contains 12 entries on topics that deal with more methodological questions in comparative law (such as aims of comparative law, the idea of a European Civil Code, legal transplants). Third, there are contributions that deal at large with common law in general and with American, German, Japanese, Scots and Russian law. These legal systems were chosen for their importance in the comparative debate. Finally, 15 authors were asked to write a report about specific countries’ legal systems. These are short entries in which a set format is followed and in which, usually, material in English, German or French on these systems is mentioned.

To describe the current state of affairs within the word limit prescribed by the editor proved to be impossible for some topics. The length of these entries therefore extends beyond what was originally envisaged. Consistent with the idea of a reference work, all contributors were asked to add a list of references. The reader is thus able to use this book as a first entry into a field of law, a specific topic or a legal system.

It is easy to criticize an encyclopedia like this. First, a reference work in a rapidly emerging field like comparative law runs the risk of quickly being outdated. This is why the contributors were asked, not only to look at recent materials, but also to pay attention to the classic comparative 'canon' in their field. Second, no doubt other editors would have included topics not covered in the present volume or would even have left out topics that are now included. I fully agree that many other topics could have found a place in this book. It is only constraints of length – and, I must admit, editorial management – that have precluded me from including more topics. My hope is that, with regard to the topics that are included, the reader finds the entries just as valuable as the editor finds them to be.

Finally, I would like to express my gratitude to the 73 authors that participated in this project. It is thanks to their enthusiasm that this book could be produced. Thanks are also due to Renske van Dijken who, as a student–assistant at Maastricht University, provided invaluable help in the editing process.

1 Accident compensation*

Michael G. Faure

1 Introduction

The issue of how victims of accidents can receive compensation has been addressed for a long time in many legal systems and of course also in comparative law. The complicated issue of the topic ‘accident compensation’ is of course that a variety of legal instruments come to mind that can be used by victims to receive compensation after an accident has happened. Some of these will be discussed in other items in this encyclopedia. This is more particularly the case for tort and for insurance, both of which are important instruments. There is also an overwhelming literature describing the ways in which victims can achieve compensation not only for their damage in different countries, but also from a comparative perspective. It seems as if recently the number of publications in this domain has only been increasing.

One reason for the interest in accident compensation may simply be the increasing interest in the harmonization of law and more particularly private law in Europe. This has given rise to many volumes which usually are based on country reports describing the situation in the particular country of the reporter and which usually contain a comparative analysis as well. Many of these books have as their goal to examine whether there is a common core in the (European) legal systems which could be used as a basis for a possible harmonization of the law with respect to accident compensation. Hence, a lot of material is available today, much of which has emerged in recent years. To a large extent we can therefore simply discuss this material for further reference.

A second reason for the increasing interest in accident compensation in a comparative perspective is probably the sad fact that, although technological progress has undoubtedly largely added to the quality of life of mankind, at the same time mankind also seems to be exposed (increasingly) to various (also new) risks which raise the question of compensation of the victims. And even in cases where the risks are not new (as with earthquakes, flooding, hurricanes or, more recently, tsunamis) the question of legal instruments that can provide adequate compensation to victims is increasingly asked. Many specific studies address specific risks, many of which are also ‘man made’ and particularly an undesired side-effect of technological

* See also: American law; Tort law in general; Insurance; Damages (in tort); Social security.

progress. In this respect we can of course refer to environmental risks, medical malpractice, but especially after 9/11 also to the terrorism risk. For all of these (and many others, such as traffic) risks specific comparative studies exist, all devoted in some way or another to the question of how in different countries victims can receive compensation. There have even been specialized institutes that have set themselves as a goal to promote research with respect to the various instruments that can provide accident compensation to victims. In this respect, for instance, the European Centre of Tort and Insurance Law (ECTIL), founded in 1999 and located in Vienna, should be mentioned. In the various studies that ECTIL initiated, many of which will be mentioned in the list of references, research is undertaken on similarities and differences with respect to accident compensation in various legal systems in Europe, but also in non-European countries like Israel, South Africa and the United States.

A third reason for the increasing body of literature which addresses accident compensation is the growth of the domain known as law and economics or the economic analysis of law. Starting from the concept of efficiency law and economics, scholars examine what types of legal rules in various legal systems are and can be used to prevent accidents in an efficient way and to compensate victims without negative effects on the prevention. The focus of law and economics scholars (Shavell, 1987) is indeed rather on prevention of accidents than on accident compensation. The premise of a law and economics scholar is usually that the best way to protect the victims is to prevent accidents. Hence a law and economics scholar will always be interested in the question of what the influence of a chosen compensation mechanism is on the incentives of the parties involved to prevent accidents or, more generally, whether the different instruments presented lead in an optimal way to cost reduction. This domain of law and economics certainly has reached comparative law. In this respect we can simply refer to the domain of 'comparative law and economics' which more particularly addresses inter alia the question whether differences between legal systems can also be explained on efficiency grounds. Also this interest in the economic analysis of law, more particularly among lawyers interested in accident compensation, can explain the increasing body of literature in this domain.

2 General scope of accident compensation systems

Although it would within the scope of an encyclopedia on comparative law probably be interesting to focus on differences between the legal systems, we could probably start with focusing on some similarities. Starting from the already mentioned law and economics literature many make, as mentioned, a distinction between two functions of a compensation system,

being on the one hand prevention and on the other hand compensation. It is then argued (e.g. by Skogh, 1989) that the prevention goal could primarily be reached through regulation, backed up with administrative or criminal sanctions. That should, as mentioned, according to economists be the primary focus of the system. If in addition victims are to be awarded accident compensation this can according to this economic logic be guaranteed through a variety of instruments, some of which we will discuss here, such as social security, insurance or a compensation fund. In most legal systems one can indeed notice that this is the way that accident prevention and compensation is structured: there is a primary role of regulation in the prevention (Shavell, 1984) and public compensation mechanisms (more particularly social security) play a primary role in providing compensation.

However, more particularly as far as this compensation is concerned, one can notice a striking difference in many legal systems (and again that seems to be a similarity) between the treatment of on the one hand personal injury damage and on the other hand property damage.

In most legal systems as far as personal injury is concerned victims will for their compensation primarily rely on the social security system that will provide them with a basic guarantee against income losses as a result of disability. Social security (at least in the western European legal systems) will moreover also take care of the medical bills and healthcare expenses. If the injury is work-related (occupational health hazards or accidents at work) the compensation is usually more generous than when this is not the case. Some systems (of course the developing countries where social security may be non-existent, but also the US where the social security system is less generous) provide substantially less. But even in the (relatively) generous European system social security only covers a part of the victim's loss. Usually for wealthier victims, a part of their lost income is covered under social security, but for the remaining part (the top) they will have to use tort law. The top of the income will usually not be compensated under social security nor will there be compensation for the non-pecuniary losses. In that respect victims will have to look for additional compensation systems, where tort and insurance are the primarily indicated systems (Bona and Mead, 2003; Koch, 2003).

Tort law can of course only be used when a liable injurer can be found. That may be the case with 'man-made' accidents, but for instance not when the accident was caused by a natural disaster. If an injurer can be held liable and is solvent (or has liability insurance to cover his obligations) the victim can receive accident compensation through tort law. If this is not the case, in most legal systems victims can call on a personal accident insurance that might provide compensation for personal injury. Most accident insurances provide for lump sum payments (and sometimes additional coverage of lost

income for the part not covered under social security) to cover the damage resulting from personal injury. Personal accident insurances are usually not mandatory and the scope of coverage is of course dependent upon the policy conditions. Personal accident insurances, like social security, usually provide cover irrespective of the cause of the accident.

If no liable injurer can be found and no first party insurance covering the damage is available, the victim might call on specific compensation regimes if they apply to his particular situation. For instance many legal systems have a specific compensation fund for the victims of intentional crime. They can call on a crime compensation fund. In other cases, for instance with natural disasters, some legal systems have installed compensation funds, others rely on ad hoc compensation. There the legal systems largely differ.

A different structure is generally followed, however, for the case in which an accident victim suffers property damage. Social security generally does not cover property damage. Thus the victim will have to use other compensation mechanisms like tort or insurance. Again, tort only provides accident compensation in so far as a liable (and solvent) injurer can be found. Otherwise, inasmuch as this is available, victims may again have to call on first party insurances (like fire or housing insurance) to cover the property losses. If these do not suffice, in some cases legal systems have again installed specific compensation regimes, for instance to cover property damage resulting from environmental degradation. But also here the solutions in the various legal systems seem to vary largely.

3 Social security

In the introduction we indicated that, although there are of course differences, the basic role of social security systems in covering damage resulting from personal injury is, at least in the European states, relatively similar, of course also due to the harmonizing effects of many international conventions and European directives in this field. Many comparative studies addressing social security systems are available (Pieters, 1993a, 1993b; Gordon, 1988; Jacobs, 2000). As far as the role of social security in providing accident compensation is concerned it should be recalled that in the countries with an elaborate social security system its role is important in the compensation of personal injury damage. It is, however, far less important in the compensation of property damage.

An interesting debate is today taking place in many countries as to whether the services traditionally performed by social security in providing accident compensation can also be provided by private insurers. The starting points of these systems are different: whereas private insurance starts from risk solidarity between similar risks in a pool, but at the same time

stresses the need of risk differentiation, social security is based on a distributive solidarity with income-dependent (not risk-related) premiums (Faure, 1998). Nevertheless, some countries are nowadays, as a result of privatization in the social security area, experimenting with private insurers providing services that were traditionally provided through social security. This shows that there is certainly a grey area between publicly provided social security and private insurance. These grey areas and interdependencies can also play a role between tort and social security. Many countries stress the importance of granting large redress rights to social insurance carriers in order to allow them to exercise a right of recourse against a liable injurer after they have paid the primary victim. A notable exception to that rule can be found in Nordic legal systems, like Sweden, where in principle the right of redress of social insurance carriers is very limited. This is criticized from an economic perspective since the tort-feasor will not be fully exposed to the damage he causes and hence 'benefits' from the fact that social security paid a part of the compensation (Magnus, 2003).

4 Liability and insurance

As already mentioned many accident victims will seek compensation for the part not covered under social security (more particularly the top of one's income, non-pecuniary losses and property damage) through other systems like either tort law or insurance.

Already in the classic international encyclopedia of comparative law under the editorship of André Tunc the treatment of tort law in the different legal systems was examined (*International Encyclopedia of Comparative Law*, 1980). Many of the findings in that well-known volume concerning the different approaches in, for example, the roman law-based systems (France, Belgium, Spain and Italy) which largely are based on the code civil of 1804, the German law-based systems (Germany, Austria and Switzerland) which see wrongfulness as the basic element of a tort, and the common law system, are probably still valid today, although since 1980 many evolutions of course have taken place both in the legislation of the different countries and in case law. Especially within the examination of the possibilities of arriving at a common European law of tort the European Group on Tort Law (but also many other study groups) has examined the various aspects of tort in country reports with a view to identifying a common core. Thus recently attention has been given to the key elements of a tort, being wrongfulness (Koziol, 1998), causation (Spier, 2000), damages (Magnus, 2001), strict liability (Koch and Koziol, 2002), liability for damage caused by others (Spier, 2003) and contributory negligence (Magnus and Martin-Casals, 2004). These different approaches in the various countries are also discussed in the impressive oeuvre of Von Bar (Von Bar, 1996, 2000) and in an interesting project of a

group of scholars linked to former Advocate-General Walter van Gerven who developed casebooks in which the important case law in the various legal systems is presented and critically discussed (van Gerven and others, 1998). Of course also in the well-known 'classic' books on comparative law the different approaches to tort are discussed (Zweigert and Kötz, 1998).

It would of course be impossible to summarize the findings of this impressive literature within the scope of our contribution to this encyclopedia. Nevertheless a few generalities can be noticed. The reader interested in developments in tort law in the various European legal systems can be referred to the publications by Koziol and Steininger who, since 2001, publish overviews of European tort law which sketch the developments in tort law in the different European legal systems, the most recent one in 2004. First, it seems from these various contributions that, although the legal form concerning the traditional liability for one's own act is different in the legal systems, the way case law deals with the issue of negligence (or fault or breach of a duty of care) may not always be that different. In other words: there seem to be some similarities, for instance in the way judges balance interests to establish what could be expected of an injurer among the seeming different approaches in the legal systems. However, there are of course differences as far as the contents (and thus the result) are concerned, for instance when the scope of protection of various interests is examined. The different way countries deal with pure economic losses is an example often mentioned of remaining important differences (van Boom, Koziol and Witting, 2004). The latter also seems the case as far as the area of strict liability is concerned. There is of course some harmonizing effect of conventions (for the areas where they apply, like nuclear accidents and oil pollution) and European directives (for instance for the area of product liability and, more recently, environmental liability). But fundamental differences still seem to exist between, for instance, the very restrictive English approach towards strict liability and the far more generous French case law where strict liability applies on the basis of article 1384 (1) of the Civil Code for damage caused by defective objects.

A second generality is that in all of this literature it is mentioned that victims increasingly seem to use tort law as a mechanism to seek compensation for damage resulting from accidents. It is argued that there is an expanding liability, especially of industrial operators (Faure and Hartlief, 1996) but nowadays in some systems also of public authorities. Some argue that this tendency of victims to use tort law to seek compensation should be stopped, referring to the fact that the limits of liability are reached and it is time to 'keep the floodgates shut' (Spier, 1996, 1998). Of course the incentive for victims to use tort law to obtain compensation largely depends on the availability of other instruments to provide this accident compensation.

Thus it has often been argued that tort law, for example, in the US is far more developed precisely because American victims lack a basic social security system to provide for their basic needs after an accident. European victims would primarily be able to rely on tort law and should thus use the 'luxury' of tort law only to provide the limited part of damage not compensated under social security. Traditionally tort law therefore played, at least in European systems, a rather modest role in providing accident compensation. However, with a reducing role of government in the social security system (as a result of financial deficiencies governments in many European systems tended to reduce social security payments) the need for victims to use tort law also to receive compensation of basic needs may increase in the European context as well.

A third trend is undeniably that the increasing research with respect to the differences in the (European) tort systems has also given rise to an increasing interest in the harmonization issue, although the question whether or not tort law should be harmonized at a European level is still an issue of debate (see section 6 below).

Of course many authors stress that tort law can only play its role in providing accident compensation to victims if there is a guarantee against the insolvency of the insurer. Many legal systems have (again often as a result of conventions or directives, as with motor vehicle insurance) introduced a duty for insurers to seek financial coverage, usually taking the form of liability insurance. Also economists have stressed that, in case of an insolvency risk, such a duty should be introduced, since otherwise tort law may fail to have its deterrent effect (Shavell, 2004).

If liability and insurance do not provide relief to the victim, victims may also seek coverage on a first party insurance basis. As mentioned in the introduction, many legal systems allow victims to seek coverage for that part of personal injury damage not covered under social security through personal accident insurances. These generally cover the risk, depending upon the policy conditions, irrespective of the cause of the accident and usually provide lump sum payments. In some cases, for instance in the well-known French insurance 'garantie contre les accidents de la vie', coverage is provided on a first party basis as if tort law were applicable. That means that a victim can receive compensation from his first party insurer also for non-pecuniary losses, which is rare in first party insurance contracts unless a lump sum is paid, which can of course include a component of non-pecuniary damage as well. The scope of coverage will usually depend upon the policy conditions. Victims may also seek cover for property damage they suffer as a result of an accident. Traditional examples (heavily regulated in most legal systems) are housing insurances or fire insurance. Although not mandatory, often an insurance is required to obtain a mortgage from a

bank. Consequently these types of insurance, especially covering real estate, are widespread in practice. A problem that has risen recently on the occasion of large (natural) disasters is that in many countries property damage caused by natural disasters was excluded from coverage (Schwartz and Wagner, 2004). This has led some legislators, for instance in France, to introduce compulsory cover of damage caused by natural disasters on (voluntary) housing insurances (Moreteau and others, 2006).

5 Alternative solutions

There are various reasons why increasingly alternative (in the sense of different from social security, tort and insurance) mechanisms are at least discussed and in some cases introduced to provide accident compensation to victims. One possibility is that, even after all the above-mentioned instruments have been used, victims still remain uncompensated. A fund would then be used simply because the traditional instruments would not provide adequate accident compensation. This may for instance be the case when no liable injurer can be found or when the injurer proves to be insolvent. In many legal systems one can therefore see compensation funds for instance to cover damage by uninsured motor vehicles or damage suffered by victims where the liable injurer can not be identified. That is for instance also the case with environmental damage coming from unknown polluters. Insolvency may particularly be a problem with damage caused by intentional violent crime. Many legal systems therefore have fund solutions to compensate victims of those crimes. Many more examples of those funds could be given. It applies for instance also to cases where victims suffer property damage as a result of natural disasters. Here (see above) social security usually does not intervene and in many countries first party insurances exclude damage caused by natural disasters. For instance Austria and Belgium have therefore created catastrophes funds (although the role of these funds is limited: not all damage is covered). In all of these cases the fund solutions have a subsidiary character. They come in other words into force only because traditional mechanisms do not provide an adequate remedy. However, a condition for calling on the fund is usually that the victim has used the available traditional mechanisms.

A different way of looking at alternative solutions is to consider them really as a complete alternative for the tort/insurance model. Some argue that it makes no sense to use the tort system to provide accident compensation since it would be too costly, too slow, ineffective and thus not able to provide adequate compensation at low costs. Economists would argue that the tort system still plays an important role in providing deterrence against accidents, but others argue that the prevention of accidents could be taken care of by safety regulation backed up by administrative and

criminal sanctions. Generally it is argued, for instance in the area of traffic liability, that liability and insurance rarely have a deterrent function. In sum the argument goes that both deterrence and compensation can better be provided through other mechanisms than tort and insurance. This point of view has especially been defended strongly by the well-known French tort lawyer André Tunc (Tunc, 1996, 1998). He has been quite successful with his plea in favour of a so-called no-fault accident compensation system since such a no-fault model has for instance been introduced in France and has afterwards been discussed in many other countries as well (Van Dam, 2001). This idea, that accident compensation could take place in a totally different way from via tort and insurance is not only limited to the area of traffic liability (Van Schoubroeck, 2003); in some legal systems a generalized no-fault accident compensation scheme for victims has been introduced, the best known (at least the most discussed in the literature) probably being the Scandinavian one (Bitterich, 2003). This is a topic that has many proponents: many praise the system for the low administrative costs (compared to the tort system); others argue that it would dilute the incentives for prevention (Solender, 1993; Mahoney, 1992). Similar tendencies towards no-fault compensation schemes exist in other legal systems (Rhodes, 1986), the best known probably being the Swedish personal injury compensation law. But also this Swedish no-fault compensation scheme has been subject of serious criticism. On the one hand the amounts of compensation would be lower than what would be awarded under tort law, on the other hand there are doubts about the preventive effects of the system (Dufwa, 2000).

6 Harmonization

As was indicated above, a great deal of the research with respect to the differences in tort and insurance law in many (European) legal systems has in the past decade been undertaken from the perspective of the question whether a harmonization of tort law could be realized in Europe. This question has led to a lot of controversy. Some lawyers argue that there would be no reason why a victim in, for example, Portugal should receive less in non-pecuniary losses in the case of the loss of, say, an arm, than in Germany. Harmonization would therefore be needed (Magnus and Fedtke, 2001). Others, especially law and economics scholars, are far more critical of the harmonization of tort law in Europe. They argue that there are good reasons for the different treatment of victims in different countries, one of them being that the differences are linked to different preferences of citizens (Hartlief, 2002). Law and economics scholars especially argue that harmonization would not be necessary to level the playing field (in other words for the internal market) and that, also in the domain of tort law, the subsidiarity principle should be taken seriously. Therefore they argue that, in

areas where differences in form are merely technical and do not reflect varying preferences, a harmonization may be indicated, but that otherwise the costs of harmonization would probably be higher than the benefits (Faure, 2004).

7 Specific: environment/catastrophes and terrorism

All of the major questions and controversies indicated above of course also play a role in some specific areas. We have already mentioned the domain of traffic liability where in legal doctrine, but also in some countries, there is a trend away from liability and insurance towards no-fault compensation schemes. Also for other specific areas a debate takes place on the role of tort and insurance versus alternative compensation mechanisms. For instance in the environmental area the problem often arises that no liable injurer can be found and that hence tort and insurance may only play a little role (of course social security almost plays no role at all in this domain). A much debated example, also in Europe, is the American superfund legislation in CERCLA. The legislator introduced far-reaching joint and several liability rules that even apply in a retroactive manner. Here the wish of the legislator to receive compensation to finance the clean-up of so-called 'black spots' apparently had priority over the respecting of fundamental principles of tort law. The superfund construction (and similar examples in Europe) is therefore heavily criticized from an economic perspective (Revesz and Stewart, 1995). In many European countries there is undeniably also a tendency towards an increasing use of tort law (but also public law mechanisms) to obtain recovery of (especially) soil clean-up costs. However, some scholars argue forcefully against using tort law as a compensation mechanism in this domain (Bergkamp, 2001). The European Union followed recently, with its environmental liability directive of April 2004, a mixed approach in that public authorities can claim compensation from liable polluters for clean-up costs, although the basis is apparently not necessarily a liability claim. However, in line with suggestions in the literature, the new mechanism is not retroactive and many important aspects (like the issue of causation and the justificative effect of a license) are left to the member states (Faure, 2003).

As we have already indicated, also the question of how victims of catastrophes can receive adequate compensation has received attention from many legislators, resulting in specific arrangements. For the specific area of nuclear accidents some harmonization took place since international conventions deal with this issue (Vanden Borre, 2001). Since insurance coverage especially for property damage resulting from natural disasters is often lacking, either specific regulatory measures to force victims to purchase insurance coverage (as in France) were introduced, or specific compensation

mechanisms such as funds (in Austria and Belgium). A type of catastrophe that received much attention, especially after 9/11, is of course the terrorism risk. The US reacted on 9/11 with a generous compensation fund for the victims of 9/11, but the US and many other legal systems also intervened in insurance markets, for instance providing reinsurance through the state for the terrorism risk (for instance in the UK, France, the Netherlands and Germany). All scholars agree that the scope (magnitude) and uncertainty of the terrorism risk are such that it is very difficult to apply classic insurance principles to this risk. That explains why most legal systems have looked for alternative (government provided) solutions to guarantee accident compensation to victims in this domain (Liedtke and Courbage, 2002; Koch, 2004; Posner, 2004).

8 Specific: medical malpractice

An area which has also given rise to much debate is medical malpractice. Again, the well-known issues play a role here as well: victims increasingly use tort law to seek recovery for their damage and courts (at least in some countries) seem increasingly willing to provide compensation via tort law, in some cases backed up by liability insurance. However, there still are considerable differences in this respect between the countries (see Faure and Koziol, 2001).

However, in some cases the liability in the medical malpractice area has been expanding so much, more particularly in the US, that some have argued that this expanding liability has led to an insurance crisis (Priest, 1987). In some countries insurers have therefore withdrawn from that market (Danzon, 1985). In cases where victims suffer large damages, compensation is therefore often lacking. Also in this domain a call for the introduction of alternative liability regimes can be heard (Danzon, 1990). Again, the countries with some experience in this domain are to be found in Scandinavia (Norway and Sweden), but also New Zealand. Recent comparative research shows that similar empirical material is apparently differently interpreted by health lawyers and tort lawyers (Dute, Faure and Koziol, 2004a). Tort lawyers are generally sceptical with regard to no-fault compensation systems, fearing that this will dilute any incentives of the healthcare providers to prevent medical malpractice. Health lawyers on the other hand praise the no-fault compensation systems since these would provide quick compensation for accident victims at relatively low costs. They tend to attach less belief to the deterrent effect of tort law on medical malpractice.

A related area on which specific legislation (and quite a bit of legal doctrine) exists is the liability for biomedical research with human subjects. Many countries have a system of (strict) liability of healthcare providers for

damage resulting from biomedical experiments and in addition in many countries (as in the Netherlands) compulsory insurance applies. However, also here problems arise on the one hand because the compulsory insurance which is imposed can not always be fulfilled because in some legal systems insurers seem reluctant to cover this risk. Also problems arise with the proof that the damage of the victim is caused by the biomedical research and does not result from the health condition of the victim (Dute, Faure and Koziol, 2004b). It is indeed often the causation issue that will crucially influence the scope of the compensation regime.

9 Empirics

The most interesting issue is of course whether there is some proof as to which of the many compensation systems we have discussed so far is most suitable as compensation mechanism, and at the same time the question arises what the effect of the different systems will be on the incentives to prevent harm. There is with respect to the specific areas (see the references in sections 7 and 8 above) some interesting empirical material usually showing, not surprisingly, that the liability system may provide the luxury of fully compensating the victim, but that it is far too costly (in administrative costs), takes a long time (before the victim is compensated) and is limited in scope (in the sense that only a relatively small percentage of damage caused by accidents is compensated through the tort system). Some specific studies have equally addressed this point. In the Netherlands as early as the 1970s, Bloembergen (later a member of the Netherlands Supreme Court) claimed that the tort system only led to huge administrative costs and to claims by first party insurers against traffic liability insurers (Bloembergen, 1973). Also a study by Weterings on the administrative costs of compensating personal injury showed that the costs involved in establishing medical causation (see section 8) are relatively high compared to the proportion of the damages finally awarded to the victim (Weterings, 1999). Similarly research also showed that tort law would, compared to other (social security and first party insurance) sources, only contribute up to 10 per cent of the total compensation of traffic accident losses (Faure, 2001).

Far more interesting than the question of what the impact of the various systems on accident compensation is, is of course the question of what the influence of the various compensation instruments is on the deterrence of accidents. Also in that respect many studies exist, an excellent summary of which has been provided by Dewees, Duff and Trebilcock (1996). They examine various categories of accidents, which we have also discussed above (traffic, medical malpractice and environment). Without reporting the results in detail it is striking that they show that as far as prevention is concerned the influence of regulation on, for example, pollution reduction

is far more impressive than the impact of tort law (Deweese, 1992). This may once more prove the point that, although most academic writing is occupied with the way in which various legal systems deal with tort law, its importance in practice, both as far as compensation is concerned as well as regarding prevention, may be far more limited than one would expect from the literature. Other systems apparently play a far more important role both in preventing (regulation) and in compensating (social security, insurance) accidents.

10 Conclusion

This brief overview of the way accident compensation has been dealt with in legal doctrine, legislation and practice in various legal systems in recent years has shown a number of trends. The traditional debate between on the one hand those who favour regulation with public compensation systems and on the other the (often private) lawyers who favour tort law and insurance is still of importance today. This debate apparently influences the legislator in many countries as well, since in various domains legislators seem to move away from the mere use of tort and insurance towards alternative compensation mechanisms, for instance in the areas of medical malpractice, environmental pollution and traffic accidents. Nevertheless, this tendency away from tort towards alternative mechanisms is certainly not generalized and moreover definitely not free from criticism. Many, indeed, hold that this trend away from individual responsibility towards collective compensation mechanisms may reduce essential incentives towards the prevention of accidents, which still is the primary way of victim protection.

Whether the public or private instruments are most suited to provide accident compensation is, as we have shown, often an empirical matter having to do with the way in which the various systems are able to provide speedy compensation at low cost and depending upon the influence on the incentives for prevention of the different systems. However, the empirical material available seems to be limited and even its interpretation is highly debated.

Although we have noticed many harmonization attempts, some in conventions and European directives, but mostly in legal doctrine, we should also note that, especially as far as specific compensation mechanisms are concerned (compulsory insurance or compensation funds), there is still a lot of variety between the different legal systems and even between the different categories of accidents. There seems in this respect to be no general way in which different accidents such as traffic accidents, medical malpractice or environmental pollution are handled. Moreover, accident compensation is an area which today is in full evolution. Ever new accidents and disasters (natural disasters, but especially terrorism), constitute new

challenges for the various legal systems and new solutions are still being developed in the various legal systems today. This is therefore undoubtedly a domain that deserves to be followed carefully in the near future.

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2 Administrative law*

Hanns Peter Nehl

1 Introduction

Comparative administrative law constitutes a relatively young discipline in comparison with other fields of law in which comparative analysis is deeply rooted, such as, in particular, private law. The main reason for this has been the widely shared assumption that in the area of public law there would be neither a practical nor a theoretical need to search for solutions that comparative analysis might have been able to bring about. In fact, since the 19th century the domestic administrative systems have long been perceived as reflecting a unique organizational choice by the nation state tailored to the national political, societal, economic and cultural particularities of its polity rather than being the result of transnationally shared fundamental values or concerns. Thus traditional concepts of administrative law used to emphasize the uniqueness of the state's administrative system that would not easily allow comparisons with, let alone 'transplants' from, other systems. Contrary to this, private law, at least in its commercial aspects, has traditionally been more open to comparative analysis and transnational convergence. This essentially flows from the 'universality' of the private economic interests at stake and the need to facilitate ever growing private cross-border transactions. Moreover, private law does not bear the same intimate link with the identity of the nation state, its fundamental values and the functioning of its public institutions as has been the case for domestic administrative law (Bermann, 1996, pp. 30–31; della Cananea, 2003, pp. 563–8).

Another reason for the longstanding lack of comparative work on administrative law stems from the fact that notably the common law systems, with the exception of the United States, have long resisted – under the Diceyan influence (Dicey, 1885) – the recognition of administrative law as constituting a body of law in its own right (Chiti, 1992, pp. 15–17). Furthermore, the relatively late development of fully fledged national administrative systems governed by judge-made law or statutes with clearly delineated subcategories of administrative powers, such as for instance in environmental matters, has rendered administrative law less amenable to useful comparative analysis than private law, a domain which was early

* See also: Aims of comparative law; Constitutional law; Public law.

subdivided into various subfields with clear-cut boundaries (Schwarze, 1992, p. 77; Bermann, 1996, p. 31).

This is not to say that comparative administrative law has played no role in the early development of modern democratic polities. Indeed, albeit pursuing different purposes, a number of important analyses in comparative administrative law were delivered as early as the end of the 19th century (Gneist, 1884; Dicey, 1885; Mayer, 1886; Goodnow, 1893). Moreover, comparisons with leading continental administrative systems, such as those of France and Germany, have helped shape and consolidate under the 'rule of law' the administrative structures of a number of emerging nation states, putting the latter under continuous influence of the former until today (Chiti, 1992, pp. 13–15; Schwarze, 1992, pp. 76–7). However, it was only in the post-World War II period that the first serious attempts at establishing comparative administrative law as a discipline of its own were undertaken (Rivero, 1954–8; Schwartz, 1954; Scheuner, 1963; Braibant, 1975; Heady, 2001).

Today, for a variety of reasons, comparative administrative law has become an essential part of both legal practitioners' and academics' work with a great potential for further evolution. Growing internationalization and integration of economic relations among states and individuals ('globalization'), enhanced international diffusion of information, knowledge and technological innovation, cross-border environmental issues etc. increasingly require common administrative responses to common problems that appear more or less contemporaneously on a worldwide scale. It is obvious that traditional domestic administrative law is inherently inappropriate to meet problems transcending national boundaries. It therefore requires adaptation and an opening for efficient problem-solving mechanisms that may be found by means of comparative analysis and/or transnational convergence. A factor contributing to this evolution has been the continuous blurring in the second half of the 20th century of the traditional dichotomy between the so-called civil and common law systems that was concomitant with the overall recognition of administrative law as a discipline of its own. Moreover, European integration has created marked convergence tendencies in administrative law during the same period. This convergence phenomenon can be described as a circular process of mutual adaptation and cross-fertilization of administrative laws with a view to constraining the exercise of public power by the new supranational polity, which is characterized by the pooling of various administrative competencies, the emergence of new functions and responsibilities for public administrators at both national and supranational level as well as novel and complex ways of horizontal and vertical interaction between them ('multi-level governance') (Scharpf, 1985; Chiti, 1992, pp. 12, 24–7; Schwarze, 1996d). Comparative

administrative law thus gains a crucial role in shaping the administrative constraints and judicial control mechanisms required to ensure the obedience of the supranational public power to the 'rule of law'. The latest rise, more recently at international level (Stewart, 2005; Kingsbury *et al.*, 2004), in doctrinal debate and the emergence of a number of specific journals, notably European, dedicated to comparative analysis in administrative law, such as for instance *European Public Law* and the *European Review of Public Law* is evidence of the fact that this evolution is being taken seriously in legal doctrine and practice.

2 Methodological foundations

2.1 Determining the objective of comparative analysis

Comparative analysis applied to administrative law should be understood as a specific tool aiming at reaching predetermined objectives and not as an end in itself. The giving of a comprehensive descriptive and/or analytical account of different administrative law systems or specific parts of it certainly constitutes a valuable knowledge-gaining exercise about the functioning and the values of these systems, but will not immediately offer solutions to perceived problems. While such comprehensive analyses may well serve as a reference or a starting point for more detailed research into a given problem, the core of comparative work consists of singling out the responses that foreign systems or branches of administrative law offer to the same or to a similar problem in order to enable the comparative analyst to make well-argued suggestions for a better solution.

2.2 Applying the principle of functionality

From a purely methodological point of view, comparative analysis in administrative law, as in other fields of law, follows the principle of functionality. The application of this principle entails in a first step the accurate definition of a given problem in its most generic terms freed from the specific doctrinal underpinnings of the legal order in which it occurs. This should enable the comparative analyst to find in a second step 'a functionally equal solution' in a foreign legal order irrespective of the source of law delivering that solution (Schwarze, 1992, pp. 82–3; Bermann, 1996, pp. 32–3). Schwarze explains this process of comparison as comprising a negative and a positive effect: as regards the negative effect, the principle of functionality demands that the solutions taken from the foreign legal system are 'to be divested as far as possible from all specific conceptual content in order to facilitate their separation from specifically national doctrine and their proper evaluation' regarding their generic function and substance. The positive effect consists of examining each solution 'as a single unit with respect to its function' and its substance and taking it into

consideration for comparative purposes (Schwarze, 1992, p. 83). In a third step, subsequent to this comparative analysis, a critical evaluation of the results gained needs to be undertaken so as to determine the most appropriate, preferable, efficient or 'best' solution adapted to the requirements of the legal order to which it should be applied (*ibid.*, pp. 84–5; Bermann, 1996, pp. 32–3). This last step is particularly important in order also to guarantee the legitimacy and the acceptance of a new solution that comparative work brings about.

However, the comparative methodology underlying the principle of functionality necessarily bears its limits in administrative law with a view to the inherent uncertainties as to the actual substance and meaning of administrative rules and guarantees in the context of any administrative system. Accordingly, administrative rules of a 'technical' or 'incidental' nature, such as those on the classification of goods, are much more amenable to solutions singled out by comparative work than 'essential' rules with a particularly firm grounding in the polity's administrative and political system, such as rules on the protection of public security and order, social security or immigration. In other words, the more a given administrative legal concept reflects the identity and the fundamental political and societal choices of the state, the less likely it is that it is open to comparative analysis and/or adaptation by borrowing legal solutions from abroad (Schwarze, 1992, pp. 85–7; Bermann, 1996, pp. 32–3).

2.3 Objectives of comparative research in administrative law

Among the objectives to be reached through comparative research in administrative law a number can be distinguished. Firstly, comparative analysis may help better understand the underpinnings and intrinsic values of a given legal concept, which may long be rooted in domestic administrative law or even originally be 'borrowed' from a foreign system, to enable it to deliver better results through modified interpretation or adaptation.

Secondly, comparative research may contribute to developing domestic administrative law beyond its traditional paradigm by adapting it to foreign concepts or even accepting 'transplants' from other administrative systems that contribute to more efficient problem solving or better results.

Thirdly, comparative methodology has proved to be an indispensable tool for fostering legal and administrative/institutional solutions regarding the exercise of a 'federal-type' of public power, such as the one at the European level. In this context, comparative analysis can provide the basis for coordination, harmonization or even unification of national administrative laws in order to facilitate cooperation between the public institutions involved, the final objective being to create a coherent environment for dealing more efficiently with transnational issues in the interest of both

public utility and individual protection. Comparative analysis may also prepare the ground for establishing new higher-ranking administrative principles that specifically constrain the exercise of public power by the new supranational polity (see below, section 3). This may be reached in different ways, namely through the creation of laws by the competent domestic legislature, the coordination, harmonization or unification of laws by transnational or supranational institutions, the interpretation or shaping of administrative law concepts by the judiciary, or a combination of these instruments (Schwarze, 1992, pp. 78–82). It has also been argued that comparative analysis is particularly important in providing guidance in the discussion on the usefulness of regulatory cooperation and harmonization among states on the one hand and maintaining competition of legal cultures and concepts on the other. Indeed, both models – regulatory cooperation and regulatory competition – require careful comparative analysis in order to be able to decide upon the most efficient solution for improving both public and private utility (Bermann, 1996, pp. 34–5).

3 General principles of administrative law

One of the most important objects of comparative administrative research since the 1950s has been the quest for universally applicable or general principles of administrative law (Chiti, 1995a). The frontrunners in the evolution of shaping such general principles at the European level clearly are the European Court of Human Rights in Strasbourg (Boyle, 1984; Bradley, 1995) and the Court of Justice of the European Communities in Luxembourg (Rengeling, 1977, 1984; Schwarze, 1992; Usher, 1998; Tridimas, 1999). In the context of Community law, the European Court of Justice's elaboration of general principles of administrative law, alongside the creation of autonomous Community fundamental rights, has been one of the most important contributions a judiciary has ever made to the functioning of a supranational organization entrusted with its own regulatory and executive powers (Chiti, 1995b). While the Strasbourg European court was asked to shape a range of guarantees of administrative justice based on Article 6 of the European Convention on Human Rights (Schwarze, 1993b; Jacot-Guillarmod, 1993; Bradley, 1995), the European Court of Justice was faced with the need to create such principles in the complete absence of codified rules – the exception being the duty to state reasons under Article 253 of the EC Treaty – by drawing in particular on the legal traditions of the Community's member states. To that effect, thorough comparative analysis of the member states' administrative laws was an indispensable prerequisite.

It is submitted that the European Court of Justice's activity in filling gaps in the European Community's administrative system by judge-made

general principles constitutes, not least because of its enormous practical importance, the most striking example of applied comparative analysis in the field of administrative law so far. Bearing in mind the legal effects that Community law is capable of producing within the national legal orders (direct effect and supremacy), there has unsurprisingly been a long-lasting debate in legal doctrine on the correct methodology to be followed, stretching from a 'minimalist' to a 'maximalist' approach, which was essentially inspired by the concern to ensure that the member states and their citizens could accept the newly shaped principles as legitimate. Whilst the minimalist comparative approach would require finding a solution on the smallest common denominator that matches or is close to the choice of all of the member states, the maximalist theory in its extreme form would allow for opting for the solution that offers the most extensive protection to the individual (Schwarze, 1992, pp.71–2). It has been convincingly argued with respect to the judicial development of Community fundamental rights that none of these approaches offers workable solutions having regard to the heterogeneity of the national balances struck between individual and public interests (Weiler, 1995). Instead, the European Court of Justice needs to define its own balance between the individual and the (Community) public interest in instances where the former is subject to the exercise of Community public power. Thus comparative work in this context implies a considerable autonomy on the part of the Community judge in finding the adequate or 'best' solution among the several sources available which is compatible with the structure and the objectives of the Community (Schwarze, 1992, p. 73). In German doctrine, this comparative approach has been labelled 'evaluative comparison of laws' because it involves a weighted comparison and a value judgment on the adequacy of the solution found for the functioning of the Community administrative system and its compatibility with its own fundamental goals and values (Bleckmann, 1992, 1993; Schwarze, 1992, pp.72–3). But it also seems obvious that the European Court of Justice's comparative approach is equally inspired by the three-step methodology underlying the principle of functionality (see above, section 2).

Mainly as a result of judicial activism, the Community system now disposes of an array of higher-ranking general principles of administrative law – whether procedural or substantive in nature – putting constraints on the exercise of Community public power vis-à-vis the citizen and providing adequate protection to the latter (Usher, 1998; Tridimas, 1999; Nehl, 1999; 2002a). The recent codification of a number of these principles in Article 41 of the European Charter of Fundamental Rights is further evidence of their recognition as fundamental parameters of legality of Community administrative action under the 'rule of law' (Kańska, 2004). However, once

these principles are established at Community level, they also reflect back on the member states' legal orders owing to the intimate linkage between the Community and the national administrative systems regarding the joint implementation of Community law, a phenomenon which has been described (above, section 1) as a continuous process of mutual influence and convergence (Schwarze, 1996d; Nehl, 2002a, pp. 24–6). It seems that similar developments may take place at international level, notably in the context of the World Trade Organization, which is now equipped with an own 'judiciary' in the form of 'panels' and an 'appellate body' who have started shaping comparable general principles of administrative law disconnected from the national paradigm (della Cananea, 2003; Stewart, 2005).

4 Administrative justice: procedural versus substantive justice

The notion of administrative justice, although being widely used in particular by Anglo-Saxon lawyers (Justice, 1988; Bradley, 1995; Longley and James, 1999), is not easily amenable to comparative analysis as it is too broad a concept, implying a wide range of principles and values governing not only executive activity as such but also its control by the judiciary. However, the dichotomy between procedural and substantive administrative justice has proved to be a subject of particular interest for comparative research as it grants useful insights into the functioning and the fundamental values of a given administrative system from which further conclusions may be drawn when comparing different branches or types of rules of administrative law (Ladeur, 2002a). In various legal systems procedural administrative justice forms a concept of its own, such as 'natural justice' or 'procedural fairness' in English law (Craig, 1993; Galligan, 1996; Harlow, 2002) or 'due process' in US law (Pennock and Chapman, 1977; Mashaw, 1985). Its primary objective is that administrative procedures should be conducted fairly, *inter alia* by granting individuals whose rights and interests can be affected by the outcome of the administrative decision-making process the opportunity to make known their views effectively. While the concept of procedural justice thus relates to the formal and procedural requirements governing administrative decision making independently of its final outcome, the concept of substantive administrative justice is concerned with the rationality of its results and in particular with distributive justice (Tschentscher, 1997).

From a comparative viewpoint, it is certainly worthwhile conducting comparative analysis regarding the various substantive rules that ensure distributive justice. The results of such analysis are however likely to be disparate as they necessarily reflect the diversity of substantive policy choices made by the respective legal systems which the relevant substantive rules are designed to attain. Moreover, in the face of the undeniable loss in all

modern legal systems of the legislatures' capacity of sufficiently directing the achievement of distributive justice (Grimm, 1990; Ladeur, 2002a), it may nowadays appear more promising to have a comparative look at rules enhancing procedural justice. This is particularly true of those fields of administrative activity that are no longer open to 'pre-regulated' substantive distribution decisions by the legislator but rather have to rely heavily on the exercise of wide administrative discretionary powers – be it in the form of executive regulation or individual administrative acts – that enable the administration to react efficiently to rapidly changing market, technological and living conditions, as for instance in the area of technocratic rule making or risk management in environmental matters (Ladeur and Prella, 2002). Legal sociology teaches us that, in such conditions of uncertainty regarding the attainment of distributive justice and the rationality of the policy choice, procedural administrative justice has an increasingly important role to play in compensating the loss of substantive control and, accordingly, in enhancing the legitimacy of the substantive distribution decision finally reached (Luhmann, 1969; Rawls, 1971; Röhl, 1993). Comparative research may thus take a particular interest in unveiling the various procedural solutions followed by different administrative systems in order to outweigh the loss of control and legitimacy entailed.

The above emphasis on procedural rather than substantive administrative justice bears important implications for the observance of the 'rule of law' by the administration equipped with wide discretionary powers as well as for the judicial control of the latter (see below, section 5). Under these circumstances, the administration no longer simply constitutes the executive arm of the legislator being charged with a purely 'technical' implementation of legislative directives transmitted to it by the polity ('transmission belt model') (Stewart, 1975, pp. 1669–88). It has therefore been argued, in particular at the European level, that new models of administrative justice and legitimacy should be introduced which are rooted in procedural rationality and thus depart from the traditional 'rule of law' concept. These models notably include pluralist approaches based on heterarchical postmodern legal theory (Ladeur, 1997), deliberative schools of thought (Joerges and Neyer, 1997; Everson, 1998) or non-majoritarian theory inspired by US doctrine that favours administration by independent agencies (Majone, 1996; Fischer-Appelt, 1999). All of these theories are firmly grounded on procedural justice considerations and draw on the various facets of legitimacy that the observance of procedural rules may bring about in this context (Nehl, 2002b, pp. 135–43). It is submitted that comparative analysis is particularly helpful in providing valuable insights into the opportunities opened by those new concepts of procedural justice, be it at national or transnational level.

5 Access to justice, judicial review and remedies in administrative law

5.1 Access to justice or locus standi

In particular, Anglo-Saxon lawyers tend to understand the issue of citizens' access to justice or judicial review of administrative action as forming an integral part of a (fundamental) right to administrative justice (Bradley, 1995; Harlow, 1999b; Longley and James, 1999). On the other hand, the French administrative system considers access to justice by the individual primarily as a means to enable the courts to control the legality of the administration's behaviour 'objectively' and in the public interest. The protection of individual rights is thus merely a necessary reflex of such judicial control, a phenomenon which seems to explain the paucity of French doctrinal debate on the concept of 'intérêt à agir' (Woehrling, 1998). However, rules on locus standi or standing have given rise to considerable doctrinal and comparative debate particularly with regard to those legal systems (among them the United Kingdom and the European Community) in which there exists no clear-cut theory of access to justice and where there is the need to decide on the applicant's right to challenge the administrative act on the basis of case-specific ad hoc criteria (Annull, 1996, 2001; Harlow, 1992, 1999b). Comparative analysis with administrative systems which know a specific theory of access, such as the German 'Schutznormdoktrin' with its focus on the protection of subjective rights, may help overcome such difficulties (Blankenagel, 1992). It should also be noted that these access theories are themselves subject to intense adaptation as a consequence of European legal integration and the direct effect of Community rules (Ruffert, 1997; Calliess, 2002).

5.2 Judicial review: types and degree

The powers of judicial review regarding administrative conduct and in particular the degree of scrutiny of administrative acts grant valuable insights into the functioning and the basic values of a given administrative system (Nehl, 2002b). The issue of intensity of judicial control is closely connected to the substance–procedure dichotomy mentioned above (section 4). In fact, legal systems showing a relatively high degree of judicial deference vis-à-vis the substantive policy choices made by the administration normally focus on reviewing more intensely the legality of the administrative decision-making process, thereby putting much emphasis on the observance of procedural guarantees. The United Kingdom's concept of judicial review constitutes one of the most striking examples in this respect (Harlow, 2002) which seems also to have influenced the Community courts' case law (Nehl, 1999, 2002a). On the other hand, administrative law systems – most prominently the German system – with a long tradition of particularly intense powers of judicial scrutiny over administrative discretion, tend to

undervalue the relevance of procedural legality, as they accord procedural rules merely a serving function ('dienende Funktion') in the interest of the rationality of the outcome of the decision-making process rather than a protective rationale on their own (Schoch, 1999; Schmidt-Aßmann, 2003). It is submitted that, in the face of the continuous rise of administrative discretionary powers in modern administrative systems, combined with an increasing lack of substantive guidance emanating from legislative statutes (see above, section 4), judicial review will have to undergo a fundamental change in respect of both its object and its degree of scrutiny. In this context, comparative analysis has already proved to be a very valuable instrument. Thus European administrative law starts benefiting from rich US experience in a comparable 'federalized' setting (Stewart, 1975; Shapiro, 1988, 2002) and German administrative law is reconsidering its dogma of intense control of administrative substantive discretion by discussing a possible reevaluation of judicial procedural review (Schmidt-Aßmann, 1997; Ladeur and Prella, 2002).

5.2 Judicial remedies

European legal integration has furthermore triggered an intense debate on the convergence of judicial remedies, stretching from interim relief to state liability, as a result of case law of the European Court of Justice (Curtin and Mortelmans, 1994; Caranta, 1995; Schwarze, 1996a). Although a number of these remedies, in particular state liability for the infringement of Community rules, do not belong to the core of administrative law but rather to the realm of private or tort law, the methodological underpinnings of comparative analysis in this context do not differ substantially from those mentioned in sections 2 and 3.

6 Outlook

Comparative administrative law has grown into a discipline of comparative analysis of its own in recent years. As the example of European integration impressively shows, the importance of comparative research in administrative law cannot be underestimated with a view to the ever closer ties that are continuously being established between the various administrative systems at national and international level. Regional integration in other parts of the world will further stimulate this development and intensify the move towards a *ius commune* transcending the boundaries of the traditional nation state. As the case law of the World Trade Organization's panels and appellate body demonstrates, there even is a prospect of convergence of administrative principles on a worldwide scale, an issue that academic debate has recently taken up under the topic of the 'emergence of global administrative law' (Kingsbury *et al.*, 2004).

Apart from convergence among administrative systems being more or less induced by legal integration, comparative administrative law also continues playing its role in the reformation of the domestic administrative system that needs to react to the new challenges posed by modern and open societies and the continuous loss of the nation states' capacity and autonomy in finding responses to problems in an ever more globalized world. The continuous need for reform thus renders domestic administrative law particularly amenable to comparative analysis and increases the readiness to 'borrow' legal concepts from abroad even if this is not required by legal integration.

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3 Agency and representation*

Hendrik Verhagen

1 Agency and representation

'[A]ll legal systems today accept the conclusion of contracts through the medium of agents who bind their principal and acquire legal rights for him' (Müller-Freienfels, 1982, p. 280). This has not always been the case. Classical Roman law never developed a general concept of representation. The personal nature of obligations, reflected in the maxim 'alteri stipulari nemo potest' (D. 45.1.38.17), prevented the recognition of representation as an autonomous legal category. The contract of *mandatum*, which later became the vehicle for representation in the civil law, did not entail a power for the mandatary to bind and entitle his principal. Only in a few instances did classical Roman law attach legal consequences to the acts of intermediaries, which are to a certain extent comparable to those of direct representation (Zimmermann, 1992, pp. 47–53). Although in the *ius commune* (what we now call) direct representation became more and more accepted, 'it was left to the natural lawyers . . . to break away decisively from the principle of "alteri stipulari nemo potest" and to lay the conceptual cornerstones for the future' (ibid., pp. 54–7).

The possibility that someone (the principal) may become legally bound and entitled by the acts of someone else (the agent) is now fully recognized in modern civil law and common law systems. The normal legal consequence triggered by the mechanisms of representation and agency is that the main operation (i.e. the juridical act executed by the agent on the principal's behalf) is 'attributed' to the principal. Where the main operation is a contract entered into with a third party, the contractual relationship is established directly between principal and third party. To a very large extent this relationship is identical to the relationship that is created when both parties to a contract conclude it personally. The agent usually (though by no means always) incurs neither rights nor liabilities under the main operation: he 'drops out'. However, as will be discussed below (section 19), under the common law doctrine of the undisclosed principal all this may be considerably different.

In this comparative account the terms 'agency' and 'representation' will be used interchangeably, in order to refer to the legal mechanism pursuant

* See also: Offer and acceptance; Transfer of property.

to which the legal effects of a juridical act (the main operation) executed by one person (the agent) are attributed to another person (the principal), triggered by the agent's exercise of his authority to execute this juridical act for the principal. For comparative purposes 'representation' will be the preferred term, since it indicates more clearly than 'agency' that this survey is only concerned with the so-called 'external relationship'. This is the relationship existing between the principal or the agent on the one hand and the third party on the other, as a consequence of the agent's acts on behalf of the principal. The 'internal relationship' – in most cases a contract between principal and agent – will only be discussed in so far as it interacts with the external relationship.

2 Consensual representation and legal representation

With respect to the civilian laws of representation a division is usually made based upon the source of the agent's power to represent someone else. The division made is that between consensual representation and legal representation. In cases of consensual representation the agent's power of representation is in principle derived from an act emanating from the principal himself (the authorization). Instances of legal representation, on the other hand, are characterized by the fact that the agent's authority is attached by operation of law or by a court's decision to certain legal relationships (e.g. a parental relationship), without any authorization by the person being represented being required. The most important category of legal representation is that of minors and persons who are subject to guardianship. Also representation in connection with matrimonial property regimes and representation in situations of negotiorum gestio (agency of necessity; *gestion d'affaires*) are covered by the notion of legal representation. By way of contrast, the law of agency of the common law systems in principle only deals with agency which is based on the will of the person being represented and is therefore largely covered by the civilian notion of consensual representation. There are only a few extensions which cannot be reduced to the will of the principal. They are called 'agency by operation of law' and mainly operate in the 'presumed authority' from cohabitation and in 'agency of necessity' (Reynolds, 2001, nos 3-041, 4-002). Legal representation as a general protective device for incapable persons is unknown to the common law systems: they are protected by alternative means, such as the trust (Kötz, 1997, p. 222; Holmes and Symeonides, 1999, pp. 1096–7). The representation of companies and other legal persons by their 'organs' is a separate category in the civilian systems, while in the common law it is an integral part of the law of agency (Reynolds, 2001, no. 1-024). Corporate representation will not be reviewed here: this account only deals with consensual representation *stricto sensu*.

3 Vicarious liability

In both civil law and common law legal writing it has been suggested that vicarious liability – the principal's liability for wrongs committed by his agent – should be integrated into the law of agency. In particular in the United States this theory has been influential and has generated effects in the Restatement (§12, Comment (a)). The English law of agency, on the other hand, is primarily concerned with contractual liability. Vicarious liability is considered to be a part of the law of torts, not of the law of agency. It is however recognized that the total separation of agency and vicarious liability is not possible and there is a 'considerable interrelation' between them (Reynolds, 2001, no. 8-176). Nevertheless, it appears that in most (if not all) western legal systems a complete integration of representation/agency and vicarious liability has not taken place. In this account the notion of representation is therefore restricted to the legal consequences of juridical acts, viz. acts the legal consequences of which are ultimately based on the (real or apparent) intentions of the persons who execute these acts. Usually these juridical acts are contracts and this survey will be mainly confined to representation in connection with contracts.

4 The development of representation and agency as autonomous concepts

In the French Code civil (art. 1984, see section 5 below) and other 19th century codifications (e.g. the 1838 Dutch Civil Code, the Austrian Civil Code and the 1870 Louisiana Civil Code) representation was still not recognized as an autonomous legal institution. These codifications all regulated representation mainly in their sections on mandate. They did not make a sharp distinction between this contract and the authorization of the agent by the principal. The agent's power to bind his principal was regarded as an exclusive and accessory consequence of the contract of mandate.

It was the German jurist Laband who 'discovered' the principle that mandate (*Auftrag*) and authority (*Vollmacht*: lit. 'full power') are two different notions and may produce different legal consequences. In particular Jhering had already paved the way, by stressing that one should distinguish between the notions of mandatary (*Beauftragter*) and representative (*Stellvertreter*). According to Jhering the expression 'mandatary' relates to the 'internal' side of the contract of mandate whereas the expression 'representative' relates to the 'external' side of this contract. Jhering further emphasized that the one side is completely without influence on the other, that 'their coincidence is purely accidental' and that there are mandataries who are not representatives and representatives who are not mandataries (Jherings *Jahrbücher* 1, 1857, p.272). However, Jhering still conceived the internal side and the external side as two features of the same relationship, the contract of mandate. Laband, on the other hand, stressed

that authority and mandate are by no means two sides of one relationship. They are two autonomous notions, although they may often, because of their factual overlap, appear to be one. In Laband's view the contract of mandate only relates to the agent's rights and duties vis-à-vis the principal, whereas it is the notion of authority that enables an agent to bind his principal towards third parties. Laband also established that the notions of mandate and authority should not only be separated conceptually but also as regards their legal consequences: an agent may have authority, although he acts contrary to his contractual duties under the contract of mandate (Laband, 1866).

These ideas elaborated by Laband were later referred to in German legal writing as embodying the 'principle of abstractness' (Abstraktionsprinzip) and this principle is regarded as one of the famous 'legal discoveries' of the 19th century. See in particular Müller-Freienfels (1977, pp. 144–212 (see also Müller-Freienfels, 1982, pp. 60–130)), where further references can be found. The principle of abstractness has generated effects in the German Civil Code (BGB) of 1900 and in many other codifications, among which are the Civil Codes of Italy, Turkey, Greece, Portugal and Japan and the Swiss Law of Obligations (OR) (Müller-Freienfels, 1982, pp. 243–5; Lando and Beale, 2000, p. 199). It strongly influenced the Agency sections of the Nordic Contract Acts (1915), still in force today (Tiberg, 2000, p. 58). More recently, it has been adopted in jurisdictions whose provisions on mandate and representation used to be virtually identical to art. 1984 of the Code civil, see art. 3:60 of the 1992 Dutch Civil Code (BW) and arts 2985–7 of the revised (1997) Louisiana Civil Code (see section 5 below).

As in the civil law systems, agency did not become an autonomous legal concept in the common law until the beginning of the 19th century. Before that time agency remained an 'unorganized subject, with its rules distributed over different titles' such as master and servant, attorney, bailiff and the actions of debt and account (Stoljar, 1961, p. 3). Many of the features of the present law of agency, such as the undisclosed principal doctrine (section 19) and estoppel as the basis of a principal's liability for unauthorized acts of his agent (section 7), were elaborated in the 19th century. The distinction between the agent's competence in his relationship with the principal and his external powers as regards the third party was not 'rationalized' (Müller-Freienfels, 1982, p. 268) until Corbin (1925). This is not to say that in practice English law was radically different from German law after Laband's discovery. Müller-Freienfels has made the following observation on 18th and 19th-century English courts dealing with agency:

For them there was no doubt that an agent could act within the scope of his agency power even though violating his duty by not observing his instructions.

They reached the right results in the concrete cases, with a minimum of systematic and conceptual implements – without feeling the need of such a working hypothesis as was to be propounded by Laband. (Müller-Freienfels, 1982, p. 270)

Moreover, already in *Chatenay v. Brazilian Submarine Telegraph Co.* (1891) 1 QB 79 (CA) 82, Lindley J defined a power of attorney (a formal authorization, often of a general nature) as follows: ‘a one-sided instrument, an instrument which expresses the meaning of the person who makes it, but is not in any sense a contract’.

5 The principle of abstractness in contemporary law

The principle of abstractness is underlying the laws of representation of the Germanic and the Nordic jurisdictions, as well as those of many other countries (e.g. Italy, the Netherlands). The authorization is conceived as an independent unilateral act by the principal, to be distinguished from the underlying contract between principal and agent. The contract of mandate is not necessarily linked with the granting of authority. Mandate is possible without the existence of authority (e.g. a commission agent) and authority may exist without there being a mandate (e.g. an authorized employee). Voidness of the internal relationship does not necessarily affect the validity of the authorization. However, it appears that this principle of strict separation of mandate and authority has been mitigated ever since Laband proclaimed it (Müller-Freienfels, 1982, pp. 256–60). For instance, even in the ‘externalized’ German attitude towards authority it is recognized that in the case of a purely internal authorization (‘Innenvollmacht’), whose content has not been disclosed to the third party, a strong interdependence between the internal relationship and the agent’s authority exists (Schilken, 2004, §167, no. 85). Also in other respects interactions may take place between the internal relationship and the agent’s authority (e.g. implied authority, termination). In modern German legal writing the principle of abstractness is sometimes even criticized, for unnecessarily disrupting a ‘unitary social relationship’ (Beuthien, 2000). Nevertheless, it is clear from the leading commentaries that the principle is one of the leading principles underlying the rules on representation of the BGB and therefore cannot be ignored (e.g., Schilken, 2004, §§, 164ff, no. 34). In special cases the principle’s undesirable effects can be mitigated, in particular by the institution of ‘abuse of power of representation’, where the third party is aware of the agent violating his duties towards the principal in exercising his authority (Schilken, 2004, §§, 164ff, no. 34; § 167, nos 91–105).

In present-day English legal writing the same attitude can be found with respect to the distinction between the internal and the external relationships as in modern civil law doctrine. When one looks into Bowstead and

Reynolds one will see that the editor's views on authority are quite close to the Germanic conception of authority, more close than the approach of, for instance, many French writers. Having established that also in the 'most externalized theories' of the civil law systems the agent's power is ultimately derived from an internal starting point (such as the appointment of a Prokurist), the editor observes (Reynolds, 2001, no. 1-025).

When this is borne in mind, common law is not so different as may appear. It has been said that its approach to agency, as outlined above, fails to make the proper distinction between the internal relation between principal and agent and the external relation between the agent and third parties, but simply derives the one from the other. But it has already been pointed out that at common law the authority of an agent stems not from any contract between principal and agent (for indeed there need not be one) but from the unilateral grant of authority. This may occur in pursuance of a contractual relationship; but the conferring of authority is a separate event which may occur also in other circumstances.

The modern French conception of consensual representation, on the other hand, still seems to be strongly influenced by the Code civil. Article 1984 Cc provides: 'Le mandat ou procuration est un acte par lequel une personne donne à une autre le pouvoir de faire quelque chose pour le mandant et en son nom.' The majority of writers still appear to consider the contract of mandate, and not an independent authorization, to be the source of the agent's power of representation (Didier, 2000, pp. 40–50 (critical)). The same approach can still be found in the 1991 Québec Civil Code (entry into force, 1994): mandate is defined as 'a contract by which a person, the mandator, empowers another person, the mandatary, to represent him in the performance of a juridical act with a third person, and the mandatary, by his acceptance, binds himself to exercise the power' (art. 2130). Typical of the French approach is that, where exceptions to the conception of the contract of mandate as the exclusive source of power of representation are admitted, they are often formulated in terms of mandat. Thus the protection of the third party when the agent lacks authority to represent is provided by the doctrine of mandat apparent (Daloz, Mandat, nos 142–65); an employee is invested with a mandat tacite (implied authority) when there is power of representation in connection with a contract of employment (Daloz, Mandat, no. 111) and instances of legal representation are referred to as involving mandat légal (Daloz, Mandat, nos 11–20).

Even within the Romanist legal family the principle of abstractness is gaining ground. Where art. 2985 of the Louisiana Civil Code of 1870 was still formulated in terms similar to art. 1984 Cc, the revised arts 2985–7 now provide a general definition of 'representation' (art. 2985) and indicate

that the source of the authority of the representative can be law, contract (e.g. mandate) or the 'unilateral act of procuration' (art. 2986) (Holmes and Symeonides, 1999, pp. 1108–9). Art. 2987, first paragraph, gives the following definition of procuration: 'Procuration is a unilateral juridical act by which a person, the principal, confers authority on another person, the representative, to represent the principal in legal relations.' However, the revised Louisiana Civil Code has not completely abandoned the idea that the agent's power of representation is the external side of the contract of mandate itself. Art. 2986 still mentions the contract of mandate as one of the sources of an agent's authority, beside the law and a unilateral authorization.

6 Actual authority

When under civilian systems an agent has a power to bind or entitle his principal he is said to have 'power of representation' (*Vertretungsmacht*). We have seen that in cases of legal representation this power of representation is generated by operation of law. In situations of consensual representation, on the other hand, the agent's power is derived from a manifestation of (real or apparent) consent by the principal himself, which is either expressed in the contract of mandate (Romanist systems) or in a unilateral juridical act (Germanic systems). Where this manifestation of consent reflects the true intentions of the principal it results in a valid authorization and such authorization confers authority. Likewise, the fundamental justification of the agent's power to affect his principal's legal relations in English law is 'the idea of a unilateral manifestation by the principal of willingness to have his legal position changed by the agent' (Reynolds, 2001, no. 1-006). In the 'paradigm case' of agency the principal consents to the agent acting on his behalf and the agent acts accordingly. This consent of the principal results in the agent having actual (or real) authority. When authority is conferred the law attaches a consequence to it: the agent is invested with a legal power to bring his principal into a legal relationship with a third party (*ibid.*, no. 1-012; Restatement, §7).

In common law and civilian systems the authorization may be express or implied from the circumstances of the case (e.g. art. 3:61(1) BW; art. 1710(1) Spanish CC; Reynolds, 2001, no. 3-003). If authority is given by explicit words it is referred to in English as 'express authority'. When authority is deduced implicitly, based on the conduct of the principal and the circumstances of the case, it is called 'implied authority'. Although, normally, the authorization takes place *vis-à-vis* the agent, in many systems it can also take place by a declaration directed to the third party: a so-called external authorization (e.g. art. 167(1) BGB; art. 2987 Louisiana CC; art. 2:13 Nordic Contract Acts).

7 Apparent authority

Where the agent concludes a contract with a third party without having the (express or implied) permission of the principal to do so, the agent is said to act without real (actual) authority. Nevertheless it is recognized in all reviewed jurisdictions that in certain circumstances it is still possible that, although the agent acted without real authority, the principal is bound by the agent's acts. In other words, the agent can have power of representation, either when he was authorized by the principal (actual authority) or when the third party was entitled to assume that such authorization had taken place (apparent authority).

In French law the principal's liability in cases of mandat apparent was originally regarded as based upon delict (art. 1382 Cc). Accordingly the principal would only be liable where there was fault on his part in leading the third party to believe that a sufficient mandate existed. However, since a 1962 decision by the Cour de cassation, the principal's liability is no longer regarded as of a delictual nature (Cass. 13 December 1962, D 1963, 277). The Cour de cassation considered that the principal (mandant) can be liable on the basis of mandat apparent even in the absence of fault (faute), if the reliance by the third party on the extent of the powers of the agent is legitimate (si la croyance du tiers à l'étendue du pouvoirs du mandataire est légitime). Similar reasoning is employed in other civilian jurisdictions. For instance, under art. 3:61(2) BW the third party may hold the principal liable on the basis of apparent authority where, on the basis of some declaration or conduct by the principal, the third party reasonably assumed that the agent was authorized. The doctrine of apparent authority is a specific application of the doctrine of reliance, which is also underlying the Dutch objective theory of contract (Verhagen, 2002, p. 144). Also German law distinguishes between actual authority (Vollmacht) and apparent authority (Rechtsscheinvollmacht). Apparent authority is often subdivided in Duldungsvollmacht, which exists when the principal knowingly allows the unauthorized agent to act for him (sometimes also regarded as a case of implied authority), and Anscheinvollmacht, where the principal reasonably should have been aware of the unauthorized agent's acts and should have been able to prevent this (Dörner, 2005, §174, nos 8–9).

Under English law the principal, under certain circumstances, is liable in respect of a transaction concluded by the agent despite the fact that this transaction was entered into without the principal's consent. In English literature and case law one speaks of these cases as involving apparent authority or ostensible authority. Apparent authority is contrasted with actual or real authority. The doctrine of apparent authority is said to be an application of the doctrine of estoppel. Under the doctrine of estoppel a

person who made another person believe that a certain state of affairs existed cannot afterwards call upon the true state of affairs, when this would cause some kind of detriment to the other person. Applied to agency the doctrine operates, in the words of Diplock LJ in the leading case of *Freeman & Lockyer v. Buckhurst Park Properties (Mangal) Ltd.* ([1964] 2 QB 480, 502), in the following manner:

The representation, when acted upon by the contractor by entering into a contract with the agent, operates as an estoppel, preventing the principal from asserting that he is not bound by the contract.

It is possible that the eventual justification for the principal's liability may (as, it may be noted, in civilian systems) be the same as the objective basis of liability in the law of contract (Reynolds, 2001, no. 8-029). In the Restatement (§8, Comment d) apparent authority is distinguished from estoppel and is regarded as being based on the same principle as the objective theory of contracts.

8 Apparent authority: requirements

Under the following conditions a third party may, in most jurisdictions, hold the principal liable on the basis of apparent authority (Reynolds, 2001, nos 8-013, 8-050; Schilken, 2004, §167, nos 28–45; Dalloz, Mandat: nos 142–65; Verhagen, 2002, pp. 144–6). (a) Declaration or conduct by the principal. The principal must somehow have been responsible for the third party's reliance that the agent was duly authorized. Apparent authority cannot be founded on the agent's statements and conduct alone. In the last decade, however, there seems to have developed a tendency in some (civil law and common law) jurisdictions to attribute more weight to other factors than the principal's statements and conduct alone. There may be situations where the third party's reliance that the agent was duly authorized must be protected not only when this reliance is caused by the principal himself, but also when it is created by factors which are within the principal's sphere, in particular where the principal has placed the agent in a certain position (Reynolds, 2001, nos 8-018, 8-023; Verhagen, 2002, p. 146). (See, e.g., *First Energy (U.K.) Ltd. v. Hungarian International Bank Ltd.* [1993] 2 Lloyd's LR 194 and HR 27 November 1992 NJ 1993, 287 (*Felix/Aruba*).) (b) Third party's reliance. The third party will only be protected when he actually relied on facts creating the appearance of authority. (c) Third party in good faith. The third party will only be able to hold the principal liable if he relied on the appearance of authority in good faith; i.e., neither was nor should have been aware of the agent's lack of sufficient authority.

Under some legal systems these requirements do not have to be fulfilled in cases where the scope of the agent's authority is fixed by law (see section 14 below). In other legal systems the liability of the principal may be dependent upon whether the third party suffered some detriment. This is the case under the English doctrine of estoppel, pursuant to which, however, the third party changing his position merely by entering into the main contract already is sufficient (Reynolds, 2001, no. 8-026).

9 Apparent authority: legal consequences

In the paradigm case of consensual representation, where the agent acts pursuant to his actual authority, the principal and the third party become (in the case of a synallagmatic contract) directly and unconditionally liable and entitled towards each other. In situations of apparent authority this may very well not be the case. In English law (estoppel) and perhaps also Dutch law, although the third party can sue the principal, the principal himself can only claim from the third party when he has ratified the agent's unauthorized acts (Reynolds, 2001, no. 8-031; Verhagen, 1995, p. 25). In other words, the exercise of apparent authority under some systems only results in liability for the principal, but does not make him entitled. For the creation of a reciprocal contractual relationship, under which the principal is both liable and entitled, a further act by the principal (ratification) may be necessary. Moreover, the creation of a direct relationship based upon the main operation may also be dependent upon the third party's wish to hold the principal liable: the third party may under some systems have the possibility of withdrawing from the transaction entered into with the agent. In Germany it is held in case law that apparent authority has the same legal consequences as real authority. This means that the principal does not have to ratify the main operation and that the third party does not have the option to withdraw from the main operation (Schilken, 2004, §167, no. 44). According to one of the leading commentaries, however, the better view is that the third party does have a 'right of election' (Wahlrecht), enabling him to sue either the principal (apparent authority) or the agent (lack of authority) (*ibid.*, 2004, §167, no. 44; §177, no. 26). In the Netherlands it is the other way round: according to the legislative history of the Dutch Civil Code the third party can withdraw from the contract provided that the principal has not yet ratified the contract (Van Zeben *et al.*, 1981, pp. 265–6). The leading textbook on representation, on the other hand, states that in situations of apparent authority the third party cannot withdraw from the contract (Kortmann, 2004, no. 85).

10 Distinction between actual and apparent authority

Often express, implied and apparent authority are all present in one case: the agent's express authority may be supplemented by implied or apparent

authority. Moreover, it may often be difficult to distinguish between implied authority and apparent authority. In the absence of an express authorization covering the main operation the principal's consent has to be determined objectively. For this, often the same factors are relevant for both implied and apparent authority, the only difference being that in connection with implied authority the emphasis is on the principal's conduct towards the agent whereas in cases of apparent authority the principal's conduct towards the third party is the central issue. These factors are often recognizable not only for the agent but for the third party as well. In this sense, the Restatement (§8, Comment a) says: 'The rules of interpretation of apparent authority are, however, the same as those for authority, substituting the manifestation to the third person in place of that to the agent.' A similar observation has been made by the Dutch Hoge Raad. In HR 1 March 1968 NJ 1968, 246 (*Molukse Evangelische Kerk v. Clijnk*) the Hoge Raad considered that the basis of a principal's liability not only can be an appearance created by the principal towards the third party, but can also be an appearance created by the principal towards the agent. Thus the doctrine of reliance can result not only in apparent authority, but also in implied authority.

It has even been argued in both civil law and common law literature that no distinction should be made between real and apparent authority. It is held that a more objective approach must be taken and that the reasonable reliance of the third party may result in the agent having (real) authority rather than there being an 'appearance' of authority (Verhagen, 1995, pp. 23–9, with further references). In comparative literature it has been submitted that on this point there exists a fundamental difference between the Germanic systems on the one hand and the common law systems and the Romanistic systems on the other, in the sense that, in the first group, the authorization is regarded as a communication from the principal to the third party, whereas in the second group it is conceived as a communication from the principal to the agent (Tiberg, 2000, pp. 58–65). There is not sufficient evidence in the reviewed jurisdictions to support the generality of this submission.

11 The agent's liability where he acts without (actual) authority

All modern legal systems recognize that the agent can be liable towards the third party in cases where he acts without authority to conclude the main contract, although the nature and measure of liability is treated differently from system to system.

The agent may be liable for his unauthorized acts even where there is no wilful misconduct or negligence on his part, although in some jurisdictions the agent may in certain circumstances be relieved from liability, in particular when the third party knew or should have known that the agent had

not been duly authorized (§179(3) BGB; art. 3:70 BW; art. 2158 Québec CC; Reynolds, 2001, no. 9-067). It may often also be assumed that the agent will no longer be liable vis-à-vis the third party after the principal has ratified the agent's unauthorized acts (§179(1) BGB; art. 2158 Québec CC; Reynolds, 2001: no. 9-069; Verhagen, 2002, p. 155).

The agent's liability for unauthorized acts may in some jurisdictions simply arise by operation of law (§179 BGB). In English law it was decided in *Collen v. Wright* ((1857) 7 E & B 301; reaffirmed (1857) 8 E & B 647) that the agent was liable regarding a separate implied warranty of authority, which gives rise to contractual liability for the agent. In French law the agent is liable in tort or – when he expressly or impliedly guaranteed his authority – in contract. In the legislative history of the Dutch Civil Code it is suggested that, pursuant to art. 3:70 BW, which reads: 'he who acts as procurator warrants to the other party the existence and the extent of the procuration', the agent is liable on the basis of a 'collateral contract', a separate warranty by the agent towards the third party (Van Zeben *et al.*, 1981, p. 283). The better view, however, is that this is an unnecessary fiction and that the agent's liability simply arises by operation of law (Verhagen, 2002, p. 155). Under Dutch law the agent may also be liable in tort (HR 31 January 1997, NJ 1998, 704 (*Reisbureau De Globel Provincie Groningen*)). The advantage of suing in tort would be that, where a contractual relationship exists between the principal and the agent (as in a contract of employment or a contract of mandate), the principal may be vicariously liable for torts committed by the agent (arts 6:170 and 6:171 BW). In English law an action in tort (negligence) may be possible as well, but in practice a contractual action based on breach of warranty will normally be preferable (Reynolds, 2001, no. 9-062).

Usually the third party is entitled to claim compensation for loss of his expectation from the agent (*ibid.*, no. 9-075; Verhagen, 2002, p. 155). Accordingly, the third party must be brought into the same financial position he would have been had the agent been authorized (positive interest). Under §179(1) BGB the third party may even elect to sue the agent for specific performance of the contract where the agent was aware of his lack of authority. When sued in tort the agent will normally be liable for reliance damages.

12 Ratification

In all legal systems the principal can ratify the agent's unauthorized acts (§§177 and 184 BGB; art. 1998 Cc; art. 3:69 BW; Reynolds, 2001, no. 2-047; Restatement, §§82, 83). The effect of ratification is retroactive: the contract of the agent has the same effect as if it had been authorized, although the rights granted by the principal to third persons are often respected (art. 3:69(5) BW; Dalloz, Mandat: no. 325; Reynolds, 2001,

no. 2-095). Ratification can take place explicitly and impliedly and – under doctrines of reliance (civil law) and estoppel (common law) – the principal can also become liable although he had no actual intention of ratifying (Verhagen, 2002, p. 164; Reynolds, 2001, no. 2-075). Even when the third party purported to withdraw from the contract ratification often is possible. However, in some jurisdictions this may be different where the third party, before ratification has taken place, has already given notice to the principal that he considers the act of the agent invalid (because of lack of authority) (e.g. art. 3:69(3) BW). In other legal systems, for instance English law, such notification will not prevent the principal from ratifying the agent's unauthorized acts (Reynolds, 2001, no. 2-082, 2-085).

13 Formalities

In several legal systems the authorization is subject to the same formalities as required for the main operation (e.g. art. 1392 Italian CC). In some legal systems such a rule applies only where the form required for the main operation is that of an authentic deed (e.g. art. 1280, section 5 Spanish CC) or of a 'common law deed' (Reynolds, 2001, no. 2-040). In some legal systems (German law and Dutch law) the law generally requires no formalities for authorization, even where the main operation itself is subject to formal requirements (§167(2) BGB). It is only with respect to a limited number of specific acts (e.g. dispositions of immovable property) that the law expressly requires a specific form (e.g. art. 3:260(3) BW: authorization by mortgagor requires authentic deed). In Germany it is even held, despite §167(2) BGB, that, where the main operation is subject to formal requirements and creates an obligation for the principal, the authorization may need to be subjected to the same formal requirements (BGHZ 89, 47: irrevocable authorizations to sell real estate). As regards general authorization formal requirements are imposed by various legal systems, in order to allow such authorization to extend to certain acts (e.g. 'acts of disposition') (art. 1988 French CC; art. 3:62 BW).

14 Legally fixed authorizations

Some legal systems contain rules which mandatorily determine the scope of the authority of certain categories of agents. A famous example is the German Prokura, the authority to do all acts incidental to the management of a commercial enterprise (art. 49 German Commercial Code). This 'almost completely unrestricted external agency power' (Müller-Freienfels, 1982, p. 253), which needs to be recorded in the Commercial Register, cannot be restricted with effect against third parties. Limitations imposed by the principal upon the agent's authority in principle only have internal effect. Similar institutions exist, for example, in Swiss law, in Italian law and

in the laws of the Nordic countries, although some of the rigour of the German Prokura has been taken away in these legal systems. Thus Swiss law and the laws of the Nordic countries only protect third parties in good faith (*ibid.*, p. 254; Kötz, 1997, pp. 227–8).

In the Restatement, a third ground for liability is recognized in agency cases, besides actual authority and apparent authority. It is called ‘inherent agency power’ and its purpose is ‘the protection of persons harmed by or dealing with a servant or other agent’ (Restatement, §8A). The distinctive feature of inherent agency power, when compared with apparent authority, is that there does not have to have been a manifestation of the principal or reliance by the third party (Restatement, §6, Comment c *in fine*). This inherent agency power bears some similarities, as far as the legal consequences in the external relationship are concerned, with ‘externalized’ civil law forms of authority such as the German Prokura. In the Tentative Draft of the Restatement (Third) of Agency inherent agency power is not maintained as a separate category, but is brought under an expanded notion of apparent authority (Ward, 2002, critical).

15 Irrevocable authorizations

Under many legal systems authorizations can be made irrevocable. If the principal has (orally or in writing) expressed an authorization to be irrevocable he is deprived of his right of revocation. Because of the far-reaching effects of irrevocable authorizations, special rules apply to these forms of authority in many legal systems. In German law, Dutch law and English law it is required that the authorization be in the interest of the agent or of a third person (art. 3:74 BW; BGH WM 71, 956; Reynolds, 2001, no. 10-007). Also the irrevocability clause may in exceptional circumstances be modified or cancelled, either by the principal himself (e.g. BGH 8 Feb. 1985, WM 1985 646) or by a court (e.g. art. 3:74(4) BW). Under some legal systems (e.g. art. 34 Swiss Law of Obligations (OR)) irrevocable authorizations are void, because they are felt to be too large an infringement upon party autonomy. In other jurisdictions certain types of irrevocable authorization may be invalid for this reason, for instance irrevocable general authorizations (Generalvollmacht) in German law (Schilken, 2004, §168, no. 9) and irrevocable authorizations given for an unlimited period in French law (Daloz, Mandat: no. 350).

16 The publicity principle

Under the civilian systems, in order for an agent to bind his principal he must not only act with authority, but he must also reveal to the third party that he is acting on behalf of a principal. The agent must act ‘in the name of’ the principal (§164(1) BGB; art. 1984 CC; art. 3:66(1) BW). It is

sufficient that it appears from the circumstances of the case that the agent acts in his capacity as representative: it is not necessary that the name of the principal be expressly mentioned (e.g. §164(1), second sentence BGB).

The fundamental difference between the laws of representation of most civil law jurisdictions and the laws of agency of the common law jurisdictions is that, under the common law, a completely undisclosed principal may also be liable and entitled under the contract concluded by the agent in his own name. This is a consequence of the so-called ‘doctrine of the undisclosed principal’ (which will be discussed below (section 19)). Nevertheless, although English law recognizes that an agent who acts in his own name can establish direct contractual relations between his principal and the third party, it may still be important to decide (to use the civil law terminology) whether an agent acted in his own name or in the name of the principal. As will be seen below, different rules apply in both situations. The most important difference between disclosed and undisclosed agency is that under the doctrine of the undisclosed principal the agent remains personally liable under the main contract whereas in situations of disclosed agency the agent *prima facie* (though by no means always) ‘drops out’: there is no ‘privity of contract’ between the agent and the third party.

17 Acting for an unidentified principal (partially disclosed agency)

Under the civilian and common law systems it is not required that the agent immediately reveal the identity of the principal. Acting for an unidentified principal is possible. The agent then has to disclose the identity of the principal at a later stage. If he fails to do so the agent is, under some systems, regarded as having contracted in his own name and will be personally liable under the main contract (art. 3:67 BW; art. 2159 Québec CC). In other systems (e.g. German law) the agent may be liable as an unauthorized agent (BGHZ 129, 149), which may also lead to his liability under the main contract (§179(1) BGB). A general rule such as that of Restatement, §321, pursuant to which the agent (even after disclosure of the principal’s identity) is personally liable under the main contract has been rejected in England (*The Santa Carina* [1977] 1 Lloyd’s LR 478). It is nevertheless submitted in Bowstead and Reynolds that the agent is *prima facie* liable under the main contract, unless it is absolutely clear that the person concerned acted as agent only (Reynolds, 2001, no. 9-016). However, if in the latter case the agent turns out to have no principal, he should be liable for breach of warranty of authority (*ibid.*, no. 9-065).

18 Indirect representation: the commission agent (commissionnaire)

When an agent concludes a contract in his own name he is personally liable and entitled under the main contract – in civilian systems – and does not

bind and entitle his principal. Situations in which the agent acts in his own name are in civilian legal writing usually referred to as involving indirect representation (mittelbare Stellvertretung) or ‘imperfect’ representation (représentation imparfaite). The ‘classic case’ of indirect representation arises when the agent is a ‘commission agent’, a commissionaire. When the relationship of principal and agent is a so-called ‘contract of commission’ no contractual relationship is established between principal and third party. The contract between principal and agent is an agency agreement, whereas in respect of the third party the agent is regarded as the sole counterparty to the transaction entered into with the third party. This is so also when the third party knows, as he often will, that the commission agent, being such, is acting on behalf of a principal, and even when he knows the identity of that principal. The situation is therefore one of indirect representation, but not of undisclosed representation, since the third party may be aware of the existence of an agency relationship between principal and agent.

It appears that the English courts have never recognized a concept similar to that of the commission agent under the civil law systems. They do not seem to have accepted that there can be a contract of agency between principal and agent under which the agent is instructed not to create privity of contract between the principal and the third party but which further has all the characteristics of such a contract (e.g., the agent promises to use his best endeavours; the agent is remunerated by pre-arranged commission). In other words, English law has difficulties with situations where ‘the internal aspect of agency is found but not the external’ (Reynolds, 2001, no. 1-020). There were, however, relevant dicta from Blackburn J (*Robinson v. Mollett* (1875) LR 7 HL 802, 809–810) (a dissenting judgment) in which existed, as Hill observed, ‘an embryonic growth from which a native contract of commission, or a concept closely akin to it, could have developed had it not been for the more pedestrian outlook of his colleagues on the bench’ (Hill, 1968, p. 630). Bowstead and Reynolds consider it ‘difficult to see any doctrinal objection at common law to the setting up of indirect representation’ and (inter alia) point to the possibility of the agent and third party contractually excluding the intervention by an undisclosed principal under the undisclosed principal doctrine (see section 19) (Reynolds, 2001, no. 1-021, 8-073).

19 The undisclosed principal doctrine

Under English law there can be (direct) representation even when an agent acts in his own name. In the civilian systems it is mainly because of the objective theory of contract that a contractual relationship cannot exist between two persons of whom at least one (the undisclosed principal) was a complete stranger to the other. Under the English objective theory of

contract the acting of the agent in his own name also leads to the personal liability of the agent. The agent does not 'drop out' of the transaction, not even after the third party becomes aware of the identity of the principal, and he may also be able to sue, subject to the principal's intervention. As a result of the undisclosed principal doctrine, however, the undisclosed principal is liable and entitled as well, presumably because he authorized the conclusion of the main contract. This result is difficult to reconcile with standard theories of contract, but then: 'the doctrine was formed before such theories had acquired prominence' (Reynolds, 2001, no. 8-071).

In practice the doctrine of the undisclosed principal operates as follows. When an agent concludes a contract with a third party in his own name, both the undisclosed principal and the third party may under certain conditions be able to sue each other directly (*ibid.*, no. 8-070; Restatement: §§186, 302). The agent must be acting within the scope of his actual authority and, in entering into the contract, he must intend to act on the principal's behalf (*ibid.*, no. 8-072, 8-074, 8-079). The terms of the contract may, expressly or by implication, exclude the undisclosed principal's right to sue and his liability to be sued (*ibid.*, no. 8-081). Although the undisclosed principal doctrine's main field of application concerns contracts it should be noted that the doctrine also applies with regard to money paid or received on behalf of the principal (*ibid.*, no. 8-070). It is not clear whether the doctrine is applicable with regard to goods transferred to the agent, so that the principal would directly acquire ownership of the goods transferred to the agent (*ibid.*, no. 8-172). As will be seen in section 21 below, civilian systems have no problems with accepting such direct acquisitions.

The doctrine of the undisclosed principal, with possibly one exception, only operates if the agent had actual authority to conclude the main contract (*ibid.*, no. 8-172). The possible exception to this rule is provided by the old and celebrated case of *Watteau v. Fenwick* ([1893] 1 QB 346). In this decision an undisclosed principal was held liable under a contract, which he had expressly forbidden his agent to conclude, and which was therefore outside the scope of his actual authority. This decision has been much criticized and may well be wrong (*ibid.*, no. 8-079). Moreover, an undisclosed principal cannot ratify an unauthorized act (*ibid.*, no. 8-072; Restatement: §85). The reasoning behind these rules is that otherwise it would be too easy for someone to intervene in a contract concluded by someone else. In the Restatement it is recognized that in situations of undisclosed agency there can be no liability on the part of the undisclosed principal based on apparent authority (§194, Comment a). However, an undisclosed principal can be liable as a result of the unauthorized acts of his agent, where these acts are within the scope of the agent's inherent agency power (Restatement: §§194, 195, 195A).

Under the undisclosed principal doctrine the agent may by his acts create a direct contractual relationship between the undisclosed principal and the third party. The doctrine may therefore be characterized as involving (direct) representation: the main legal consequences of the contract concluded by the agent with the third party are attributed to the principal. It is not clear, however, whether the undisclosed principal is to be regarded as a genuine party to the main contract. According to Bowstead and Reynolds, there are some decisions, such as *Cooke & Sons v. Eshelby* ((1887) 12 App Cas 271) (where it was held that the third party who had purchased goods from an agent acting for an undisclosed principal was not entitled to set off the purchase price against a debt due by the agent personally) which can only be explained on this basis. On the other hand, the fact that the agent can be sued by the third party and that the third party can invoke defences which he would possess against the agent's claim make it difficult to deny, according to Bowstead and Reynolds, that 'the principal is really a third party intervening on a contract which he did not make' (Reynolds, 2001, no. 8-071). In the Restatement the Reporter observed that 'in fact, the contract, in the common law sense, is between the agent and the third person'. According to the Reporter a 'fictitious contractual relation' is created by the law and it is said that 'the principal becomes a party to the contract by operation of law' (Restatement: §186, Comment a).

The doctrine of the undisclosed principal is an unusual common law institution and has as such acquired considerable attention from comparative lawyers. Moreover, not only did it have a considerable influence in 'mixed' jurisdictions, it also generated effects in the Unidroit Agency Convention, the 1992 Dutch Civil Code and the Principles of European Contract Law (see section 21).

20 The undisclosed principal doctrine: election and merger

Peculiar features of the undisclosed principal doctrine are the doctrine of election and the doctrine of merger. It is usually said that the third party who has discovered the existence of a principal has a right of election: the third party has the option to sue either the agent or the principal. Under the so-called 'doctrine of election' this option is extinguished when the third party has elected to enforce his rights against either the principal or the agent. In that case the third party loses the right to sue the other party. This consequence is attached to election irrespective of the results of the suit. It is not exactly clear what constitutes election and the courts seem to have been very reluctant to find cases of election (Reynolds, 2001, no. 8-120). A clearer rule is that the third party, after obtaining judgment against either the agent or the principal, cannot sue the other. This is the case not only when the third party has successfully sued the agent, but also

when he has done so unsuccessfully. This is a consequence of the doctrine of merger. The courts, unhappy with the undisclosed principal doctrine, may have tried to limit its scope and they may have considered the principal's liability a windfall, 'and the third party cannot complain if the windfall turns out to be of limited value' (*ibid.*, no. 8-117). As a result of the position of the American courts, the doctrine of merger had to be recognized in the Restatement, although in a mitigated form (Restatement: §210, Comment a). The doctrine of election is rejected in the Restatement (§209 and §337). Only when either the agent or the principal have changed their position in reliance on the conduct of the third party, which suggests an abandonment of the claim, are the agent or principal relieved. For a critical discussion of the doctrines of election and merger in English law (with references to the Restatement) see Reynolds (2001, no. 8-114–8-125).

21 Civilian counterparts of the undisclosed principal doctrine

In several civil law jurisdictions which have experienced the strong influence of the common law (Louisiana, Québec, South Africa) the doctrine of the undisclosed principal has been adopted. For instance, in Louisiana the undisclosed principal doctrine was received as early as 1828 (*Williams v. Winchester*, 7 Mart. (n.s.) 22 (La. 1828)). In 1983, however, a court of appeal rejected the undisclosed principal's right to sue, using civilian analysis (*Teachers' Retirement System v. Louisiana State Employees Retirement System*, 444 So. 2d 193 (La. Ct. App. 1983)). In *Woodlawn Park Ltd. Partnership v. Doster Construction Co.* (623 So. 2d 645 (La. 1999)) the supreme court unequivocally reaffirmed that undisclosed agency was part of the law of Louisiana, not based upon the Civil Code but rather as an importation from the common law. In the revised Civil Code (1997) undisclosed agency is fully recognized, albeit with certain differences from the common law doctrine (Holmes and Symeonides, 1999, pp.1140–42). Similarly, under the 1991 Québec Civil Code, the undisclosed principal is – subject to certain qualifications (e.g., terms of the main contract, defences) – liable vis-à-vis the third party for the main operation entered into by the (authorized) agent in his own name (art. 2160) and may after disclosure enforce the main operation against the third party (art. 2165). The agent is liable as well (art. 2157). Also in South African law a reception of the undisclosed principal doctrine has taken place, but not to everyone's satisfaction: 'There is almost total objection in South Africa to the rule of the English law of agency relating to the undisclosed principal' (Beinart, 1981, p. 48).

In French law no general doctrine under which an undisclosed principal would be able to sue or could be sued exists. There are, however, some rules in French law which take into account the trilateral nature of cases of indirect representation. First of all there is a rule of property law pursuant to

which a principal of a commissionaire directly acquires ownership of goods bought by the commissionaire on the account of the principal (Jurisclasseur (commercial), Fasc. 360, no. 120). A real circumvention of the publicity principle takes place when a principal authorizes an agent to act as his representative and the agent does not disclose to the third party that he was acting in this capacity (*prête-nom*). The institution is regarded as a cumulative application of the rules concerning simulation and representation. The main contract is the *acte apparent*, while the contract of principal and agent is the *acte secret*. The third party has a choice: he can rely upon the *acte apparent* and sue the agent; but he can also call upon the real situation, viz. the agent having acted with power of representation, and sue the principal (Storck, 1982, pp. 228–9). Finally, it has been argued that if everything else fails, the principal and the third party can sue each other on the basis of unjustified enrichment (by means of the so-called *actio de in rem verso*) (Jurisclasseur (commercial): Fasc. 365, nr 20).

Like the other civil law systems, German law does not recognize a theory of undisclosed representation, although some authors have argued in favour of its acceptance (especially Müller-Erzbach, 1905). However, under the doctrine of ‘transaction for whom the matter concerns’ (*Geschäft für den, den es angeht*) a contract concluded by an agent acting in his own name directly binds the principal to the third party. The doctrine operates when it is clear that it was immaterial to the third party who was the other party to the contract (Schilken, 2004, Vor §§164ff. nos 51–6). The effect of the doctrine is that only the principal and the third party are bound by the contract; the agent drops out. Moreover, pursuant to §392(2) HGB the rights arising under the main contract belong, as regards the relationship of a principal, on the one hand, and a commission agent and his creditors, on the other, to the principal. As a consequence of this provision the principal in the bankruptcy of the agent does not have to share the proceeds thereof with the other creditors of the agent. The scope of §392(2) HGB is confined to commercial agents (Müller-Freienfels, 1982, p. 232; Schilken, 2004, Vor §§164ff. no. 44). Finally, under German law the agent can assign his future contractual rights against third parties in advance to the principal. In contrast with other civilian jurisdictions (e.g. art. 35(2) of the Dutch Bankruptcy Act), these rights, once they come into existence, are directly acquired by the principal/assignee. They do not pass – for a ‘juridical second’ – the estate of the agent/assignor, thereby making the assignment immune to the agent’s insolvency (*ibid.*, Vor §§164ff. no. 45).

Although the Dutch legislator has rejected a Dutch undisclosed principal doctrine, the 1992 Civil Code contains provisions which aim at a compromise between the English undisclosed principal doctrine and the traditional civil law approach to indirect representation (Parl. Gesch.

Boek 7, p. 354). By virtue of arts 7:420 and 7:421 BW, direct 'contractual' relations can be established between the undisclosed principal, or the principal of an agent without power of representation (e.g. a commission agent), and the third party. The functions of these provisions are the same as those of the undisclosed principal doctrine: protection of the principal and third party against the agent's bankruptcy and avoiding circuitry of actions. The provisions operate as follows. Art. 7:420 BW in certain circumstances (in particular the agent's insolvency) confers upon the principal a power to effect a transfer of the agent's rights under the main contract to himself. The third party has, by virtue of art. 7:421 BW, a similar power which enables him to exercise his rights vis-à-vis the agent under the main contract against the principal. In this respect the provisions have the same effect as the undisclosed principal doctrine: the principal and third party may sue each other on the basis of the main contract. Provisions similar to arts 7:420 and 7:421 BW have been included in the 1983 Unidroit Convention on Agency in the International Sale of Goods (art.13) and in the Principles of European Contract Law (arts 3:301–3:304) (Verhagen, 1995, pp. 43–50; Hartkamp, 1998; Busch, 2002).

The laws of many other civilian jurisdictions contain rules that protect the principal and the third party against the agent's insolvency or allow them to sue each other directly. For instance, like German law, Swiss law recognizes that an undisclosed principal becomes a party to the contract when it was immaterial to the third party with whom he contracted. Furthermore, by virtue of art. 401 OR claims acquired by the agent in his own name, but on account of the principal, automatically pass to the principal when the principal has fulfilled all his obligations in his relationship with the agent. By virtue of art. 401(2) OR this has full effect in the agent's bankruptcy. Finally, art. 401(3) OR grants the principal the right to claim movable goods in the agent's bankruptcy. Under art. 1705(2) of the Italian Civil Code the principal of an agent who acted in his own name can exercise the agent's rights under the main contract, when this does not prejudice the agent's position. Under Spanish law a third party who contracted with a factor acting in his own name can sue both the factor and the principal (art. 287 Commercial Code). Islamic law apparently recognizes a doctrine of undisclosed agency as well (Badr, 1985, pp. 75–6).

In conclusion, various civilian jurisdictions recognize that in situations of indirect representation the main operation can produce effects for the undisclosed principal. The rules governing these situations are, as regards their legal nature, of a wide variety. On the one hand, there are rules which apply only to and are especially created for situations of indirect representation. On the other hand, there are rules of bankruptcy law, restitutionary remedies, possibilities of suing in delict and rules of property law, which

were not particularly created in respect of situations of indirect agency, but which may provide the principal or the third party with a protection similar to that offered by the undisclosed principal doctrine.

22 Convergent tendencies

The three main legal families of the Western legal tradition also represent the three main concepts of representation and agency. Characteristic of the Romanist family is that the contract between principal and agent and the authorization are not clearly distinguished, whereas the strict separation of these two notions is the typical feature of representation in the Germanic legal family. The distinctive feature of agency in the Anglo-American (common law) legal family is the so-called 'doctrine of the undisclosed principal'. However, it cannot be doubted that in many respects common law and civil law (Romanist and Germanic) systems are converging, although the degree of convergence may vary from system to system.

The typical feature of the Germanic legal family is the principle of abstractness, pursuant to which a clear conceptual distinction is made between the agent's authority and the underlying legal relationship between principal and agent. However, the same distinction can also be found in the modern common law of agency. Moreover, even within the Romanist legal family the principle of abstractness is gaining ground, particularly in the revised Louisiana Civil Code. To this it may be added that in German law the principle of strict separation of mandate and authority has lost some of its original rigour.

The leading principle of the common law of agency is that, when the agent exercises his authority by concluding a contract with a third party, the effect is that the principal becomes liable and entitled under this contract. In other words, the exercise of authority alone is sufficient to trigger the agency mechanism. Also in the civil law systems the existence of authority is a *conditio sine qua non* for the immediate contractual liability of the principal. However, as a result of fundamental principles of the law of contract the exercise of authority only triggers the mechanism of representation if the third party is (or should have been) aware that the agent was acting in this capacity. The main difference between common law and civil law therefore is that the common law of agency recognizes one leading principle, viz. the exercise of authority triggers agency, whereas the civil law of representation is governed by two principles, viz. that the agent should have authority to act and that the third party must be aware that the agent is acting in this capacity. However, here also there are converging tendencies between common law and civil law. Civil law systems, both Romanistic and Germanic, have developed rules and institutions whose effects are often very close to those of the undisclosed principal doctrine.

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4 Aims of comparative law*

H. Patrick Glenn

1 Introduction

The idea that comparative law must have a specific aim or aims became widespread through the 19th and 20th centuries, as comparative law itself came to be recognized as a specific discipline. The idea assumes that comparative law is distinct from law itself, or subsidiary to it, and requires justification which law in its entirety would not. Today, however, comparative legal reasoning is increasingly evident in almost all dimensions of the practice and study of law, such that the aims of comparative law are increasingly difficult to state within a small compass. Comparative law is increasingly integrated into law itself, as a fundamental technique and means of support. The argument has thus already been made that comparative law should disappear as an autonomous subject (Reimann, 1996) or at least be seen as an integral dimension of all forms of legal endeavour (Glenn, 1999).

These different attitudes towards the comparing of laws, and the aims of doing so, have been evident throughout legal history. Greek lawyers used the law of other Greek city-states to decide cases and the process of comparison was here no different from that of comparing one internal norm to another in the decision-making process. Aristotle, however, surveyed the constitutions of the then known world with a view to improvement or perfection, and the use of comparative law as a subsidiary instrument of law reform is here evident. In the same manner, the Romans would have sent a delegation to Greece prior to the drafting of the Twelve Tables, generally thought to be at the origin of Roman law, though more informal comparison of laws would inevitably have occurred in practice in the Roman provinces (leaving, however, few records). The importance of comparative legal reasoning declined in some measure in the process of development of the *ius commune* on the continent of Europe, as Roman law and contemporary rationality became the main instruments in the development of this particular corpus of law. Given the belief that a universal law was possible, driven by religious and imperial convictions, comparison became seen as a potential source of contamination (Thunis, 2004, p. 6). Outside of the academy, however, informal comparison was essential to legal practice, as everywhere the refined features of the *ius commune* had to be measured

* See also: Legal culture; Legal history and comparative law; Methodology of comparative law.

against local forms of normativity. The later middle ages were a time of proliferation of laws on the same territory, and comparison was essential to their reconciliation in particular cases.

From the time of what is known as the enlightenment, and the western imperialism which accompanied it, different forms of legal comparison remained in evidence. In the process of construction of European states, many sources of law were used and the 16th century saw major doctrinal efforts to draw out the best from Roman, canonical and customary sources. This may have been driven initially by curiosity and a spirit of scientific enquiry, but eventually it became constructivist in character as centralizing forces, royal or otherwise, formulated modern laws according to the range of comparative examples provided by the research. Beyond Europe, however, and the process has continued to the present day, the law of the European colonizers had to be constantly compared with local laws which were never displaced in their entirety. European authority was largely persuasive in character and necessarily coexisted alongside local law, whether written or unwritten. Comparative law here was the stuff of daily practice.

The contemporary discipline of academic comparative law developed as a response to the fragmentation of European laws following the 19th-century codifications and development of the concept of national *stare decisis* (David and Brierley, 1985, p. 2; Constantinesco, 1972, p. 66). The 19th century thus saw the creation of a number of national comparative law associations and comparative law reviews while the World Congress of Comparative Law held in Paris in 1900 is generally seen as marking the arrival of the discipline in the scientific world (Ancel, 1971, p. 18). Articulation of the aims of this distinct academic discipline was essential and while diverse aims were eventually brought forward, they shared some common characteristics. As the discipline of comparative law is today questioned, however, so are its traditionally stated aims subject to critical examination.

2 Comparative law as an instrument of learning and knowledge

Many distinguished comparative lawyers have insisted on the virtues of comparative law, as a means of expanding knowledge generally and as a means of better understanding law (Ancel, 1971, p. 10; David and Brierley, 1985, p. 4; Ewald, 1995; Glendon, Gordon and Carozza, 1999, p. 4 ('pursuit of knowledge as an end in itself'); Örüçü, 2004, p. 33; Rheinstein, 1967, p. 554 (usefulness of 'insights . . . in and by themselves'); Zweigert and Kötz, 1998, p. 15 ('primary aim . . . as of all sciences, is knowledge')). For Professor Sacco there is a 'false problem' of the goal or aim of a scientific discipline, since the objective of any science is that of knowledge (Sacco, 1991, p. 1). It is of course difficult to argue against learning and knowledge, yet the question is a more precise one as to whether this is a sufficient

and necessary aim of comparative law as a distinct academic or scientific discipline. All of the authors in question, and many others, acknowledge further, more pragmatic and utilitarian objectives, recognizing implicitly that the pursuit of knowledge is not in itself sufficient to justify the existence of any particular discipline. The justification of particular disciplines must be established not only on the basis of the general need for learning and knowledge, but in relation to the way that need is satisfied by other disciplines. Comparative law as an academic discipline here exhibits the circumstances of its origins. Given the normative closure of nationalist legal theory in the 19th and 20th centuries, comparative law became necessary as a means of knowledge of law beyond national political boundaries. In the language of Jacques Vanderlinden, the comparative lawyer fulfilled an essential vocation of 'opening doors' (Vanderlinden, 1995, p. 423). To the extent today that doors are no longer closed (and comparative lawyers have played an important role in this process), the aim of comparative law of providing basic information on the law of the world has become less fundamental and necessary, as has the discipline itself. If law is no longer considered exclusively in terms of national sources, then it is the discipline of law in its entirety which must assume the cognitive burden of providing information on law beyond national borders. There has already been some recognition of this in programmes of legal education which teach more than a single national law, though these programmes are still of recent date.

In assessing the importance of comparative law as a means of learning and knowledge, however, it is important also to examine the nature of the learning and knowledge which has been produced, notably in classifying the laws of the world.

3 Comparative law as an instrument of evolutionary and taxonomic science

As a distinct academic discipline or science, comparative law had to establish its precise scientific aims or objectives, and these were naturally conditioned by prevailing scientific ideas of the 19th and 20th centuries. Darwinism was important for the biological sciences throughout this period, remaining so today, and there was an ensuing form of social Darwinism which had its effect in the social sciences. This meant that, parallel to western imperialism, much work in the social sciences was directed to establishing the progression of human development and the multiple stages of that progression. Different peoples, and laws, were at different stages of social development, and comparative law could play an important role in the discovery of this evolutionary process. Imperialism, moreover, could be considered an entirely justifiable process if it accelerated a

progression of development which would take place in any event. Much of the comparative law of the 19th century was carried out within this manner of thought (David and Brierley, 1985, p. 5, with references; Constantinesco, 1972, pp. 118–26) and ongoing references to ‘primitive’ peoples and laws are a part of its legacy. There are still references to comparative law illustrating the ‘evolution’ of societies (Collins, 1991, p. 396, referring to ‘bankrupt predicament’ of evolutionary social theory) but today this must be taken as simply referring to comparison’s ability to highlight diachronic change, and not to any fundamental laws of human progression.

The evolutionary aims of comparative law were closely related, however, to another scientific objective, which was that of establishing a taxonomy of the laws of the world according to various notions of legal families or ideal types of laws. This aim of comparative law was influenced by the emergence of many comparative and taxonomic disciplines in the 19th century (comparative anatomy, comparative literature etc.) and by the notion of ideal types (of western construction) given prominence in the social sciences by Max Weber. These taxonomic efforts assumed static and positive national laws as objects of the taxonomic process. They were often related to notions of social progress or evolution; since while taxonomy was possible, there could still be progression from one stage of development to another. This idea of classification of the laws of the world, like that of legal evolution, has today lost much of its interest. In spite of great efforts expended (for a tabulation, see Vanderlinden, 1995, pp. 228, 417) no conclusive results were reached and today there is increasing doubt as to the criteria of classification and as to the stability of the laws to be classified. This reflects a certain disenchantment in the social sciences generally with respect to objectives and methods drawn from the physical sciences. It has been observed that human beings, unlike physical objects and the world of nature, have a tendency to ‘answer back’ and that this must be accommodated by the academic discipline in question.

Some dissatisfaction having emerged with the large, scientific aims of comparative law, it has increasingly been justified, in recent years, by more pragmatic and utilitarian considerations.

4 Pragmatic and utilitarian aims of comparative law

In a world of national laws, it became inevitable that the work of comparative lawyers would be looked at through the prism of national law. Many of the aims of comparative law have thus been expressed in terms of its contribution, in different ways, to national law. In this respect the discipline today continues in much more intensive form the constructivist tradition, dating from Aristotle and extending through the period of state construction in Europe. Comparative law would thus, on a purely cognitive level, contribute

to a better understanding of one's own, national law through the contrasts and greater range of information it provides (Ancel, 1971, p. 9; Constantinesco, 1974, p. 290; David and Brierley, 1985, p. 3; Glendon, Gordon and Carozza, 1999, p. 5; Rodière, 1979, p. 47). As a practical consequence, it would be a primary instrument of domestic law reform through legislation, and the necessity of comparative research is a constant theme in the agenda of law reform agencies and ministries of justice (Coing, 1978; Grossfeld, 1990, p. 15; Gutteridge, 1949, p. 35; Kahn-Freund, 1974 (famously arguing of dangers of 'transplants' based on different power structures); Pound, 1936, p. 60; Rabel, 1967, p. 3; Schlesinger, Baade, Herzog and Wise, 1998, p. 37; Watson, 1976 (replying to Kahn-Freund and arguing for a general principle of transferability of laws without regard to social context); Zweigert and Kötz, 1998, p. 15). Particularly in common law jurisdictions the contribution of comparative law to the development of case law has been urged (Gutteridge, 1949, p. 37; Markesinis, 2003; Rheinstein, 1967, p. 555; Schlesinger, Baade, Herzog and Wise, 1998, p. 3). Improvement of national law has been formulated recently in terms of improvement of its economic efficiency or wealth-producing capacity and there has been interesting use of comparative reasoning to demonstrate the utility of different national models in the pursuit of this particular objective, notably with respect of different forms of corporate governance. A number of large studies, written by economists, have also attempted to demonstrate the relative efficiency of entire traditions of civil and common law (e.g. La Porta *et al.*, 1998). It has been said, however, that comparative law is a means both of evaluating the efficiency of different models and also of recognizing the resistance of particular national traditions (the language of 'path dependency' is often used) in the 'evolution' towards efficiency (Mattei, 1997, p. 121). While comparative law has been used most frequently in the perfecting of national private law, there is a growing tendency to deploy it as a means of interpretation of national constitutions (Tushnet, 1999).

The aims of improving national legislation or national case law scarcely exhaust, however, the pragmatic or utilitarian applications of comparative legal reasoning. A larger pragmatic objective is the regional or international harmonization of law, of great importance today within Europe but also in the worldwide process of development of international and transnational law (Constantinesco, 1974, pp. 343, 370; Örüçü, 2004, p. 37; Schlesinger, Baade, Herzog and Wise, 1998, pp. 37–43; Zweigert and Kötz, 1998, p. 16). In the context of Europe in particular, comparative law is an indispensable method in the work of the European courts, which draw on the national law of all member states both in enunciating the law of the European Union and in the application of the European Convention on Human Rights (van der Mensbrugge, 2003). Regional or topic-specific

forms of harmonization would today be seen, however, as the maximum limits of the comparative process of harmonization. Earlier sentiments, notably those of Saleilles, in favour of development of a 'common law of humanity' (Jamin, 2000) are today considered as utopian in character. Comparative law is also said to be an indispensable aid to international forms of legal practice (Ancel, 1971, p. 9; Glendon, Gordon and Carozza, 1999, p. 5; Rheinstein, 1967, p. 555; Rodière, 1979, p. 38), and it is today the case that comparison of national laws is a fundamental process in the practice of transnational law firms and in the process of international arbitrations. The process is no longer limited to obtaining expert foreign advice on the content of foreign law, pursuant to a national choice of law rule, but now extends to broader forms of evaluation of national laws for purposes of choice of forum and choice and application of national law, in the context of either international litigation or international arbitration (Glenn, 2001).

5 Resulting tendencies of discipline of comparative law

This brief survey of the recent aims of comparative law reveals the present vulnerability of the discipline and the reasons for dissatisfaction with its stated aims. For while comparative law and comparative lawyers have succeeded in demonstrating the utility of comparative law, this has generally been for constructivist purposes and in a way which has lent support to the idea of the autonomy and exclusivity of national law. It is as though one opens a door in order to close it more securely, or to allow in (only) a particular, invited guest. Use of comparative law in the process of law reform would thus be in the hands of a very select group of people, following whose work national law would have been improved and would have become more self-sufficient. Establishing taxonomies of comparative law, as in a museum of contemporary law, would reinforce the autonomous existence of the objects of classification. Taxonomy consists of the establishing of boundaries and the comparison once terminated would leave fixed and determined objects. Categorized state laws would be more certain in their existence following the process. At the level of regional or international harmonization, the comparison would also be purposive and of limited duration. The measure of comparison suggested by these aims of comparative law would thus be compatible with an underlying epistemology of separation, of peoples and of laws. Comparative law as a pragmatic and utilitarian subsidiary discipline would also, necessarily, be taught as a separate discipline and would pose no danger to the exclusivist teaching of state law. Courses of comparative law would even reinforce this hegemonic teaching of the *ius unum*, since all appreciation of other laws could thus be left in the curriculum of law faculties to the specific course of comparative law. It is

symptomatic of this underlying attitude that courses in comparative law are in general courses of foreign law, in which no comparison with local law takes place. The fear of contamination would remain with us; comparative law would need to acquire a more subversive character (Muir Watt, 2000).

6 Comparative law as comparison

What is to be done? It may be possible to restate the aims of comparative law in a more subversive, and effective, manner by returning to the original idea of comparison. The word comes to us, appropriately enough, as a combination of other words. 'Com' is the archaic form of the Latin 'cum' or 'with'. 'Par' is the Latin for 'equal', giving us in different languages 'peer', 'pair', 'paire', 'paar', 'par' etc. So the Oxford English Dictionary gives us, prior to all of the contemporary meanings of the word 'compare', a 'literal' meaning which is to pair or bring together, and the bringing together must be taken to be of those things which are taken as equals. Equality would here not imply similarity or close correspondence (Merryman and Clark, 1978, p. 27, on comparison implying difference; Legrand, 1999, p. 36, on justification of difference) but simply equal treatment or standing in the process of bringing together. There is thus an English word 'compear' which means to appear or come together in a court of law, for purposes of peaceful resolution of a particular dispute, and without prejudice to continuing difference. This 'literal' meaning of the word is remarkable, in contrast to present understanding of comparative law, in having no limitation in time or underlying, instrumental purpose. One brings together, and if there are tendencies to drift apart, one continues to bring together. The process of comparison would thus in no way imply resulting uniformity. Indeed if anything it implies the reverse, that differences remain which must be somehow brought together, such that coexistence of difference is possible. This is subversive. It implies rejection of a millennium of teaching of western law as a *ius unum*, whether the *ius unum* is the *ius commune* or the law of the state. It implies a discipline of conciliation of laws as opposed to one of the conflict of laws. It implies legal theory which is cognizant of the realities of life and legal practice in the world. For comparative law it would imply a new emphasis on the importance of comparative legal reasoning in the world, and less emphasis on the autonomy of the discipline itself.

The aim of com-paring would be without prejudice to some of the existing aims of comparative law. Comparative law could continue to be an aid in simply understanding one's own law. Domestic law is also always in need of improvement, and comparative law can be useful in this constructive process. These objectives would be situate, however, in a broader context or cadre which is that of the continuing relations of interdependent laws in an interdependent world. The modern world is no longer one of the

construction of national laws, but rather of their necessary collaboration. There are more and more demonstrations of the viability of transnational law (Glenn, 2003) and more and more indications of the willingness of judges to resort to a broader range of sources of law (Abrahamson and Fischer, 1997; L'Heureux-Dubé, 1998; Drobnig and van Erp, 1998; Canivet, Andenas and Fairgrieve, 2004). Governments are finding ways of collaborating at effective levels of management and no longer simply through formal diplomatic channels (Slaughter, 2004). Legal education may be (slowly) overcoming its hegemonic biases. The notion of global government has given way to that of global governance. Lawyers have acquired a historically unknown mobility, as has the legal information which they rely upon and produce. In all of this, comparative legal reasoning is essential and comparative lawyers have an important, though far from exclusive, place. The aims of comparative law thus would come to parallel those of law itself. Perhaps more accurately, it could be said that law would be recognized as an inherently comparative process, as opposed to a single, universal corpus of rules.

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5 American law (United States)*

Ralf Michaels

1 The role of law in the United States

Understanding US law is impossible without first understanding the role law plays both in its political system and in the consciousness of its citizens. Law is ubiquitous in general culture: literature, cinema, television (Raynaud and Zoller, 2001). On first impression, law's status appears paradoxical. On the one hand, there is an almost mystical faith in the power of law to transcend all conflicts: the rule of law (as opposed to the rule of men) was the American formula for a just society, in opposition to the absolutist European government of the time. The US Constitution was the founding document for the nation, and law has ever since had a defining character for the country and its self-perception as a beacon of democracy and individual freedom. While there are struggles within the law, the rule of law and the Constitution themselves seem beyond discussion: they provide an almost unquestioned framework for debates (Levinson, 1988). On the other hand, and for similar reasons, the distinction between law and politics is much less clear than in European countries. It is acknowledged – sometimes cynically, sometimes approvingly – that law incorporates and serves the political ends of those who shape it. The traditional American distrust of government encompasses distrust of any claims of neutral, objective, natural law. Public reactions to the US Supreme Court decision in *Bush v. Gore* (2000) demonstrate both these aspects. When a majority of five Republican-appointed Justices held for Republican presidential candidate Bush, and four less conservative Justices held against him, there were widespread complaints about the politicized judiciary, and the court's split along partisan lines. Yet hardly anybody seriously questioned the binding nature of the decision, which in effect determined the presidency.

The political character of law also explains why law, and in particular litigation, is often seen as a tool for proactive social change, not just for the retrospective resolution of individual disputes. Supreme Court decisions like *Brown v. Board of Education* (1954), which abolished school segregation and implemented civil rights, and *Roe v. Wade* (1973), which established a constitutional right to abortion, were not only mileposts in legal development, they are also part of the country's cultural identity, familiar

* See also: Accident compensation; Constitutional law; Statutory interpretation.

to every schoolchild. The reason is that public regulation was relatively weak for a long time; as a consequence the task of enforcing standards of conduct was left to private parties who would act as private attorneys general. This is true for areas as diverse as antitrust, civil rights, environmental regulation, products safety standards and many others. There are one million lawyers in a country of roughly 300 million inhabitants not only because Americans are more litigious than others, but also because litigation serves broader purposes than elsewhere.

A good example of regulation by private litigation is the law of damages for accidents. Compensatory damages for tort victims are often substantially higher than elsewhere; in addition plaintiffs can often claim ‘punitive’ damages over and above their actual injury, meant to deter and punish defendants. What looks to foreigners like an undue mixture of private and criminal law and an inappropriate enrichment for plaintiffs must be understood with regard to three functions. First, the function of tort law, and especially of punitive damages, is as much regulatory as compensatory. Because damages are a cost of doing business, they must be high enough to ensure that the regulated conduct becomes unattractive for defendants. Giving these damages to plaintiffs is justified as an incentive for private individuals to perform this ultimately public regulatory function. A second reason for high damages under US law is often overlooked: US law usually provides for one-time lump sum payments of damages, equitable remedies like both specific performance and recurring payments are only exceptionally granted, because courts are unwilling to oversee complicated enforcements. Hence a one-time sum must not only cover attorneys’ fees but also all future costs to the victim. These costs can be substantial, because the social security and healthcare systems in the US are much weaker; costs of accidents, which are borne, in European countries, by the state, must here be provided through damages. This leads to a third and last point. In the United States, accidents are seldom seen as a matter of fate that must be borne either by the victim or by society at large; rather, injuries can and should be compensated by the responsible person or corporation, provided that defendant is rich enough (‘deep pocket theory’). Private law and litigation thus perform functions of regulation and of redistribution, which are performed, in other countries, by public law.

While small claims can often not be brought because litigation is expensive and legal aid restricted, big private suits are attractive, to plaintiffs and their lawyers, for several reasons. Under a system of contingency fees, a plaintiff need not pay her attorney unless she wins (winning fees can be considerable, and must be paid from the award). Class actions enable multiple plaintiffs with similar grievances to pool their claims and bring suit together. Far-reaching discovery enables plaintiffs to substantiate their

claims. Juries decide even in private law. In recent years, though, regulation through litigation has come under attack; it remains to be seen whether this development changes the role of law, and lawyers. Litigation (and lawyers) are often criticized; litigation is often avoided through arbitration and alternative dispute regulation.

It is therefore inaccurate to say, as many do, that US law prioritizes the individual over community more than other systems. Indeed, there is on the one hand a strong emphasis on rights, especially civil rights (Glendon, 1991). Individuals bear the burden to defend their interests because the state will not do this for them. Criminal defendants, for example, will be sentenced, sometimes to death, because they neglect to pursue procedural rights. On the other hand, these individual rights and responsibilities are enforced largely because they serve as incentives for welfare-maximizing conduct; they exist for the benefit of the community. It would be more accurate to say that US law prioritizes overall social welfare maximization over equality.

2 Characteristics of US law

2.1 Sources of law

Law schools are professional schools. Students attend them after graduating from college, and learn how to argue as attorneys. This is crucial in shaping US lawyers' understanding of their own legal system's identity. Students are taught the law as a line of cases, and as a forum for constant struggles between arguments and counterarguments rather than as a substantive whole (except in bar exams). Statutory interpretation is often only taught in the course of cases. This is why the US legal system is perceived, by insiders and outsiders alike, as a system mostly shaped by case law: not a fully accurate picture.

The most important and distinctive legal source in US law is the US Constitution of 1787. It is brief and incomplete, often unclear, and antiquated (Dahl, 2002): it has only seen 27 amendments since its drafting, ten of which – the Bill of Rights – by 1791. Despite, or perhaps because of, all this, the US Constitution is still the founding document of national and legal identity to the same degree as the French Civil Code in France, a testament to the respective importance of public and constitutional law in the United States, compared to that of private law in Continental Europe. The Constitution is comparable to the Code in another sense: it provides a superior normative framework for legal development.

Large areas of US law are still based on case law, developed by the courts through the system of precedent. Courts, in deciding a case, will look at previously decided cases as authority and guidance. The binding force of precedent ('*stare decisis*') is not absolute: courts are not strictly bound by their

own earlier decisions, and they are more willing than their English counterparts to develop the law in accordance with social reality, a reflection of the higher relevance of extralegal considerations for the law (Llewellyn, 1960).

At the same time, however, the number and importance of statutes in the United States is, in all likelihood, rather higher than in civil law countries, the density of regulation in some is considerable, and the readiness of US courts to deviate from a statute's meaning is lower than in Europe (Calabresi, 1982). Contrary to the perception of both insiders and outsiders, the role of legislation vis-à-vis the judiciary is comparable to that in Europe.

The important difference is the relative lack of codification. US law has never been codified to the same degree as European legal systems (Herman, 1995/1996; Weiss, 2000). Proposals to codify the private law of individual states in the 19th century either failed (e.g. in New York) or became irrelevant (e.g. in California, where the code was soon ignored by the judiciary). Louisiana is an exception; it has a civil code that is applied. A codification was not necessary as a national or even a state symbol (the constitutions played this role), and a general American distrust in government meant that, unlike the situation in France, democratic values were expected more from judges, less from parliament. However, the lack of a codification should not be overestimated in its importance. First, several areas of the law are codified, especially on the state level; this is true for example, for civil and criminal procedure. Often they are modelled on national model codes, the most prominent example being the Uniform Commercial Code which codifies (and unifies) wide areas of commercial law. Second, the American Law Institute has, since the beginning of the 20th century, compiled 'Restatements of the Law' with the goal of restating, ordering and (to some extent) unifying the law. These Restatements, though not binding, are often cited in court decisions and fulfil, partly, the systematizing function fulfilled by codes in Europe. Finally, much common law doctrine has become so refined by now that large areas of the law are as detailed and systematic as in codified systems.

2.2 Federal system and plurality of law

In an important sense there is not one US American law but many: the laws of the 50 states, the District of Columbia, and the territories, plus federal law. The individual states not only have their own legislatures and executives, as in other federal systems; they also have their own judiciaries. There are therefore two parallel strands of judiciaries from first instance courts to Supreme Courts: state courts and federal courts. The scope of federal law is narrow: Congress has only limited competence to legislate and, since the 1990s, the Supreme Court has enforced these limitations more strictly. Furthermore, federal courts are restricted in their ability to generate federal

common law (*Erie Railroad v. Tompkins*, 1938). Similarly limited is the jurisdiction of federal courts: they have exclusive subject-matter jurisdiction only in some areas, especially admiralty law and federal antitrust law. Their jurisdiction is concurrent with that of state courts in two important areas: most federal law questions (i.e. matters of federal law) and diversity jurisdiction, when plaintiff and defendant come from different states (to avoid bias of state courts). Otherwise, jurisdiction lies exclusively with state courts. The federal system is built on an idea of competition, rather than coordination, as in European systems (Halberstam, 2004).

This plurality of laws is otherwise not unlike the one in the European Union, where EU law has a limited scope, and competences remain largely with the member states. But there is an important difference: the different laws in the United States, including Louisiana, share the same methodology and inductive legal style, while there are often significant differences in substance. In fact, federalism is often praised as providing a laboratory for policy experiments. The states are seen to be in regulatory competition, most notably in areas like environmental law, but also in corporate law. In Europe, on the other hand, comparative law has recently revealed remarkable similarities in substance (especially, but not only, in private law) as a consequence of a less instrumental understanding of law, while differences in style and methodology between legal systems are still significant.

2.3 *Legal actors*

The US Constitution adopted Montesquieu's concept of the separation of powers, and distinguishes among executive, legislative and judicial functions. Yet, while in Montesquieu's conception different institutions perform neatly separated functions, the US Constitution, fuelled by mistrust in government, establishes an elaborate system of checks and balances of institutions upon each other, under which no single institution should be able to have too much power, and compromises are necessary. This is true between the branches of government, but also within each of them. Thus the most important executive position in the federal government is held by the President, yet numerous administrative agencies perform executive functions often in considerable autonomy. The legislative function is allocated to the Congress, which consists of two chambers: the Senate and the House of Representatives. The Senate is made up of two senators from each state, no matter how big or small, while the House represents voters from each constituency more or less equally. However, so-called gerrymandering, creative redistricting typically implemented by the majority, distorts results to a degree unknown in Europe. Finally, the judiciary consists, on the federal level, of judges appointed by the President for life, and allocated to three levels of courts: district courts, courts of appeals and the Supreme

Court. While the state constitutions differ, sometimes considerably, from the US Constitution (which some of them predate), the same approach can generally be found there; judges, however, are often elected by the public.

The system of checks and balances has two important consequences. First, the government speaks with many voices, which makes it weaker than the sum of its powers should suggest. Second, law, especially public law, is not a rational system of substantive rules, but more a procedure for a constant power struggle (or the outcome of such struggles), not only between the federal government and the states, but also within each of these systems. This has spurred an emphasis on process instead of substance. Government is restrained by procedure and by the system of checks and balances, not so much by substantive constitutional law.

2.4 Legal style

Legal style and legal method in the United States are different from those in other countries, even common law countries (Atiyah & Summers, 1991). On the one hand, especially in statutory and constitutional interpretation, there is still a remarkable degree of textualism and formalism reminiscent of European law in the 19th century. There are two reasons. First, the judge is supposed to implement the will of the legislator (although, somewhat paradoxically, many oppose the use of legislative materials). This resembles the otherwise rejected concept of the judge as 'mouth of the law'. Second, legislation often represents a compromise as the result of hard bargaining, judges should not second-guess such a compromise to reach seemingly more rational results. This judicial restraint may also explain why proportionality tests are relatively unpopular, not only in criminal law, where punishment is often unusually harsh, but also in other areas, where balancing is considered inappropriate for judges. On the other hand in case law, US law and legal thought have, perhaps more radically than most other legal systems, rejected a formalism that was still en vogue in the 19th century, and have supplemented it with open policy considerations to an extent unknown in most European legal systems. Law is not usually understood as a coherent and systematic whole, but rather as a hodgepodge of court decisions and statutes; therefore systematic arguments carry little weight, and legal reasoning is both more case-specific and more inductive than in Continental European systems. Americans doubt that there is 'one right answer' to every case that can somehow be distilled from the legal system as a whole: court decisions are the result of the better argument made by the winning party, not by logical deductions from a coherent system of law.

A consequence of the political substance of the law and of the fact that law is the fruit of political determination rather than of systematic and

neutral goals, is that law often embodies either extreme positions or ad hoc compromises. For example, positions on abortion (both by individuals and by lawmakers) have always been either 'pro choice' or 'pro life'; compromises seem harder to achieve than in other countries (Glendon, 1987). Homosexuality sees similar extremes: in the same year (2003), Texas still criminalized homosexual conduct (overturned by the US Supreme Court in *Lawrence v. Texas*), while in Massachusetts homosexuals attained the right to marry, because anything short of that would have been considered a violation of equal protection rights. The middle ground of registered partnerships seems unattractive to both sides in the debate. While such oscillation between extremes may look unattractive in the short run, the upside is that US law has traditionally been more open to change and reform than either English common law or continental European law. Bad laws may be frequent, but a process of trial and error keeps their detrimental effects to a minimum, and the US is quicker than others to change its law.

2.5 *Legal thought*

US legal thought in the 19th century (often called 'classical legal thought'), was traditionally formalist and conceptualist, comparable to, and influenced by, legal thought in Europe, especially Germany (Reimann, 1993a, 1993b). In the beginning of the 20th century, formalism was rejected by legal realism, a development which in turn was influenced by developments in Europe – German 'Freirechtsschule' (Herget & Wallace, 1987) and French social theory of law – but in more radical fashion. Legal realism rejected formalism with its emphasis on logical deductions on two grounds. First, formalism was inconclusive: legal concepts do not have inherent meanings and thus do not yield definitive outcomes to solve cases and problems. Second, the autonomy of law as a discipline was questioned on normative and empirical grounds: law was influenced by and in turn had influence on real world issues, and therefore was and should be influenced by insights about the real world. Politically, legal realism often came with a progressive social agenda and was instrumental for the New Deal and social legislation.

Legal Realism spurred an array of schools of legal thought, mostly interdisciplinary in nature (Duxbury, 1995). The most influential of these has been Law and Economics, which can now be considered mainstream and often serves as a kind of substitute for the lack of legal doctrine. A politically radical offspring from legal realism was Critical Legal Studies, a loosely connected movement that combined the antiformalism of legal realism with leftist political ideas (often drawing on Marxism or the Frankfurt Critical School) and modern/postmodern philosophical methods (Joerges & Trubek, 1989). Critical Legal Studies spurred other movements, including Critical Race Theory, Law and Feminism, and several other

politically progressive and/or methodologically postmodern groups. All in all, the rejection of formalism and of doctrine means that an interdisciplinary approach is almost required now in legal writing, although approaches other than law and economics have rarely been influential on judges (Zimmermann, 1995/1998).

3 US law and other legal systems

3.1 Influences of foreign law on US law

The United States received English (common) law, with the exception of those parts not in accordance with the principles of the new Republic, in particular Constitutional law, the division between barristers and solicitors, and feudal elements of property law. English law remained influential after the foundation of the nation; decisions of English courts are still, though more rarely, cited as persuasive authority. But English law was not the only influence. The law in Louisiana is still based to a large (though sometimes overestimated) degree on French and Spanish (civil) law; private law is codified (Palmer, 1999). Similarly, the law of Puerto Rico still has strong roots in Spanish law. Moreover, the 19th century saw considerable influence from German law (Pound, 1937). At the same time, continental philosophical ideas, particularly from the French and Scottish Enlightenment, were far more influential on the United States than on England. Its written Constitution and judicial review of legislation represent a significant difference from 'purer' common law systems. Thus the United States is rather a mixed legal system 'sui generis' than a pure common law system (von Mehren, 2000) and the quip about England and the US being 'separated by a common law' is not inaccurate.

3.2 Influences of US law on foreign laws

In the 20th century, as the United States became simultaneously more self-confident and more parochial, Europe seemed far less attractive as a model and US law developed in more isolation. European émigrés found that, while they were often welcome, their legal traditions were not (Graham, 2002). Foreign influences are now often forgotten or played down in the United States; Karl Llewellyn, for example, had to conceal the German origins of the Uniform Commercial Code. Since the two world wars, the desire to learn from others has been outweighed by the desire to teach others, and US law has in turn influenced many legal systems worldwide, a process not unlike the reception of Roman law in Europe (Wiegand, 1991, 1996). The most important influence was in constitutional reforms and drafting: constitutionalism, judicial review, enforceable civil rights and a system of checks and balances between the branches of government have been influential in numerous countries. A second important area, moved by business

and big law firms, has been commercial law: antitrust law, securities regulations, accounting standards, corporate governance, bankruptcy and also consumer protection and products liability law. There has been notably less influence in criminal law (with the exception of criminal procedure, e.g. the right of the accused to remain silent) and traditional areas of private law, especially property law, family law and law of succession. Reception is rarely pure. Often US institutions are adapted for their new local settings, influence is more in rhetoric than in substance, and receiving countries pass laws with no will or ability to enforce them (Archives de Philosophie du droit, 2001).

US law has also been extremely influential on commercial legal practice. US law firms have long been big enough to 'go global' and open offices all around the world; US clients have been strong enough to influence the day-to-day work of non-US attorneys. Many modern contract types (leasing, franchising, barter) stem from the creativity of US lawyers. The drafting style has become more American: long, detailed contract documents are more and more replacing the brief documents other legal cultures were used to.

The reason for adopting US law is not always its (perceived) superiority. Another important reason lies in economics (Dezalay & Garth, 2002): a US interest, in part altruistic in part not, to bring other countries up to US standard and the desire of developing countries to appease such pressure, a process that has been described as hegemonic (Mattei, 2003). Adoption is sometimes very successful, sometimes not at all. Often the lack of similarities regarding culture and infrastructure of the United States means that laws on the books are either ineffective (e.g. corporate governance reform in Vietnam) or outright disastrous (reform of capital markets in Russia). Lack of sensitivity on the side of American exporters, and desire to please (the US government and foreign investors) on the side of receiving states often contribute to unsuccessful legal transplants (Carrington, 2005).

3.3 *US law and international law*

The nation's founders, inspired by a strong desire to be accepted by other sovereign nations as an equal, gave international law the status of 'supreme law of the land' (US Const. Art. VI, §2). Since then, the United States has become stronger and, as a consequence, less eager to enter into international treaties, and to be restrained. Americans trust their own institutions and mistrust supranational institutions that take powers and competences away, even (or in particular) if those institutions aim at enforcing essentially similar values to those embodied by the US Constitution. This does not merely represent disdain for, or ignorance of, international law. First, international law is considered federal law, and foreign politics is a domain for the federal government. Consequently the states have little say in its creation

and fear loss of competences; courts are prevented, by the separation of powers, from using international law to overrule statutes. International law is dealt with as a matter of constitutional law. Second, the United States has always been eager to justify its actions in legal terms; it is trying to develop (or revolutionize) rather than simply break or ignore international law. This is congruent with the general US view of law as shaped by process in accordance with societal needs rather than as a transcendent and depoliticized natural law body.

3.4 Comparative law in the United States

In the beginning of the republic, US courts saw themselves in the Continental European *ius commune* tradition and frequently cited European, not just English, authors as well as Roman law sources (Hoefflich, 1997). Comparative law was relevant; the Second World Congress of Comparative Law (the first after the Seminal Congress in Paris, 1900) took place in 1904 in St. Louis (Clark, 2005). In the 20th century, however, perhaps with growing self-confidence in US law, comparative law became less fashionable in the United States. While there is much comparison between different state laws, internationally comparative law was taught at some universities only, originally mainly by European immigrants, later by some US American pioneers to the field. Today, comparative law is considered of vital importance, no doubt owing to perceived demands posed by globalization, and is taught at almost any law school. But it is considered a field separate from general law classes, and frequently its content is a very basic introduction to (often stereotypical) basic characteristics of various legal systems (Bermann, 1999; Reimann, 2002).

Lack of interest in comparative law is not so much due to the (often exaggerated) parochialism of the United States in general. Rather, the main reason lies in legal education. In particular the first year of law school emphasizes ‘thinking like a lawyer’, which means thinking like a US lawyer. This often suggests, albeit not deliberately, that thinking like a US lawyer is a universal way of thinking, and that the results of this reasoning, like the results of developments in case law, are somehow natural and optimal results of any legal systems. As a consequence, foreign law is often seen with a strong US bias, and differences from US law are easily seen as deficiencies. Only in recent years, and in large part through the influence of other disciplines (anthropology, sociology, economics) has there been renewed interest in foreign and comparative law on the one hand, methodology of comparative law on the other. Unfortunately, theory and practice of comparative law do not always supplement each other. Paradoxically, while US law may be the most important reference point for many comparative law studies, US comparative law itself is still in need of development.

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6 Arbitration*

Stefan M. Kröll

1 Definition and types of arbitration

Arbitration is a process in which the parties agree to refer their disputes to one or more neutral persons (arbitrators) in lieu of the court system for judicial determination with a binding effect (Lew, Mistelis and Kröll, 2003, paras 1–5 *et seq.*, with further definitions; Carbonneau, 2004, p. 5). This definition shows the hybrid nature of arbitration: it is contractual in origin, since it requires an agreement between the parties to submit their disputes to arbitration, but has judicial effects, as it results in a binding determination of a dispute having the same effect as a court decision. The binding and judgment-like nature of the final arbitral award distinguishes arbitration from other forms of alternative dispute resolution, such as mediation and all types of expert determination.

Depending on the parties and the nature of the dispute, one can distinguish different types of arbitration, each of which have particular features despite their common basic structure: states arbitration, investment arbitration between a host state and an investor, consumer arbitration involving at least one party which is a consumer, and statutory arbitration, where the jurisdiction of the tribunal is not based on an agreement between the parties but on statute. Since the most frequent use of arbitration is in the field of commercial disputes, this exposé concentrates on commercial arbitration unless explicitly stated otherwise.

In commercial arbitration a distinction must be made between national or domestic cases and international cases. Many countries, such as France, Switzerland or Hong Kong, provide different regimes for each type of arbitration. Moreover, the relevant international instruments – such as the United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 (New York Convention – UN Treaty Series, vol. 330, p. 38, no. 4739 (1959)) or the UNCITRAL Model Law on International Commercial Arbitration of 21 June 1985 (Model Law – UN Doc. A/40/17) – are generally intended to apply only to cases with an international element. In general, the provisions regulating international arbitration give greater room for party autonomy and allow for less court intervention during the arbitration proceedings and the post award stage than is found in the domestic context.

* See also: Civil procedure; Private international law.

A further distinction to be made is between institutional arbitration and ad hoc arbitration. Institutional arbitration is characterized by the fact that the parties have submitted their dispute to the rules of a particular arbitration institution which provides the necessary administrative support, in particular concerning the constitution of the tribunal. Some institutions, such as the International Chamber of Commerce (ICC), go even further and scrutinize draft awards in order to ensure a minimum standard of quality (Craig, Park and Paulsson, 2000, p. 1). In ad hoc arbitrations, by contrast, it is generally left to the parties to draft their own arbitration rules or to provide for application of one of the existing sets of arbitration rules for ad hoc arbitration, such as the UNCITRAL Arbitration Rules (Resolution 31/98 adopted 15 December 1976 – www.uncitral.org/english/texts/arbitration/arb-rules.htm). Where the parties have not done so the proceedings will be conducted on the basis of the arbitration law at the place of arbitration. Modern national arbitration laws usually leave it to the local courts to provide any necessary procedural support in these cases.

2 Development and harmonization of national arbitration laws

In the early 1970s, the national arbitration laws in various countries differed considerably as to the extent of court intervention and supervision. While some countries such as Germany had a very liberal arbitration law allowing for oral arbitration agreements and very limited court intervention, the law of other countries was based on a much more sceptical view of arbitration. The latter approach was not limited to countries which were traditionally hostile to arbitration such as those in Latin America (Blackaby, Lindsey and Spinello, 2002, p. 3). Also in countries with a long tradition in arbitration, such as England, the law allowed considerable court intervention culminating in the ‘case stated procedure’ by which a party could ask the tribunal to refer any question of law to the English courts (Mustill and Boyd, 1989, p. 585; Sanders, 1996, p. 31).

Since the 1970s, many countries have enacted new arbitration laws, and the trend is for such new laws to take a very favourable approach towards arbitration (National Reports in van den Berg, ICCA Handbook). Party autonomy has been strengthened and the extent of court intervention has been cut down considerably. An important role in this process has been played by the UNCITRAL Model Law which is based on the principle of party autonomy. Adopted in 1985 by UNCITRAL after years of intensive discussion on a global level, the Model Law was meant to provide ‘a sound and promising basis for the desired harmonization and improvement of national laws’. The Model Law is written in a user-friendly way and covers all stages of the arbitral process. It was supposed to serve as a model for national legislation and, up to 2005, almost 50 countries have either

enacted the Model Law itself as their national arbitration law or have based their new legislation largely on the Model Law (Sanders, 2004, pp. 54 *et seq.*). The harmonizing effect of the Model Law is bolstered by UNCITRAL's freely accessible CLOUT database, which collects case law from the various countries which have adopted the Model Law. Even in countries such as England, where the drafters of the new English Arbitration Act 1996 decided not to adopt the Model Law as the national arbitration law, the Model Law's provisions have influenced the courts in their interpretation of the national law. Taken together, these various developments have resulted in a considerable harmonization of national arbitration laws (Sanders, 1999, p. 83; Poudret and Besson, 2002, paras 956 *et seq.*).

3 Use and advantages of arbitration

Arbitration is frequently the chosen mechanism for dispute resolution in situations where there is either no court that has binding jurisdiction over the parties, as is often the case in arbitrations between sovereign states, or the parties want to avoid actual or perceived disadvantages of the relevant judicial system. In particular for international commercial transactions today dispute resolution by arbitration is the rule and not the exception. The main advantage of arbitration in these international transactions is that it provides a level playing field for the parties involved. Neither party must submit to the courts in the other party's home country, and the arbitral tribunal may be composed of arbitrators reflecting the parties' different cultural and legal backgrounds. Furthermore the arbitrators may be chosen for their expertise in the particular areas of business and law involved in the dispute. The proceedings may be shaped in such a way as to take account of the international character of a dispute, for example by allowing submissions in different languages, letting witnesses testify in their mother tongue, or facilitating service of documents. Another major advantage of arbitration in international cases is that arbitration awards can be enforced worldwide. More than 130 countries are party to the New York Convention, Art. III of which obliges the courts of these Contracting States to enforce foreign awards unless one of a very few bases to resist enforcement enumerated in Art. V exists. Additional factors which may induce parties to submit a domestic or international dispute to arbitration are the finality of awards and the reductions in time and costs that flow from the lack of a second (appeals) instance, the perceived greater potential for settlement, and the confidentiality of the proceedings (Bernstein, *et al.*, 2003: paras 2-016 *et seq.*).

4 The statutory (public) and contractual (private) sources of arbitration

Owing to its hybrid nature, arbitration is regulated by a complex interplay of different legal sources of statutory or contractual origin. In domestic

arbitrations, these comprise the national arbitration law including the arbitration practice, on the one hand, and the arbitration agreement and the chosen arbitration rules, on the other hand. In cases with an international element, these sources are supplemented by international instruments such as the New York Convention, the Panama Convention (Inter-American Convention on International Commercial Arbitration of 13 January 1975) or the European Convention (European Convention on International Commercial Arbitration of 1961 – UN Treaty Series, vol. 484, p. 364, no. 7041).

From a purely legal perspective, the statutory (public) sources are of primary importance, since they determine how much room is left for party autonomy. In practice, however, the contractual sources are of greater importance, since most modern arbitration laws now clearly embrace the principle of party autonomy. The role of party autonomy receives further protection by the international and regional conventions, where they apply. Figure 6.1 illustrates the regulatory web in which arbitration is embedded.

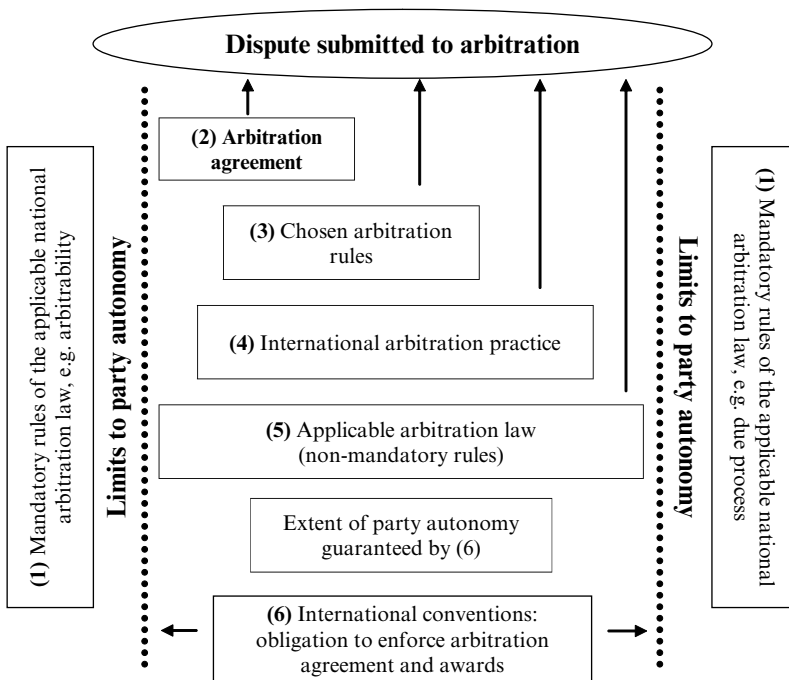


Figure 6.1 Regulatory web

In arbitration the applicable national arbitration law has a double function, which is reflected by the separation into mandatory and non-mandatory provisions. On the one hand the mandatory provisions of the arbitration law define and limit the scope of party autonomy (1). They determine *inter alia* what disputes can be referred to arbitration, what minimum requirements must be met in relation to due process and fair trial for the award to be recognized, and what extent of court control over the arbitration will be exercised. On the other hand the arbitration laws in their non-mandatory provisions contain fall-back or gap-filling provisions that apply only if the parties have not regulated issues which require regulation (5). For example, if the parties have neither explicitly nor implicitly agreed upon how the tribunal should be constituted, the relevant provision in the national arbitration will become applicable and provide for a mechanism for appointment.

The parties are free, within the wide scope left by the mandatory provisions of the applicable arbitration law, to agree in their arbitration agreement whether (and what) disputes should be referred to arbitration, how the tribunal should be composed, how the proceedings should be conducted, and on the basis of which substantive law the dispute should be decided. The parties may either regulate these issues explicitly in the arbitration agreement (2) or indirectly by submitting the arbitration to a set of arbitration rules, institutional or *ad hoc*, which provide the necessary regulatory framework (3). Arbitration practice (4) comes into play at all stages, not only as a separate legal source but also to interpret the provisions of the applicable arbitration laws and the arbitration agreement as well as the chosen rules.

The international conventions (6) form part of the applicable law and aim to ensure that arbitration agreements and awards are enforced. In so doing, they uphold party autonomy as the backbone of the regulatory web, irrespective of more restrictive provisions in the relevant national arbitration laws. For example, courts in member states to the New York Convention are bound to deny jurisdiction if a written arbitration agreement (as defined in Art. II) exists, even if the arbitration agreement itself falls short of stricter-form requirements imposed by national law.

The governing national arbitration law in international cases generally depends on the place of arbitration. In line with Art. 1 (2) Model Law, most modern arbitration laws determine their general scope of application on the basis of this strictly territorial criterion. The place of arbitration is a legal concept which is independent of the place of the hearings or the domicile of the parties or the arbitrators. Under most modern arbitration laws the parties may freely determine the place of arbitration. Some provisions, however, by their nature apply irrespective of the place of arbitration, such

as provisions concerning the enforcement and recognition of arbitration agreements and awards.

5 Subjective and objective arbitrability

Despite the now generally favourable approach to arbitration in most countries, certain types of disputes are still excluded from arbitration and reserved for the jurisdiction of state courts. If this exclusion is based on the nature of the parties involved or their special need for protection, one speaks of subjective arbitrability. For example, state entities or certain types of consumers are precluded from entering into arbitration agreements without special governmental consent or before a dispute has arisen (Gaillard and Savage, 1999, paras 534 *et seq.*). Much more important in practice, however, are exclusions based on the nature of the dispute, or so-called 'objective arbitrability'. Certain disputes involve such sensitive public policy issues that it is felt that they should only be dealt with by state courts. Obvious examples are criminal law and proceedings relating to the civil status of persons. What disputes are finally reserved for domestic courts is left for every country to determine and often reflects the general approach to arbitration. Consequently neither the New York Convention nor the Model Law contains any provisions as to what disputes are arbitrable. These international legal sources only stipulate that arbitration agreements and awards relating to non-arbitrable matters do not have to be recognized and enforced but eventually may be set aside.

Areas with a public interest involved where arbitrability has traditionally been an issue include antitrust and competition law, securities transaction, the validity of intellectual property rights, illegality and fraud, bribery, corruption and state contracts (Lew, Mistelis and Kröll, 2003, paras 9–35 *et seq.*). At least in commercial arbitration the trend in recent decades has been to enlarge the scope of arbitration and diminish the number of disputes which are not arbitrable.

6 The arbitration agreement

The existence of a valid arbitration agreement is normally a necessary prerequisite for any arbitration. Only in the very rare cases of statutory arbitration can arbitral tribunals, like state courts, base their jurisdiction on statutory provisions. In all other cases, the consensual nature of arbitration requires that the parties involved have agreed to submit their dispute to arbitration and thereby conferred jurisdiction on the tribunal. There can be no arbitration between parties which have not agreed to arbitrate their disputes. Even in investment arbitration, where the host country and the investor are often not linked by a contract, the arbitration is premised on an arbitration agreement. In most such cases, the host state submits to

arbitration either in its investment legislation or in a bi- or multilateral investment protection treaty. This is viewed as tantamount to an offer by the host state to all investors, which offer is deemed accepted by the investor when instituting arbitration proceedings (Lew, Mistelis and Kröll, 2003, paras 28–11 *et seq.*).

Traditionally a distinction is made between arbitration agreements made before the dispute has arisen, the so-called ‘clause compromissoire’, and those made after the dispute has arisen, the so-called ‘compromis’. While in some jurisdictions only the latter type of agreements were historically enforceable, at least in commercial cases, the distinction has lost most of its importance. The New York Convention as well as the Model Law and most national laws nowadays recognize the validity of pre-dispute agreements and enforce them. In consumer arbitration, however, the distinction still plays a role, since often only post-dispute agreements are enforceable. In commercial cases, such post-dispute agreements are rare, since it is often difficult for the parties to agree on anything after a dispute has arisen. Consequently parties generally include a clause providing that all disputes are referred to arbitration from the outset when concluding their main contract. Though the arbitration clause forms part of another contract, it is generally considered to be a separate contract. According to the doctrine of separability, which is recognized in Art. 17 Model Law and other national laws, the arbitration clause has a legal fate of its own. In particular its validity is not dependent on that of the main contract and it may even be submitted to a different law (Berger, 1993, pp. 156 *et seq.*). However in most cases, unless special facts are involved, the law chosen to govern the main contract also governs the validity of the arbitration agreement and, thus, the latter may also be affected by the same flaws as the main contract.

To be valid and enforceable most arbitration laws as well as the New York Convention require that the arbitration agreement be in writing. The reason for this form requirement is that the effect of the arbitration agreement is not limited to conferring jurisdiction on the arbitral tribunal, but at the same time ousts the jurisdiction of the state courts or at least prevents them from assuming jurisdiction. The New York Convention provides in Article II (3) that a court in a ‘Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.’ Comparable provisions can be found in Art. 8 of the Model Law and other national arbitration laws. The writing requirement imposed by such provisions is meant to ensure that the arbitration agreement does not become part of the contract

unnoticed, given that it entails a loss of the right to a day in court. Only a very few laws also allow for oral arbitration agreements (Lew, Mistelis and Kröll, 2003, paras 7–5 *et seq.*).

The various national arbitration laws and conventions differ as to what constitutes a ‘written arbitration agreement’. The New York Convention stipulates that the writing requirement is fulfilled if the agreement is contained either in a document signed by both parties or in an exchange of letters or telefaxes by the parties. A comparable definition can be found in the more recent Model Law, which explicitly allows for an exchange via all forms of telecommunication. The arbitration legislation of some countries has also abolished the controversial ‘exchange requirements’ with the result that arbitration agreements contained or referred to in confirmation letters may fulfil the writing requirements.

In some countries, the arbitration agreement entails further contractual obligations for the parties that extend beyond the jurisdictional effects of conferring and ousting jurisdiction over a particular dispute. In France and Germany, for example, parties have been ordered to pay their share of an advance on costs requested by the tribunal as part of their general duty to participate in the arbitration, while in England and the US a violation of an assumed obligation to go to arbitration has given rise to damage claims.

7 The arbitral tribunal

Unlike domestic courts, arbitral tribunals are not standing adjudicative bodies, but are normally constituted for every single case. Exceptions are special purpose arbitration tribunals installed to determine a series of disputes arising out of a war or other historical events, such as the Iran–US Claims Tribunal or the United Nations Compensation Commission. In the various national arbitration laws and the Model Law the composition of the arbitral tribunal is submitted to party autonomy. The parties are generally free to agree on the number of arbitrators, the requirements to be met by them and the appointment process. In most cases the tribunals will consist either of a sole arbitrator or of a three-member tribunal. Other numbers are rare and the arbitration laws of some countries, such as Egypt, prohibit an even number of arbitrators. One peculiarity of arbitration in common law countries is the so-called ‘umpire system’. The umpire only steps in if the party-appointed arbitrators cannot agree on an award, and then decides the dispute as a kind of sole arbitrator (Mustill and Boyd, 1989, p. 8).

If the parties have not settled the composition of the tribunal either directly in their arbitration agreement or by reference to a set of arbitration rules, the national arbitration laws contain fall-back provisions. These rules vary as to the number of arbitrators, with common law countries generally favouring a sole arbitrator while civil law countries and the Model

Law prefer to appoint a three-member tribunal. Under the fall-back provisions contained in the national arbitration laws, the appointment of a sole arbitrator usually requires an agreement by the parties, while each party appoints one arbitrator to a three-member tribunal, and those two arbitrators then select the chairman. In the case where no appointment can be made under the agreed procedure, the parties can generally ask the courts to make the necessary appointment (Lew, Mistelis and Kröll, 2003, paras 10–8 *et seq.*).

Most modern arbitration laws require arbitrators to be impartial and independent from the parties and provide procedures for challenging and removing arbitrators who do not fulfil these requirements. Under the Model Law, the right to challenge an arbitrator before a court is one of the few mandatory provisions from which the parties cannot derogate. To ensure the impartiality and independence of the tribunal, national arbitration laws as well as the arbitration rules generally require arbitrators to disclose all circumstances which might give rise to justifiable doubts as to their impartiality or independence. In an effort to overcome the uncertainty arising from the different standards employed in the various legal systems, the International Bar Association adopted in 2004 the IBA Guidelines on Conflicts of Interest in International Arbitration (www.ibanet.org/legalpractice/Arbitration.cfm#Guides). While in international arbitration the requirement of independence and impartiality also extends to the party-appointed arbitrators, this has not always been the case for domestic arbitration in some countries such as the US (Finizio, 2004, p. 88).

8 The jurisdiction and powers of the arbitral tribunal and the arbitration proceedings

The jurisdiction of the arbitral tribunal is a crucial issue in any arbitration. The assertion of jurisdiction is a prerequisite for any activity by the tribunal and awards rendered without jurisdiction are open to challenge. The Model Law as well as most other new arbitration laws recognize the power of the arbitral tribunal to decide on its own jurisdiction, which doctrine is known as *Kompetenz-Kompetenz*. Though this may lead to the odd situation that a tribunal renders a decision denying that it ever had jurisdiction in the first place, tribunals are not required to refer challenges of their jurisdiction to the courts. Quite to the contrary, some national laws give the tribunal the right to take the first decision on its jurisdiction, even if the issue is raised in proceedings before domestic courts where one party relies on the existence of an arbitration agreement (Gaillard and Savage, 1999, paras 672 *et seq.*; Lew, Mistelis and Kröll, 2003, paras 14–49 *et seq.*).

Frequently tribunals will render their decisions to assume jurisdiction in the form of a separate award or decision on jurisdiction. These may

then be challenged before the state courts, either in special procedures provided for in the applicable arbitration law or under the general rules for challenging awards. Some laws appear to go so far as to allow the parties to exclude any review of the tribunal's decision to assume jurisdiction (Park, 1996, p. 143).

In addition to the power to decide on its own jurisdiction, it is generally assumed that the parties have also transferred to the tribunal all powers necessary to fulfil its task of rendering an enforceable award. In particular, the tribunal is free under most arbitration laws and rules to conduct the proceedings in a manner it considers appropriate, unless the parties have explicitly provided that a particular type of procedure will be followed. This freedom is only limited by the need for the tribunal to ensure that both parties are treated with equality and are given a full opportunity to present their cases. According to Art. 24 Model Law, this might include holding an oral hearing upon the request by one party, unless the parties have agreed on a 'documents only' arbitration.

In international arbitrations involving parties from different legal systems who are likely to have different expectations as to the conduct of the proceedings, it is common practice for tribunals to agree on a certain procedure with the parties at the outset of an arbitration. Such an agreement covers in particular questions pertaining to the taking of evidence, which is not covered by detailed provisions in most arbitration laws and rules. In an effort to harmonize the different approaches found in the various legal systems, the International Bar Association prepared in 1999 Rules on the Taking of Evidence in International Commercial Arbitration (<http://www.ibanet.org/legalpractice/Arbitration.cfm#Guides>), which may be used by tribunals as a guideline or may be expressly agreed upon by the parties.

If one of the parties does not participate in the proceedings without good cause and after having been duly notified, the tribunal can in most countries continue the proceedings without the defaulting party. Under the Model Law and most modern arbitration laws, the arbitral tribunal has the power to order interim relief necessary to ensure the preservation of evidence or to protect the parties' position during the arbitration proceedings. However, national legal systems differ widely on the type of interim relief available.

9 The award

The majority of arbitrations settle long before the parties have made their final submissions. Under many modern arbitration laws these settlements can be turned into an 'award on agreed terms'. Where no settlement can be reached the tribunal will determine the dispute in an award based on the evidence presented to it and the applicable law. This will either be the law chosen by the parties or – in the absence of such a choice – the law to be

determined on the basis of the relevant conflict of laws rule. Many modern arbitration laws (and rules) contain special provisions to guide the tribunal in its choice of law, the most permissive of which leave the determination of the applicable law to the discretion of the tribunal. Others provide that the tribunal should apply the law with the closest connection to the dispute, while still others take an indirect approach and allow the tribunal to determine the choice of law rules it considers appropriate to determine the applicable law (Lew, Mistelis and Kröll, 2003, paras 17–39 *et seq.*). Where the tribunal is composed of three or more arbitrators, awards can be rendered by a majority of the tribunal. According to the Model Law and various other arbitration laws, the award must give reasons for the decision, unless the parties have agreed otherwise.

Once an award has been rendered, it is final and binding and its determinations have *res iudicata* effect between the parties. In general no review on the merits is possible, unless the parties have agreed upon a second instance. Under the majority of arbitration laws, proceedings to challenge the award may only be based on procedural irregularities or a violation of public policy. A limited review on the merits may, however, be possible in some common law countries. The bases for challenging an award are virtually identical to the grounds to resist enforcement. National arbitration laws usually impose an obligation on the courts to declare awards enforceable and thus turn them into a title upon which execution can be based. In relation to foreign awards rendered in another contracting state, such an obligation arises from Art. III New York Convention, unless one of the grounds to resist enforcement enumerated in Art. V exists. The grounds for resisting enforcement under the New York Convention, which are mirrored in the Model Law and other national arbitration laws, include the lack of the tribunal's jurisdiction, the violation of a party's right to a fair trial or its right to be heard, an incorrectly constituted arbitral tribunal or proceedings which were not in line with what the parties agreed, and where enforcement of the award would be contrary to the forum's public policy.

10 The role of the courts in arbitration

Courts perform important supportive and supervisory functions in arbitration. The general prohibition against assuming jurisdiction when the parties have concluded a valid arbitration agreement only pertains to actions on the merits, but does not preclude courts from getting involved with a wide variety of procedural issues that arise in the course of arbitration. The Model Law, for example, provides that parties may apply to the courts for the appointment (Art. 11 (3)(4)), challenge (Art. 13(3), 14(1)) and substitution of arbitrators (Art. 15), for interim relief (Art. 9), assistance in the taking of evidence (Art. 27), and to have an award declared

enforceable (Art. 35). Furthermore courts are empowered to control the correctness of the arbitration proceedings and the compliance of the award with public policy in setting aside proceedings (Art. 34). In addition to these competences, which can be found in most national arbitration laws, some countries provide for further types of court intervention. Under German law, for example, a party may apply to the court for a declaration that arbitration is or is not admissible, until tribunal has been constituted (section 1032 (2) CCP). The English Arbitration Act 1996 contains a comparable procedure (section 32), and also allows the parties to submit a question of law to the courts for determination (section 45) or to apply for an extension of time limits (section 12). Article 5 of the Model Law illustrates the modern trend to enumerate explicitly the powers of the courts in relation to arbitration and to prohibit any further intervention.

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7 Assignment*

Brigitta Lurger

1 General remarks

The term ‘assignment’ means a transaction whereby a right to performance by a debtor is transferred from its owner, the ‘assignor’, to another person, the ‘assignee’ on the basis of a legal provision (assignment by operation of law) or on the basis of an agreement between assignor and assignee (assignment by agreement). An assignment having been effected, the assignee is entitled to sue the debtor for performance (Kötz, 1992, p. 52). The following lines only deal with assignments by agreement and not with assignments by operation of law. The transfer of title in property is outside the scope of this chapter as well.

Rights to performance by a debtor (claims) are a very important asset in domestic as well as international trade. Particularly, the assignment of a company’s claims plays an important role in the financing of the company’s regular business and in project financing. Frequently, the assignment of a company’s claims against its customers serves to secure credit risks and as a source of repayment of credits. The use of claims as instruments of financing is not only in the interest of the company itself, but is more generally to be considered an efficient and desirable means of using an economy’s resources. Thus the legal rules on the assignment of rights and claims are of considerable importance for large sectors of the economy: the financing opportunities of companies dealing in goods and services, the factoring branch and the whole banking and financing sector.

One of the prerequisites for a smooth functioning of the assignment system is the appropriate accommodation of the interests of the financing institutions or other financing parties – these are the potential or actual assignees – and the interests of other potential and actual creditors of the company and the assignees. The financing parties are interested in the simplicity and reliability of the assignment process: they need to know that the assigned claims are validly and effectively transferred to them by a sure and simple procedure, without having to carry out complicated examinations as to the existence of the claim and its transferability. The creditors of the company and of the assignees are mainly interested in the transparency of

* See also: Personal and real security; Transfer of movable property.

legal situation created by the assignment: they need to know to whom a claim belongs before and after the assignment.

And last but not least the debtors' interests have to be taken into account. Their interests may be twofold. Interest number one is undisputed: the debtors' position should remain unchanged by the assignment; any restriction of their rights or other deterioration of their position must imperatively be avoided. Interest number two may lie in the prevention of an assignment altogether; they may want to prevent a change of creditor by inserting a clause prohibiting an assignment in their contract with the creditor. Whether or how far this interest is worthy of protection by the legal system is not clear from the outset and will be discussed later on (see section 5 below).

2 International and national sources of law

The often strongly diverging national rules regulating the requirements and effects of outright assignments and assignments for security purposes may constitute a considerable obstacle especially to cross-border transactions. Issues like the following are often answered in completely opposite ways by national jurisdictions; depending on the applicable law, court actions of the parties involved may thus succeed or fail completely. Examples are – form requirements and acts necessary in addition to the assignment contract to make the assignment effective: notification of the debtor, handing over of written documents, registration, entry into the assignor's books of account or no additional acts at all? Are overall or blanket assignments of all the company's future claims against its customers effective or void? Does the invalidity of the assignment contract affect the validity of the assignment: yes or no, causal or abstract conception? Which assignee will have priority in case of subsequent assignments of the same claim? What are the risks of a debtor rendering performance to the wrong creditor? This deep divergency in essential points creates great insecurities and risks for the parties involved in any assignment relationship that has cross-border aspects. Art. 12 of the Rome Convention on the Law Applicable to Contractual Obligations adds to this insecurity, because it does not answer the question of the applicable law in all cases in a clear and unambiguous way.

On the international level, two international conventions exist which aim at the unification of assignment rules. The UNIDROIT Ottawa Convention on International Factoring of 1988 (text on the UNIDROIT homepage www.unidroit.org) applies to the assignment of receivables pursuant to a factoring contract whenever the receivables arise from a contract of sale of goods between the assignor and one of her customers whose places of business are in different states. Therefore, it does not cover all cross-border assignments, not even all cross-border factoring assignments.

The UNIDROIT Factoring Convention has been ratified by only six countries so far: France, Italy, Germany, Hungary, Latvia and Nigeria.

The UNCITRAL Convention on the Assignment of Receivables in International Trade of 2001 (text on the UNCITRAL homepage www.uncitral.org and in *Zeitschrift für Europäisches Privatrecht* (2002) pp. 860 *et seq.*) applies to the assignment of international receivables (this is when the assignor and the debtor are located in different states) and to international assignments of receivables, where the assignor and the assignee are located in different states. It therefore has a much wider material scope of application than the UNIDROIT Factoring Convention. But the UNCITRAL Convention has been signed only by three countries so far, Luxembourg, Madagascar and the USA, and has not been ratified by any state.

In addition to the already mentioned limitations of their material scope of application, the conventions do not cover some important questions of substantive law such as some of the requirements for an effective assignment or the priority issue. Thus they often do not help us to reduce the complexity and insecurity of the present legal situation and support the call for a more comprehensive unification of the substantive issues involved, which could for instance be achieved at the European level.

Chapter 11 of the Principles of European Contract Law (PECL) (Lando *et al.*, 2003, pp. 85–124) on the ‘Assignment of Claims’ provides a comprehensive set of rules, with comparative notes and commentaries. Chapter 11 PECL applies to claims for any contractual performance and partially also other transferable claims, not only to claims for payment of money, and it does not distinguish between domestic and cross-border situations. The wide scope of application is underlined by the inclusion of ‘assignments by way of security’ and – ‘with appropriate adaptations’ – of the ‘granting of a right in security over a claim otherwise than by assignment’. Unlike the two conventions, Chapter 11 PECL covers virtually all aspects of the assignment. Only for assignments for security purposes and other rights in security, which are of high relevance in financial practice, does it refer to additional rules that will be drafted by the Drobnig-Group in the Study Group on a European Civil Code (see www.sgecc.net).

The 2004 UNIDROIT Principles of International Commercial Contracts (UP) (UNIDROIT, 2004, with comments and illustrations), which are the extended new version of the former UNIDROIT Principles, now also contain a Chapter 9, section 1, on the ‘Assignment of Rights’, which covers outright assignments as well as assignments for security purposes of the assignor’s right to payment of a monetary sum or other performance from a third person (Art. 9.1.1 UP). The section does not apply to the transfer of negotiable instruments, documents of title and financial instruments and the transfer of rights in the course of transferring a business (Art. 9.1.2 UP).

The 15 Articles of section 9.1. also cover virtually all legal issues of an assignment.

Even though the PECL and the UP are not formal sources of law, they may be incorporated by the parties into their agreements and may serve as model rules for desirable future attempts to unify this field of law at the European or international levels. In the following overview of assignment rules attention will be paid to the respective rules of the UNIDROIT Factoring Convention, the UNCITRAL Convention, the PECL, the UP and the domestic rules of the USA, England (and Wales), France, Italy, Austria, Germany and Switzerland.

3 Assignment contract and further requirements

Under English law two different forms of assignment have to be distinguished: the 'legal assignment' and the 'equitable assignment'. A legal assignment is effective if the assignee issues a written declaration of assignment which has to include the names of assignor and assignee and has to be signed by the assignor. The underlying contract between assignor and assignee does not have to be in writing. The assigned claim must exist when it is assigned; the legal assignment of future claims is not possible (Carl, 1999, p. 201). Only 'legal choses in action' can be assigned, not claims in equity like claims out of a trust relationship. The whole claim, not only parts of it, has to be assigned. The legal assignment is only effective if the debtor has been notified of the assignment in writing. An assignment that does not comply with the strict requirements of legal assignments can be effective as an equitable assignment. An equitable assignment does not have to be in writing. It generally enables the assignee to sue the debtor in the name and with the cooperation of the assignor, but does not enable the assignee to sue the debtor independently in her own name (*ibid.*, p. 203). The equitable assignment is effective without notification of the debtor. However before notification the debtor can perform to the assignor and thereby discharge her obligation, and in case of subsequent assignments of the same claim the assignee who notifies the debtor first will have priority. Legal assignments have priority over equitable assignments (*ibid.*). Assignments for security purposes, which are called 'assignments by way of mortgage' and 'assignments by way of charge', have to meet additional publicity requirements (normally registration) to be effective (*ibid.*, pp. 205 *et seq.*).

In the USA the assignment is governed by the contract law of the states and the rules of the UCC (Uniform Commercial Code). Art. 9 UCC covering 'Secured Transactions' was revised in 2001. It applies to most assignments for security purposes and partly also to outright assignments (Farnsworth, 1998, s. 11.2). The assignment requires a contract between the

assignor and the assignee, which in most cases has to be in writing (s. 1-206 UCC: to be enforceable beyond \$5000; s. 9-203 (b) (3) (A) UCC: Attachment and Enforceability of Security Interest). The effectiveness of the assignment does not require a notification of the debtor (s. 9-406 UCC). According to Art. 9 UCC a 'security interest' comes into existence ('attaches') when it is enforceable between the parties of the security agreement (assignment contract). In order to become effective against third parties the assignment for security purposes has to meet further requirements ('perfection'). These further requirements are either 'possession' (s. 9-313 UCC) or registration by 'filing of a financing statement' (s. 9-310 UCC). The objects of a security interest are divided into three groups: tangible property (goods), quasi-intangible property (documents of title, negotiable instruments, investment certificates, chattel paper) and intangible property (accounts, general intangibles). In the case of an assignment for security purposes, perfection by possession (delivery to the secured party) is only possible if a document of title, an instrument or a chattel paper exist (s. 9-313 UCC), but perfection by filing is also permitted in these cases (s. 9-312 (a) UCC). The filing of a financing statement is regulated in s. 9-501 *et seq.* UCC.

In France (Arts 1689–95 Code Civil) two stages of effectiveness of the assignment have to be distinguished. First, with the conclusion of the contract of assignment between assignor and assignee the assignment becomes effective between the parties only, but is without effect with respect to third parties including the debtor. The contract has to be in writing for evidence purposes, no writing is required if both parties are merchants. In performance of the contract the assignor is obliged to deliver to the assignee the document issued for the obligation. Second, with respect to the debtor and other third parties the assignment becomes effective if certain requirements of publicity are met: formal notification of the debtor ('signification') by service of a document by a court officer ('huissier') or acceptance of the assignment by the debtor in a public document ('acceptation'). If the debtor accepts the assignment in a private document, as for instance in a letter, it is effective against him, but not against third parties (Blaise and Desgorces, 1999, p. 254). The same rules apply to assignments for security purposes (*ibid.*, pp. 271–3). The contractual subrogation ('subrogation conventionnelle') (Art. 1249 *et seq.* Code Civil) offers an informal alternative to the civil law assignment described above. As the assignment it effects the transfer of the claim to the new creditor. The subrogation requires an express agreement of subrogation and a simultaneous payment to the creditor by the new creditor (Art. 1250, no. 1 Code Civil). This concept is – among others – used for factoring purposes ('affacturage'). According to a special statute, the 'Loi Dailly' (Loi no. 81-1 of 2 January 1981 on the facilitation

of extension of credit to enterprises), an enterprise can assign large numbers of claims against its customers for security purposes to a bank by delivering a detailed list of these claims to the bank which thereupon extends credit to the enterprise.

In Italy (Arts 1260–67 Codice Civile) an effective assignment requires a contract between assignor and assignee. No writing is required, except for the assignment of claims against the state (public document or publicly certified private document). It is disputed whether the notification of the debtor or the acceptance by the debtor (Art. 1264 Codice Civile) are further constitutive elements of the assignment or whether the assignee acquires the claim already with the contract of assignment (Dolmetta and Portale, 1999, p. 348). The debtor cannot discharge her obligation by paying to the assignor if she was notified, if she had accepted the assignment or if she simply knew of the assignment (Art. 1264 (2) Codice Civile). The notification of the debtor or her acceptance of the assignment at a specific date determine the priority of assignments (Art. 1265 Codice Civile). The same rules apply to assignments for security purposes. The special form of ‘securitization’ is regulated by a separate statute (legge 30 aprile 1999, n. 130) (Troiano, 2001). The assignment of claims by an enterprise is facilitated by legge 21 febbraio 1991, n. 52.

In Germany (ss. 398–413 BGB) the assignment becomes effective with an agreement between assignor and assignee to transfer the right or claim. This agreement is seen as a special ‘in rem’ agreement (‘Verfügungsgeschäft’) which is independent of the underlying contract between assignor and assignee (abstract conception). The invalidity of the underlying contract does not affect the validity of the transfer agreement. The notification of the debtor is not a requirement for the effectiveness of the assignment. After (informal) notification (s. 409 BGB) or if the debtor has acquired knowledge of the assignment otherwise (s. 407 BGB) the debtor can discharge her obligation only by performing to the assignee. The same rules apply to assignments for security purposes.

In Austria (ss. 1392–9 ABGB) an outright assignment becomes effective with the conclusion of the assignment contract between assignor and assignee, which in fact consists of two agreements between the parties: the sale of the claim (or other underlying contract) and the agreement in rem to transfer the claim (‘Verfügungsgeschäft’). Unlike the German abstract conception, the Austrian causal conception requires the validity of both agreements for an effective assignment. The notification of the debtor is not a requirement for the effectiveness of the assignment. Knowledge of the assignment and notification of the debtor have the same effects as in the German system (s. 1395 ABGB). However, in the case of assignments for security purposes, additional publicity requirements have to be met (ss. 427,

452 ABGB): the parties have either to notify the debtor of the assignment or to enter a note of the assignment in the books of account of the assignor. In the case of assignors obliged by law to keep accounting records only the latter act will be recognized as act of publicity (Apathy, 1999, pp. 518 *et seq.*).

In Switzerland (Arts 164–74 OR), as well as in Germany and Austria, a distinction is made between the *in rem* agreement to transfer the claim ('Verfügungsgeschäft') and the underlying contract between assignor and assignee. The question whether there is an abstract or causal relationship between the two agreements is still disputed. Younger authors and the courts tend to favour a causal conception (Stauder and Stauder-Bilicki, 1999, p. 770). The agreement to transfer the claim has to be in writing (Art. 165 OR). The notification of the debtor is not a requirement for the effectiveness of the assignment. Knowledge of the assignment and notification of the debtor have the same effects as in the German and Austrian systems (Art. 167 OR). The same rules apply to assignments for security purposes.

The UNIDROIT Factoring Convention and the UNCITRAL Convention do not explicitly specify any requirements for an effective assignment. However they both seem to imply that an agreement between assignor and assignee exists. Under both the PECL and the UP only an agreement to assign the right or claim between assignor and assignee is required. The agreement does not have to be in writing (Art. 11:104 PECL) and the notice to the debtor is not a constitutive element of the assignment (Art. 9.1.7 UP). The commentary to Art. 11:101 PECL (Lando *et al.*, 2003, p. 89) states that Art. 11 PECL did not want to take a position on the issues whether the required agreement between assignor and assignee consists of two agreements, the agreement to transfer ('Verfügungsgeschäft') and the underlying contract between the parties, and whether the relationship between these two agreements is abstract or causal. The same may apply to the UP concept. Special publicity requirements for assignments for security purposes are not specified by either the PECL or the UP. However such additional requirements are not excluded by both texts. In the case of the PECL they will be found in the new chapter on security rights in the Study Group's European Civil Code. The comment to Art. 9.1.7 UP (UNIDROIT, 2004, p. 274) states that 'assignments for security purposes may be subject to special requirements as to form'.

4 Relationship between assignee and debtor

In all jurisdictions rights can be effectively assigned without the consent of the debtor. It is therefore a common concern of all legal systems to keep the position, the rights and defences, of the debtor unchanged. The debtor must not suffer any disadvantages resulting from a transaction she cannot

prevent. In all jurisdictions and legal texts considered the debtor can discharge her obligation by performing to the assignor before having been notified of the assignment. This rule applies independently of the fact whether the notification is a constitutive element of the assignment or not. Likewise the debtor keeps all her defences against the claim that arise out of the legal relationship underlying the claim. The right to use a set-off defence based on a claim of the debtor against the assignor (not arising out of the legal relationship underlying the assigned claim) is usually limited to set-off claims that come into existence before notification of the assignment to the debtor. In England a set-off defence cannot be based on so-called 'personal claims' (these are non-generic claims) (Carl, 1999, p. 204).

In most jurisdictions and the international texts considered the notification can be given either by the assignor or by the assignee. When the notice is given by the assignee, the debtor can normally request additional adequate proof of the assignment (see for instance Art. 17, no. 7 UNCITRAL Convention; Art. 11:303 (2) PECL; Art. 9.1.10 UP Comment no. 3; Art. 8 (1) (a) UNIDROIT Factoring Convention – notice by assignee only effective if made with the assignor's authority). In some legal systems the notice has to be in writing (or in France in the form of an official document served by the 'huissier'), in others an oral notice is sufficient. Commonly the debtor's knowledge of the assignment obtained otherwise than by proper notification bars the debtor's right to discharge her obligation by performing to the assignor.

5 Contractual prohibition of assignment

In the jurisdictions and legal texts considered the effects of prohibition of assignment clauses in the contract between the debtor and the assignor range from complete ineffectiveness to absolute *erga omnes* effectivity. The interests of the debtor in keeping her original creditor conflict with several other interests: the interest of the assignor to use the claim freely as a financial asset, the interests of actual and potential assignees to use the claim as an asset in the course of their business (factors, banks) and the interests of the creditors of assignor and assignee who rely on the effectiveness of the assignment. Prohibition of assignment clauses are frequently used in contracts between weak creditors and strong debtors, as for instance in contracts between dependent suppliers and large manufacturers.

An analysis of the interests of the debtor reveals that they are rather weak as compared to the conflicting interests of the other persons mentioned (in the effectiveness of the assignment despite the prohibition clause) and that most of them do not seem to be worthy of protection (Lurger, 2004, p. 653 *et seq.* and 2005, p. 141 *et seq.*). The debtor's interests in the overall effectiveness of the prohibition can be specified as follows.

The debtor may want to avoid the risk of overlooking the notice of assignment and paying the wrong creditor (but she can be more careful with business notices she receives); she may want to use her obligation as a means of putting pressure on her contractual partner, the original creditor (but she can do that anyway because she keeps all her defences arising from the contract); if the original creditor is in danger of becoming insolvent, the debtor may want to secure the supply by her creditor and by effecting advance payments on a large number of invoices shovel liquidity into the enterprise of her supplier; in the case of bankruptcy of the creditor, the debtor can secure herself a privileged position compared to the other creditors in bankruptcy by setting off her claims against her debts (in the case of an assignment of her debt this right of set-off would be limited, but both interests are in conflict with the aims of insolvency proceedings which try to secure the equal treatment of all unsecured creditors in bankruptcy and to prevent unilateral manipulations); the debtor may want to avoid being confronted with public law provisions in the country of the assignee's place of business she is not familiar with (but which public law provisions can be relevant in that respect? The problem does not seem to exist if the debtor owes only a money payment).

In those jurisdictions which provide for a principal inter partes effectivity of the prohibition clause (all but the USA and partly France – Art. L-442-6 Code de Commerce – see below) it has to be taken into account that the clause may be nevertheless ineffective (invalid) between the parties (assignor and debtor) because of a violation of the principles of good faith, fairness or unconscionability ('*bonos mores*', '*gute Sitten*') of general contract law. Such a violation is not unlikely because prohibition clauses are frequently found in contracts between parties of unequal bargaining power (strong debtor, weak creditor).

Under English law the prohibition of assignment clause makes the assignment ineffective with respect to the debtor. The debtor can discharge her obligation by performing to the assignor even if she knows of the assignment (Carl, 1999, p. 204; Goergen, 2000, pp. 85–115). In the USA ss. 2-210 (2), 9-406 (d), 9-408 (a) and 9-409 (a) UCC provide that a contractual clause restricting or prohibiting an assignment is ineffective. This means that such a clause has no *erga omnes* effects with respect to the debtor, to the assignee and the creditors of assignor and assignee and that it also has no inter partes effects (between debtor and original creditor).

Under French law a prohibition clause is effective between the parties of the contract (assignor and debtor), but it does not prevent the transfer of the claim to the assignee unless the assignee accepts the prohibition clause (Rosch, 2001, p. 609). According to Art. L 442-6 Code de Commerce a prohibition clause is completely ineffective (also inter partes) if the debtor is

a producer, merchant, industrialist or craftsman. As a party to the UNIDROIT Factoring Convention France made a declaration in accordance with Art. 18 of the Convention. According to this declaration an assignment violating a prohibition clause is not effective against a debtor who has her place of business in France. Thus in France three different legal regimes coexist: the general rule of only inter partes effects of the prohibition clause but no effects for the transfer and against the debtor; the Commercial Code rule of complete ineffectiveness; and the international factoring UNIDROIT rule of effectiveness between the parties (assignor and debtor) and against the debtor. In Italy the effects of a contractual prohibition of assignments is expressly regulated by Art. 1260 no. 2 Codice Civile. The prohibition clause has inter partes effects between assignor and debtor, but it is without effects against the assignee provided that the assignee did not know of the clause at the time of assignment. Within the scope of the UNIDROIT Factoring Convention (Italy is a party to the Convention, but has not made a declaration in accordance with Art. 18) a prohibition clause has only inter partes effects irrespective of the assignee's knowledge of the prohibition clause (Art. 6).

In Germany three different legal regimes coexist with respect to the issue. First, the general rule of s. 399 BGB provides for the complete ineffectiveness of an assignment that violates a prohibition clause. This means that the prohibition clause has absolute effect, inter partes as well as erga omnes (against assignee, debtor and all creditors). Second, s. 354a HGB (Commercial Code) supersedes s. 399 BGB if assignor and debtor are merchants or the debtor is a state institution. Section 354a HGB provides for the general effectiveness of an assignment that violates a prohibition clause. The prohibition clause is effective only inter partes. The transfer of the claim to the assignee is effective with all erga omnes effects except one: the debtor can always discharge her obligation by performing to the assignor, whereas the assignor cannot demand performance since she is no longer the owner of the claim. Third, within the scope of the UNIDROIT Factoring Convention (Germany is a party to the Convention, but has not made a declaration in accordance with Art. 18) a prohibition clause has only inter partes effects, the debtor (if notified or with knowledge) can only discharge her obligation by performing to the assignee (Art. 6). Under Austrian law only one rule applies (which was formulated by court decisions and finds no textual support in the ABGB): assignments in violation of a prohibition clause are absolutely ineffective. The majority of authors heavily criticize this rule (Bydlinski, 2004, pp. 121–31, with further references). In Switzerland Art. 164 OR provides that rights and claims cannot be assigned if the contract between assignor and debtor prohibits an assignment (absolute effect of prohibition clauses as in German BGB and in

Austria). However such a prohibition clause is without effects against the assignee, if the assignee acquired the right or claim in reliance on a certificate of debt issued by the debtor which does not mention the prohibition clause. If no such certificate was issued, but the assignee otherwise relied on the non-existence of a prohibition clause, the absolute ineffectivity rule applies (Stauder and Stauder-Bilicki, 1999, p. 772).

The two international Conventions have adopted an approach which generally does not allow for any *erga omnes* effects of prohibition clauses (Art. 6(1) UNIDROIT Factoring Convention, Art. 9 UNCITRAL Convention). But the prohibition clause stays effective *inter partes*. The UNIDROIT Factoring Convention provides for an exception to that rule upon separate declaration by a member state (see France above). According to Art. 11:301 PECL prohibition clauses have *inter partes* effects and assignments are only effective against the debtor if she consents to the assignment, if the assignee neither knew nor ought to have known of the prohibition clause, or if the assignment is made under a contract for the assignment of future rights to payment of money. Art. 9.1.9 UP distinguishes between rights to payment of money and rights to other performances. If a right to payment of money is assigned, the prohibition clause has only *inter partes* effects and the assignment is effective *erga omnes*. In the case of a right to other performances the assignment is effective *erga omnes* only if the assignee neither knew nor ought to have known of the prohibition clause. Otherwise the assignment is ineffective.

6 Priority in the case of one or more subsequent assignments

The answer to the question of priority in the case of one or more subsequent assignments of the same right or claim is closely related to the general concept of assignment adopted by the respective jurisdiction (see section 3 above). Under English law the priority of an assignment among only legal assignments and among only equitable assignments is determined by the date of the notification of the debtor. The assignment first notified to the debtor has priority over other assignments of the same type. Legal assignments always have priority over equitable assignments (Carl, 1999, p. 203). In the USA the question may be governed either by the general contract law of the states or by the rules of the UCC. In the common law of the states three different rules were developed (Farnsworth, 1998, s. 11.9): the New York rule (priority of first assignment), the English rule (priority of assignee who first notified the debtor) and the Massachusetts four horse-men rule (the first assignee prevails unless the second assignee received performance, obtained a judgment against the debtor, made a new contract with the debtor (novation), or obtained possession of a symbolic writing). Both Restatements of Contract Law have endorsed the Massachusetts rule.

Within the scope of Art. 9 UCC unperfected security interests are subordinate to perfected security interests (s. 9-317 (a) UCC). Conflicting perfected security interests rank according to the priority in time of their perfection or filing (s. 9-322 (a) UCC).

Under French law the assignee who first obtains the fulfilment of the publicity requirements of Art. 1690 Code Civil (notification of debtor by 'huissier' or acceptance by debtor in public document) has priority over other assignees provided that she neither knew nor ought to have known of the earlier assignment(s). It is important that the special documents required for notification and acceptance contain a specific date. With respect to the priority question no deviations from the formal rules are accepted (Blaise and Desgorces, 1999, p.257). In Italian law Art. 1265 Codice Civile expressly deals with the priority issue. The assignment that was first notified to the debtor or that was first accepted by the debtor in a document containing a specific date ('atto di data certa') will have priority over other assignments. If the earlier notification effected by assignee A does not contain a specific date and the later notification or acceptance pertaining to assignee B contains such a specific date, the notification or acceptance with the specific date will prevail (Dolmetta and Portale, 1999, p. 346). Therefore the inclusion of a specific date plays a crucial role with respect to the priority question.

Under German, Austrian and Swiss law the assignee who has first fulfilled all requirements for an effective assignment will prevail. In the case of Austria and Switzerland these are the conclusion of an underlying contract and a contract in rem ('Verfügungsgeschäft'), in the case of Germany the contract in rem alone is sufficient. Only in Austria do assignments for security purposes require a notification of the debtor or a note of assignment in the books of account of the assignor. In the case of outright assignments under Austrian law and in the case of all assignments under German and Swiss law the notification of the debtor is irrelevant for the question of priority.

In all jurisdictions in which the above described priority rules operate without regard to the good or bad faith of the prevailing assignee with respect to earlier assignments, the law of torts may provide additional legal consequences if the prevailing assignee acted in bad faith. Under certain circumstances the prevailing assignee who acted in bad faith, for instance when notifying the debtor first, will be liable for damages to the subordinate assignee(s).

The UNIDROIT Factoring Convention does not contain any rules dealing with the question of priority in the case of subsequent assignments. The UNCITRAL Convention only provides a private international law rule for the issue (Art. 22: law applicable to competing rights). Art. 11:401

PECL generally gives priority to the assignee who first concluded the assignment contract with the assignor. But a later assignee will prevail over any earlier assignee if she first notified the debtor of her assignment and she neither knew nor ought to have known of the earlier assignment(s). Art. 9.1.11 UP gives priority to the assignee who first notified the debtor and does not take into account the good or bad faith of the assignee.

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8 Australia

Martin Vranken

1 Introduction

Australia, officially known as the Commonwealth of Australia, has a legal system that for historical reasons belongs to the family of the common law. In colonial times the application of English law was regarded as self-evident. Even nowadays many a decision of the Australian courts contains, at times elaborate, references to English precedent. Technically English law no longer constitutes a binding source of law, though. The formal judicial emancipation of the Australian courts became complete with the enactment of the Australia Act 1986 (Cth). That statute formally abolishes a right of appeal in Australian cases to the Privy Council in London.

Gradually a local version of the common law is developing in present-day Australia, one that is adapted to that country's own characteristics and customs of its people. At times this evolution has been a matter of necessity. An example taken from the law of contract is disputes about the sale of land: they feature much more prominently in Australian than in English litigation. This feature of Australian society inevitably has an impact upon the common law of contract even if it may prove to be a slow process for now (Ellinghaus, 1989, p. 53). In other areas of private law Australian courts have displayed less reluctance to go their own way. The tort of negligence is a case in point (Luntz, 1989, pp. 70–88).

Australia has a federal system of government and this is reflected in the legal make-up of the country. Six separate states, originally known as colonies, predate the formation of the Commonwealth of Australia in 1901. They are, in chronological order, New South Wales (1788), Tasmania (1803), Queensland (1824), Western Australia (1829), South Australia (1836) and Victoria (1851). Each state traditionally has its own constitution and lawmaking bodies. Federation did not really alter this state of affairs. In addition, there are ten territories, but these are subject to the Commonwealth's lawmaking powers. Some of the more important territories, however, the Australian Capital Territory (encompassing Australia's capital city Canberra), the Northern Territory and Norfolk Island, in particular, enjoy a relatively high degree of autonomy under self-government arrangements.

The only official national language is English. All case law and legislation is produced in this language. The various languages spoken by the

indigenous population (the *Koori*) are not officially recognized. Legal recognition of any Koori customs is also largely lacking. Significantly, until very recently Australia was legally considered empty (*terra nullius*) prior to European settlement and it took until 1992 for claims of traditional inhabitants over ancestral land to be judicially acknowledged. The relevant High Court decision is known as the *Mabo* case. It recognizes a traditional right of usage ('native title') rather than full property rights. The *Mabo* decision proved most controversial, especially in the farming community and in the natural resources and mineral industries.

Particularly appealing to comparative lawyers are Australia's federal constitutional make-up and its rather peculiar approach to industrial dispute resolution. As the formation of the Commonwealth of Australia is barely a century old, Australian federalism constitutes a more modern and yet intriguing (because it is generally less well known) field of research than the unification movement in North America. The distribution of powers among the Commonwealth and the former colonies also places Australia in between the position occupied by the USA and Canada (Parkinson, 2005, p. 146). Australian labour law, on the other hand, is traditionally typified by a government-controlled system of compulsory conciliation and arbitration for settling wage disputes in the private sector. The Australian model of compulsory arbitration is truly unique in the western world, although it once was also found in neighbouring New Zealand (Macintyre and Mitchell, 1989). The current deregulation debate does not distract from the comparative interest in social experimentation 'down under' (Vranken, 1994, 1998).

2 Constitutional law

Australia has a written constitution. Technically, its text was passed as part of a British Act of Parliament in 1900 and took effect from 1 January 1901. In practice, the enactment of this legislation was the product of lengthy discussions, spanning some ten years, among leading political figures from the various colonies. Pivotal to the success of these talks was the need to reach agreement about which colonial powers ought to be transferred to the federal level. Here parallels can be drawn between the reluctance displayed by the framers of the Australian constitution in yielding power to a new national government and the current ambivalence in several EU member states about how best to complete this grand work-in-progress called the European Union!

In the end the founding fathers opted for a *verbatim* enumeration of the federal powers in the Australian constitution (section 51). The list is relatively long – longer than its American counterpart – without being exhaustive. Among the more important powers on the list are taxation, defence

and external affairs. Important exclusions are education, crime and the environment. Any powers not catered for expressly are commonly referred to as residual powers. In principle, these remain with the states, unless they can be said to be 'incidental' to any of the express federal powers. The constitution does not expressly confer any exclusive powers on the Commonwealth. While some can be deemed inherently exclusive because of their very nature (e.g., the power to borrow money 'on the public credit of the Commonwealth'), the bulk of the powers contained in section 51 are treated as belonging to the Commonwealth on a shared basis with the states (Lumb and Moens, 1995, p. 112). The full text of the constitution is available at <http://www.aph.gov.au/senate/general/constitution>.

The current debate about the desirability of moving to a republic notwithstanding, Australia continues to be a constitutional monarchy for now. The formal head of state is Queen Elizabeth II and her representative in Australia is the Governor-General. The Australian constitutional system is also a monist one: ministers, including the prime minister, must be members of parliament. The Australian parliament consists of a house of representatives and a senate. By convention, the leader of the political party commanding a majority in the House of Representatives becomes the prime minister. Since Australia has essentially a two-party political system, the influence of the prime minister is relatively greater than that of his counterpart under a proportional representation regime. The current prime minister (John Howard) is the leader of the Liberal (conservative) party.

The Australian constitution allows for amendment following a popular referendum. Required is an overall majority, together with a majority vote in a majority of states. The Australian constitution does not contain a US-style Bill of Rights.

3 Civil and commercial law

Civil and commercial law are core components of private law. As such they are governed by the common law in the first instance. Inevitably, no doubt in line with the ever-greater complexities of present-day life, the importance of technical and often detailed statute law has increased over the years. However, as the Australian constitution limits the ability of the Commonwealth government to legislate in relation to contracts or torts, much of the regulatory framework affecting the law of obligations is found in state legislation. Major examples include the Contracts Review Act 1980 (NSW) and the Wrongs Act 1958 (Vic). Important federal commercial legislation include the Corporations Act 2001 (Cth) and the Trade Practices Act 1974 (Cth). Statutes do not automatically oust the common law. Often they must be read in conjunction with any established precedent at common law.

No special commercial courts exist in Australia. As will be discussed immediately below, specialization is less visibly present in the Australian judicial system than in civilian legal systems that adhere to the French or German model.

4 Court system and law faculties

As Australia is a federal country, it has a dual (federal and state) court structure. At the state level, the highest court is a supreme court with jurisdiction in civil and criminal matters. Intermediate state courts tend to be known as county or district courts. At the bottom of the court hierarchy is the magistrates court. Serious civil and criminal matters go directly to the intermediate court or even to a supreme court judge sitting alone.

The top federal court is the High Court of Australia. Its primary function is to decide disputes about the interpretation of the Australian constitution, including disputes about the validity of federal legislation. The High Court is also the final court of appeal in all other types of cases, ranging from labour law and social security law to commercial law, taxation law and even administrative law. Final appeals in purely state matters (e.g., involving state criminal laws) are also heard by the High Court. However, no automatic right of appeal exists. Instead a request ('application for leave') must be put to the High Court. This requirement allows for selectivity in both the number and the type of cases dealt with. In recent years the High Court has rendered judgment in some 300 disputes annually: 75 per cent are decisions on applications for leave; one in three applications concern criminal proceedings.

The Australian constitution allows for the creation of further federal courts by the Commonwealth parliament. Thus the Federal Court of Australia and the Family Court of Australia were established in 1976, followed by the creation of a federal Magistrates Court in the late 1990s. State courts alone previously exercised the federal powers exercised by these courts.

Academic scholarship plays a relatively unimportant role in Australian law. Of course, this does not prevent judges from referring to scholarly writings, but any such references remain sporadic and selective. In part, an explanation can be found in history and, in particular, the traditional importance of the judge rather than the scholar in the formation of the common law.

The Australian universities sector has grown rapidly in recent years thanks to rising local and international (mainly Asian) demand. The traditional, 'sandstone' universities continue to enjoy the greatest prestige: they are the University of Sydney in New South Wales, the University of Melbourne in Victoria, the University of Adelaide in South Australia, as

well as the Universities of Tasmania, Queensland and Western Australia. However, these now form but a small part of a whole range of universities located right across the country as a direct result of technical training colleges having become accredited universities and new universities emerging to service an expanding population. Today law can be studied at a staggering 29 law schools. The Australasian Law Teachers Association organizes interaction among scholars from Australia, New Zealand and Papua New Guinea. Its members meet annually in a series of interest groups to discuss their teaching and research. The Association has no separate interest group devoted to comparative law.

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Each (federal, state or territory) jurisdiction has a *Government Gazette* for the publication of its legislation. The websites of the various attorney generals' departments provide a useful starting point when looking for the full text of a particular statute or regulation. The site for federal legislation is <http://scaleplus.law.gov.au/quicksrch.htm>.

Case law is published in the law reports of the relevant (federal, state or territory) jurisdiction. The most important federal law reporter is the *Commonwealth Law Reports*. The official website of the High Court of Australia can be found at <http://www.hcourt.gov.au>.

A useful site when searching statutes or case law is maintained by the Australasian Legal Information Institute, a joint facility of the law schools of the University of Technology at Sydney and the University of New South Wales. Its address is <http://beta.austlii.edu.au>.

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9 Belgium

Nathalie Van Leuven

1 Introduction

From a constitutional point of view Belgium (België/Belgique/Belgien) is a very peculiar country. As a federal state, it is composed of communities and regions (section 2) and its constitutional model is a complicated but interesting model for countries composed of different populations. Belgium is divided into four language areas: the larger Dutch and French areas, the small German area (a few municipalities in the predominantly French-speaking province of Liège), and the bilingual area of Brussels. Except for the area of Brussels, all areas are monolingual which implies that the language of the area (Dutch, French or German) has to be used by the administration of that area and by the citizens in their relations with the administration. In a few municipalities, however, located near another language area, the citizens are allowed to use their own language in their relations with the authorities. Federal statutes are published in Dutch and French. The language to be used in court proceedings is Dutch in the Dutch area, French in the French area, German in the German area and Dutch or French in the bilingual area of Brussels. Belgian law is rooted in the French legal tradition. The Belgian Civil Code is based on the Napoleonic Civil Code (section 3).

2 Constitutional law

The first Belgian Constitution dates from 1831, a year after the independence of the Belgian State. This Constitution (Grondwet/Constitution) has undergone some major changes due to the transformation from a unitary to a federal state. In 1994 a coordinated version was adopted. It contains chapters on the federal state and its composition, the rights and freedoms, the federal parliament (House of Representatives and Senate), the federal government, the communities and the regions, the judicial power and the Constitutional Court (Arbitragehof/Cour d'arbitrage), the Council of State and the administrative tribunals, the provincial and municipal institutions, foreign relations, finances, the army and the revision of the Constitution. The Constitution can be found, in Dutch and French respectively, on the following sites: www.senate.be/doc/const_nl.html, www.arbitrage.be/nl/basisteksten/basisteksten_grondwet.html, www.senate.be/doc/const_fr.html and www.arbitrage.be/fr/textes_base/textes_base_constitution.html.

The Belgian constitutional system is dualist in nature: a member of the government cannot at the same time be a Member of Parliament. The federal Parliament consists of two chambers, the first one being the House of Representatives (*Kamer van volksvertegenwoordigers/Chambre des représentants*). The 150 members of the House of Representatives are directly elected by the people. The electoral colleges for this election correspond to the provinces, with an exception for the area of and around Brussels. The second chamber of Parliament is the Senate (*Senaat/Sénat*). The 71 members of the Senate are partly directly elected, partly sent by a community parliament, and partly coopted. The federal government is politically responsible only before the House of Representatives. Bills always have to be adopted by the House; the Senate can always discuss a bill and vote on it, but its approval is not always required. In legislative matters, the Senate is expected to play the role of 'reflection chamber'.

Belgium is a federal state. The reform of the Belgian unitary State into a federal State started in 1970. Belgium is divided into communities, on the one hand, and regions, on the other. The division of the country into communities is mainly due to the Flemish motivation to obtain cultural autonomy for all the Dutch-speaking people in Belgium, be it in the Dutch language area or in the bilingual area of Brussels. The division of the country into regions is mainly due to the Walloon motivation to pursue its own social and economic policies in the Walloon area. There are three communities: the Flemish Community, the French Community and the German Community. The Flemish Community is competent in the Dutch language area, and for certain Flemish institutions in Brussels (e.g. schools). The French Community is competent in the French language area, and for certain French-speaking institutions in Brussels. The German Community is competent in the German language area. The communities are competent for culture, some matters related to the individual (health policy, aid to families, protection of youth, social welfare, etc.), education and use of languages.

There are three regions: the Flemish Region, the Walloon Region and the Brussels Region. The territory of the Flemish Region corresponds to the Dutch language area, and is composed of the provinces of West-Flanders, East-Flanders, Limbourg, Antwerp and Flemish Brabant. The territory of the Walloon Region corresponds to both the French and the German language areas, and is composed of the provinces of Liège, Namur, Luxembourg, Hainaut and Walloon Brabant. The territory of the Brussels Region corresponds to the bilingual language area of Brussels. The regions are competent for matters related to the territory (town and country planning, environment and water policy, modernization of agriculture and nature conservation, energy, housing, employment, public works and transport).

The communities and regions have their own parliaments and governments. In Flanders, the community and regional institutions were merged: there is one Flemish Parliament and one Flemish Government. The statutes of the French Community, the Flemish Community, the Flemish Region, the Walloon Region and the German Community are called decrees (decreten/décrets), while those of the Brussels Region are known as ordinances (ordonnanties/ordonnances). The federal statutes, the decrees and the ordinances are on equal footing, each entity, including the federal authority, having to respect the competences of the other entities.

The Belgian Constitution allows restricted constitutional review of legislative acts (federal statutes, decrees and ordinances) by the Court of Arbitration. This Court owes its existence to the transformation of the Belgian unitary state into a federal state. In a first period, from 1985 to 1988, the Court of Arbitration had the competence to supervise the observance of the constitutional division of powers between the state, the communities and the regions. In a second period, from 1988 to 2003, the competence of the restricted Constitutional Court was extended to include the supervision of the observance of Articles 10, 11 and 24 of the Constitution, guaranteeing the principles of equality and non-discrimination, and the rights and liberties in respect of education. Since the special Act of 9 March 2003, the Court of Arbitration has exclusive jurisdiction to review legislative acts for compliance with Articles 8–32, concerning the rights and freedoms, Articles 170 and 172, concerning tax law, and Article 191, concerning the protection of foreigners, as well as of the rules governing the division of powers between the federal state, the communities and the regions. The name ‘court of arbitration’ might change in the future into ‘constitutional court’. The judgments of the Court of Arbitration can be found in Dutch, French and sometimes German on www.arbitrage.be (there is also an English section on this website with more information on the organization of the Court of Arbitration).

3 Civil and commercial law

The Belgian Civil Code (Burgerlijk Wetboek/Code Civil) is based on the French Code Napoléon of 1804. This Code has undergone a lot of revisions and is completed by specific acts. Will autonomy forms the basis of contract law. The contract is not based on formal aspects, but is based on the will agreement. Some revisions of the Code, such as rental provisions, temper the will autonomy and try to protect the weaker party. The statutory basis of tort law is to be found in Articles 1382 to 1386 of the Civil Code. Liability for wrongful acts only arises if causation is established between the fault and the damage. Belgian courts apply the doctrine of equivalence of conditions, which implies that a fault is a cause of the

damage if the damage could not have occurred without the fault. The Code has probably been changed the most in the field of family law, owing to the evolution of ideas in society and the influence of the European Convention on Human Rights.

The Commercial Code (*Wetboek van Koophandel/Code de Commerce*) is based on the French Code de Commerce of 1807. Belgium has a dual regime distinguishing between civil and commercial rules. Commercial law is exclusively applicable to commercial firms. A firm is commercial if it engages in one of the activities listed in Articles 2 and 3 of the Commercial Code. This list refers to traditional trading, the production and distribution of goods, including transport, banking, insurance and maritime law (but not liberal professions, or activity relating to soil, or the agricultural sector).

The division between civil and commercial law becomes apparent in these two different Codes and in the organization of the judiciary. Cases concerning civil law conflicts above an amount of 1860 euros are judged by the civil section of the tribunal of first instance. Cases concerning commercial law conflicts above an amount of 1860 euros are dealt with by the commercial tribunal. Civil or commercial cases below the amount of 1860 euros are brought before the justice of the peace. Appeal against a judgment of the justice of the peace is heard either by the civil section of the tribunal of first instance or by the commercial tribunal, depending on whether the conflict is of a civil or a commercial nature.

If one had to characterize the Belgian private law system in terms of legal families, one should say that Belgium is located in the French legal tradition. Nevertheless, the interpretation given by the Belgian courts to articles of the Belgian Civil Code often differs from the interpretation given to the similar article by the French courts.

4 Court systems and law faculties

There are four sorts of courts or tribunals in Belgium. Firstly, the ordinary courts and tribunals are the justices of the peace (in principle for amounts beneath 1860 euros), the police tribunals, the tribunals of first instance, the commercial tribunals, the labour tribunals, the courts of appeal, the labour courts (of appeal), the courts of assizes and the Court of Cassation. These ordinary courts and tribunals are competent for conflicts concerning civil rights and criminal charges, and also for conflicts concerning political rights, if the legislator has not erected a specific administrative tribunal for matters with regard to political rights. The Court of Cassation does not judge on the basis of the facts of the case, but looks at whether the lower court has applied the law in a correct way. Secondly, there are administrative tribunals. They are only competent for conflicts with regard to political rights. Thirdly, there is the Council of State. The ‘administrative

section' of the Council is a judicial organ, competent for conflicts between a citizen and a public authority or between two authorities, relating to the legality of an administrative act; it also acts as cassation court for the administrative tribunals. With respect to acts of administrative authorities, the administrative section can annul and suspend them, but it cannot order the public authority to pay compensation for damages. A claim for damages against a public authority belongs to the competence of the ordinary courts and tribunals. The Council of State has a 'legislative section' as well. That section is competent to advise the parliaments and the governments on the conformity of bills and draft regulations with higher norms. Fourthly, there is the Court of Arbitration, which is competent to annul and suspend federal statutes, and statutes of the communities and regions (decrees and ordinances); it can (and sometimes must) also give preliminary rulings on the constitutionality of these acts, at the request of any other court.

Legal doctrine plays an important role in Belgium. There is interaction between the judiciary, the legislator and legal academics. The judgments of the courts often refer to legal doctrine and are often commented on by scholars as well. Some law professors perform judicial functions in the highest courts.

The Belgian law faculties are located in Antwerp, Brussels (where there are four), Ghent, Leuven, Liège, Louvain-la-Neuve and Namur. The links of these law faculties can be found on http://www.raadvst-consetat.be/Nl/links_nl.htm#facult.

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10 Canada

Michael Deturbide

1 Introduction

Canada, situated in northern North America, is the second largest country in the world. It is administered by a federal system of government, whereby the authority to make and administer laws is constitutionally divided between the federal government and the governments of ten provinces and three territories.

Canada's legal system largely reflects the English and French traditions brought by settlers in the 17th and 18th centuries. The mixed legal system of Canada is highlighted by the importance of the English common law tradition in most of the country, and the Civil Code of Quebec, which is modelled on the French Code Napoléon. The rights and traditions of Aboriginal peoples are also reflected in Canadian law.

Canada is officially a bilingual country. Federal laws are published and federal government services are rendered in both English and French throughout the country. Either English or French may be used by any person in, or in any pleading in or process issuing from, any court established by the federal Parliament. French is the official language of the province of Quebec, whereas English is the official language in most other provinces. Only one province, New Brunswick, is officially bilingual.

2 Constitutional law

Canada's Constitution is the supreme law of the country. It is comprised of numerous written and unwritten components, the latter including constitutional traditions inherited from Great Britain. The principal written elements of Canada's Constitution are the Constitution Act, 1867 and the Canadian Charter of Rights and Freedoms.

Upon Canada's founding in 1867, the British North America Act (now known as the Constitution Act, 1867) divided governmental powers between the federal parliament and provincial legislatures. The federal government has jurisdiction over matters such as defence, navigation and shipping, banking, criminal law and the regulation of trade and commerce. The provincial governments have exclusive powers to make laws on matters such as education, property and civil rights, solemnization of marriage, and generally all matters of a merely local or private nature within the province. Matters that are not specifically

enumerated within provincial jurisdiction are deemed to fall within federal jurisdiction.

In 1982, Canada's Constitution was revised, principally by transferring from Britain to Canada the power to amend Canada's Constitution, and by incorporating the Canadian Charter of Rights and Freedoms into Canadian constitutional law. The Charter guarantees certain fundamental rights and freedoms, including freedom of conscience and religion; freedom of thought, opinion, and expression; legal rights; and equality rights. The passage of the Charter signalled a major change in the role of the judiciary in Canada, which became vested with the power of interpreting the Charter and determining whether federal and provincial legislation conformed to Charter principles. The 1982 constitutional revisions also specifically recognized Aboriginal treaty rights.

Canada's federal Parliament is comprised of the House of Commons and the Senate. Certain specific powers remain vested with the Crown. For example, before a Bill becomes law, the Queen's representative in Canada, the Governor-General, must provide royal assent. By convention, however, assent is always given. The executive power of the federal government in reality rests with the Prime Minister and the Cabinet.

3 Civil and commercial law

There are three principal sources of law in Canada: legislation, case law and, in the province of Quebec, that province's Civil Code. Pursuant to Canada's Constitution (see above) both the federal parliament and the provincial legislatures are empowered to make laws within their respective jurisdictions, including laws that have an impact on traditional private matters. For example, each province may pass legislation that specifies the consumer protection rules within that province, whereas bankruptcy procedures are governed by federal legislation.

Except for Quebec, most of Canada inherited the common law tradition from Great Britain. The doctrine of *stare decisis* stipulates that the decision of a higher court within a particular province on a private matter is binding on a lower court within the same province. Decisions of courts of other provinces on similar matters are persuasive, as may be decisions of courts from other countries with common law traditions, particularly in situations that have not been addressed by courts in Canada. Because of Canada's ties to the economic system of the United States, American jurisprudence is important in business law matters. The decisions of the Supreme Court of Canada are binding on all courts in the country.

Quebec's first Civil Code, enacted in 1866, derived primarily from the judicial interpretations of the law that had been in force long before confederation, and was inspired by some of the modernizations found in the

1804 Napoleonic Code. A reformed and modernized Quebec Civil Code came into force in 1994, containing over 3000 articles within ten books governing such matters as persons, the family, successions, property and obligations. Although the Quebec Civil Code is a comprehensive code, Quebec judges often write lengthy judgments that do consider previous decisions of appellate courts.

Academic doctrine is frequently relied upon by the courts in Quebec, and is increasingly referred to by courts in common law jurisdictions.

4 Court system and law faculties

Each province and territory has a superior court and an appellate court. The superior courts have inherent jurisdiction to hear any matter not specifically assigned to a lower court or tribunal. Serious criminal law cases, constitutional cases and most private law cases are heard in the superior courts. Decisions of the superior court may be appealed to the province's or territory's appellate court, which is typically composed of a panel of three judges.

Each province and territory also has a provincial court, to which all criminal matters are initially brought. An accused may be able to have his or her case tried by the provincial court, depending on the severity of the charge. Provincial and territorial courts also deal with some family law matters and provincial regulatory offences. Most jurisdictions also provide for a small claims court, which allows litigants to appear with a minimum of formality, on matters involving legislated maximum monetary amounts. Certain administrative tribunals also exercise a quasi-judicial function (e.g., labour relations boards). Appeals of provincial court or administrative tribunal decisions are usually heard by the province's or territory's superior court, or sometimes directly by the appellate court.

As well, certain specialized federal courts operate as superior courts dealing with matters specified by federal legislation. The jurisdiction of the Federal Court of Canada (Trial Division) includes intellectual property matters, judicial review of decisions of federal administrative tribunals, and many maritime law issues. The Tax Court of Canada deals with matters under federal taxation legislation. Appeals from the Federal Court, Trial Division and the Tax Court of Canada are heard by the Federal Court, Appeal Division.

Appeals from appellate courts across Canada may ultimately be made to the Supreme Court of Canada in Ottawa. The Supreme Court has jurisdiction over disputes in all areas of the law, including constitutional law, criminal law and civil law, but is selective in the cases it chooses to hear. Since Canada's adoption of the Canadian Charter of Rights and Freedoms in 1982, the Supreme Court has been most active in Charter cases. Its decisions have been influential on the courts of many other countries.

There are 20 law schools across Canada, each a faculty of a major university. Four law schools in Quebec teach the civil law tradition. Two other schools, at McGill University and the University of Ottawa, teach both common and civil law. All remaining schools offer common law degrees. Dalhousie Law School in Nova Scotia is the oldest common law school in the British Commonwealth.

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11 Civil procedure*

C.H. (Remco) van Rhee and Remme Verkerk

1 Introduction

When approached from a national point of view, the notion of ‘civil procedure’ does not pose major difficulties. In principle, civil procedure governs the adjudication of civil cases before a court of law. Apart from the occasional difficulty, for example the fact that in some countries such as France and The Netherlands there is room for deciding ‘civil’ claims for compensation in a criminal procedure, legal scholars and practitioners are perfectly able to give a definition of civil procedure in a national context. This is different in comparative legal research. Of course, also in this context one may claim that civil procedure governs the adjudication of civil cases before a court of law. However, if one observes this definition closely, one may conclude that it is problematic.

The first difficulty – and this will not come as a surprise for those who are familiar with the case law of the European Court of Human Rights as regards the definition of ‘civil rights and obligations’ in Article 6 of the European Convention of Human Rights (Jacobs and White, 2002, pp. 139–70) – is posed by the definition of a ‘civil case’. In England, for example, the adjective ‘civil’ is used in the dichotomy civil–criminal. In principle, cases that are not criminal in nature are classified as civil. As such they are subject to the rules of civil procedure. In other countries the definition of a civil case is different. This is due to the fact that in most civil law countries the main dichotomy is that between private law and public law. The rules of procedure that are applicable to cases within the ambit of public law are either criminal or administrative in nature. Administrative procedural rules are applicable in actions in which one of the parties is the state or other public authority. This results in a major difference as regards jurisdictions like England, where such actions are adjudicated on the basis of the ordinary civil procedure rules (Jolowicz, 2000, pp. 11–22).

The second difficulty is related to the classification of rules as ‘procedural’ or ‘substantive’. This classification is of primary importance in an international context owing to the applicability of the *lex fori* as regards procedural law (e.g., see Kerameus, 1997). Although a court may apply foreign substantive private law, it will under no circumstances adjudicate

* See also: Arbitration; Legal families.

cases according to foreign civil procedure rules. At first sight the distinction between substantive law and procedural law seems clear. Substantive law *inter alia* defines, regulates and creates rights and duties, whereas procedural law regulates the legal proceedings in case of a dispute concerning these rights and duties. However, in practice the distinction is not always that clear. How should, for example, remedies in English law be classified? Do they belong to the domain of procedural or substantive law (Andrews, 2003, no. 1.44)? And to what area of the law do the rules of evidence belong? In some jurisdictions, such as France, rules of evidence can be found both in the Civil Code and in the Code of Civil Procedure. In The Netherlands, which originally knew a system that was similar to that of France, the situation has changed. In that country the rules of evidence have been transferred to the Code of Civil Procedure.

On the basis of the above one may conclude that defining 'civil procedure' in a comparative legal context is a difficult task. If one attempts to provide for a working definition nevertheless, it seems justified to follow closely the working definition for 'civil litigation' supplied by J.A. Jolowicz (Jolowicz, 2000, pp. 20–22). That author states: (1) civil litigation involves proceedings before a court of law; (2) the initiation of civil proceedings is a voluntary act; (3) the plaintiff acts in his own interest; (4) civil litigation does not occur without the will of the defendant. It is this type of litigation that is governed by 'civil procedure'. Of course, this definition, although much more useful in comparative legal studies than the definition mentioned in the initial paragraph, is not ideal either, for parts of the law that in some countries are brought under the heading 'civil procedure' cannot be brought under it. Problematic areas are, for example, the rules on judicial organization and enforcement, and the rules on cases which do not involve the adjudication of contested matter but the performance of acts of an 'administrative' nature by a court of law (e.g., the appointment of a guardian).

Apart from problems of definition, other difficulties specific to comparative legal research in the area of civil procedure can be mentioned. In a well-known article, J.H. Langbein, for example, criticizes comparative legal research in American and German civil procedure by Johnson and Drew. Johnson and Drew came to the conclusion that American courts are 'undermanned' when compared to the much greater number of judges *per capita* in Germany. Langbein, however, points out that there is a fundamental difference between American and German civil procedure which makes this conclusion doubtful. He states that many of the tasks that are performed by the court in Germany are performed by the parties and their counsel in the American adversarial system. Therefore a smaller number of judges is required (Langbein, 1979).

In the next paragraphs we will focus on a selection of topics that are of interest from a comparative legal point of view. First, some remarks will be made on ‘families of civil procedure’. Next, fundamental and other principles of civil procedure will be discussed. Thirdly, contemporary trends and developments in civil procedure in the various national systems of civil procedure will be addressed. Finally, some remarks will be made on harmonization of civil procedural law (on these and related topics also, see e.g., Kaplan, 1960; Cappelletti, 1989; Jolowicz, 1990; Markesinis, 1990; Habscheid, 1991; Grunsky *et al.*, 1992; Lemmens and Taelman, 1994–. . .; Civil Procedure in Europe, 1997–. . .; Jacob, 1998; Carpi and Lupoi, 2001; Stürner, 2001; Kötz, 2003; Storme, 2003).

2 Families of civil procedure

At least two large families of civil procedure may be distinguished in today’s world: those that find their origin in the common law and those that have developed on the basis of the Romano-canonical procedure (van Caenegem, 1973; van Rhee, 2000). The common law family is, of course, the result of the expansion of the British Empire, which brought the English system of civil litigation to places all over the world, for example, the United States of America, Canada, Australia, India and South Africa.

Originally, the distinction between common law and equity, which today is mainly relevant in the area of substantive law, also played a role in the field of procedure. In England, the three superior courts of common law (King’s Bench, Common Pleas and Exchequer) knew the writ system with its forms of action. Litigation could only be commenced if a suitable remedy was available, and, because the available writs in the register of writs became fixed, this was not necessarily the case. The English Courts of Equity (basically the Court of Chancery and the equity side of the Exchequer) knew a procedure that was more akin to the Romano-canonical procedure of the European Continent. In equitable cases, the Chancery was not bound by a fixed list of writs.

In the 19th century, this system changed considerably. The first step was taken in the United States of America. There, the 1848 Code of Procedure of the State of New York, drafted by David Dudley Field (1805–94), was to some extent influenced by the Romano-canonical model and abolished the distinction between common law and equity in the field of procedure. It introduced a uniform procedure for common law and equity which knew only one ‘form of action’, i.e., the ‘civil action’ (Clark, 1993; van Rhee, 2003).

Other common law countries followed suit. In India, for example, this happened with the introduction of the 1859 Code of Civil Procedure, whereas in England itself the Judicature Acts, 1873–5 brought about a system that resembled, to a certain extent, the system of the 1848 New York

Code (van Rhee, 2005). South Africa is a special case. After the Cape had been taken over by England from the Dutch in 1795, Roman–Dutch law continued to reign supreme in the field of substantive law. However, a procedural system was introduced that was based on English law. An important difference between England and South Africa was that in the latter country the distinction between common law and equity was not introduced in the field of procedure because it was absent in substantive law; substantive law remained Roman–Dutch (de Vos, 2002).

On the continent of Europe, the medieval Romano-canonical procedure formed the basis of further developments. It was based not only on Roman law, but also on canons from the second part of Gratian's *Decretum*, the law of northern Italian cities and papal decretals. Originally applied within the ecclesiastical sphere, the learned Romano-canonical procedure soon became the model for the modernization of procedural law within the secular courts. In Europe, most superior courts like the *Reichskammergericht* for the German states, the French *Parlement de Paris*, as well as the *Grand Conseil de Malines* in the Low Countries, knew a procedure that was inspired by the learned Romano-canonical model. During the so-called 'codification period' (roughly the late 18th century to (in some countries) the end of the 19th century), the learned procedure exerted considerable influence, both in a positive and in a negative way: in a positive way because many of its basic features were adopted by the codes of civil procedure that were introduced all over Europe (often through the intermediary of the 1806 French *Code de procédure civile*), and in a negative way, because various features that were felt to be unsuitable to 19th-century conditions were replaced by their opposite (an oral instead of a written procedure, the hearing of witnesses in public instead of behind closed doors) (van Caenegem, 1973; van Rhee, 2000).

An aspect of the Romano-canonical procedure that was left untouched by many of the Codes was the relatively passive position of the judge, which resulted in undue delay and high costs. An early but in the end unsuccessful attempt to introduce an active judge was the First Book of the *Corpus Iuris Fridericianum* of Frederic the Great of Prussia, dating from 1781. More successful was the procedural model advocated in Austria by Franz Klein (1854–1926) at the end of the 19th century. This model became the focus of attention in Continental Europe and beyond (Jelinek, 1991). In his programmatic work *Pro Futuro* Klein stated, amongst other things, that an active judge would be a solution to undue delay and high costs (Klein, 1891). The judge should establish the 'substantive truth' instead of basing his judgment on the truth as fabricated by the parties (the 'formal truth'). Klein's 1895 Code of Civil Procedure became very influential outside Austria and paved the way to an approach of civil procedural law which at

the end of the 20th century even became popular in England with its traditionally adversarial model of civil litigation. The 1999 English Civil Procedure Rules are the result of this development. Currently, the key word in many countries is ‘cooperation’ between the parties and between the judge and the parties (see also Stadler, 2003, pp. 57, 69).

3 Fundamental principles and ‘other’ principles of civil procedure

A distinction must be made between fundamental principles and ‘other’ principles of civil procedure. Fundamental principles of civil procedure may be seen as standards to fulfill the requirements of justice (Andrews, 2003, no. 3.02). When these principles are ignored, one cannot speak of a fair trial. Other principles of civil procedure are not fundamental, but are nevertheless observed in many jurisdictions. If they are ignored, however, the fairness of the trial is not immediately endangered.

Although the precise content of a list of fundamental principles of civil procedure is subject to debate – one may think of the right to trial by jury of the Seventh Amendment to the Constitution of the United States, a right which even in England is absent in most civil cases (Andrews, 2003, ch. 34) – many fundamental principles are widely shared throughout the world. Exemplary for the codification of (fundamental) principles of civil procedure in a national code are the *principes directeurs du procès* of the French Code of Civil Procedure. These Guiding Procedural Principles take the form of a chapter at the start of the Code. This Chapter is divided into ten sections devoted, respectively, to the judicial proceedings (Section 1, articles 1–3), the subject-matter of the dispute (Section 2, articles 4–5), facts (Section 3, articles 6–8), evidence (Section 4, articles 9–11), law (Section 5, articles 12–13), adversarial procedure (Section 6, articles 14–17), defence (Section 7, articles 18–20), conciliation (Section 8, article 21), oral arguments (Section 9, articles 22–3) and the duty of restraint (Section 10, article 24) (Cadiet, 2005).

Fundamental principles of civil procedure have shaped and continue to shape civil procedure in many countries. The principles that may be found in Article 6 of the European Convention of Human Rights (on a worldwide scale, Article 14(1) of the International Covenant on Civil and Political Rights of the United Nations contains similar guarantees) are a good example. Only the first paragraph of Article 6 ECHR is applicable to civil litigation. It provides that, ‘in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law’. After a somewhat dormant existence in the years following the coming into force of the European Convention on 3 September 1953, Article 6 now figures prominently in the case law of

the European Court of Human Rights. On the basis of that article, the European Court has worked out a detailed scheme of fundamental principles that must be observed by the courts of the member states of the Council of Europe (Jacobs and White, 2002, pp. 139–70; Andrews, 2003, ch. 7). Article 6 ECHR has had (and still has) a harmonizing effect on the systems of civil procedure in Europe.

Apart from fundamental principles, ‘other’ principles of civil procedure may be distinguished. A combination of fundamental and ‘other’ principles may be found in the Principles (and Rules) of Transnational Civil Procedure that are currently being prepared under the sponsorship of the American Law Institute and UNIDROIT (Hazard, Taruffo, Stürner and Gidi, 2001; UNIDROIT 2004, Study LXXVI-Doc. 11; American Law Institute and UNIDROIT, 2006). The project was initiated by the American Law Institute and aimed originally solely at creating transnational rules for international commercial disputes. Later, when the project was incorporated within the framework of UNIDROIT in 2000, work on transnational principles started. Principles, which are less specific and broader than rules of procedure, may be better fit for the harmonization of civil procedure. The fundamental principles that have been identified concern, amongst other things, the independence and impartiality of the court, the right to engage a lawyer and the right to be heard. An example of a principle that in our opinion cannot be classified as fundamental is the principle that the proceedings shall ordinarily be conducted in the language of the court.

The drafters of the principles claim in their introduction that their principles may be implemented by national systems in different manners: either by statute or a set of rules or by way of an international treaty. Case law of national courts may in their opinion also play a role.

4 Trends and developments in the national systems of civil procedure

Civil procedure changes quickly. Throughout the world several general trends and developments can be perceived. First of all, there is the age-old problem of high costs and undue delay (van Rhee, 2004). High costs and undue delay are, according to some, currently even more problematic than in the past owing to the increase in litigation rates during the last few decades (Zuckerman, 1999, p. 42). Various strategies have been employed to fight this problem. The cheapest, and therefore a popular strategy, is the introduction of new rules of civil procedure. Reorganizing the courts and additional funding is another approach. A change in procedural culture is a third option. This option is currently advocated in countries like England and The Netherlands. In practice combinations of these approaches may be chosen.

Undue delay and high costs may give rise to a review of the triangular relationship between the judge and the parties or aspects of it. A distinction is often made between two theoretical extremes: the inquisitorial model and the adversarial model (Jolowicz, 2003). In a purely adversarial system the judge acts as an umpire. He does nothing but listen to what the parties put before him and declares a 'winner' in his judgment. In a purely inquisitorial procedure the judge has an active, dominant role. He is, for example, involved in the framing of the issues and the gathering of the evidence. Neither extreme exists in practice. Nevertheless, the United States of America and, before the introduction of the 1999 Civil Procedure Rules, England, are often seen as examples of systems tending towards the adversarial model. The Civil law systems are categorized as less adversarial (the adjective 'inquisitorial' instead of 'less adversarial' is often used by English and American authors). This is due to the fact that in these systems the judge is more active than his Anglo-American counterpart. The differences, however, can easily be exaggerated. Throughout most systems of civil procedure the parties enjoy a certain degree of autonomy. The decision whether or not to initiate legal proceedings is left to them, they decide about the subject-matter that is put before the court, and it is also usually the parties who decide whether or not to make use of available procedural techniques and instruments.

The role of the judge is changing or has changed in many jurisdictions. As stated above, this happened in Austria at an early moment as a result of the 1895 Code of Civil Procedure (Oberhammer and Domej, 2005). French law gradually changed from 1935 onwards, giving the *juge chargé de suivre la procédure* (the expression '*juge-rapporteur*' became more common) and later the *juge de la mise en état* certain case management powers (Wijffels, 2005). Recent changes in English law also reveal a clear shift in control over the procedure from the parties to the judge. Lord Woolf, the 'father' of the 1999 English Civil Procedure Rules, identified the adversarial culture as one of the main reasons why English procedure before the reforms was slow and expensive.

In the United States case management has also been on the agenda since experiments in this field were started in the pre-trial stage at the Circuit Court of Wayne County, Michigan, sitting in Detroit in the 1920s (Epp, 1991, pp. 715–17). However, during trial the adversarial model is largely left untouched and hence the procedural system of the USA is very different from European procedural models. The role of the American judge in civil proceedings has been the subject of discussion during the last few decades. This discussion was started by a celebrated article of J.H. Langbein entitled 'The German Advantage in Civil Procedure' (Langbein, 1985). In complex litigation in the United States, Langbein saw 'growing manifestations of judicial control of fact-gathering'. He stated:

Having now made the great leap from adversary control to judicial control of fact-gathering, we would need to take one further step to achieve real convergence with the German tradition: from judicial control to judicial conduct of the fact-gathering process. In the success of managerial judging, I see telling evidence [. . .] that judicial fact-gathering could work well in a system that preserved much of the rest of what we now have in civil procedure.

Langbein has triggered a discussion that continues until this very day (Allen, Köck, Riecherberg and Rosen, 1988; Bryan, 2004).

Apart from giving the judge a more active role, another strategy to decrease costs and undue delay is tailoring the procedure to the complexity of the case. This has resulted in the introduction of summary procedures for small claims litigation in many countries. In Austria, for example, summary proceedings for debt collection (*Mahnverfahren*) are obligatory for money claims not exceeding 30 000 euros. In Poland there is a simplified fast-track procedure for small claims since the Reform of Civil Procedure in 2000. In England a small claims procedure was introduced in 1974, at first limited to claims under £100. Later this was changed to £1000. With the introduction of the 1999 Civil Procedural Rules the amount was raised further to £5000 for the majority of cases (Andrews, 2003, no. 22.01). Also for more complicated cases there is differentiation in England; the two other procedural tracks that are available are the fast-track and the multi-track.

At the European level a Green Paper on a European order for payment procedure and on measures to simplify and speed up small claims litigation was issued in 2002 (COM (2002) 746 final, 20.12.2002). In this respect, one may also refer to the European Directive combating late payment in commercial transactions (2000/35/EC, 29.06.2000, Official Journal 2000 L200, 35–8).

A third way to reduce litigation costs and undue delay is avoiding litigation altogether or to stop it at an early stage. There is an increasing interest in alternative dispute resolution (ADR) such as, for example, mediation, mini-trial and arbitration. Many countries have passed legislation to encourage ADR. In Austria, for example, legislation on mediation (*Mediationsgesetz*) has recently been accepted by the *Nationalrat*. In Belgium new legislation in this field has been adopted by Parliament (new Sections 1724–37 of the Belgian Judicial Code). Also on the supranational level an interest has been shown in ADR. Within the framework of the Council of Europe, the Committee of Experts on the Efficiency of Justice examines questions connected with mediation as an alternative to court proceedings in civil cases. The European Union has published a Green Paper on the issue of ADR, regarding alternative methods as an important means to enhance access to justice (COM (2002) 196 final, 19.04.2002). In addition the European Commission issued a preliminary draft proposal for

a directive on certain aspects of mediation in civil and commercial matters in 2004 (COD/2004/0251).

Apart from the three methods to combat undue delay and costs mentioned above, a multitude of other approaches to curb undue delay and costs exist in different national legal systems. An interesting example is the Austrian *Fristsetzungsantrag* or ‘application to set a time limit’. By way of this application the parties may file a request with a higher court to order the lower court to perform a requested procedural act within a certain time limit. The application is, however, rarely used, most likely because it may give rise to further delay (Oberhammer, 2004, p. 230). Another example is the use of IT technologies. In some countries (e.g., Austria and Germany) electronic communication is used on a large scale, whereas other countries (e.g., The Netherlands) are behind in this respect.

Some authors are extremely sceptical as regards the effectiveness of reform in civil procedure in order to address problems in civil litigation (Leubsdorf, 1999). Indeed, history shows us that the effects of reform projects were often short-lived (van Rhee, 2004). It is therefore still an open question whether, for example, the new English Civil Procedure Rules 1999 will have a lasting impact. First signs are, however, positive.

5 Harmonization of civil procedural law

In many fields of law efforts are made to reduce the differences among the existing national legal systems (on fundamental similarities in and differences among procedural systems, see Hazard, Taruffo, Stürner and Gidi, 2001, pp. 772ff). This is also true in the area of procedural law even though harmonization of procedural law may pose specific difficulties owing to the fact that it is closely related to court organization: a change in procedural rules may necessitate changes in court organization, and this often turns out to be an insurmountable problem, if only for political reasons. This is very clear where the harmonization of the rules on recourse against judgments is at stake (on ‘harmonization’ and the related concept of ‘approximation’, see *ibid.*, pp. 769–72).

Some authors claim that harmonization of procedural law may have negative consequences, for example, if it means that a country with an efficient system will have to change its rules in order to comply with a common standard that is less efficient (Lindblom, 1997). Others are of the opinion that harmonization of procedural law should be pursued because of its benefits. It could, for example, simplify transnational proceedings and cut transaction costs. Harmonization may also safeguard preceding substantive law harmonization (Kerameus, 1998; Schwartze, 2000).

The authors who are in favour of harmonization often also claim that the harmonization of civil procedure is highly feasible. In their view one

reason for this is that the unification of procedural law may have a fragmentary character: '[. . .] specific procedures can be unified or only a partial degree of unification can be carried out. This is more difficult in substantive law, where there is a greater tendency towards overall standardization: the law of contracts and the law of bankruptcy, for instance, form a coherent whole, so that it is difficult to put forward partial reforms' (Storme, 1994, p. 54).

In the context of the European Union, Article 65 of the Treaty Establishing the European Community (cf. Articles III-158 and III-170 of the proposed European Convention), provides a legal basis for the harmonization of civil procedural law, at least as regards civil matters having cross-border implications and in so far as necessary for the proper functioning of the internal market (Drappatz, 2002). Although the field of operation of Article 65 ECT is still unclear (Hess, 2002, pp. 13–14), it is not unlikely that, in the future Article 65 ECT or its successors will also be of significance for cases which are currently qualified as purely national (Article 65, sub. *c* especially may be relevant in this context, which allows measures eliminating obstacles to the good functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the member states).

An important question is how procedural harmonization can be achieved (Kerameus, 1990; Stürner, 1992). One approach is the drafting of a model code. An example is the *Codigo Procesal Civil Modelo para Iberoamerica* (1988). Although this code has no binding force, it is a model for reforms in procedural law in Latin America. An early example of its influence is the 1989 *Codigo General del Proceso* in Uruguay (Storme, 1994, p. 42).

A project aiming at partial harmonization is that of a working group chaired by Professor Marcel Storme from Ghent. In their report, published in 1994, the working group presented a series of Articles with explanations aiming at the harmonization of civil procedural law in the European Union (Storme, 1994). The topics that were addressed are as follows: Conciliation, The Commencement of the Proceedings, Subject Matter of Litigation, Discovery, Evidence, Technology and Proof, Discontinuance, Default, Costs, Provisional Remedies, Order for Payment, Enforcement of Judgments or Order for the Payment of Money, *Astreinte*, Computation of Time, Nullities, and Rules relating to Judges and Judgments. The proposal is aimed at creating a European directive (see also Schwartz, 2000, p. 143).

An earlier attempt by the Council of Europe (*Principes de procédure civile propres à améliorer le fonctionnement de la justice*) was more restricted. The Council's recommendation of 1984 addressed the formal course of proceedings (Council of Europe, R (84) 5, 28.02.1984). Part of its aims was to speed up the litigation process (*ibid.*).

The Storme report has triggered some discussion. It was criticized by P.H. Lindblom (Lindblom, 1997). The main thrust of his criticism was that partial harmonization will lead to great complexity because of the need to deal with the interaction between harmonized and non-harmonized rules. The author states that an analysis of the Storme Commission proposal demonstrates that it leaves considerable uncertainty as to the remaining role of national laws, and that it would not gain universal acceptance because it would conflict with the approach adopted in some jurisdictions.

The Storme report was followed by another project in the field of the harmonization of civil procedural law: The Principles and Rules of Transnational Civil Procedure, drafted under the sponsorship of the American Law Institute and UNIDROIT (Hazard, Taruffo, Stürner and Gidi, 2001; UNIDROIT, 2004, Study LXXVI-Doc. 11; American Law Institute and UNIDROIT, 2006). These Principles and Rules aim at providing a framework that a country might adopt for the adjudication of disputes arising from international transactions that find their way into the ordinary courts of justice. The project is inspired in part by the model of the Federal Rules of Civil Procedure in the United States. The Transnational Civil Procedure Project assumes that a procedure for litigation in transactions across national boundaries is also worth the attempt.

Apart from the above projects, it seems that systems of civil procedure have a tendency to converge 'naturally' as a result of the increasing interaction between the systems. There is, for example, reason to believe that the divide between common law and civil law countries is narrowing (van Rhee, 2003). The forms of action that set civil procedure in civil and common law countries apart have been abandoned in most, if not all, common law jurisdictions during the 19th and 20th centuries (*ibid.*). Apart from the United States of America, the Anglo-American civil jury has nearly disappeared from the legal landscape. Written elements gain in importance in civil litigation in common law countries (e.g., witness statements in England which may serve as an alternative for examination in chief) (Zuckerman, 1999, p. 47). Currently, the adversarial system is under attack. England has witnessed a major reform in this respect. As stated above, the role of the judge has been strengthened in that country, giving him extensive case-management powers. Consequently, the English judge has become much more like his Continental European counterpart (Stadler, 2003, p. 56).

At the same time the law of civil procedure of many civil law countries changes, bringing this procedure nearer to common law examples. Orality, for example, which traditionally did not play a significant role in the systems that found their origin in the Romano-canonical procedure, has been on the rise ever since the 19th century (van Rhee, 2005). At the same time, Continental procedural lawyers show an interest in various elements

of English civil procedure, such as, discovery (disclosure) and pre-action protocols.

Apart from harmonization projects and the 'natural' movement of systems of civil procedure in each other's direction, some influential international regulations and conventions play a harmonizing role (Werlauf, 1999). Some of these have already been mentioned: for example, Article 6 of the European Convention of Human Rights. Within Europe the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in civil and commercial matters has been important. The Convention originally only applied to the then six member states of the European Community, but became more influential when the Community/Union expanded. The Brussels Convention has recently been converted into a European Regulation (EC no. 44/2001, 22.12.2000, Official Journal L012 1-23). This Regulation is applicable to all member states except Denmark.

In 1988, the parallel Lugano Convention was implemented. This Convention deals with international cases involving the member states of the European Union and the members of the European Free Trade Association.

On a worldwide scale, various Conventions on civil procedural topics drafted by the Hague Conference on Private International Law have achieved some harmonization. An example is the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters (1970).

6 Conclusion

The authors of the present chapter hope to have demonstrated that in the area of civil procedure some of the major differences that for a long time have set the various systems of civil procedure in the world apart from each other are disappearing. This occurs especially in those parts of the world where the systems of civil procedure are in close contact with each other, for example in the European Union. There, the divide between the common law jurisdictions and the civil law jurisdictions has become less pronounced than in the past.

Whether or not harmonization of civil procedure is a goal that should be pursued is open to discussion, as is the question of how it should be pursued. Evidently the drafters of documents aiming at harmonization are convinced of its benefits. Examples of such documents have been discussed in the present chapter: for example, the model code of civil procedure in Latin America, or the Rules and Principles of Transnational Civil Procedure on a worldwide scale. However, even if one is not convinced of the blessings of harmonization, it is clear that these documents and especially the comparative legal research on which they were based and to which they have given rise, may contribute to a better understanding of the

differences and similarities in the existing systems of civil procedure in today's world. They may also give the procedural lawyer an insight into the shortcomings of the various procedural systems and into the question of how these may be addressed. An example is the age-old problem of undue delay and high costs, the solution of which will certainly benefit from comparative research in civil procedure. That comparative scholarship in civil procedure is indeed a fruitful enterprise is demonstrated by the discussion on the 'German Advantage in Civil Procedure' triggered by J.H. Langbein in 1985. This discussion is still with us today, and those scholars who have followed it will most likely support our opinion that it has thoroughly deepened our insight in a multitude of procedural questions.

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12 Commercial regulation*

Luke Nottage

1 Introduction

Until the early 1980s, comparative lawyers tended to be interested in the mostly doctrinal implications of distinguishing rules and institutions dedicated to ‘commercial law’ from other aspects of civil or private law. Especially as states intervened more in economies, some tried to incorporate these developments into broader notions of ‘economic law’ or ‘business law’.

Over the 1980s and particularly since the 1990s, however, more analysts have realized that ‘hard law’ promulgated and enforced by national authorities is only one way of regulating commercial behaviour and expectations. Private and semi-private norms and dispute resolution processes within states, and growing regional and transnational dimensions even to hard law, underpin the emergence of ‘commercial regulation’ as a broader research agenda. An older strand of regulation theory had been built around the idea that regulators pursue the public interest. A newer strand acknowledged that they can pursue, instead or in addition, their private interests. Particularly under the latter approach, the main focus was on how regulation might be most efficiently generated and applied to achieve pre-defined goals.

However, some more recent scholarship takes an even broader approach, questioning also the nature and legitimacy of such goals. This ties into current debates about ‘governance’ generally, in contemporary industrialized democracies exposed to increasing globalization. A particularly topical issue has been ‘corporate governance’, namely how incorporated firms (especially listed companies) can be most effectively and legitimately controlled. Also, if only to make effective comparisons, corporate governance has often been studied by examining a broad range of stakeholders in companies. A major concern remains shareholders and their directors, but other stakeholders now range from creditors and employees through to suppliers, consumers and even governmental or non-governmental organizations. Thus, by understanding comparative corporate governance and related debates about corporate social responsibility (Winkler, 2004), most aspects of contemporary commercial regulation can be brought into view as well.

* See also: Comparative law and economics; Competition law; Insolvency law; Personal and real security; Transnational law.

2 From commercial law to business law

As growing numbers of states began to codify private law, especially from the 19th century, legal scholars began to consider developing a distinct set of legal rules to govern economic activities, and related institutions such as specialist commercial courts or tribunals (Tallon, 1983). Japan, for example, decided to follow Germany and France and enact both a Civil Code over 1896–8 and a Commercial Code in 1890 (Kitagawa, 1970). By contrast, despite receiving advice from a prominent Japanese jurist, Thailand decided to enact a combined Civil and Commercial Code in 1935. Jurisdictions following the common law tradition tended to be even more sceptical about distinguishing a separate set of rules for commercial law. In England, for example, commercial practices and expectations – especially perceptions of those existing in the subset of sophisticated traders and their legal professionals – were mostly folded into general contract law and other areas of law governing private commercial transactions. Socialist states also provided little or no autonomy to commercial law as such. These different paths have been highlighted more recently, especially as countries have moved away from socialist models (see, e.g. Mong and Tanaka, 2002).

As comparative law developed as a discipline as well as a policy-making tool over the 20th century (Riles, 2001), such points of convergence and divergence attracted increasing interest. First, even in states that openly recognized a distinct body of commercial law, some (like Germany) preferred a ‘subjective’ delimitation, based on the definition of ‘merchants’ as a social professional category. Others (like Spain) adopted primarily an ‘objective’ test, based on acts classed as ‘commercial acts’. Some hybrid systems (as in France and Japan) applied both criteria without one being clearly more important than the other. Secondly, even in states that maintained a distinctive body of commercial law, differences emerged in sub-distinctions and their own degrees of autonomy. For example, maritime transportation law was gradually separated from land-based transportation law. Other illustrations come from insurance and banking law, the law of commercial business associations and insolvency law, and intellectual property law.

As such differences became apparent, more scope was created to reconsider why an autonomous body of rules ought to be maintained at all. A common rationale was that commercial law responded to needs distinct from dictates of ordinary private law: speediness, rather than security; yet protections for creditors. However, as state intervention in the economy burgeoned after World War II, more restrictions were placed on freedom of contract and other forms of commercial activity, undermining the imperative of speed. More generally, commercial transactions were increasingly subjected to an array of public law norms and institutions. This led to theories of a more abstract ‘economic law’, for example in Germany, going

beyond the traditional conceptualizations of private and public law. A major focus became competition law, which has been maintained even as many countries started instead to deregulate their economies, especially over the 1990s. Even broader concepts of 'business law' have gained favour, especially in common law jurisdictions (e.g. Storach and Ellis, 2005).

In parallel, the autonomy of commercial law was challenged by accelerating internationalization. First, national systems of private law have been subjected to a burgeoning array of international treaties, beginning precisely with a focus on commercial transactions or dispute resolution. While this has again highlighted possible special needs of cross-border traders, those needs may differ from those of domestic traders, and the treaties may delineate different criteria than domestic commercial law. These treaties have also reinforced the fact that many states party to such treaties do not maintain autonomous rules or institutions of commercial law at all. Secondly, since World War II there has been a resurgence of the *lex mercatoria* – including practices and norms for structuring and implementing cross-border deals that are more autonomous from 'hard law' generated directly by either national or even transnational authorities (Berger, 2001). This too highlights the potential for diversity within private law, but it challenges established categorizations and conceptualizations. Questions are increasingly being raised about the implications of this new *lex mercatoria* from political or constitutional viewpoints (Teubner, 1997).

3 From business law to commercial regulation

Challenges to an autonomous commercial law, at least within traditions of national law, have been compounded by a broader shift. As deregulation has proceeded in many states, especially over the 1990s, more use has been made of 'soft law' even within the boundaries of local economies, such as industry codes of practice and voluntary undertakings to regulators given by industry participants. Analysts of regulation, even from a legal perspective, have had to acknowledge its 'privatization' through such hybrids (Scott, 2001). Likewise, to understand the myriad evolving forms of control exerted over contemporary commercial entities, the broader notion of economic or business law is starting to be subsumed into an even broader concept of 'commercial regulation'.

Regulation has been defined in a variety of ways. Lawyers have tended to adopt narrower definitions. The narrowest contrasts regulations, as the legally binding rules made by the executive branch of government, with statutes enacted through legislative bodies. Another definition contrasts criminal law (concerned with prohibitions), contract law (concerned with rules generated bilaterally, not unilaterally) or tort law (activated by public, not private, initiative). This links up to a broader third definition, more

often found among political scientists, viewing regulation as one of many policy instruments available to the state, distinguished by its command and control characteristics from subsidies, taxation, public sector management or information policy. An even broader definition, favoured for example by *laissez faire* economists, instead includes all acts of the state controlling or altering the activities of markets. A recent comparative sociolegal approach adopts a variant of the third, instrumental definition, acknowledging private legal rights as well as the existence of non-state legal orders. It also notes the standard dictionary definition of controlling, directing or organizing according to a rule, principle or system (Daintith, 1997, paras 2–7).

Another expansive conception views regulation as ‘a process involving the sustained and focused attempt to alter the behavior of others according to defined purposes with the intention of producing a broadly identified outcome or outcomes which may involve mechanisms of standard-setting, information-gathering or behavior-modification’, or ‘the intentional, goal-directed, problem-solving attempts at ordering undertaken by both state and non-state actors’ (Black, 2002, p. 170). From this perspective, both regulators and those regulated may include governments, associations or firms, and regulators may operate at transnational, national or subnational levels. However, the definition is not as wide as for some sociologists who view the market itself or ‘culture’ as regulating. Along with these various definitions, analysts from different disciplines have examined regulation through a variety of theoretical lenses. Economic analysis has become very popular, but cultural/anthropological theory, institutionalism, social systems theory and discourse analysis have also been applied (Black, 2002, pp. 163–4).

Broader definitions and approaches are proving especially useful for comparative studies, which are also feeding back into further theory building. One typology distinguishes the following four modes of policy implementation and dispute resolution (Kagan, 2001, p. 10).

Organization of decision-making authority	Decision-making style	
HIERARCHICAL	INFORMAL Expert or political judgment	FORMAL Bureaucratic legalism
PARTICIPATORY	Negotiation/mediation	Adversarial legalism

As well as providing insights into criminal and civil justice, this framework has been applied particularly to the delivery of welfare state services, and to ‘social regulation’ (such as pollution controls) as opposed to ‘economic regulation’ (viewed as limiting competition and stabilizing markets in

banking, transport, telecommunication and the like: see also Basedow *et al.*, 2002). A major conclusion is that political controversy in the US has resulted in systems of social regulation that differ little from those of other industrialized democracies in terms of problems addressed and the substance of the regulatory standards. However, processes for making and enforcing the rules remain more 'adversarial' and 'legalistic', compared for example to the more 'informal' and/or 'hierarchical' regulatory style still found more in Japan and Europe. More specifically, social regulation in the US tends to be more detailed and prescriptive, more strictly enforced, contested more intensely by regulated firms (and third parties) in and out of court, and more enmeshed in political conflict. While allowing more participation, for example, this style generates – for US firms and society more generally – greater unpredictability, lawyering costs, accountability or compliance costs, opportunity costs (from not proceeding more quickly with beneficial innovations) and divisiveness (Kagan, 2001, pp.181–206). Reviewers of this study, even from a broader comparative perspective, have tended to agree with the typology and description presented. However, some have questioned the extent of such disadvantages, as well as highlighting other problems emanating from the different styles found elsewhere, such as in Japan (Johnson, 2003).

As well as a range of other published comparative studies, Kagan's analysis draws heavily on a large research project directed over 1995–8, involving case studies of multinational corporations that had similar business operations in the US, Japan, Europe and Canada. The distinctive 'adversarial legalism' in the US was found to apply in a wide variety of industries and regulatory arenas (Axelrad and Kagan, 2000). Admittedly, even smaller corporations operating multinationally may tend to be the 'better' firms; but this makes it even more surprising that the US operations tended still to interact in an adversarial manner with their regulators, and makes it plausible that domestically focused firms may do so even more. On the other hand, there may be areas where identification of the underlying problem is different and changing, reinforcing differences in the substantive regulatory standards (food regulation, e.g., where Europe has become stricter while the US has become laxer: Vogel, 2001). Such different starting points seem likely to generate conflicting styles in framing and enforcing regulations (becoming more adversarial in Europe, therefore, and perhaps in Japan: see also Nottage, 2004).

A broader issue is whether national goals, substance and style of regulation have changed significantly over the last decade, and especially whether convergence is accelerating. Mechanisms for change nowadays include global markets, increasingly pervasive supranational or transnational institutions (such as the European Union, and the World Trade Organization

established in 1994) and cross-border advocacy networks. However, recent evidence confirms a tendency towards a regulatory 'race to the top', rather than a straightforward 'race to the bottom' (Vogel and Kagan, 2002). More ambitious claims of the 'Globalization of American Law', in both the European Union and Japan (Kelemen and Sibbitt, 2004), also seem overstated, even if elements of economic liberalization, political fragmentation, and growing legal services markets have emerged there too. Overall, 'global business regulation' is an increasingly powerful force, but leads still to a complex variety of processes or outcomes in different regulatory arenas (Braithwaite and Drahos, 2000).

4 From commercial regulation to corporate governance

Theorists of regulation have also begun to uncover and acknowledge a current blurring of legal and social influences on contemporary commercial entities, for example in pollution regulation of pulp and paper milling across many countries (Gunningham *et al.*, 2004). This also raises challenges for the predominant paradigm in studies of regulation, focused on instrumental analyses of how it can be most effectively generated and enforced (Scott, 2003). That orientation has been reinforced by a shift, since the 1970s, towards a 'private interest' approach to regulation, premised on regulators as well as those affected by regulation acting to maximize self-interest, rather than pursuing a broader 'public interest' (Ogus, 1994). Even as regulation has become more fragmented and less dominated by direct state intervention, interest has begun to grow in how to reinstate contemporary public values in this evolving field. A recent study of competition law, informed by a comparative perspective, checks for consistency with such values as reflected in constitutional, administrative and criminal law (Yeung, 2004). Parker (2002) calls for regulation of corporations that promotes both effective self-regulation with them, by opening up internal processes and links to outside actors engaging a variety of stakeholders, and more diffusely, legitimacy in terms of democratic values. Black (2000, 2001) adds more theoretical underpinnings for incorporating the latter aspect into designing and implementing a variety of regulatory strategies.

Overall, therefore, strands of contemporary regulatory theory incorporating a focus on the activities of corporations and other commercial entities are beginning to overlap with an even broader interdisciplinary area of research: the study of 'governance', going beyond more state-centric studies of 'government'. The need for this broader conceptualization, to examine growing diversity in the functions of governing and in the diversity of levels and actors involved, is particularly acute in transnational settings. However, the study of 'governance' also opens up more readily the potential also for normative appraisals that those with a formative

background or continuing engagement with law still tend to bring with them (Teubner, *et al.*, 2004).

In turn, the evolving fields both of regulation and of governance have begun to overlap significantly with studies of 'corporate governance' (Hopt *et al.*, 2005). Traditionally, the latter were also narrowly circumscribed, concentrating on the concerns found in corporate law itself, sometimes located within Commercial Codes or specialized commercial law. Especially in Anglo-American law, the predominant issue was the relationship between shareholders in corporations and their directors. Directors were appointed as managers or, as firms grew in size and listed on stock exchanges to gain equity finance more readily, as professionals charged with supervising managers for the benefit of shareholders. Systems of corporate law also always set out some protections for creditors, supplying debt finance to corporations. Some countries, like Germany, further developed formal recognition of employees as stakeholders with decision-making and monitoring functions in certain large corporations. However, Japan developed a *de facto* equivalent after World War II primarily through the practice of appointing many directors from among employees, who in turn enjoyed an implicit promise of lifelong employment (Kraakman *et al.*, 2003). Especially as comparative research burgeoned over the 1990s, theorists of corporate governance, even from a legal background, have tended to expand the scope of analysis even further (Hopt, 1998). Many studies now consider insolvency law or financial markets regulation more generally (Skeel, 2004). Others incorporate stakeholder relations created with the corporation's suppliers (overlapping with competition law), its customers (overlapping with consumer law) and even governmental or non-governmental organizations (overlapping with aspects of public law). The broader conceptions tend to correlate with growing scepticism about full-scale convergence on the shareholder-driven model of corporate governance which gained primacy in the US over the 1980s and 1990s, even though elements of this model have found considerable traction in Japan and Europe since the 1990s (Milhaupt, 2003; Milhaupt and West, 2004; Nottage and Wolff 2005).

The earlier narrower focus on shareholders as the primary stakeholders recognized in corporate law tended to lead, not only to descriptions comparing the legal treatment of shareholders, but also to the normative proposition that corporations should be governed only for their benefit. As a broader stakeholder approach has gained currency, albeit predominantly to make better comparisons and instrumental reforms to corporate law itself, more attempts are being made to legitimate and further expand stakeholder interests, through reform to corporate law itself or to the regulatory environment in a much wider sense (Parker, 2002). This is particularly evident in recent studies of 'corporate social responsibility', which re-emerged as

a burgeoning area for policymakers and theorists following major corporate collapses in the US, Europe and other parts of the world in the early years of the 21st century (Shamir, 2004).

5 Conclusion

More than a century ago, comparative lawyers initiated a narrow debate about carving out a distinct set of ‘commercial law’ rules within the broader field of private law, the main preoccupation of their emerging discipline. The growth of the welfare state over the 20th century, along with the internationalization of public institution building and private economic activities, underpinned the emergence of the broader concept of economic or ‘business law’. Deregulation since the 1980s, accompanied by considerable re-regulation, has also challenged scholars interested in some areas of business law, but more from the perspective of public law generally or of political science. This has generated studies constituting the even broader field of ‘commercial regulation’. That field also now includes more interest in normative dimensions, not just narrower instrumental approaches that take for granted the goals and means for regulation of commercial entities. That interest makes it easier to find points of intersection with an even broader modern area of study, the governance of contemporary socio-economic relationships, analysed also by social scientists and legal theorists from yet other backgrounds. A major focus is ‘corporate governance’. Now that the latter itself has expanded in scope of analysis (Winkler, 2004), there is a rich overlap with the concerns of those studying commercial regulation, business law and narrower commercial law. Comparative studies will continue to be important in each of these areas, and in helping to make the most of their overlaps.

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13 Common law*

Geoffrey Samuel

The expression ‘common law’ has a variety of meanings, but in the context of comparative law it is usually used to denominate the legal family or tradition associated with Anglo-American legal systems. In fact care must still be taken. First, the expression ‘common law’, if translated into Latin or French, will come to mean something very different; thus *jus commune* or *droit commun* are labels that will never mean the Anglo-American legal tradition. Secondly, the common law tradition encompasses more than the legal systems of England and the United States; most of the United Kingdom Commonwealth countries have legal systems belonging to the common law family. In addition to these two ambiguities, the expression ‘common law’ is used in English law to mean different things depending on the context within which it is employed. Thus it must be stated at the outset that ‘common law’ for the purposes of this contribution will be taken to mean the legal tradition encompassing the legal systems of the United Kingdom (except Scotland), the United States and the Commonwealth countries. However the main emphasis will be on English law.

1 Introduction

Roman law was not the only law to be found in medieval Europe. Indeed while ‘the Glossators mainly busied themselves with the interpretation and systematic exposition of the Roman texts, they knew well enough that much of what they taught had no effective influence outside the doors of the lecture-room’ (Jones, 1940, p. 14). The living law was the feudal and customary law. In continental Europe the influence of the Glossators led to the reduction of much of the feudal customary law to writing and this in turn exposed it to analysis and commentary by the university doctors. Gradually such feudal law became Romanized as ‘the method, the terminology and even some of the substance of Roman law rubbed off on their coutumiers’ (Van Caenegem, 1987, p. 106). In Britain, however, it was a different story. Feudalism provided the context for the development of a customary system that was to resist the effects of Romanization and Humanism. Moreover the institutions which developed during this medieval period were to survive until nearly the end of the 19th century.

* See also: Legal history and comparative law; Statutory interpretation; England.

Thus the common law tradition can really only be understood in its full richness from an historical position. This historical tradition has, moreover, resulted in a mentality and methodological orientation that can be contrasted with the mentality and methods of the civil law family (Legrand, 1999). Another epistemological feature of legal systems is their structure in terms of a taxonomy, an aspect that is of particular importance to the comparatist; and so something will need to be said about the categories employed by common lawyers. History, method, mentality and taxonomy will, therefore, be used as means for appreciating the common law tradition.

2 Historical considerations

It is certainly arguable that the foundations of the common law pre-date the Norman invasion of 1066. Nevertheless this event was of such importance that it still provides a useful historical starting point.

2.1 Feudalism

The English common law is the result of the survival of a system of customary law that was to be found in northern Europe before the reception of Roman law. This system of Northern France was exported to England with the Norman invasion of 1066. William I extended feudalism to the whole of England and Wales and this preserved not just the local customs but equally the local courts. One of the main characteristics of feudalism both as a political model and as a legal structure is that it made a fundamental distinction between land and other property. All land was held from the king and thus private ownership of the Roman type (*dominium*; cf. French Civil Code art. 544) was politically inapplicable. In practice of course the king devolved land to his lords and barons who in turn granted interests to those lower down in the social and political hierarchy. From a legal point of view this feudal model was very different from the one to be found in Roman law. It was not possible to think in terms of a direct relationship between *persona* and *res*, that is to say in terms of a direct bond between person and physical thing, because several people might have legal relations with a single plot of land. Equally it was relatively meaningless to distinguish between the public and the private. Feudalism was based on the granting of land and the passing of contracts; to a Romanist it was a matter of *dominium* and *obligatio* rather than *imperium* (sovereignty).

2.2 Early common law courts

The Normans may have imported and extended feudalism, but they nevertheless embarked on a process of centralization. The key institutions in this centralization were the sheriff (a local official appointed by the king) and the *Curia Regis* (the King's Council). The function of this latter body was

executive, judicial and legislative and because of the importance of land it developed a special interest not only in revenue but in any disputes which might affect the king's interest. As a result of this interest several 'departments' developed: the first was Exchequer, which dealt with revenue, and the second was the king's own court, King's Bench. This court obviously tended to travel with the king and consequently a third fixed court, the Court of Common Pleas, subsequently became established at Westminster. Thus by the end of the 13th century three courts of common law, each with their own professional judiciary, emerged out of the Curia Regis. The development of these courts from the 13th to the 17th centuries is dominated by jurisdictional battles between themselves and with outsiders such as Chancery and Star Chamber. However, as between the three of them (they lasted until 1875), their jurisdiction gradually merged and the increasingly coherent body of case law that arose from them became known as the English common law.

2.3 Court of Chancery

There were, however, a number of serious defects with the early common law courts. They were obsessed with technical form, founded upon juries of ordinary people who were usually illiterate, and could offer for the most part only monetary remedies. Appeal against a jury verdict was, to say the least, difficult; and bribery, corruption, delay and acute conservatism were other problems. People who were disgruntled with the system could petition the king directly in his capacity as 'Fountain of Justice' and the practice soon developed of the king passing such petitions to his Lord Chancellor. As a result, 'chancery slowly changed from a royal office to a royal court' (Weir, 1971, s. 90) and the law administered in this court became known as Equity.

Now, this secondary system of law never set out directly to challenge the common law. Instead it tried to supplement it with new substantive ideas, such as the trust, which were designed to mitigate the rigours of the common law. Chancery supplied in addition new, largely non-monetary, remedies such as injunction, specific performance, rescission and rectification. Despite the absence of any direct challenge by Chancery to the common law courts, it attracted the hostility of common lawyers which was only settled in the 17th century when James I ruled that, where equity came into conflict with the common law, equity was to prevail (see now Supreme Court Act 1981 s. 49(1)). From 1616 onwards equity was free to develop, which it did under the guidance of a number of notable Lord Chancellors, and by the 18th century Chancery had become just another court not so indistinguishable from the common law courts. That is to say equity had become a system of precedents and procedures itself lacking flexibility.

Nevertheless equity as a system of law remains in substance independent of the common law; only at the level of procedure are the two systems merged (see s. 49(2) of the 1981 Act).

2.4 *Forms of action*

Royal power via the Curia Regis thus developed its own system of exceptional jurisdictions to deal with matters that impinged upon the king's interest. But this 'public law' system was not open as of right to the population. In order to gain access to the royal courts one had to obtain an administrative 'ticket' called a 'writ' and these writs were based upon model factual situations which were gradually extended only on a case by case basis. The 'formulae of the writs, most of which were highly practical responses to the needs of thirteenth-century litigants, became an authoritative canon which could not easily be altered or added to'. They 'came to be seen as somehow basic, almost like the Ten Commandments or the Twelve Tables, the data from which the law itself was derived' (Milsom, 1981, p. 36). The conceptual foundation of these writs did not follow the Roman structure or mentality. Certainly there was a reliance on a law of actions (the writ system was called the 'forms of action') and the common law courts were prepared to offer a vindication remedy for land (writ of right) (for a modern use see *Manchester Airport Plc v. Dutton* [2000] 1 QB 133). But many of the other writs and subsequent forms of action such as debt, detinue, trover and nuisance were both in personam and in rem in nature (although they were called 'personal' actions). They grew out of the facts of late medieval English society and not out of some revered law book in which a strict blueprint of in rem and in personam relations dictated how lawyers were to model the world.

The feudal-based English legal system survived in form up to the 19th century. A series of major procedural reforms during this period revolutionized the court structure and the forms of action were replaced by a system of pleading less formal in style. However in substance the common law remained attached to the distinction between land and movable (personal) property with the result that personal property problems were handled by remedies that were categorized under 'tort' (see Torts (Interference with Goods) Act 1977). In addition, the idea of 'categories' of liability is still a distinctive feature of the law of non-contractual obligations (see, e.g. *Esso Petroleum Ltd v. Southport Corporation* [1954] 2 QB 182 (CA); cf. [1956] AC 218 (HL); *Wainwright v. Home Office* [2004] 2 AC 406).

2.5 *Jury and orality*

The history of the common law has, in comparison with the civilian tradition, bequeathed another important institutional difference. The English

common law developed its own specific form of procedure quite separate from the Romano-canonical model to be found in the countries of the reception of Roman law. This English procedure had two distinct characteristics. First, it was an oral procedure because decisions of fact were made, not by judges learned in Roman law and trained in the university faculties, but by juries which consisted of ordinary people who were often illiterate. To the Roman and canon lawyers of the late Middle Ages the idea that 'the decisive verdict in a law case' might be put 'in the power of a dozen illiterate rustics' was considered 'as utterly ridiculous and absurd' (Van Caenegem, 1987, p. 119). Yet the jury was to dominate the civil procedure of English private and criminal law up to the end of the 19th century and even today, in order to understand the structure of the legal process, it is necessary to imagine the jury fantôme in every tort and contract case (Jolowicz, 1992, s. 12). The rigid distinction between the trial and pre-trial process and between questions of fact and questions of law result from the existence of the jury.

Secondly, once the jury had issued its verdict, appeal against the decision was in theory impossible and in practice very difficult: there were no proper appeal courts until the 19th century and while the House of Lords had assumed the role of an appeal institution from early times its influence on the common law and equity was not great. In the common law system, because of the illiteracy of the jury, the trial was, and to an important extent remains today, an oral process. Witnesses are heard in court and their evidence is open to examination and cross-examination by the parties' lawyers. In such a process it is not for the judge to question the witnesses since his or her role is largely passive; indeed too many interruptions by a judge will probably give rise to grounds for appeal (*Jones v. NCB* [1957] 2 QB 55). The end of the 20th century has, it must be said, seen further fundamental procedural reforms (Jolowicz, 2003). But an important characteristic of the common law remains the practical skill of dealing with evidence both at the pre-trial and the trial stage. Fact handling, to put it another way, helps give the common law its empirical flavour and helps shift the emphasis off the idea that legal knowledge is a matter of highly systematized rules.

3 Mentality and methods

One of the distinguishing features of the common law vis-à-vis the civil law is said to be its 'distinctive mode of legal thinking'. This distinctive style, a product of its history, is particularly evident, so it is claimed, in the mentality and methods of the common lawyer. The civil lawyer 'approaches life with fixed ideas, and operates deductively'. The common lawyer, in contrast, 'is an empiricist' who 'is not given to abstract rules of law'. Common lawyers 'think in pictures' rather than in abstract concepts and systematics (Zweigert and Kötz, 1998, pp. 69–71).

3.1 *Conceptualism and customary law*

Feudalism as a political and legal structure used, as has been seen, quite different concepts to those found in the *Corpus Iuris*. When one adds to this conceptual difference, not just the historical absence of a university tradition in law (there were few law faculties before the 20th century) but a procedural framework insensitive to the *ius commune*, one should not be surprised if the common law turns out to be different. This difference is accentuated by a number of constitutional characteristics rooted in the particular history of England. Thus until quite recently there was a conscious rejection by common lawyers of the dichotomy between public and private law, a rejection that still finds academic if not judicial support (Oliver, 2003; cf. Taggart, 2003).

3.2 *Teaching and practice of law*

Even in Roman law itself, a clear distinction is to be found between the literature aimed at practitioners and the literature written for law students. The Institutes (*institutiones*) of Gaius and of Justinian were designed as structured summaries of the law; they were 'scientific' in the sense that they consisted of propositions arranged into genus and species categories. The practitioner literature, in contrast, was for the most part case-oriented. The law was a matter of actual fact problems, of pushing out from the facts (Samuel, 1994).

Now it could be said that codification was largely the result of the practitioner literature losing out to the elegant 'nutshells' of the continental university professors (Watson, 1994). Codes both unified the teaching and practice of law and abstracted it from social reality (*mos geometricus*). However in England the absence of law faculties meant that the literature and the methodology of the law remained in the hands of practitioners. It was a law of cases and discussion of law was always a matter of the discussion of factual problems. There was little attempt at doctrinal organization of this material until the end of the 19th century (Lobban, 1991) and even when textbooks finally appeared they were marginalized by the judiciary (Birks, 1994, pp. 163ff); it is only very recently that they have been accepted as an unofficial source of law. The result is that legal technique never became eclipsed by legal science; classification was, and still is to some extent, based on the alphabet (Rudden, 1991–2).

3.3 *Precedent*

Such a 'haphazard' (Lobban) system did not lack all formal structure since the notion of precedent was seen as endowing the law with stability and certainty. In fact, until quite recently, the doctrine of precedent was encapsulated within a fiction that the common law was immutable and latent within

a ‘seamless web’ of history; the role of the judges was simply to ‘discover’ the law. This theory, always historically meaningless given the procedural nature of the early common law, has, if not formally abandoned, at least been modified (*Kleinwort Benson Ltd v. Lincoln CC* [1999] 2 AC 349). Indeed stare decisis itself was meaningless before reliable law reports (19th century) and, as Glenn (1993) has observed, the idea was probably institutionally impractical before the 19th century.

Glenn is certainly right to say that stare decisis has a limited place in the history of the common law mentality, but care must be taken, with respect to English common law at any rate (other common law jurisdictions are different), before abandoning it completely. Certainly common law judges, in the last few years, have indicated their reservations about precedent even if they refuse to go as far as Glenn in saying that it is now extinct and should be avoided. Perhaps the first major step was the Practice Direction ([1966] 1 WLR 1234) issued by the House of Lords indicating that a ‘too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law’; the Law lords proposed therefore ‘to depart from a previous decision when it appears right to do so’. A further development is Lord Goff’s lecture, where he said the ‘answer must lie both in not adopting too strict a view of the doctrine of precedent, and yet according sufficient respect to it to enable it to perform its task of ensuring not merely stability in law, but consistency in its administration’. He went on to note that in the past ‘there appeared to exist some judges who saw the law almost as a deductive science, a matter of finding the relevant authorities and applying them to the facts of the particular case’. This is, he said, no longer the case; judges cannot disregard or ignore precedents but they see themselves at liberty to adapt or qualify them to ensure a legally just result on the facts before them (Goff, 1983 [1999], p. 326; and see also Lord Steyn in *Att-Gen v. Blake* [2001] 1 AC 268, 292).

3.4 *Ratio decidendi*

In terms of actual method, it has to be remembered that cases do not bind, but ‘their rationes decidendi do’ (*R (Kadhim) v. Brent Housing Board* [2001] QB 955 at s.16). Discovering the ratio, as Lord Denning MR once pointed out, can be a formidable task, especially as the ratio has to be distinguished from any obita dicta (things said by the way) which are not binding (*The Hannah Blumenthal* [1983] 1 AC 854, 873–875). Rather than attempt any definition of the ratio, it may well be more helpful to start by indicating what it is not. The ratio decidendi is not an abstract rule, principle or norm to be induced out of a case subsequently to be applied in a deductive fashion, although this does not necessarily mean that induction, deduction and the syllogism have no formal (or ideological) role. The ratio ‘is almost

always to be ascertained by an analysis of the material facts of the case' (*Lupton v. FA & AB Ltd* [1972] AC 634, 658 *per* Lord Simon).

This means that a comparison must always be made between the facts of the case in hand and the facts of any precedent; and this of course takes reasoning beyond the strict syllogism. First, the court must decide what are the 'material facts' of the previous case(s) and this is as much a question of 'construction' as description (see Samuel, 2003). What are the 'material facts' of *Donoghue v. Stevenson* ([1932] AC 562): an injury by a 'bottle of ginger-beer' containing a 'decomposed snail' or injury by a 'product' that was 'defective'? Secondly, whether or not facts of the precedent are relevant will involve reasoning by analogy as much as any reasoning via the syllogism. Is a bottle of ginger beer analogous to a pair of defective underpants for the purposes of determining the liability of the manufacturer of the pants? (cf. *Grant v. Australian Knitting Mills Ltd* [1936] AC 85.)

3.5 *Pragmatism and policy*

Legal theorists in the UK do, admittedly, present law as a body of rules. Yet the actual case law perhaps tells a rather different story from those presented by rule-theorists (Waddams, 2003). Thus one finds in the judgments comments such as that the common law often prefers pragmatism to logic (see, e.g. *Ex p King* [1984] 3 All ER 897, 903). This pragmatic approach is now usually seen in terms of policy. 'In a less formalistic age,' said Steyn LJ in one liability case (*Watts v. Aldington*, 1993), 'it is now clear that the question . . . is a policy issue' in that more than one 'solution is logically defensible' and 'good sense, fairness and respect for the reasonable expectations of contracting parties suggests that the best solution' is one which 'at least has the merit of promoting more sensible results than any other solution' (quoted in *Jameson v. CEGB* [1997] 3 WLR 151, 161). In addition to this pragmatic approach, the courts see themselves as being under no duty to rationalize the law (*Read v. J Lyons & Co* [1947] AC 156, 175); their only duty is to decide particular cases between particular litigants. Indeed, discussing two famous precedents, Waddams concludes that the 'evidence tends to show that the conclusions were not reached . . . by allocating facts to pre-existing categories, or by reference to anything like a pre-existing map or scheme, but by the operation of several concurrent and cumulative considerations' (Waddams, 2003, p. 38).

3.6 *Statutory interpretation*

Another myth of English law is that it is a system whose main source is case law. This may have been true before the 19th century but today the majority of cases to be found in the law reports are concerned with the interpretation and application of a legislative text.

The interpretation of statutes in English law is both a constitutional and a methodological issue. It is constitutional in as much as it is closely tied in with the supremacy of Parliament which expresses the idea that Parliament can pass any law it sees fit. The judges themselves continue to insist upon this constitutional position even after the coming into force of the Human Rights Act 1998 (*In re K (A Child)* [2001] 2 WLR 1141; and note also the Act itself, s. 3). However the judges have always reserved to themselves the right to interpret these laws and it is this reservation that has in part given rise to a number of methodological issues. For example it has encouraged the refusal of the courts, until recently, to look beyond the text itself when it came to interpretation leading not just to a relatively literal approach to texts (compared with civil law systems) but also to a reluctance (now partly abandoned) to examine Parliamentary reports and debates (see generally *Pepper v. Hart* [1993] AC 593). In turn this attitude has encouraged Parliament to draft detailed texts in a style that is often opaque if not impenetrable. Moreover many legislative texts, in addition to being drafted in opaque language, often rely upon pre-existing common law concepts and categories. Thus it is impossible to understand certain provisions without a sophisticated knowledge of the common law background (see, e.g., *Misrepresentation Act 1967* s. 2).

In recent years however, there has been some modification by the judges with respect to their approach to interpretation. Lord Nicholls has observed that the three traditional rules of statutory interpretation (literal, golden and mischief) have given way to a rather different method, that of the 'purposive approach' (see *R v. Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd* [2001] 2 AC 349). Other Law lords have confirmed this method as the modern approach (see, e.g. Lord Steyn in *IRC v. McGuckian* [1997] 3 All ER 818, 824). This change of attitude is not at first sight always obvious to perceive. Thus it has recently been stated: 'it is an elementary rule in the interpretation and the application of statutory provisions that it is to the words of the legislation that attention must primarily be directed' (Lord Clyde in *Murray v. Foyle Meats Ltd* [2000] 1 AC 51, 58). Another important development with respect to statutory interpretation is to be found in the Human Rights Act 1998. This states in section 3(1) that so far 'as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights'. The provision undoubtedly gives the judges considerable freedom to adopt a purposive approach and no doubt they are taking advantage of this liberty. Nevertheless it would be a great mistake to think that the literal rule is dead. What has changed is that resort to the literal rule is likely to be motivated by functional (policy) or even political reasons (see, e.g. *Birmingham CC v. Oakley* [2001] 1 AC 617).

3.7 Remedies and rights

One of the primary ways of expanding and developing liability in the common law is through the use of remedies. Both common law (debt and damages) and equitable remedies (injunction, specific performance, rescission etc.) have a certain ability to act independently of the causes of action to which they are normally attached. For example, a third party's interest might receive protection via an award of damages made to another person whose rights have been invaded (*Jackson v. Horizon Holidays Ltd* [1975] 1 WLR 1468). Specific performance might be awarded to a plaintiff in respect of a debt unenforceable at common law (*Beswick v. Beswick* [1968] AC 58). And, as Lord Nicolls observed, a 'bill of discovery is another example of the Chancery Court giving in personam relief where the plaintiff had no existing cause of action against the defendant' (*Mercedes Benz AG v. Leiduck* [1996] 1 AC 284, 312). In these kind of cases the person obtaining the remedy has no 'right' at common law against the person liable; nevertheless the law of actions recognizes an 'interest' (Samuel, 2004). Of particular importance is the interlocutory injunction, a form of emergency relief to prevent a *fait accompli*. Although it is only a temporary remedy, it can stimulate the law into new directions (see, e.g. *Burris v. Azadani* [1995] 1 WLR 1372). Again, this is not to say that the law is 'haphazard', but 'it should not be forgotten that until after the mid-[nineteenth] century, most judges still saw the law as a system of remedies for individual cases' (Lobban, 1991, pp. 288–9).

One important question, however, is this. To what extent will the Human Rights Act 1998 affect this remedies thinking? The evidence to date suggests that its effects are limited. As one Chancery judge once put it: 'In the pragmatic way in which English law has developed, a man's legal rights are in fact those which are protected by a cause of action'. And it 'is not in accordance, . . . with the principles of English law to analyze rights as being something separate from the remedy given to the individual'. For, 'in the ordinary case to establish a legal or equitable right you have to show that all the necessary elements of the cause of action are either present or threatened' (*Sir Nicolas Browne-Wilkinson, Kingdom of Spain v. Christie, Manson & Woods Ltd* [1986] 1 WLR 1120, 1129). What is clear is that the 1998 Act is not effecting a shift, as yet, from causes of action to a system of *droits subjectifs* (*Wainwright v. Home Office* [2004] 2 AC 406). This is not surprising since the common law has not traditionally made use of the notion of the 'subjective right' (Samuel, 1987).

4 Structure and taxonomy

In the civil law world the history of the fundamental legal categories is tied up with the history of Roman law. The forms of legal thinking had been

determined and defined by the classical jurists and these categories were transported to the modern world in Justinian's Institutes. The great *summa divisio* was between public and private law and private law, in turn consisted of persons, things and actions. The law of things was subdivided into property and obligations and, with regard to the latter, liability was *ex contractu*, *quasi ex contractu*, *ex delicto* or *quasi ex delicto*. In the common law there was no such blueprint. Both the system of courts and the system of liability developed in a haphazard fashion according to the empirical needs of the time. The result was a structural foundation very different to that of Roman law.

4.1 *History of actions*

The historical basis of liability is to be found in a series of writs, known as personal actions (real actions fell into disuse in the 14th century), which were in effect a list of categories into which one had to fit one's claim. These writs were not 'based on substantive legal categories or any legal plan'; and if 'there was a plan behind it all, it was merely to create an adequate royal remedy for a number of very common wrongs, which upset society and with which the existing courts dealt in too slow, cumbersome and incalculable a way' (Van Caenegem, 1971, s. 22). Very simply, the English 'law of obligations' was not divided up into contract and tort, but into trespass and debt, the former giving birth to all sorts of actions on the case (trover, nuisance, negligence, breach of contract etc.). And indeed the idea of a law of obligations itself was misleading since the writs could not be classified in terms of *in rem* and *in personam* claims; the action of debt, for example, was as much a proprietary claim as 'contractual' (Ibbetson, 1999, p. 18). Equally many 'torts' like trover or detinue (although detinue even in the 19th century was being seen as more 'contractual' in nature) were not really, from a Romanist viewpoint, dealing with relations between persons. They were part of the law of property. The forms of action were in substance abolished in 1852 and this had the effect of opening up the system in as much as it became much easier for a substantive law to free itself from the procedural forms which had dominated legal thinking in the common law.

4.2 *Causes of action*

However the effect of the abolition of the forms of action was not to dispense with centuries of legal thinking overnight (see *Bryant v. Herbert* (1877) 3 CPD 389). The old forms became causes of action; that is to say they moved from being procedural structures that obliquely defined substantive ideas to become a list of substantive ideas underpinning liability. Thus, while debt and *assumpsit* got swallowed up by a general theory of contract (although not completely), trespass, nuisance, trover (conversion),

detinue and the like became 'torts'. They became little more than 'wrongs' that could not be accommodated by the category of contract. Tort, in other words, is not in its origin some rationally conceived category of liability; it is, or was, simply a category into which claims which could not be classified elsewhere were housed (or dumped). As a category it 'provided few answers to the substantive questions that might have been asked' (Ibbetson, 1999, p. 57) and this is still true today. 'Tort' (unlike contract) is not itself the basis of a cause of action, it is only a generic category containing a list of specified causes of action and, before liability in tort can be established, a plaintiff must base his claim on one of these causes (for an illustrative approach see Denning LJ in *Esso Petroleum Ltd v. Southport Corporation* [1954] 2 QB 182).

4.3 *General principles of liability*

Nevertheless the abolition of the forms of action did open up the common law to the development of forms of liability based upon general principles and this is a process that is still continuing. Even before the abolition, the judges had more or less developed a general theory of contract out of two old actions. A 'contractor' owed money, in the old common law courts, recovered the sum using debt while a contractor suffering damage as a result of a non-performance (or *inexécution* as the civilian would say) could sue for damages through an action called *assumpsit*, a form of action developed from an action on the case for trespass, itself a development from the writ of trespass ('the mother of all actions'). By the middle of the 19th century these debt and damages actions had been rationalized under a theory of contract imported from the continent (Simpson, 1975b).

As for non-contractual liability, at the end of the 19th century a general principle of liability was established in respect of physical harm intentionally caused (*Wilkinson v. Downton* [1897] 2 QB 57) and this was extended to negligently caused physical harm during the early part of the 20th century (*Donoghue v. Stevenson* [1932] AC 562). One can more or less say now that any physical damage (personal injury and physical damage to property) intentionally or negligently caused will give rise to tortious liability (*Letang v. Cooper* [1965] 1 QB 232). More recently quasi-contractual remedies at common law (non-contractual debt claims) have been grouped together with a number of equitable claims (equitable tracing, rescission, account of profits) under the general principle of unjust enrichment (*Kleinwort Benson Ltd v. Glasgow CC* [1999] 1 AC 153; *Kleinwort Benson Ltd v. Lincoln CC* [1999] 2 AC 349). That said, it would be a mistake to think that the old categories of liability have disappeared, even if the onward march of negligence, with its empirical notion of reasonable behaviour, is infecting the law of tort as a whole (Weir, 1998). Trespass, nuisance, defamation, conversion, the rule in *Rylands v. Fletcher* etc. remain distinct

causes of action with the result, as has already been noted, that one can still take an alphabetical approach to the law of torts (Rudden, 1991–2). And the debt and damages dichotomy continues to manifest itself beneath the general theory of contract (see, e.g. *White & Carter (Councils) Ltd v. McGregor* [1962] AC 413), just as differences between types of claim remain of importance in the law of restitution.

4.4 *Equity and the law of actions*

Property, contract, tort and restitution are not adequate in themselves to give expression to the full scope of civil liability in the common law. The fundamental and old-established distinction between law and equity remains important, particularly with regard to remedies. The common law of obligations can, generally speaking, offer only the remedies of debt and damages; all other remedies – injunction, specific performance, rescission in equity, rectification and account – are equitable and subject to the rules of equity. Equity also offers some more substantive doctrines such as estoppel and relief against penalties; and, while these doctrines do not form part of the fundamental principles of contract, they are capable of modifying the existing substantive law.

It is sometimes said that the division between law and equity is disappearing, but with regard to substantive obligations law there is still an important difference between a common law and an equitable duty (*Banque Keyser Ullmann v. Skandia Insurance* [1990] 1 QB 665; [1991] AC 249). In addition, there are aspects of the law of contract that can only be understood in terms of the division. At the level of remedies, the distinction remains valuable in respect of the division between monetary and non-monetary remedies. And while this is not to assert that equity has no monetary remedies – account of profits has recently been re-recognized as an important unjust enrichment claim (*Att-Gen v. Blake* [2001] 1 AC 268) – it has to be remembered that the role of the Court of Chancery was never to be a competitor to the common law courts.

4.5 *Foundational subjects and legal knowledge*

What is it, then, to have knowledge of the common law? According to the professions the basic academic knowledge can be gained simply from seven subjects, namely, Public Law, Criminal Law, Obligations I, Obligations II, Land Law, Equity and European Union Law. Of course the university student will do much more: empirical and specialist categories such as Family Law, Consumer Law, Labour Law, Commercial Law and the like help fill in the gaps between the seven foundational subjects. Jurisprudence (legal theory and philosophy), Feminist Legal Studies, Law and Literature, Comparative Law and other theory-oriented subjects inject an

interdisciplinary and critical perspective into legal studies. From the civilian perspective it is perhaps difficult to defend the attitude of the professions; the complexities of the common law can hardly be acquired simply from following seven courses. Indeed, such a view has never commended itself to American lawyers. Moreover the whole idea of 'legal scholarship' in England is not without its difficulties (Wilson, 1987). However the point has to be made once again that the basis of *le savoir juridique* in England is regarded by practitioners as experience rather than science and thus one is said to learn the common law through practice rather than study.

Of course, the real question is more subtle. What actually is meant by legal knowledge? Even in the civil law world this is by no means an easy question (Atias, 1994) and one can hardly accuse modern civil lawyers – at least in comparison with some American academics – of being at the cutting edge of radical legal theory. In truth the narrow perspective of the legal profession and the judiciary in the common law world has stimulated a certain section of the academic community to turn away from the study of positive law. Such academics have, instead, seen themselves more as social scientists or philosophers taking as their object of study 'law'. One may applaud or condemn this development, but at least it has added a new dimension to legal knowledge and moved critical thinking beyond norms and rules. Such radical critical thinking is, now, part of the common law tradition.

5 Concluding remarks: absence of a legal science

A number of conclusions can be drawn from this survey of the common law but perhaps the most important for the comparatist is the absence of a notion of legal science (Legrand and Samuel, 2005). There are several reasons for this. First, and foremost perhaps, is the lack, until the late 19th century, of university law faculties which, of course, not only deprived English law of a body of professors keen to rationalize and systematize but equally left law in the hands of practitioners whose epistemological framework was, and is, different. Secondly, the old forms of action did not lend themselves to scientific analysis; they were closed empirical categories which did not form part of more general categories themselves capable of forming part of a deductive, and ultimately axiomatic, model. Reasoning, therefore, tended to be by way of analogy rather than logic; and while things have undoubtedly changed since the 18th century – mainly as a result of the growth of university law faculties (Hedley, 1999; Gray and Gray, 2003) – this change has come too late to effect a fundamental epistemological shift.

Perhaps it is an exaggeration to say that common law and civil law are not converging (cf. Legrand, 1996), although much of course depends upon

what one means by 'convergence'. But what can be asserted is this. The idea that legal solutions can be deduced via the syllogism from a closed axiomatic model of law (codification in its traditional sense) finds little place in the common law mentality (Waddams, 2003). Moreover this spirit of non-codification is not confined to the judges, as a glance at the English statute book will soon confirm. Zweigert and Kötz (1998) rightly say that the common lawyer 'thinks in pictures' but they are wrong to think that this is just a question of 'style'. It is evidence of a different, non-symbolic, type of knowledge whose epistemological significance can only be grasped through an appeal to metaphor or analogy. Thus common law judges have been compared to chain novelists (Dworkin, 1986) and common law thinking to photographic, rather than cartographical, knowledge (Samuel, 2005). Civil lawyers, in their turn, have, in the past at least, preferred to compare their knowledge to mathematics and to geometry.

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14 Comparative law and economics*

Raffaele Caterina

In 1994, Ugo Mattei celebrated ‘the methodological wedding between the two most interesting recent general attempts to understand the law: Comparative Law and Law and Economics’ (Mattei, 1994, p. 18). In 1997 the same author predicted a bright academic future for the new field of comparative law and economics (Mattei, 1997, p. x). Since 1997, new important contributions to the field have been published (see, for instance, Hansmann and Mattei, 1998; Mattei and Cafaggi, 1998; Ogus, 1999, 2002; Van den Bergh, 2000). A group of scholars who form the Comparative Law and Economics Forum has held annual meetings under the leadership of Robert Cooter. The first anthology on comparative law and economics was recently published (De Geest and Van den Bergh, 2004a).

However, it can be said that comparative law and economics is still a relatively marginal field. Several factors have contributed to this. Law and economics is still largely an American phenomenon, and comparative law plays a relatively marginal role in the American legal universe. On the other hand, in many European countries both comparative law and law and economics play marginal roles in the academy. Also (as we will see) Chicago law and economics is not a natural ally of comparative law and economics; and while some comparative law and economics literature has pointed out important affinities with other approaches (especially with neo-institutional economics), not much work has been done in exploring these potentially fruitful intersections.

1 A competitive model of legal rules

One of the central tenets of comparative law and economics is the idea that there is a competitive market for the supply of law. Comparative law has reached the conclusion that, in many cases, changes in a legal system are due to legal transplants. However, comparatists who have been working on legal transplants are less interested in a theoretical explanation of why a legal borrowing happens than in observing its occurrence: ‘the few attempts to explain legal transplants from one system to another have relied on the largely empty idea of prestige’ (Mattei, 1994, p. 4). Prestige is not a clearly defined concept; it can hardly explain the phenomenon of

* See also: Coordination of legal systems; Legal transplants.

selective borrowings from different legal systems, the complex sets of sectorial transplants that constitute the normal dynamics of legal change.

Comparative law and economics explains the convergence of legal systems as a movement towards efficiency. 'Every legal system or every component of it produces different legal doctrines or techniques for the solution of a given problem. All these different inputs enter what we may call the market of legal culture. Within this market the suppliers meet the need of the consumers. This process of competition may determine the survival of the most efficient legal doctrine' (*ibid.*, p. 8).

Interactions with other jurisdictions create external competition for the supply of law. This competition may take the form of pressure applied on the lawmakers by national industries finding that their national legal system imposes on them higher costs than those incurred by their foreign competitors (a pressure which may be strengthened by the threat of migration to more favourable jurisdictions). An alternative form of competition takes the form of the choice, by the contracting parties, of the law that best meets their demands (Ogus, 1999, pp. 406ff.).

A classical example of the competition in the market of legal doctrines is the trust, commonly considered as more efficient than its civilian counterparts. Despite the very peculiar institutional background in which the law of trusts has developed, the trust has been adopted in many mixed jurisdictions and in several civilian systems, and in 1985 civil law and common law countries entered a convention on the recognition of trusts. Nowadays trust's success is testified not only by its adoption by many lawmakers, but also by its obvious appeal to private actors from non-trust jurisdictions.

Being fully conscious of the potentially beneficial effects of competition between legal systems, comparative law and economics scholars often take a cautious stance towards a top-down (as opposed to spontaneous) harmonization of laws (*ibid.*, pp. 415ff.; Van den Bergh, 2000).

Comparative law and economics has always made clear that divergences in different legal systems do not necessarily imply inefficiencies. From its very beginning it was admitted that 'different legal traditions may develop alternative solutions for the same legal problem that are neutral from the standpoint of efficiency' (Mattei, 1994, p. 11). On a more sophisticated level, a distinction has been drawn between 'facilitative law', which provides mechanisms for ensuring mutually desired outcomes, and which does not give rise to significant variation in preferences between market actors in different jurisdictions, since the assumed preference is for the minimization of legal costs, and 'interventionist law', which protects defined interests and supersedes voluntary transactions; there is no necessary expectation that competition between national legal systems will lead to convergence as to interventionist law, because preferences are likely to vary between countries

as to the different combinations of the levels of legal intervention and of the price which must be paid for them (Ogus, 1999, pp. 410ff.).

However, especially in its initial stage, comparative law and economics assumed that 'the more efficient legal theories and solutions would spread around in a world with zero transaction costs': 'in such a world, efficient legal solutions would survive, while inefficient legal solutions would disappear' (Ajani and Mattei, 1995, p. 135). The legal reality, however, is one of very high transaction costs. Such costs, opposing the spread of efficient laws, are created by the so-called legal traditions or, worse, by legal parochialism. An efficient English solution will find its way in France with difficulty because the two systems are built on profoundly different traditions. More simply legal parochialism may create a monopoly-like situation because of the ignorance of possible alternatives. Transaction costs may be created by the same 'prestige', which may preclude transplants from 'non-prestigious' legal systems. In its normative dimension, comparative law and economics may be of help, working as a prestigious support to legal systems that have already reached the efficient solution without having the internal strength to export it.

A recent essay provided an economic interpretation of legal culture, considered as an obstacle to change generated by competition (Ogus, 2002). Legal culture is recognized as a network (the subject of a rich economic literature). A network is a system providing links for users of a product or a service, prominent examples being railway and telecommunication systems. An important characteristic is that the network's social value increases as more users adopt it. It has often been recognized that language as a mode of communication can be seen as a network; the same is true for legal culture. A particular set of linguistic, conceptual and procedural phenomena becomes the principal means of communication of legal principles and decisions in a particular territory.

Because of the high costs of collectively switching from one system to another, networks often lead to temporary monopolization. In the case of legal culture, this effect may be strengthened by the decision of political rulers to use a single network or specification set to serve their needs. While the monopolistic characteristics of domestic legal cultures may be threatened by trans-frontier transactions, sometimes new, more efficient legal concepts or doctrines will not be imported because the cost of accommodating them within the dominant specifications set is too great (*ibid.*, pp. 431ff.).

It is important to note that comparative law and economics applies the same competitive model within the single legal systems. Competition is at play both among different legal orders and between different sources of law within a given system. 'Scholars, judges and legislators represent producers

who offer their product (different legal rules conceived to regulate a given relationship) in a more or less competitive market' (Mattei, 1997, p. 106).

Also in this field, comparative law and economics reject simplistic assumptions about a necessary evolution toward efficiency. 'Competition between sources of law, although influenced by considerations of efficiency, may not be resolved by them. Traditional or cultural factors may be construed as real-world transaction costs and/or patterns of path dependency that resist the evolution toward efficiency' (ibid., p. 121). For instance, in the context of the analysis of legal culture as a network, it was suggested that, when this network is regulated by a caste of legal professionals, these legal professionals may seek – and should often be able – to render the law more formalistic, more complex and more technical than is economically optimal, because this enhances the demand for their services (Ogus, 2002, p. 427).

2 Comparative law and economics and institutions

It is at this point easy to understand how comparative law and economics scholars came to consider neo-institutional economics as a natural interlocutor (Mattei and Cafaggi, 1998; Mattei *et al.*, 2000). This in turn has partially reshaped their view of efficiency and legal change.

Comparative law and economics and neo-institutional economics share both the recognition of the importance of local institutional frameworks and the comparative method. In both the approaches 'not only formal legal institutions but also all those arrangements affecting the form of organized interactions among individuals can be seen as transaction costs affecting devices, crucial in understanding the real world' (Mattei and Cafaggi, 1998, p. 347).

Transaction costs change according to the legal and social environment within which the agents operate, and are thus context-dependent; context-dependency increases when transaction costs are associated with risk preferences of different actors whose variance is also largely correlated to the social and cultural environment in which they operate. 'The same legal rule may be efficient or inefficient depending on the institutional background it refers to; conversely, different legal rules may all turn out to be efficient when located in different institutional frameworks' (ibid.). Efficiency itself acquires a relative meaning; differences among legal rules may therefore be explained by looking at the institutional frameworks in which they are embedded, which in turn may be justified by the different organizational structure of each community. A consequence of this is that legal transplants often generate in the borrowing legal system very different effects from those which occurred in the exporting one.

The idea of path-dependence is considered as a very powerful analytical tool for studying and explaining the evolution of legal systems, where all

innovation, be it endogenous or the result of a transplant, depends heavily on the existing institutional framework.

The 'universal character of neo-classical economic theory' is strongly rejected by comparative law and economics (*ibid.*, p. 348). Comparative law and economics emphasizes the role not only of formal legal institutions but also of social customs and norms and of ideologies; thus, it can be considered as closely related to the law and economics literature paying attention to social norms and internalized values and to their influence on behaviour (see, for instance, Cooter, 2000).

3 The renewal of law and economics

Comparative law and economics starts from the premise that comparative law may gain theoretical perspective by using the tools employed in economic analysis of law. But it is also strongly critical of the 'mainstream' economic analysis of law. 'Law and economics elaborates its theories on institutional backgrounds that either are abstract natural law models or postulate without criticism the modern institutional background of US law' (Mattei, 1997, p. 27). The economists' contribution to traditional law and economics is affected by a 'natural law misconception': for instance, much law and economics is based on a substantive natural law conception of property rights which does not exist, and never existed, as 'law in action' in any legal system (*ibid.*, p. 28ff.). 'Comparative law may supply economic analysis with a reservoir of institutional alternatives, which are not merely theoretical but actually tested by legal history' (*ibid.*, p. 28).

On the other hand, 'the legal process structure in which economic models are introduced is typically American common law' (*ibid.*, p. 75). Mainstream law and economics is thus accused of parochialism. Comparative law and economics does not 'assume that the contingencies of the American legal process are the necessary substratum for theories concerning the efficiency of the law' (*ibid.*, p. 28). In a similar vein, it has been remarked that comparative law can enrich law and economics scholarship by allowing 'for the correction of home-country biases in theoretical explanations' (De Geest and Van den Bergh, 2004b, p. xiii).

A field in which the limits of the traditional approach are underlined is the law and economics of development (Mattei, 1997, pp. 223ff.; Buscaglia, 1997). The American-centrism of mainstream law and economics raises evident problems when approaching, both from a positive and a normative point of view, legal systems of the so-called Third World countries. In this peculiar context, it is of the utmost importance to pay attention to the social norms and ethical codes prevailing in society. Comparative law and economics claims to be better equipped for this challenge. In a society with a weak state and a corresponding underdeveloped legal system, exchange

relations are conducted primarily through social institutions other than competitive market. Law and economics cannot prescind from the stratified nature of such legal systems.

The layers of a stratified legal system (customary law, Islamic law, colonial law, post-colonial law) are not like clothes that can be worn or removed at will. A legal tradition cannot be changed, unless it is changed in a very incremental way. 'The challenge to less developed countries is to develop a legal tradition adaptable to the needs of modernization without merely acting on the layers of the law received from more developed countries' (Mattei, 1997, p. 237).

Comparative law and economics may show the comparative efficiency of each layer to solve a given legal problem. By so doing, it may favour the interaction between different layers and prevent the distortions that the imposition of the modern layer on more traditional ones may create. In many areas, the transaction costs of substituting modern solutions for traditional ones are just too high. Limited or very limited resources are better allocated in alternative ways rather than in trying to solve, by means of enacted (modern) law, cultural problems:

It is clear from law and economics, moreover, that the modern layer of the legal system should not act as if there were a legal vacuum whenever a given problem does not find a solution in (or at least a provision of) enacted law. Any intervention in the legal order that does not take full account of the plurality of centers of supply of legal rules is bound to fail, just as would a market supplier that established his or her prices without taking into consideration the existence of market competition. (Ibid., p. 239)

4 The future of comparative law and economics

A doubt which may be raised about comparative law and economics (and similar enterprises) is that, once repelled the (maybe simplistic but) powerful schemas of Chicago law and economics, it is just comparative law with an appealing name and some economic 'flavour' taken from sparse sources.

This doubt does not seem to be justified. Several years ago Thomas Ulen (himself a member of the Comparative Law and Economics Forum) emphasized the need for law and economics scholars to turn their attention to comparative law, in order to develop a 'unifying theory' making a consistent and coherent whole of the different national legal systems, their convergences and divergences (Ulen, 1997). Whether they use the 'comparative law and economics' label or not, law and economics scholars are increasingly interested in comparative law issues (see, for instance, Heller, 1998; Hansmann and Kraakman, 2001; Coffee, 2001; Parisi 2002; Pistor, 2002; Parisi and Fon 2004). If law and economics wants to increase its explanatory power, it cannot remain American-centric, but must widen its horizons

to include other legal systems and the dynamics of transnational exchanges and influences.

In dealing with the complexity of different cultures and different institutional backgrounds some help may come from unexplored directions: behavioural economics and experimental economics. During the last 30 years experimental economists have demonstrated that human economic reasoning substantially deviates from the predictions of rational choice theory under a number of important conditions, including risk, bargaining, cooperation etc. In response to this, some economists have begun to modify economic theory to incorporate what has been learned from this laboratory research (see Kagel and Roth, 1995, for an overview). More generally, behavioural economics is concerned with the empirical validity of the neoclassical assumptions about human behaviour and, where they prove invalid, with discovering the empirical laws that describe behaviour as accurately as possible. Among legal scholars, there has been a great deal of interest in an internal critique of law and economics that uses the insights of experimental economics and cognitive and social psychology to question rational choice theory and its role in legal analysis. This new field is called either law and behavioural science or behavioural law and economics (Sunstein, 2000; Korobkin and Ulen, 2000).

Like most efforts to model human behaviour in economics, these new approaches, implicitly or explicitly, make certain universalist or pan-human assumptions about the nature of human economic reasoning; i.e., they assume that humans everywhere deploy the same cognitive machinery for making economic decisions. Now, it is fully possible that some of the deviations from the standard economic model of human behaviour evidenced by behavioural economics are universal. Others may be heavily influenced by cultural differences. This possibility has been explored in a series of cross-cultural experiments, with fascinating results.

The Ultimatum Game (hereafter UG) is a simple bargaining game that has been extensively studied by experimental economists. In this game, two players are allotted a sum of money. The first player offers a portion of the total sum to a second person. The responder can either accept or reject the first player's offer. If the responder accepts, she (or he) receives the amount offered and the proposer receives the remainder (the initial sum minus the offer). If the responder rejects the offer, then neither player receives anything.

UG experiments clearly demonstrate substantial deviations from the predictions of positive game theory. Positive game theory unambiguously predicts that proposers should offer the smallest, non-zero amount possible, and responders should always accept any non-zero offer. In contrast, experimental subjects behave quite differently: in a wide-ranging number of experiments over many years, the modal (i.e., most common) proposal is for

a 50–50 split, and the mean proposal has been for a 63–37 split. Responders usually accept average offers, but often reject offers lower than 20 per cent of the total sum. Although UG results consistently and substantially deviate from the predictions of game theory, these results are very robust. It is usually concluded that both the desire to treat others fairly and the desire to be treated fairly can cause deviations from self-interested behaviour (see Korobkin and Ulen, 2000, pp. 1135ff.).

In a first multinational experiment designed to test the hypothesis that cultural factors have a relevance in this context, the experiment was run recruiting subjects from the student populations of the University of Pittsburgh, the University of Ljubljana, the Hebrew University of Jerusalem and the Keio University of Tokio (Roth *et al.*, 1991). The experiment evidenced small but significant differences, which were interpreted as cultural in character.

A subsequent experiment produced more dramatic results (Heinrich, 2000). The experiment was run among the Machiguenga, an Arawakan-speaking people living in the southeastern Peruvian Amazon. Economically independent at the family level, the Machiguenga possess little social hierarchy or political complexity, and most sharing and exchange occurs within extended kin circles. Cooperation above the family level is almost unknown.

The Machiguenga data differ substantially from the patterns found in other UG results. The mean proposal was only 26 per cent; on the receiving end, Machiguenga responders almost always accepted offers less than 20 per cent (and nearly half of the total offers were below 20 per cent). In post-game interviews, the Machiguenga often made it clear that they would always accept any money; rather than viewing themselves as being ‘cheated’ by the proposer, they seemed to feel it was just bad luck that they were responders, and not proposers. Taken together, these data suggest that Machiguenga responders did not expect a balanced offer, and Machiguenga proposers were well aware of this.

The experimenter’s conclusion was that ‘it becomes increasingly difficult to account for UG behavior without considering that, perhaps, subjects from different places arrived at the experiments with different rules of behavior, expectations of fairness and/or tastes for punishment’; and that ‘cultural transmission can substantially affect economic decisions’ (*ibid.*, p. 978).

In a subsequent large cross-cultural study of behaviour in UG and other experimental games, 12 experienced field researchers, working in 12 countries on four continents, recruited subjects from 15 small-scale societies exhibiting a wide variety of economic and cultural conditions (Heinrich *et al.*, 2001). While the standard economic model of human behaviour was not supported in any society, the study evidenced great behavioural variability across groups. According to the researchers, group-level differences

in economic organization and the degree of market integration explained a substantial portion of the behavioural variation across societies: the higher the degree of market integration and the higher the payoffs to cooperation, the greater the level of cooperation in experimental games.

In some cases, a plausible interpretation of the subjects' behaviours is that, when faced with the experiment, they looked for analogues in their daily experience, and then acted in a way appropriate for the analogous situation. For instance, the high number of hyper-fair UG offers (greater than 50 per cent) and the frequent rejections of these offers among the Au and Gnau of New Guinea reflects the culture of gift-giving found in these societies: among these groups accepting gifts, even unsolicited ones, commits one to reciprocate at some future time to be determined by the giver, and establishes one in a subordinate position. Consequently, excessively large gifts, especially unsolicited ones, will frequently be refused because of the anxiety about the unspecific strings attached.

This excursion in the literature concerning cultural differences in ultimatum game experiments is just meant to be an example. Other similar cross-cultural studies have been conducted in this and other adjoining fields. They shed some empirical light on the social norms and internalized values elaborated by different cultures, and, on the normative side, confirm that law and economics can hardly aspire to universalist, abstract models, because people belonging to different cultures may respond to the same incentives in different ways. Other interesting experiments can be imagined in different areas. For instance, a systematic deviation from the predictions of rational choice theory is the 'overconfidence bias': people have a well-documented tendency to overrate their abilities and their control over events; people tend to believe that good things are more likely than average to happen to them and bad things are less likely than average to happen to them. This unrealistic optimism creates a distinctive problem for conventional objections to paternalism in the law. But is 'overconfidence bias' homogeneous across cultures? The growing body of research on cross-national differences in risk perception, risk preference and overconfidence is of obvious relevance for predicting behaviour.

Economics has traditionally conceptualized a world populated by calculating, unemotional maximizers (*homo economicus*). In a sense, neoclassical economics has defined itself as explicitly 'anti-behavioural', ignoring or ruling out all the behaviour studied by cognitive and social psychologists. As empirical and experimental evidence mounted against the stark predictions of unbounded rationality, economics has started to turn 'behavioural', and quite naturally some scholars have begun investigating cultural differences in behaviour. Comparative law and economics can avail itself of these cross-cultural studies of economic behaviour; it may also stimulate

new experimental research focused on problems of great relevance to the study of law.

On the other hand, the use of empirical data on cross-cultural differences, but also the dialogue with the economic literature on institutions (and also on public choice theory, as exemplified by Anthony Ogus's interesting hint on the role of legal professionals in the development of legal cultures: see Ogus, 2002, pp. 426ff.) may constitute an alternative to the holistic and quasi-mystic way in which some comparative law literature speaks of cultures and traditions as spiritual entities, opaque to description and impermeable to evaluation.

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15 Competition law

Damien Geradin

There is a wide body of literature in the field of comparative competition law. The vast majority of this literature, however, seeks to offer comparative insights into US antitrust law and EC competition law.¹ Some books have, nevertheless, attempted to compare the competition law regimes of several industrialized countries (see, e.g., Doern and Wilks, 1996, comparing the six ‘model’ policy regimes of the USA, Germany, Japan, the United Kingdom, Canada and the European Union). Other books have attempted to compare an even wider set of competition law regimes, including regimes from emerging economies (see Geradin, 2004a; Chao, 2001; De Leon, 2001; Rosenthal and Green, 1996).

Europeans have been looking to the US antitrust law system since the end of World War II. At the time of the elaboration of the EC Treaty, the Sherman Act represented the legislation of reference in the area of competition law and it certainly had an influence on the drafting of the competition law provisions included in the EC Treaty. (US lawyers also played a significant role in the drafting of the competition law provisions inserted in the European Coal and Steel Community Treaty, which preceded the EC Treaty. See Gerber, 1998, p. 338.) But even after the signature of the EC Treaty, European competition law scholars and practitioners continued to look to US antitrust law as a source of inspiration (see, e.g., the two pioneering books by Joliet, 1967, 1970).

Most of the matters that were raised within the context of EC competition policy had already been dealt with in the United States. The extensive body of antitrust law scholarship also helped Europeans to understand the main underpinnings of competition policy. US economic literature and, in particular, the two main schools, the Harvard School and the Chicago School, also influenced policy debates in the European Union (for the Harvard School, see Bain, 1951; for the Chicago School, see Bork, 1978).

A final factor that has contributed to the study of US antitrust law by European competition law scholars and practitioners comes from the fact that many such scholars and practitioners studied in American law schools, in general as Master of Laws (LLM) students.

Over the last two decades, EC competition law has also become a subject to study for US scholars and practitioners. Some US scholars, such as

Professor Barry Hawk, produced significant pieces of scholarly analysis of the EC competition rules and compared them with US antitrust rules (see, e.g., Hawk, 1996). While the study of EC competition law in the US initially grew out of scholarly interest, there is now a growing demand by US scholars, lawyers, and policymakers for a more global approach to the study of antitrust law. With the globalization of the economy, EC competition law applies to an increasing number of types of conduct or transactions involving US firms (for a good example of a global transaction, see the GE/Honeywell merger which led to a great deal of controversy as it was cleared by the US antitrust authorities, but prohibited by the Commission. (See Commission Decision of 3 July 2001, General Electric/Honeywell, COMP/M.2220 O.J. 2004, L 48/1.) Most major US antitrust casebooks today contain references to EC competition law (see, e.g., Fox *et al.*, 2004; Pitofsky *et al.*, 2003).

An interesting question is whether these years of mutual observance led to a significant degree of convergence between US antitrust law and EC competition law. First, it is important to know that the enforcement of these two bodies of law tends to be very different. US antitrust law is enforced by the public authorities (e.g., the Department of Justice and the Federal Trade Commission), but also by private actions by individuals or firms seeking redress for violations of antitrust rules. On the other hand, in the European Union, enforcement remains essentially in the hands of public authorities (essentially, the European Commission and the national competition authorities). (For a comparative analysis of the enforcement of competition rules in the EC, the UK and the US, see Jones, 1999.) While the Commission has expressed interest in seeing a greater reliance on private actions for the purpose of enforcing competition rules, such actions remain minimal for a number of cultural and procedural reasons (see Waelbroeck, 2003).

Moving away from the methods of enforcement to the comparison of substantive rules and the way they have been interpreted, elements of convergence and divergence can be observed.

1 Convergence

As far as convergence is concerned, one should first observe that Section 1 of the Sherman Act and Article 81 of the EC Treaty, which both prevent agreements between competitors that may negatively affect the conditions of competition on the market, have been interpreted in a remarkably similar way by courts on both sides of the Atlantic. First, the two bodies of rules impose a *per se* prohibition on hard-core cartels (price fixing, market sharing etc.). Since such agreements have the object of restricting competition, it is not necessary to demonstrate their effects on the

structure of competition to declare them incompatible with the competition rules. By contrast, agreements that do not have as their object the restriction of competition, but which may nevertheless have negative effects on competition, will typically be examined under a 'rule of reason'. While Article 81(1) does not contain as such a rule of reason, the analysis of whether an agreement that falls under Article 81(1) can be exempted under Article 81(3) of the EC Treaty follows an analytical process that is quite similar to the one pursued under the rule of reason (Communication from the Commission – Notice – Guidelines on the application of Article 81(3) of the Treaty, O.J. 2004, C 101/97).

The restrictive effects on competition produced by the agreement in question will be balanced against the 'efficiencies' it generates. When such efficiencies outweigh the negative effects of the agreement, such agreement will be considered as compatible with Article 81.

Another issue on which EC competition law is also converging with US antitrust law relates to the growing importance of economic analysis in the determination of which behaviour should be permitted or not permitted under competition rules (see, e.g., Bishop and Walker, 2002; van den Bergh and Camesasca, 2001). While, in the past, several categories of agreements, such as research and development agreements or vertical agreements, were examined under rather legalistic standards contained in block exemption regulations (Regulation 417/85 on the application of Article 85(3) of the Treaty to categories of specialization agreements, O.J. 1985, L 53/1; Regulation 418/85 on the application of Article 85(3) of the Treaty to categories of research and development agreements, O.J. 1985, L 53/5), the new generation of EC block exemption regulations rely on an economic approach whereby it is only where market power is present that the agreement in question must be subject to a detailed examination (Commission Regulation 2658/2000 of 29 November 2000 on the application of Article 81(3) of the Treaty to categories of specialization agreements, O.J. 2000, L 304/3; Commission Regulation 2659/2000 of 29 November 2000 on the application of Article 81(3) of the Treaty to categories of research and development agreements, O.J. 2000, L 304/7; Commission Notice – Guidelines on the applicability of Article 81 to horizontal co-operation agreements, O.J. 2001, C 3/2). A remaining difference, however, between US and EC law with respect to the treatment of agreements that restrict competition is that EC competition law tends to pay much greater attention to agreements whose effect is to partition markets along national lines (Cases 56 & 58/64, *Consten and Grundig v. Commission* [1966] E.C.R. 299). For instance, though it may in some circumstances be justified by efficiencies, absolute territorial restrictions are subject to a per se prohibition under EC competition law. This

points to a major difference between US antitrust law and EC competition law. While the former is essentially concerned about promoting economic efficiency, the latter also aims at promoting market integration (see Elherman, 1992).

A further area of convergence between US and EC law relates to merger control. Both bodies of law require that mergers above certain thresholds must be notified to the proper authorities (the DoJ or the FTC in the US and the Commission in the EU) before the transaction is implemented by the parties. There is thus an *ex ante* control of mergers on both sides of the Atlantic. Until recently, however, EC competition law relied on a legal test that was different to the test applied in the US. While the EC test sought to determine whether the merger in question would create or strengthen 'a dominant position as a result of which effective competition would be significantly impeded in the common market', the US test seeks to determine whether the merger in question would not 'significantly impede effective competition'. With the adoption of its new merger control regulation in 2004, EC law abandoned its 'dominance-based test' for the US 'impediment to effective competition test' (Article 2.3 of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, O.J. 2004, L 24/1). The recent Commission Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (O.J. 2004, C 31/5) also show great resemblance to the US Horizontal Merger Guidelines.

It is subject to question why EC competition law has increasingly converged around US antitrust rules with respect to agreements restricting competition and merger control. The fact that EC competition law scholars and practitioners have always looked at the US experience as a source of inspiration certainly played a role. US and EC competition law officials also meet on a regular basis and cooperate in the case of global merger transactions. These officials represent a form of 'epistemic community' of experts sharing knowledge, experience and building consensus (on the notion of epistemic communities, see Haas, 1992). Efforts have also been made in recent years to ensure a greater degree of convergence in the area of competition law. Inconsistent approaches, especially in merger control, may indeed render the life of market players excessively difficult. Finally, the fact that both US antitrust law and EC competition law are now strongly informed by economic analysis certainly contributes to ensuring a growing degree of convergence between the two bodies of law. Legalistic approaches whereby conduct is assessed under formalistic standards have now been abandoned for an effects-based approach whereby, with the exception of cartels, the anti-competitive effects of an agreement/transaction will be balanced against its pro-competitive effects.

2 Divergence

There remain, however, several areas of divergence between US antitrust law and EC competition law. First, unlike EC competition law, US antitrust law does not seek to control state subsidies. There is thus no provision in US antitrust legislation which corresponds to Articles 87–9 of the EC Treaty. This is arguably one of the weaknesses of the US antitrust regime. Indeed, state subsidies may generate substantial distortions of competition, especially when states compete for investment. Substantial evidence shows that subsidization of economic activities is not only a problem in the EU, but also in the United States, where numerous states engage in bidding wars for the purpose of attracting investments within their border (see Hanson, 1993). It is hard to find an explanation for US law not attempting to control state subsidies. Perhaps one could say that Americans believe that public intervention is so un-American that there is no need for control. However, such intervention does occur in practice and creates significant distortions of competition.

Another area of divergence between US antitrust law and EC competition law relates to the treatment of abusive conduct. Both Section 2 of the Sherman Act and Article 82 of the EC Treaty prohibit abuses of a dominant position. However, there are significant differences in the way these provisions are applied in practice. While, as we have seen above, economic analysis now plays a major role in the assessment of restrictive agreements under Article 81 of the EC Treaty, Article 82 is still largely interpreted in a formalistic fashion. The Commission applies a per se prohibition to several practices without thus paying any attention to the fact they may in some circumstances generate efficiencies. Loyalty rebates, for instance, receive more lenient treatment under US law than under EC law, where they are strictly illegal. Moreover, in two recent judgments, the Court of First Instance ruled that, for the purposes of establishing an infringement of Article 82 EC Treaty, it was not necessary to demonstrate that the abuse in question (i.e., the imposition of loyalty rebates) had a concrete effect on the markets concerned (CFI, Case T-203/01, 30 September 2003, *Manufacture française des pneumatiques Michelin v. Commission*, not yet published; CFI, Case T-219/99, *British Airways plc v. Commission*, 17 December 2003, not yet published). It was sufficient to demonstrate that the abusive conduct tended to restrict competition or, in other words, that the conduct was capable of having, or likely to have, a restrictive effect. In its *Microsoft* decision (Commission decision in Case COMP/C-3/37.792, C (2004) 900 final), the Commission seems, however, more open to discussing the effects of Microsoft's alleged anti-competitive practices on the relevant markets, as well as to balancing these negative effects against the pro-competitive effects that Microsoft's practices could generate (see Geradin, 2004b;

Dolmans and Graf, 2004). Most commentators tend to consider that Article 82 is currently in a state of flux and that it is extremely difficult for dominant firms and their advisors to distinguish between conduct that is incompatible with Article 82 and conduct that is compatible with that provision of the Treaty.

In sum, with the exception of the issue of abuse of dominance, it seems that, in recent years, US antitrust law and EC competition law have converged rather than diverged. Interestingly, many people in the Commission tend to believe that the current interpretation of Article 82 is not satisfactory and that it should be subject to reform.

While Americans and Europeans have looked at each other's competition law regimes, such regimes have also received a great deal of attention from other nations. US antitrust law has been a source of reference for many nations and US antitrust authorities have provided technical assistance to nations willing to develop competition law regimes (see Raustiala, 2002). Similarly, the scope of EC competition law has been widely extended through the accession process as candidate countries had to implement the 'acquis communautaire' (see Geradin and Henry, 2005), as well as through a number of regional agreements, which contained chapters devoted to competition law (see Geradin, 2004a). Today, about 100 nations have adopted competition law regimes. In many instances, these regimes take the form of 'regulatory transplants' whereby US or EC competition rules are transposed into national law (see Geradin, 2004a). In other instances, developing nations have adopted hybrid regimes composed of elements of US and/or EC competition law, together with some provisions specifically designed to adapt these systems to the local circumstances.

More importantly, nations with new competition law regimes looked at more mature competition law regimes in order to find solutions to the problems they encountered in the implementation of their regimes. International organizations, such as the APEC, the OECD, UNCTAD and the World Bank, also organize workshops where competition law officials of different nations can exchange views on their respective experiences in the enforcement of competition laws. In October 2001, competition officials from different jurisdictions created the International Competition Network (ICN), which 'seeks to provide competition authorities with a specialized yet informal venue for maintaining regular contacts and addressing practical competition concerns' and is 'focused on improving worldwide cooperation and enhancing convergence through dialogue' (ICN website). Comparative analysis thus plays a central role in the development and subsequent implementation of competition law regimes.

In recent years, efforts have also been pursued at the international level to determine whether international competition rules would be desirable

(see, e.g., Tarullo, 2000; Guzman, 1998). This led some scholars to engage in comparative analysis to determine whether a common set of competition rules could be identified and thus form the basis for the development of international competition rules (see, e.g., Drexl, 2003; Ullrich, 1998). At the diplomatic level, most of the efforts to develop international competition rules have been carried out in the context of the WTO as some of its members, in particular the EU, were in favour of the adoption of a Competition Agreement as part of the so-called Doha Round (see, in general, Fox, 1999; Anderson and Holmes, 2002). Such efforts did not go very far and today there is little prospect that such an agreement could be adopted in the foreseeable future.

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16 Consideration*

James Gordley

1 Introduction

The doctrine of consideration is peculiar to common law jurisdictions. It is the result of (1) a pragmatic attempt by judges before the 19th century to set limits to enforcement of a promise by a writ of *assumpsit*; (2) a formalistic attempt in the 19th and early 20th century to define consideration; and (3) a pragmatic attempt by judges to give relief when a contract was unfair, even though these same judges did not admit that a court should consider the fairness of a contract. The result is what one might expect: a jerry-built amalgam of pre-19th-century concern with the limits of writs, formalistic efforts to define pragmatically forged concepts, and efforts to police the fairness of a contract with a tool never designed for that purpose.

2 Assumpsit

For centuries, the common lawyers did not organize their law in terms of categories such as contract or tort but rather in terms of writs or forms of action traditionally recognized by the royal courts. It was only in the 19th century that the common lawyers tried to formulate a systematic law of contract. They did so, however, while claiming that they were merely formalizing the rules that English courts had been following implicitly.

Traditionally, a disappointed promisee could sue in one of two forms of action: covenant or *assumpsit*. He could recover in covenant only if the promise had been made under seal, a formality originally performed by making an impression in wax on the document containing the promise. He could recover in *assumpsit* if the promise had ‘consideration’. The judges, however, did not define what ‘consideration’ meant.

There is famous and inconclusive controversy as to whether the common law courts originally borrowed the idea that a promise needs consideration from the civil law idea of a *causa* of a contract of exchange (Simpson, 1975a, pp. 316–405). However that may have been, the common law courts found consideration, not only for promises to exchange, but for others that were not exchanges or bargains in the normal sense: for example, promises to prospective sons-in-law and a variety of gratuitous loans and bailments (*ibid.*, pp. 416–52). Indeed, it is misleading to compare *causa* and consider-

* See also: Common law; Offer and acceptance *inter absentes*.

ation since the doctrines were devised for different purposes. The continental doctrine, at its inception, identified two reasons why, in principle or theory, a promise should be enforced: liberality and exchange. As I have shown elsewhere, those who framed the doctrine of *causa* meant more than that the promisor either did or did not receive something in return for what he gave. They drew on then fashionable Aristotelian ideas in which an act of liberality meant the sensible use of one's wealth to help those in need, and exchange meant an act of commutative justice in which neither party was enriched at the other's expense (Gordley, 1991, pp. 49–57). In contrast, the common law doctrine was not a theory of when promises should be binding. It was a pragmatic tool for limiting their enforcement. As Dawson and Harvey noted, 'on its first appearance [it] merely expressed obscurely the feeling that there should be some sufficient reason, ground or motive that would justify enforcement of a promise' (Dawson and Harvey, 1969, p. 166).

3 The attempt to define consideration in the 19th and early 20th centuries

Before the 19th century, common lawyers, with the exception of Blackstone, had organized their law in terms of writs such as *assumpsit* rather than legal categories such as contract. There was little legal literature on contract beyond a few pages of Blackstone and the reports and abridgments of reported cases (Simpson, 1975b, pp. 250–51).

Thereafter, treatises on contract appeared, contract became a university subject, and common lawyers tried to define what constituted consideration. In a certain sense, it was an effort doomed to failure since consideration was not a concept that could be defined. It was a pragmatic tool for refusing to enforce a promise. Nevertheless, the common lawyers borrowed a civil law concept and identified contract with the *causa* of a contract of exchange, often citing civil law authors (Gordley, 1991, pp. 138–9). As Simpson has said, the early 19th-century treatise writers regarded consideration as a local version of the doctrine of *causa* (Simpson, 1975b, p. 262). They did not explain the cases in which promises had been held to have consideration although they were not exchanges in any normal sense.

The common lawyers thus gave their contract law a shape like that of the civil law. Promises to make gifts were enforceable only in covenant which required the formality of a seal affixed to a document containing the promise. Promises to bargain or exchange were enforceable without a formality. Thus, as in civil law, gratuitous promises required a formality (in civil law, typically, they had to be notarized) while promises of exchange did not.

In the case of promises to make gifts, the practical effect was much like that in civil law. In contrast to the Middle Ages, today seal is no longer a formality that is widely understood. Thus where, as in England, a seal can still be used to make a promise of gift binding, a layman will be unlikely to

know how to bind himself to such a promise without consulting a member of the legal profession. That is what he must do in civil law jurisdictions and, in both cases, the requirement will discourage him from acting rashly. In many common law jurisdictions, the seal has been abolished, but a would-be donor can establish a trust which has the same effect of binding him to make a gift. While a trust requires no formalities, in practice, once again, a layman will not know how to make one without consulting a lawyer (Scott and Fratcher, 1987, pp. 188, 310–12, 315).

The identification of consideration with bargain or exchange, however, led to problems that are still with us. As just mentioned, traditionally, the common law enforced some promises which were not exchanges in any ordinary sense. Sometimes, in the interest of doctrinal consistency, courts stopped enforcing such promises their predecessors had thought worthy of enforcement. For example, English law would no longer enforce marriage settlements (Smith, 2001, p. 51). Otherwise, the problem was dealt with by constructing artificial definitions of exchange. A definition that became particularly popular in the United States was invented by the English jurist Sir Frederick Pollock. According to Pollock, whatever 'a man chooses to bargain for must be conclusively taken to be of some value to him' (Pollock, 1936, p. 172). That was so even if the man himself had received nothing, consideration having moved to a third party. Therefore, to say the promisor entered into a bargain simply means he was induced to give his promise by some change in the position of the promisee (*ibid.*, p. 164). This formulation was adopted in the United States by Oliver Wendell Holmes (Gordley, 1991, p. 173; Samuel Williston, 1914, pp. 503–29, 527–8) and the American Law Institute's Restatements of the Law of Contract of 1935 (s. 75) and 1981 (s. 71). This definition, and others like it in England, could transmute transactions into bargains as long as one of the promisor's motives was to get something from the promisee. A promise to the prospective son-in-law could be enforced because it was made in part to induce him to marry. A promise of the gratuitous bailee to look after an object was made in part to induce the bailor to part with it.

These definitions were coined in a formalist era. The question, for a formalist, was how to find a formula that fits the decided cases. It is not to ask why these cases should be decided as they were. Later, when that question was raised, there was no longer any reason to think consideration should have a single definition as long as it serves several purposes. Those purposes should then be investigated to see what they are. Thus American jurists have not used the formula to enforce marriage settlements (Gordley, 1995, pp. 574–8), though, as we have seen, English courts, in the interest of doctrinal consistency, have refused to enforce them (Smith, 2001, p. 51). The American jurist Arthur Corbin thought the formula was artificial when

applied to gratuitous loans and bailments (Gordley, 1995, p. 565). In England, Atiyah thinks the doctrine should be freed of formalism to allow courts to enforce whatever promises they deem worthy of enforcement:

The truth is that courts have never set out to create a doctrine of consideration. They have been concerned with the much more practical problem of deciding in the course of litigation whether a particular promise in a particular case should be enforced . . . When courts found a sufficient reason for enforcing a promise, they enforced it; and when they found that for one reason or another it was undesirable to enforce a promise, they did not do so. (Atiyah, 1995, p. 181)

Atiyah is not far from what, before the 19th century, the doctrine actually did mean. But if he is right, it is hard to see why one needs a unified doctrine of consideration. One needs a series of rules that specify what promises a court will enforce.

4 The use of the doctrine to police the fairness of contracts of exchange

When consideration was equated with bargain in the early 19th century, it supposedly meant that, as in civil law, promises to give required a formality but promises to exchange did not. The Americans found this limitation on the enforceability of gifts distasteful, and developed various means to enforce such promises absent a formality, culminating in the recognition of the doctrine of promissory reliance of Section 90 of the two Restatements of the Law of Contracts: an informal promise of gift is enforceable if the promisee had reasonably relied upon it.

A different problem was that, even in the 19th century, English and American courts used the doctrine to strike down unfair bargains. They did so even though they would not admit that unfairness could be grounds for relief. Today, in the United States, fairness can be policed directly by the doctrine of unconscionability adopted in Section 2-302 of the Uniform Commercial Code and Section 208 of the second Restatement of the Law of Contracts of 1981. The English are more timid but they will sometimes refuse to enforce a bargain because it is unfair (*Cresswell v. Potter* [1978] 1 WLR 255 (Ch.)). They have also enacted an Unfair Contract Terms Act 1977 (c. 50). Previously, however, courts found ways to apply the doctrine of consideration in the interest of fairness without admitting they were doing so. We will consider two examples.

First, courts refused to enforce a promise to give better terms than were initially agreed upon when the promisor was promised nothing in return but what was due him already. These promises are not like gifts. They occur in commercial contexts in which the promisor is not inclined to play Santa Claus. In *Stilck v. Merrick* [1909] 2 Camp. 317, a captain's promise to pay more than his sailors had previously agreed to take was held to be

unenforceable. The decision fit the formula: one party made a promise, but in return, the other parties gave up nothing that they were entitled to withhold. Nevertheless, these are commercial promises. The only reason they should not be enforced is that one of the parties may have acted unfairly by taking advantage of the other. The doctrine of consideration is a crude tool for policing that kind of unfairness. Sometimes a modification of one party's duties can be quite fair, for example, because of changed circumstances. When it is unfair, a clever party could satisfy the doctrine of consideration by giving up some right, even a small one.

It is not surprising, then, that the doctrine is no longer applied in its original form in America or England. In the United States, the Uniform Commercial Code and the Second Restatement of Contracts of 1981 dispense with doctrine and confront the problem of fairness squarely. According to Section 2-209(1) of the Uniform Commercial Code, modifications of a contract do not need consideration provided that they are made in 'good faith'. According to Section 89(a) of the Second Restatement, they do not need consideration provided that they are fair because circumstances have changed. The English changes are somewhat more opaque. According to *Williams v. Roffey Bros. & Nichols (Contractors) Ltd.* [1991] 1 Q.B. 1, there is consideration as long as the promisee receives a 'practical benefit'. No one knows what that really means. In *Central London Property Trust, Ltd. v. High Trees House Ltd.* [1946] 1 K.B. 130, a landlord had promised the lessee that he need not pay the full rent because of the economic dislocations caused by World War II. Having made that promise, he was not allowed to collect the rent he had forgone. The reason, according to the court, was that the lessee had relied on the promise. It is not clear what supposedly constituted the lessee's reliance: honouring his legal obligations under the lease does not seem to be a change of position in reliance. It is also not clear why English courts have only allowed the promisee's reliance to be a defence against the promisor's action, as in *High Trees*, but to be not grounds for an action against the promisor (Smith, 2001, p. 274). What is clear is that the doctrine of consideration no longer applies in its original form, as, indeed, it should not if its purpose was covertly to police this type of unfairness.

Another type of promise that may be unfair is one in which the promisee is not committed. In the famous case of *Dickenson v. Dodds* [1846] 2 Ch. Civ. 463, a party who had promised to hold his offer to sell property open until a certain date was held not to be bound because nothing was given to him to hold the promise open. As before, the trouble is that not all such promises are unfair. They are unfair if they merely allow one party to speculate at the other's expense. But they may be to the advantage of both parties. They may allow one party to learn more about the advantages that

the arrangement may have to him. He may need to take steps to learn about its advantages which he would be unwilling to take unless the other party were already committed. If so, the commitment may benefit the committed party as well since without it the uncommitted party may be unwilling to contract or to do so on as favourable terms. Again, the doctrine of consideration is a crude tool for policing this kind of unfairness.

It is not surprising that, again, American and English courts have found ways around the rule. In the United States, when the commitment is short-term and the chances of speculating at the other party's expense are therefore small, courts have found an excuse for not applying the doctrine strictly: for example, the presence of nominal consideration (Restatement of the Law of Contracts 1981 s. 87(1)) or some slight limitation on the freedom of the uncommitted party. An example is *Gurfein v. Werbelovsky*, 118 A. 32 (Conn. 1922) which upheld a sale of plate glass in which the buyer had a right to cancel the order within three months but the seller could have defeated this right by shipping immediately. Since the chances of speculating at another party's expense are small under short-term contracts, the Uniform Commercial Code, s. 2-205, upholds a written commitment among merchants to buy or sell goods within three months. While English courts have not repudiated the rule, they have sometimes bent it. In *Pitt. v. P.H.H Asset Management Ltd.* [1994] 1 WLR 327, a prospective purchaser's offer to promise to consider an offer for just two weeks was held to be consideration for a vendor's offer not to deal with anyone else. Even so, the rigidity of the English rule has been criticized by scholars such as Treitel (Treitel, 1995, p.142), and by the English Law Commission (Law Commission Working Paper no. 60, 1975).

Because it is a crude tool, my colleague Melvin Eisenberg and I agree that, instead of using the doctrine of consideration to police unfairness, it would be better to examine the unfairness of a contract directly (Eisenberg, 1982; Gordley, 1995).

5 Conclusion

In England and the United States, the doctrine of consideration cannot be defended by an appeal to tradition. It was formulated in the 19th century in a formalistic effort to devise one formula to fit all the cases in which English courts had found it worthwhile to enforce a promise. Consideration was identified with bargain, even though there was little warrant in the case law for doing so. The concept of bargain was then stretched to enforce gratuitous promises which were not bargains. It was also used as a crude tool for striking down unfair bargains. As many critics have said, the common law would be better off without it.

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17 Constitutional law*

Monica Claes

1 Introduction

The study of Comparative Constitutional Law has a long tradition, and is a well-established area of legal study, and it is undeniably on the rise. The development of new democracies and constitutions, for instance in Central and Eastern Europe or in South Africa, the constitutionalization of the EU drafting the EU Charter of Fundamental Rights and signing the Treaty establishing a Constitution for Europe, and the application of constitutional principles and doctrines to international organizations have all in their own way given new impetus to the study of Comparative Constitutional Law.

Comparative Constitutional Law may concern any topic of constitutional law, analysed from a comparative perspective. This can be done in several ways and with various purposes. It may be done in the form of *Auslandsrechtskunde*, describing for instance how federalism is shaped in various countries, or how constitutional review is organized, in order to learn about the constitution of another state. In addition, the study and comparison of the domestic constitution and constitutional law with those of other states and polities may contribute to attaining a more profound understanding of the domestic fundamental principles and institutional structures. Also the knowledge gained from comparative study may be used for ‘constitutional engineering’, for instance when constitutional amendment is considered, or for constitutional interpretation. Finally, comparative study of constitutions and constitutional law may lead to the discovery of common constitutional principles, which can be relevant in international, transnational or supranational contexts. Comparative constitutional law is thus a field which does not only serve academic curiosity; it may be helpful also in constitution making, both by political institutions drafting or amending constitutional texts and by courts when interpreting constitutional provisions and principles.

Comparative constitutional law presumes a good insight in the historical, social, political and legal cultural background of the legal constitutional systems under review. The field thus has close ties with the study of comparative government, and the legal constitutional concepts must be considered in context. The concept of ‘séparation des pouvoirs’ under

* See also: Administrative law; Public law.

French constitutional law, for instance, is very different from the 'separation of powers' in the United States (Koopmans, 2003, p. 7). Or the comparative analysis of constitutional case law requires that the distinct jurisdiction of a particular (constitutional) court is taken into consideration, as well as its constitutional position vis-à-vis the political organs, its legitimacy and the acceptance of its previous case law, the causes of action available, and the manners in which it can be seized. Likewise, the principle of 'sovereignty' (of Parliament) as a constitutional concept under the British constitution is entirely different from the concept of 'souveraineté' (nationale and populaire) in the French constitution, while it plays little or no role in Dutch constitutional law, where it is absent from the constitutional texts. Understanding and explaining constitutional law of other countries hence requires the study of comparative government, of the system of government, political culture, institutional structure, history and culture of the legal systems under review.

2 Constitutions, constitutional law and constitutionalism

The concept 'constitution' has several meanings, formal and substantive. In a formal sense it will usually refer to a written and codified document containing legal rules and principles, claiming supremacy over all other legal rules applying in the relevant legal order, and from which they derive their validity. In the substantive sense, the term refers to the set of rules and norms constituting and structuring the government of a polity and defining the limits of government authority, both in a prescriptive and a descriptive sense. Combining both the formal and substantive sense, Joseph Raz has defined a 'thick sense' of the constitution, as an entity with seven features: it is constitutive of a legal system; it is stable; it is written; it is superior law, and ordinary law conflicting with it is invalid or inapplicable; it is justiciable in the sense that there are judicial procedures to implement the superiority of the constitution; it is entrenched in the sense that its amendment requires more than the adoption of an ordinary statute; and finally, it includes principles of government held to express a common ideology (Raz, 1998, pp. 153–4). This is not to say that all constitutions comply with all of these elements, or that systems which lack a 'thick sense' constitution should be considered as not being governed by a constitution. The United Kingdom famously lacks a codified document acting as the constitution, and the constitutional legal norms are mostly made up of ordinary Acts of Parliament that are not entrenched, and conventions which are not written and not justiciable, but the United Kingdom is generally accepted to have a constitution. In the Netherlands, the constitution is not justiciable in the sense that constitutional review of parliamentary legislation is expressly excluded by the constitution itself, but not many would deny to the constitution its

constitutional nature. On the other hand, it takes more than the possession and publication of a constitutional document to have constitutional government. Constitutionalism may exist without a constitution; and there may be constitutions without constitutionalism.

‘Constitutional law’ does not only concern the document referred to as the constitution. It would even be misleading to study only the constitutional texts, especially for a comparative lawyer. The constitutional texts must be seen in their political context and in the light of legislation and constitutional interpretation by political institutions and the courts. The question as to who has ultimate authority in the interpretation of the constitution – the (constitutional) courts or the political institutions – is a central theme in the study of constitutional law in the United States, as with the debate on judicial supremacy (for instance Tushnet, 1999). Another debate concerns the issue of how it should be done: should the constitution be interpreted as a living document or should the original intent of the framers always be retained (for instance, Scalia, 1997)? In Europe, both issues will usually be discussed in the context of the general debate on judicial review and the limits of the judicial function (Koopmans, 2003). ‘Constitutional law’ puts flesh on the bones of the constitutional texts. Constitutional law is more than the constitution, but, on the other hand, there is more to a constitution than constitutional law: there are also constitutional conventions, which are considered not to be legally binding and cannot be enforced before a court of law, but are considered effectively to limit government in the absence of legal limitation. Constitutional conventions play an important role under British constitutional law, but also in other states which do have a written constitution, such as the United States or the Netherlands.

Finally, the concept of ‘constitutionalism’ refers to limited government, government under the rule of law. Constitutionalism, constitutional government or rule of law all intend to signify that the power of government is limited and that these limits can be enforced through legal or political procedures. ‘Constitutionalism’ hence in fact relates to the actual deference of the institutions of government to the constitution and the law, and to the values underlying it. It implies recognition of the supremacy of the constitution. The notion was of fundamental importance to the Founding Fathers of the American constitution, it was the very *raison d’être* of the constitution and underlies the entire constitution. In order to secure individual rights, they introduced a system of separation of powers, with checks and balances, and federalism to prevent the monopolization of power. Judicial review as developed by the Supreme Court and the Bill of Rights contributes to achieving constitutionalism. ‘Constitutionalism’ was not a novel idea; the Fathers drew on the writings of John Locke and Montesquieu, on the experience with (partial) constitutional texts in Europe, especially in

Britain and with the newly adopted constitutions of the 13 American States. The concept of 'constitutionalism' is very closely related to the notions of rule of law, German 'Rechtsstaatlichkeit' and French 'état de droit'; they are often used interchangeably (for a discussion, see Grewe and Ruiz Fabri, 1995).

3 Comparing constitutions

The oldest comprehensive constitution still in force is considered to be the US constitution, adopted in 1789. It is also one of the shortest documents, and only 27 amendments have been passed during its existence. The first ten amendments, which operate as the Bill of Rights, were passed in order to secure ratification of the constitution in the states. The American constitution has had a great impact on constitutions all over the world, and American constitutional lawyers are still called upon to advise countries developing a new constitution. Soon after its ratification and entry into force, Poland and France adopted the first European comprehensive written constitutions, which did not, however, remain in force long. Many 19th-century changes of government in Europe were marked by the adoption of written constitutions, some of which still are in force. Most constitutions in force in western Europe today were adopted after World War II (Germany, Italy, France), at the end of dictatorship (Greece, Spain, Portugal) or after the fall of communism (Central and Eastern Europe). Revolutions make for constitutional moments, a term coined by Bruce Ackerman, to indicate brief moments of constitutional politics, distinguished from ordinary politics, defining or redefining, transforming the constitution (Ackerman, 1991, 1998).

Constitutions, in the sense of codified written documents as described above, have been adopted under various procedures. Some have been drafted and adopted by constitutional conventions (Belgium), or drafted by a convention and ratified by the states making up the polity (the US), or accepted by the people themselves in a referendum (Spain). The question of how the constitution is adopted or should be adopted implies the question of the ultimate source of constitutions. Constitutions are generally viewed as the ultimate and most original expression of the sovereign will of the people, as the decision of a 'We the people' as to how they agree to be governed: 'The people are the only legitimate fountain of power, and it is from them that the constitutional charter, under which several branches of government hold their power, is derived' (Federalist Paper no. 49 (Madison)). Consequently, it has been argued that constitution making should be democratic. A much debated issue concerns the question whether constitutions in the thick sense can also exist in a non-statal polity, like the European Union, where there is no clearly established Demos, Nation or People as the source for legitimate constitution making (see further below).

Constitutions may be short, such as the American or the Dutch, or rather lengthy, such as the Indian or Portuguese, or indeed the European constitution (see further below). There is no 'style guide' as to what constitutions should look like, and length is not a disqualifying factor. Some constitutions contain only the basic principles and rules, while leaving the implementation to (organic) legislation or even convention, while others, such as the German, are fairly detailed.

Typically, modern constitutions in western Europe will open with a catalogue of fundamental rights or bill of rights, and then enumerate and establish institutions, allocate power and lay down how institutions should relate to one another.

Constitutions are mostly entrenched and difficult to amend. Some constitutions, like the Irish, require consent by the people in a referendum for each constitutional amendment; others require the dissolution of both Houses of Parliament, new elections and a special majority in both Houses (Belgium or the Netherlands), or a combination of both (Denmark). The US constitution requires, roughly, two-thirds in both Houses to propose constitutional amendment and ratification by three-fourths of the states (Article V of the US constitution). The European Constitutional Treaty requires that a Convention be convened, which shall make a recommendation to an inter-governmental conference, which shall decide by common accord. The amendments shall then enter into force when ratified by all Member States in accordance with their respective constitutional requirements (Article IV-443 of the Treaty establishing a Constitution for Europe). The British constitution is not entrenched in the legal sense: there are no special procedural requirements to be followed to amend the Acts of Parliament which are considered to be of a constitutional nature. Nevertheless, they are considered to be entrenched politically, to the extent that their amendment may even be considered unconstitutional.

4 Judicial review

Judicial review in American parlance concerns the review of the constitutionality of laws and governmental action by courts of law. Its origins are most often traced back to the United States. The US constitution does not explicitly provide for constitutional review, but a strong case in favour of the natural duty of the courts to review the constitutionality of statutes was made in Federalist Paper no. 78, where it was stated:

By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no ex-post-facto laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor

of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing. (Federalist Paper no. 78 (Hamilton))

In *Marbury v. Madison* (1803) Chief Justice Marshall held that it was

emphatically the province and duty of the judicial department to say what the law is and that those who apply the rule to particular cases must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

Since then, constitutional jurisprudence of the Supreme Court remains a focal point in comparative study, whether it concerns the initial issues of the legitimacy and limits of judicial review, the methods and standards of constitutional interpretation or any specific topic of constitutional law it has developed, such as the principles of separation of powers and checks and balances, fundamental rights protection such as the freedom of expression, civil rights or affirmative action etc. Conversely, the Supreme Court itself has only fairly recently begun to take recourse to comparative analysis in its case law. Supreme Court justices are becoming more open to comparative and international law perspectives (for instance, *Roper v. Simmons*, *Atkins v. Virginia*, *Lawrence v. Texas*, *Grutter v. Bollinger*). The question whether it is at all appropriate for the Supreme Court to do so is a much-debated topic, with several justices and scholars arguing that it is improper for the Supreme Court to look at foreign or European case law, since it is the US constitution which they are interpreting.

In Europe, constitutional review was first introduced to stay in Austria in the 1920s, where it was endowed to a specialized court. The centralized form of constitutional review, often referred to as the European model – as opposed to the American decentralized form of review – has spread over Europe. In many European states constitutional review has been introduced in the hands of a specialized court (Italy, Germany, France, Spain, Portugal, Belgium and Poland). Typically, constitutional review is introduced in order to provide for protection of the rule of law and basic rights after a totalitarian regime (Germany, Italy, Spain, Portugal, and in the new democracies of Central and Eastern Europe), or to guard a constitutional division of powers horizontally (as in France) or vertically (as in Belgium). Other European states have adopted the American decentralized system of judicial review, mostly on the basis of an explicit provision in the constitution, as in Sweden, but in none of these states is it put in effect to the same extent as in the US. Finally, there are states with a mixed system of constitutional review, where review by all or several courts is combined with special procedures before a constitutional court, as is the case in Portugal or Greece.

A central topic in Comparative Constitutional Law is the fundamental question what the place of the courts is in their relation to the political institutions, and what the limits are (if any) of judicial adjudication. Are there issues which are simply not justiciable and which must be left for the political institutions to decide? Who is to decide on where those limits are, and what techniques and tools are used by the courts to restrain themselves and retreat from a specific area? These tools and techniques are conceptualized more in the United States than in Europe, but comparable tools and doctrines do exist in Europe for the boundaries to be set. However, the vocabulary in the discourse originates from the United States: judicial activism, judicial restraint, political questions doctrine, mootness, ripeness etc. are common terminology, and set the stage for the debate. The issues are similar in Europe, but the debate runs along different lines, and the positions may be very different (for an excellent discussion, see Koopmans, 2003). Yet many aspects must be taken into account when comparing the various systems and explaining similarities and differences, among them the original intent of the framers in introducing a constitutional court or judicial review, the way in which the relevant courts may be seized, whether they can control their own docket, political context and relationship to accountable government, particular circumstances of the case and whether there are other ways to achieve judicial protection.

5 The development of European constitutional law

Within the field of Comparative Constitutional Law, European constitutional law is being developed. The concept covers distinctive areas of research, which should carefully be distinguished. First, the concept of 'European constitutional law' may be taken to refer to national constitutional provisions and rules and doctrines of constitutional law which relate to participation in the European Union, conditions for membership and the effects of membership.

Second, the concept of 'European constitutional law' may relate to the common constitutional principles of European states, both within the context of the European Union and in the context of the ECHR, or in their own right. In the context of the European Union, common constitutional principles are referred to in the texts of the Treaty: under Article 6 of the Treaty on European Union, 'The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.' Even before the Treaty included them, common constitutional principles were recognized by the European Court of Justice as a source of inspiration for the formulation

of general principles of Community law (Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125). In the context of the ECHR, common traditions and standards of both the laws and practices of the member states are analysed by the European Court of Human Rights to interpret the ECHR, to define whether a consensus exists. If such common standard can be discovered, it may form the basis of (dynamic) interpretation of the relevant provision. Conversely, the absence of a common standard or consensus may widen the margin of appreciation that is left to the contracting states, and hence limit the intensity of review by the Court: it will be less inclined to find a violation or be more willing to allow justifications for interferences with fundamental rights. The Court has noted that the Preamble to the Convention refers to the 'common heritage of political traditions, ideals, freedom and the rule of law', of which national constitutions are in fact often the first embodiment (ECHR, *Communist Party v. Turkey*, 30.1.1998, s. 28).

The work of both the European Court of Justice and the European Human Rights Court accordingly requires comparative constitutional analysis and both use it as an interpretation tool to discover the general principles of Community law (in the EU) or in order to interpret the provisions of the ECHR. In turn, the interpretation of principles developed by these European Courts, on the basis of what they consider common constitutional principles or standards, may find its way back to national constitutional law and be taken on by (constitutional) courts. National courts, including constitutional courts, may be inspired by the way in which common constitutional principles are interpreted and applied in other states leading to fertilization and cross-fertilization between the European courts, or between national and European courts in interpreting constitutional documents.

In a third sense, the concept of 'European constitutional law' may be taken to denote the application of principles, concepts and methodology of (comparative) constitutional law to the European Union. Scholars of constitutional law and of European Union law may take recourse to constitutional law and constitutional language to analyse EU law. This trend was strengthened and even instigated by the Court of Justice and its judges, and the academic debate on the constitutionalization of Europe. In Opinion 1/91 on the EEA Agreement the Court of Justice stated that 'the EEC Treaty, albeit concluded in the form of an international agreement, nonetheless constitutes the constitutional charter of a Community based on the rule of law' (Opinion 1/91 [1991] ECR I-6079), thus taking recourse to constitutional language rather than the language of international law (see on the constitutionalization of Europe famously J.H.H. Weiler, 1999). In the same vein, the Court of Justice itself has been described, not in the least by its own

members, as a constitutional court. In several ways, the Court of Justice operates as a constitutional court: it polices the boundaries between the Union, the Communities and the member states, between the institutions, it proclaims and protects fundamental rights as common principles of Community law, and reviews the validity of secondary Community law. Also its manner of developing the law and its interpretation techniques resemble those used by constitutional courts. It is probably fair to label the Court of Justice as a constitutional court. Likewise, the Strasbourg court has repeatedly qualified the Convention as 'a constitutional instrument of European public order (*ordre public*)' in the field of human rights (ECHR, *Loizidou v. Turkey* (prel. obj.), 23.3.1995, s. 75; *Bankovic* (dec.), 12.12.2001, s. 80). In this context, the notion is used differently than in the context of the EU, as the Convention is not intended to constitute a polity or legal order in its own right. The label of 'constitutional court' is probably less well chosen for the Court of Human Rights.

Also in the context of the European Union the use of constitutional language is not always successful. Some of the 'evergreens' of national constitutional law do not fit the European Union, at least not in the same manner as in national contexts. Scholars and politicians alike have attempted to apply national constitutional principles to the European Union. The institutional structure of the European Union and the relationship among the institutions have been analysed from a constitutional perspective with recourse to notions like 'government' and 'parliament', 'parliamentary systems' and 'separation of powers'. Such exercise must take due account of the fact that the European Union is based on a Treaty and has its origins in international law. It is a multi-level polity with intertwined legal orders, with a twofold legitimacy deriving from the peoples of Europe and the member states, in which national and European 'constitutions' are interlocked. The unusual institutional set-up of the European Union, quadripartite rather than tripartite, and the intertwining of European and national levels ('multi-level governance and constitutionalism') continue to bother constitutional lawyers who attempt to apply traditional concepts of constitutional law to the European Union. Most scholars will settle for the answer that the European Union is rather a 'sui generis' polity, somewhere between a state and an international organization, to which the classic standards do not apply. The Court of Justice, for instance, does not take recourse to the principle of 'separation of powers' but speaks of the 'institutional balance', a principle which may serve similar purposes. However, the European Union under Article 6 of the Treaty on European Union 'is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States'. While the institutional structure of the European Union may not suit

the usual categories known in Comparative government and Comparative Constitutional Law, the fundamental principles of democracy, rule of law, of accountability and so forth must be given shape in Union law also. Comparative Constitutional Law does provide a useful analytical framework for the conceptualization and maturing of constitutional principles at the European level.

Finally, the notion of ‘Europeanization of constitutional law’ refers to the impact of membership of the European Union on national constitutions and constitutional law. National institutions and constitutional relations change as a consequence of membership. For instance, the national courts are involved in the enforcement and application of Community law and the protection of rights which individuals derive from it. Under the case law of the Court of Justice, national courts receive a mandate to act as the common courts of Community law, and, while this mandate is grafted upon their national mandate, it may entail additional powers and jurisdiction, which results in a shift in the national constitutional relations between courts and political institutions. Most conspicuously, the direct effect and primacy of Community law require all national courts to act as judicial review courts, and to set aside or disapply measures of national law – including primary legislation – conflicting with directly effective Community law, even where they are under the national constitution obliged to abide by it. Principles of Community law may be embraced by national courts also in cases lacking a Community aspect.

6. The Treaty establishing a constitution for Europe

The ‘constitutionalization’ of Europe first became a recurring theme in European legal and political studies, referring to the process by which the Court of Justice has transformed the treaties into a constitutional charter. The use of constitutional language and constitutional rhetoric in the context of the European Union was debated for a while, and concerned fundamental issues of European and comparative constitutional law and legal theory: ‘does Europe have a constitution?’ (even before a document carrying the title ‘constitution’ had been adopted), ‘can it have one?’ (or can only states have a constitution?), ‘does it need one?’ (or would it be preferable to maintain the current situation, based on international treaties which may to a certain extent operate as the constitutional charter) and ‘what type of constitution for what type of polity?’

Since Joschka Fischer’s speech at the Humboldt University, asking for a European constitution, the Laeken declaration and the Convention on the Future of Europe, which drafted a treaty establishing a constitution for Europe, the constitutional language has become standard. Nevertheless, it is not unchallenged, and both politicians, lawyers and public opinion debate

the use of constitutional language in the context of this treaty. Is it really a constitution? Or is it rather a treaty? It would appear that it has characteristics of both: formally legally speaking, it is a treaty concluded between High Contracting Parties, subjects of international law, which must ratify it before it can enter into force. Yet, on the substance, it also, to a large extent, qualifies as a constitution: it is a codified document, operating as the basic foundational, 'constituent' document of a polity, laying down the way in which power is divided and how organs and institutions relate to one another; it contains a catalogue of fundamental rights; it claims priority over other legal acts, and is rigid and entrenched. Yet it is not (yet) generally recognized as the constitution for Europe, but rather considered a treaty masquerading as a constitution. The main difficulty in this respect, in my opinion, is not the fact that Europe is not a state: constitutions can exist beyond the state. Nor is it the fact that there is no European people or Demos. The crucial issue in this context concerns the treaty establishing a constitution for Europe (TCE)'s relation with the existing national constitutions. Indeed, the member states already have their own constitutions, considered to constitute the most original expression of the sovereign will of the people, claiming ultimate authority, situated at the apex of the legal hierarchy, and from which all other norms derive their validity. The TCE does not make tabula rasa of these national constitutions, but it does claim primacy over and above them in Article I-6 of the Constitutional Treaty, while at the same time, Article I-5 TCE declares that 'The union shall respect [. . .] their [the Member States'] national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government [. . .]'. It remains to be seen whether, even within the limited context of the European Union, the claim of primacy is accepted under the national constitutions. The better and more realistic view would be to conceive the European and national constitutions as complementary components of a multi-level constitution.

It seems that the political choice to include constitutional language in the text and in the title of the document has backfired on the framers (the member states): since the document itself claimed to be a constitution, it was judged by that standard. The general dislike of the inclusion of Part III in the TCE, the level of detail and the overall length of the document brought the disappointment over a document that claims to be a constitution, but does not meet the terms of what constitutions are supposed to look like and what they should contain, in terms of length, clarity, level of detail etc.

The drafting of the TCE in itself was an exercise in Comparative Constitutional Law, though in the unusual context of an international context, first in the Convention and then, more expressly so, in the Intergovernmental Conference. The structure of the TCE, the language used, the incorporation

of the EU Charter of fundamental rights as an integral part of the TCE, rather than as an annex, is attributable to the fact that it was a constitution that was being drafted. Several elements of the TCE reflect national constitutional techniques and tools or give away the influence of national constitutional concepts and techniques, such as the provisions on the delimitation of power between the EU and the member states, inspired by the German constitution. An even clearer example is the new catalogue of legal instruments, which inherits from various constitutional systems the distinction between legislative and non-legislative acts, and between implementing and delegated regulations. Nevertheless, the comparative analysis underlying the TCE was certainly not systematic, it was lacking precision, it was random and there was little debate on the appropriateness of legal transplants. This can only be regretted and it certainly does not contribute to the TCE's clarity and precision.

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18 Consumer protection*

Stephen Weatherill

Why, the sceptic may ask, might one suppose that the law should play a role in protecting the consumer? Why not let the market take the strain? Producers have to sell their goods to consumers in order to survive. They will only be able to sell to consumers what consumers choose to buy. Consumer preference will dictate what is made available. The ‘invisible hand’ of competition steers producers to behave in a manner that is responsive to consumer preference.

This model of ‘perfect competition’ in the market places the consumer in a position of dominance. His or her choices serve to organize the market and they drive an efficient allocation of resources. Where, then, might there be a role for the law?

It is pertinent in the first place to acknowledge that it is tendentious to assert that markets possess an autonomy from legal rules. At least in its modern form the ‘market economy’ is built on assumptions about a supporting network of legal rules – contract, tort and the wider law of obligations – and an institutional underpinning supplied by the state, most prominently in the shape of courts. The operation of the market is sustained by the willingness of the state to provide facilities that ensure the viability of essential components in a properly functioning market such as the credible enforcement of long-term contractual commitments.

The law of consumer protection ranges across a wider field. The perception that markets may function imperfectly and therefore require the correction of legal intervention embraces a great variety of laws and techniques.

The law of consumer protection is typically driven by two distinct perceptions. The first is that the ‘perfect market’ is an illusion. The model is in practice tainted by market failure with the result that the consumer interest is not properly served. Legal intervention would be a means to correct such malfunctioning. The second perception holds that even if the market does operate in a way that generates efficient results it may not be regarded as ‘fair’. The law would reflect a concern to adjust the distribution of wealth to achieve a more just society. As a general observation, the balance between these two principal motivations for introducing laws of consumer protection tends to fluctuate over time as political fashions alter.

* See also: Competition law; Insolvency law.

For the purposes of comparative inquiry, two major additional features must be blended into the mix. First, the conditions pertaining to the market and/or the law which prompt intervention in the name of consumer protection will vary between jurisdictions. So what is thought appropriate, even necessary, in one country may be of little relevance elsewhere. This relates not only to prevailing economic, legal and institutional conditions, but also to the 'consumer' him- or herself: how alert? how self-reliant? The culture of consumer attitudes varies depending on the society in which they are embedded, and the shaping of the law inevitably follows (Howells and Wilhelmsson, 1997; Micklitz, 1996). And, the second relevant dimension for bringing a comparative perspective to consumer protection: *even if the prevailing legal, social and economic conditions are the same* the chosen methods of intervention may coherently vary between jurisdictions as a result of varying policy preferences, in particular about the perceived 'fairness' of market-based outcomes. Consumer protection is inextricably wrapped up with political choices and its shape is dictated not only by cool reflection on perceived market failure but also by typically more fiercely contested calculation of the place of the consumer as citizen in society. Accordingly, comparative study of consumer protection demands the contextual sensitivity which is the hallmark of sophisticated comparative work generally.

In the first place it is a pre-condition to effective competition that producers face damaging consequences should they fail to satisfy consumer demand. This will not be the case if producers have clubbed together to agree to behave in the same way: by, for example, fixing prices or sharing out markets. Nor will it be the case if a single producer is sufficiently economically strong to control the market. In such circumstances consumers do not enjoy the choice that is vital to sustaining the operation of a competitive market. Laws which promote competition on the 'supply-side' are properly treated as measures of consumer protection, even though they are more typically labelled as competition or antitrust law. In this vein cartel or restrictive practices law places tight constraints over firms seeking to replace rivalry in the market with collaboration; monopoly law or laws governing positions of economic dominance constrain the commercial autonomy enjoyed by powerful firms; and merger law supervises deals that may strip competitive pressures out of the structure of the market. Markets serve the consumer interest, so, in so far as these forms of legal intervention seek to protect or promote competition in the market or, in the particular case of monopolies, to muffle the pernicious effects of absence of competition, they are part of the pattern of consumer protection. In comparative vein it is plain that choices about the substance, institutions and patterns of enforcement of competition or antitrust law vary, although there has been a substantial degree of convergence in Europe (Gerber, 1998; Dannecker and Jansen,

2004) and, in addition, the rise of global markets has provoked a consequent eagerness to develop effective transnational cooperation in the investigation of anti-competitive practices and the application of rules designed to suppress such improper commercial tactics (Smitherman, 2004).

Also at stake in understanding why different patterns are to be observed in the treatment of the supply side of the economy in different parts of the world is the division between public and private control. An industry under public control is commonly characterized by full or partial immunity from normal assumptions of competition law (sometimes, though not always, in association with legal protection from competition itself). Postal services, energy and water supply, telecommunications: these are 'special cases' as far as the consumer is concerned, and their treatment is commonly of special significance for economically disadvantaged consumers. Despite general tendencies towards privatization and deregulation that have become fashionable over the last two decades, the treatment of such public services varies greatly in different societies (Graham, 2000; Wilhelmsson and Hurri, 1999).

The law of consumer protection is also directed at curing flaws in the market on the 'demand side', and this is the more orthodox heartland of consumer law. The unlikely model of a 'perfect market' assumes a consumer who is readily able to differentiate between available products and services. But in practice choice is rarely so well informed. What does the average consumer know about the detailed qualities of the latest electronic gadget or pharmaceutical? And where the consumer is inadequately informed in making a purchase the function of the market as a means to transmit accurate messages about consumer preferences is undermined. The problems are not associated merely with lack of information. It is entirely plausible that even where relevant information is available consumers may fail to absorb it and/or may assess its import irrationally. Some risks are typically overestimated, others underestimated and consumer behaviour is in consequence remote from what one might anticipate in a 'perfect' market (Hanson and Kysar, 1999; Sunstein, 2000; Korobkin and Ulen, 2000; Howells, 2005). It is moreover evident that *some* consumers will be less able to process information than others. So the market will not merely fail, it will fail in a fashion that causes an unequal loading of costs among the consuming population.

Laws typically forbid the supply of deceptive information. A more imaginative response to the disabling effect on the efficient functioning of markets of the underinformed consumer lies in the technique of mandatory information disclosure (Whitford, 1973; Hadfield, Howse and Trebilcock, 1998). This may typically involve the obligatory release by producers, suppliers and/or retailers of information about price, quality and other relevant conditions. Commonly the legal rules will cover disclosure of information that one would have anticipated would have guided consumer decision making

in a perfectly functioning market. The legal requirements in this sense mimic the market, by making up for the inbuilt imbalance in information between producer and consumer in modern market conditions. Information disclosure may also be achieved in indirect fashion. For example, a requirement that traders acquire a licence before they may participate in a market can be analysed as a means of signalling to consumers that particular quality standards will be observed. More subtly still, the *possibility* – but not requirement – that a trader may secure some form of certification from a relevant public authority will permit the consumer to choose between certified traders and those who choose not to acquire such authorization and who will (one may suppose) charge a lower price.

Comparative work reveals a diversity of choices in different jurisdictions. The European Union's programme of consumer protection is heavily dominated by the desire to promote information disclosure as a means of achieving a more transparent market in the service of the consumer (Grundmann, Kerber and Weatherill, 2002; Howells, Janssen and Schulze, 2004; Micklitz, 2004). A critical perspective would question whether such heavy reliance on assumptions about the consumer's ability to respond rationally to information is realistic and, in particular, whether it is adequately sensitive to the diversity of consumer expectation in Europe (Micklitz, 1996; Howells and Wilhelmsson, 2003). A number of legal and institutional factors are relevant in explaining why information disclosure is more popular as a technique of consumer protection in some jurisdictions than in others. But the guiding perception of the capabilities of the consumer is also pertinent in assessing the variety of choices made by rule makers around the world. Can the consumer process information? Can he or she act upon it in any event? Will he or she fight back if the rules are broken? The answers will differ according to local consumer attitudes. So, for example, in the United Kingdom a governmental White Paper published in 1999 (DTI, 1999) made a vigorous case that markets work best when rivalry on the supply side is accompanied by consumer behaviour which is aggressively intolerant of failure to meet demand. It quoted Michael Porter: 'A stiff upper lip is not good for upgrading an economy' (Porter, 1998). The key insight is that consumers benefit from competitive markets, but that they generate them too. But even if one cheerfully accepts this prescription it is plain that consumers are culturally heterogeneous. Some may be very good at acting in a manner that promotes efficiently functioning markets, others may be far more reticent. Law can play only a minor role in adjusting such behavioural patterns, which will be very different in different parts of the world. And – the key comparative insight – a society in which a consumer stiff upper lip predominates may be rationally much less ready to rely on consumers, even well-informed consumers, to ignite efficient competition than a society which regards its confident

consumers as able to act in a manner that in whole or in part removes the need for direct or indirect public regulation of trading malpractice.

Different jurisdictions may place different levels of emphasis on the virtues of information disclosure as a means of achieving consumer protection, but on any measure information disclosure will not always work. Consumers (or, at least, some consumers) may be unable to grasp what they are being told. And the graver the risk, the less powerful the case for relying on information disclosure alone. In particular where health and safety concerns are at stake, rather than mere economic detriment, a regulatory preference for prohibiting products, rather than leaving them on the market supplemented by rules of information disclosure, is commonly visible. So, to take an obvious example, the consumer is typically prevented from being able to choose to buy unsafe goods, albeit that the supporting rules and institutional arrangements exhibit plenty of variation state by state (Micklitz, 1995; Howells, 1998). In fact some of the oldest recorded instruments of consumer protection are directed against the sale of adulterated foodstuffs (Ogus, 1992). In other circumstances particular forms of trading practice may be prohibited, rather than specific goods. This then generates a lively debate about whether a broadly-based rule should be employed which will allow flexibility for enforcement agencies to choose which tactics to penalize or whether instead a more detailed legal rule is needed to allow traders to predict in advance what is permitted and what is not. A good example of this is provided by the debate about whether to ban unfair commercial practices under EU law, which raises questions about whether a tolerably clear vision of 'unfairness' can be devised for these purposes (Radeideh, 2005; Collins, 2004). This line of inquiry (which is by no means relevant in Europe alone) embraces questions not only about framing appropriate rules but also about selecting the roles of individual consumers, consumer representative organizations, administrative agencies and courts in pursuing effective enforcement of the chosen rules (Whitford, 1981). Sliding from what would typically be treated as public law into the realms of private law, in other circumstances the lawmaker may conclude that the content of the bargain that is struck between trader and consumer cannot be left untouched, even where the consumer's position has been supported by information disclosure (Trebilcock, 1993; Collins, 1999). So laws typically establish certain minimum standards of quality from which the parties to a contract for the supply of goods or services may not agree to derogate, although they may agree more extensive forms of quality guarantee (Priest, 1981; Twigg-Flesner, 2003). Moreover, it is common for consumers to be able to seek relief from unfair terms, even where they appear to have agreed to their inclusion in a contract. As a matter of detail, fixing quite what constitutes 'unfairness' – and who judges it – is a persistently stern challenge for the lawmaker, and different approaches

abound (Zimmermann and Whittaker, 2000). However, the general principle is that the market arena alone is not responsible for fixing the content of the parties' bargain.

It is common for laws of consumer protection of this type to be depicted as a response to the consumer's weak bargaining power when compared with the trader. Such characterization may not be entirely helpful. After all, in modern market conditions most consumers are in a relatively weak bargaining position. Of itself, that cannot be sufficient to provoke legal intervention in so far as 'market failure' is the chosen justification. The theory and practice of regulation has become an increasingly popular and more sophisticated field in recent years (Ogus, 1994; Baldwin and Cave, 1999). That the market is flawed because consumers lack sufficient information to make a true choice is commonly a more precise explanation for legal intervention than the vaguer invocation of economic asymmetry. Moreover, it has become increasingly appreciated that identifying market failure cannot justify regulatory intervention without a demonstration that legal intervention will itself perform better. Regulators, like markets, may fail. Accordingly a more nuanced appraisal of the rationales for and advantages of legal intervention is called for, as part of a broader rethinking of the proper relationship between the public and the private sector (Giddens, 2000; Etzioni, 2000).

A more intrusive strand of consumer protection is based on the perception that the market may operate unfairly (Maihofer and Sprenger, 1992; Sunstein, 1999). From this standpoint concerns about inequality loom large. The operation of the relationship between the supplier and the consumer may be economically efficient but it will not secure a redistribution of wealth. It is not designed to do so. If one wished to adjust the position of individuals in society rather than simply treat them as consumers within the economy, then it would not be deemed appropriate to leave the market to its own devices, however bracingly efficient they may be. This opens up a vista on legal rules which are not in orthodox discourse regarded as consumer protection, but which nonetheless *are* consumer protection, provided one appreciates that the 'consumer' is also a citizen. The law of taxation and social welfare appears on this map. The policy horizons are almost limitless once one steps outside the comfortable paradigms of consumer protection in the developed world. Concerns about poor-quality televisions or holidays spoiled by delayed flights pale into insignificance in developing societies where access to clean water or basic healthcare is not guaranteed: a régime of consumer protection that prioritizes the problems of those who are already affluent is a shoddy product. The general lesson holds that choices about the place of the consumer in the market are one aspect of wider choices about the place of the citizen in society (Caplovitz, 1963; Ramsay, 1997). It is here in particular that comparative inquiry into the law

of consumer protection must be especially respectful of divergent political choices.

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19 Coordination of legal systems*

Arnald J. Kanning

Suppose that a seller values his 'widgets' at \$1 each. A buyer in another jurisdiction is willing to spend as much as \$4 for a widget. The different values a buyer and a seller place on the widget make a mutually beneficial agreement possible. Legal rules should ensure that parties who want to perform this agreement are able to do so. After all, such an agreement can leave both parties better off. In this example, the potential gains from the economic activity are maximally \$3. When the private law of either jurisdiction creates potential gains of \$3 in the aggregate, the private law of both jurisdictions facilitates this economic activity as much as possible. From this angle of perspective, private law that is able to facilitate the said economic activity so as to create potential gains of only \$2 in the aggregate does not facilitate economic activity as much as possible. Legal rules, however, do more than simply facilitate economic activity. They also may affect the way contracting parties divide potential gains from economic activity (in this case the difference between \$1 and \$4) (see, e.g., Baird *et al.*, 1994, p. 219; Kaplow and Shavell, 2002, p. 156; Cooter and Ulen, 2003, p. 260). For example, the appropriateness of an agreed price, as to which the contracting parties have to reach agreement, depends in part on terms respecting transfer of property, liability for breach, remedies for breach and burden of proof. Thus private law that ensures the potential gains to be reaped from an economic activity are \$3 in the aggregate can still have different distributional consequences. Private law has three possible distributional consequences: (1) 'buyer-biased' private law favours buyers to sellers; (2) 'seller-biased' private law favours sellers to buyers; (3) 'neutral' private law does not favour one or another contracting party. Throughout this survey it is assumed that separate jurisdictions do not randomise their choice of private law. That is, differences in the private law of separate jurisdictions are to be explained by pointing out that separate jurisdictions have genuinely different preferences regarding the way in which private law ought to affect the distribution of potential gains from economic activity. It follows that, to understand private law harmonization, an investigation of whether separate jurisdictions, constrained by economic rivalry, will succeed in providing private law that facilitates economic activity as much as possible does not suffice. The latter issue

* See also: Comparative law and economics; Private international law.

		B's Strategy	
		y	z
A's Strategy	y	1, 2	0, 0
	z	0, 0	2, 1

Figure 19.1 Coordination of legal systems (a)

has received considerable scholarly attention (see, e.g., La Porta *et al.*, 2004; Mahoney, 2001; Wagner, 1998 and references therein; Mattei, 1994).

The issue of which private law to apply to an interjurisdictional sale of widgets is captured by the two-player coordination game of Figure 19.1. The two parties to the sale are labelled players A and B. Player A is seller and belongs to jurisdiction Y. Player B is buyer and belongs to jurisdiction Z. For simplicity, assume that each party has a choice of only two strategies, ‘application of private law of jurisdiction Y’ and ‘application of private law of jurisdiction Z’, labelled y and z, respectively. The numbers in the figure represent the assumed payoffs, i.e., the gains from economic activity, received by each player for each combination of strategies that could be chosen by the players. The left-hand number of a cell of this matrix is the payoff accruing to player A, the right-hand number that of player B. The assumed payoffs reflect three things. First, the payoffs reflect that the sale of goods produces a total gain of \$3. Second, the payoffs reflect that, with a contracting price of \$2.5, the total gain of \$3 is not divided evenly amongst the players. This is because the division of the \$3 surplus depends in part on the applicable substantive private law. Jurisdiction Y has buyer-biased private law and jurisdiction Z has seller-biased private law. Then, application of the private law of jurisdiction Z to the sale results in a payoff of \$2 for player A and a payoff of \$1 for player B. Conversely, application of the private law of jurisdiction Y to the sale results in a payoff of \$2 for player B and a payoff of \$1 for player A. Third, in case the players fail to subject their agreement to the private law of either jurisdiction, they are in disagreement as to material terms. This, in turn, means that the players have not formed a valid contract and the resulting payoff is \$0 for each player.

Whilst parties might have a desire to enter into a mutually beneficial inter-jurisdictional agreement, they might fail in doing so because of incompatible views regarding the applicable private law. To be sure, the coordination game itself does not address the issue of how the contracting parties might

		Z's Strategy	
		y	z
Y's Strategy	y	2, 1	0, 0
	z	0, 0	1, 2

Figure 19.2 Coordination of legal systems (b)

resolve their disagreement as to the applicable private law. Changes in the contracting price might offset any tendency of private law to favour one or another party. But, amongst other reasons, the costs involved in learning the distributional consequences of unfamiliar private law might prevent parties from making appropriate changes in the contracting price.

Conflict of laws rules, also known as rules of private international law, according to the terminology of the civil law tradition, are rules of a jurisdiction that determine whether domestic law or foreign law applies to an interjurisdictional legal problem. With regard to conflict of laws rules, Horwitz (1977, p. 246) states: 'The field of conflicts of laws (. . .) arose to express the novel view that incompatible legal rules could be traced to differing social policies and that the problem of resolving legal conflicts could not be solved by assuming the existence of only one correct rule from which all deviation represented simple error.' The effort of jurisdictions to produce a uniform law on conflict of laws can also be captured by a two-player coordination game. This coordination game is shown in Figure 19.2. The players in the game are jurisdictions Y and Z. With regard to the composition of a uniform law on conflict of laws, each jurisdiction has a choice of two strategies, 'incorporation of the conflict of laws rules of jurisdiction Y' and 'incorporation of the conflict of laws rules of jurisdiction Z', labelled y and z, respectively. The analysis is restricted to the case with two jurisdictions, as the coordination problems identified already arise in this case and are bound to be magnified in a setting with multiple jurisdictions. The assumed payoffs reflect three things. First, the payoffs reflect that an interjurisdictional economic activity yields a total gain of \$3. Second, the payoffs reflect that, with a contracting price of \$2.5, the total gain of \$3 is not divided evenly amongst the contracting parties. This is because the division of the \$3 surplus depends in part on the applicable substantive private law. Jurisdiction Y has buyer-biased private law and jurisdiction Z

has seller-biased private law. Third, the payoffs reflect that the conflict of laws regimes of jurisdictions Y and Z affect, if indirectly, the way the potential gains from economic activity are divided amongst the contracting parties. Under the conflict of laws rules of jurisdiction Y the substantive private law of jurisdiction Z is applicable. And under the conflict of laws rules of jurisdiction Z the substantive private law of jurisdiction Y is applicable. Then, the strategy pair (y,y) means that both jurisdictions agree on using the conflict of laws rules of jurisdiction Y, i.e. the substantive private law of jurisdiction Z is applicable. The resulting payoffs are \$2 for the seller of jurisdiction Y and \$1 for the buyer of jurisdiction Z.

The coordination game itself does not address the issue of whether separate jurisdictions will succeed in agreeing on the conflict of laws rules to be included in a uniform law. For example, in the case that separate jurisdictions want to solve any interjurisdictional legal problem on the basis of their own substantive private law, an attempt at construing a uniform law on conflict of laws can only bog down in a stalemate. Yet, when jurisdictions Y and Z fail to adopt a uniform law on conflict of laws, the world will still keep on turning. To see why, it pays to notice that Figures 19.1 and 19.2 have the same payoff structure, if symmetrically reversed. Had jurisdictions Y and Z not succeeded in adopting a uniform law on conflict of laws, it would have been left to the parties engaged in interjurisdictional economic activities to make a choice of private law.

A uniform private law solves the coordination game in which parties engaged in interjurisdictional economic activity are embroiled. In the existence of uniform private laws that govern interjurisdictional economic activity, there is no room for conflict of laws rules. Supposing that the private law of all jurisdictions facilitates economic activity as much as possible, as we do throughout this survey, any argument that the private law of a given jurisdiction ought to be placed in a uniform law because, as compared to the private law of other jurisdictions, this particular private law most facilitates economic activity is rendered meaningless. So which legal rules are likely to survive in the final draft of a successful uniform private law? In this regard, it is worth noting that Lazear (1999) builds a model on the assumption that individuals have incentives to learn other languages and cultures so as to create a larger pool of potential trading partners. Similarly, one can apply the assumption that separate jurisdictions have incentives to place the legal rules in uniform private laws of another jurisdiction so as to promote exports to and imports from this jurisdiction. As to the question of which jurisdiction might have a strong hand in bargaining with other jurisdictions for adoption of its own legal rules in uniform private laws, the relative importance of interjurisdictional economic activity to separate jurisdictions provides an indication.

Suppose again that there are only two jurisdictions, Y and Z. Assuming that the total value of economic activity of jurisdiction Y is higher than the total value of economic activity of jurisdiction Z, economic activity with jurisdiction Y will constitute a relatively larger share of jurisdiction Z's total economic activity than the other way around. As interjurisdictional economic activity is relatively more important to jurisdiction Z than to jurisdiction Y, jurisdiction Y is in a position to enjoy leverage over the issue of which legal rules to place in uniform private laws. That is, given the relative economic dependence of jurisdiction Z upon jurisdiction Y, lifting legal barriers for interjurisdictional economic activity, though important to both jurisdictions, is relatively less important to jurisdiction Y than to jurisdiction Z. As a result, although jurisdiction Z prefers its own private law, it might 'voluntarily' choose to introduce the private law of jurisdiction Y in a uniform law rather than its own private law. Put differently: the adoption of the legal rules of jurisdiction Y in uniform private laws is not to imply that jurisdiction Z prefers the legal solutions of jurisdiction Y to its own legal solutions. Rather, jurisdiction Z made a tradeoff between no extra interjurisdictional economic activity versus applying private law with less-preferred distributional consequences. It goes beyond the scope of this survey to capture the bargaining between jurisdictions Y and Z over which legal rules to place in uniform private laws in a more rigorous model.

Private law can be divided into mandatory rules and default rules. This division is not relevant to the analysis, because mandatory rules as well as default rules have distributional consequences. This calls for a brief explanation. Default rules allow for parties to provide the terms of an agreement by submitting their own (standard) forms. But, like default rules, standard forms affect the way potential gains from economic activity are divided. Von Mehren (1990, p. 267) puts it thus: 'the parties' posture in "battle-of-the-forms" cases; they want a contract but, with respect to certain issues of importance, each wishes to contract on the terms he proposed'. The resulting 'battle of the forms' can be captured by a two-player coordination game similar to the one presented in Figure 19.1. To resolve battles of the forms, courts draw on default rules, amongst other sources. It goes without saying that at least one contracting party will judge the distributional consequences of the default rules that govern the unresolved battle of the forms unfavourably as compared to the distributional consequences of its own standard form. On the other hand, upon enactment of a uniform private law, the increase in interjurisdictional economic activity of the jurisdictions involved is in part dependent on the branch of the private law under consideration. For example, movements for unification of family law may perhaps draw little support from separate jurisdictions, not so much because of the distributional consequences of regionally defined family law, but,

rather, because of a relatively limited number of interjurisdictional family affairs. By contrast, in spite of possibly large distributional consequences of, for example, regionally defined commercial law, initiatives to unify this area of the law may nonetheless resonate well with separate jurisdictions. The total value of interjurisdictional commercial transactions may fuel calls for unity. At any rate, this goes to show that, in explaining tendencies toward unification of (branches of) the private law of separate jurisdictions, comparative legal scholarship is but an ingredient of a larger study that also comprises an analysis of interjurisdictional (economic) activity.

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20 Criminal law and criminal procedure*

Thomas Weigend

1 The relevance of comparative criminal law

1.1 Practical relevance

Comparative criminal law has traditionally been of mainly academic interest. Criminal law was regarded as deeply rooted in a country's social mores and cultural preferences, defying transnational assimilation and harmonization. The purpose of studying foreign systems of criminal justice was therefore seen as more educational than practical: looking at other nations' criminal laws was to help better understand and put into context one's own laws; comparison could also demonstrate the relativity of legal solutions to social problems (cf. Pradel, 1995, p. 10; Neumann, 2000, p. 128; Reichel, 2005, pp. 4–5).

Criminal courts, as opposed to their civil counterparts, do not normally apply foreign criminal law. When they have jurisdiction over an offence they will apply their national law, both substantive and procedural. There are only a few exceptional situations when foreign law has to be taken into account. These apply to offences committed abroad: in many legal systems, an offender acting outside the jurisdiction of the forum state will be punished only if the act in question is criminal both in the forum state and in the state where it was committed. Similarly, 'double criminality' has been a traditional requirement for extraditing suspects; only if the act is punishable in both the requesting state and the requested state will extradition be granted. In such instances, it has always been necessary for courts to take foreign criminal law into account; but cases with transnational aspects obviously are not everyday occurrences in criminal courts.

In most countries, foreign criminal law has played a very limited role in interpreting domestic law. Comparative analysis is typically undertaken in courts of smaller countries that look to neighbouring jurisdictions for help in interpreting their own laws, or in cases where domestic law has been modelled on some foreign 'mother law' (cf. Hauser, 1985; Eser, 1998, p. 1509). High courts also sometimes look for support from foreign jurisdictions when they venture into changing ancient rules. One example is the German High Court's adoption of a rule excluding evidence of a confession when the police had not informed the suspect of his right to remain silent (38

* See also: Legal families; Legal reasoning; Legal transplants; Methodology of comparative law.

Entscheidungen des Bundesgerichtshofes in Strafsachen [1992], p. 214 at 228), another example is the United States Supreme Court's 2005 decision to ban imposition of the death penalty on minors (*Roper v. Simmons* [2005], 125 S.Ct. 1183 at 1198–1200). In both cases, the courts took pains to point out that their rulings were in accord with current international standards.

1.2 Relevance for law reform

Many observers see the main function of comparative law in informing and promoting law reform (Jescheck, 1974: p. 765; Eser, 1998, pp. 1510–13). As Alan Watson has observed, 'law develops mainly by borrowing' (Watson, 1981, p. 181). Looking beyond national borders broadens the supply of possible solutions for social or legal problems which, in a world of global assimilation, tend to show the same or similar traits (see Schultz, 1980, p. 21; Fletcher, 1998b, p. 695). What one is looking for in the context of law reform is not picturesque legal traditions of faraway countries but innovative and practice-tested solutions from legal systems with similar operating conditions and guiding principles as one's own (cf. Pakes, 2004, pp. 14–15). In spite of the methodological pitfalls involved in 'borrowing' ready-made legal concepts from foreign systems, success stories of transplants exist. One example is the importation of the 'day fine' system, originally developed in Scandinavia, to various other European countries (Hillsman, 1990). The idea of imposing fines in accordance with the offender's income and financial resources rather than as a lump sum has spread fast because of its transparent fairness, its easy adaptability and its independence of other critical features of the criminal justice system. And yet the day fine's success story was not universal; in spite of its attractive features, it failed to take root in England (for accounts of the success and failure of day fine systems, see Tonry and Hamilton, 1995, pp. 19–55).

Law reformers sometimes use comparative law like a buffet dinner: from the vast variety of 'models' that can be found globally, they pick and choose those that best fit their idea of which way the law should go, and ignore the rest. Comparison may thus have only an alibi function, giving support to a proposed reform move by a simple show of 'it works elsewhere'. To be a reliable basis for law reform, comparison should be as comprehensive as possible and should take into account the context in which an institution or legal norm operates; only if it can be shown to thrive under circumstances similar to those of the adopting country should it be cited as a viable example for domestic reform.

1.3 Internationalization

Since the 1980s and 1990s, internationalization of the criminal law has opened up a large new market for comparative criminal law. Several

developments are responsible for the increase of its relevance. On an empirical level, easy international commerce and travel as well as the advent of the Internet have led to an increase of crime transcending national borders and have in turn made it necessary for states to cooperate in combating new forms of crime. At the same time, protection of and respect for basic human rights, including those concerning the criminal process, have become major themes in international discourse and politics, initiating a strong move toward the recognition and implementation of common minimum standards of criminal justice. Thirdly, the outbreak of armed conflicts with grave instances of genocide, crimes against humanity and war crimes in the former Yugoslavia and in Rwanda has eventually led to the formation of international tribunals to deal with the main perpetrators of atrocities; as a further consequence, a permanent International Criminal Court came into being in 2002. These international criminal tribunals require both substantive and procedural laws as a basis of their operation, and in light of the courts' supranational character these laws could not be adopted from one country's statute books but had to be created with norms and legal traditions of all members of the international community in mind (for an overview, see La Rosa, 2003). Devising and interpreting the statutes of international criminal courts has thus become an innovative and unprecedented field of action for comparatists. Finally, the European Union has expanded its activities into defining sanctions for violations of its financial interests as well as into harmonizing the criminal laws of member states in areas of economic and organized cross-border crime. The EU is also interested in facilitating cooperation among its member states in criminal matters, especially by providing for mutual EU-wide recognition of decisions made by the courts and other organs of each member state. The EU moreover aims at creating its own criminal justice authorities, such as a European prosecutor to appear before criminal courts of any member state in cases involving the interests of the EU (cf. Cullen and Jund, 2002). These moves presuppose a harmonization of relevant national law as well as the creation of a body of procedural law agreeable to all member states.

Although there is still strong resistance within most national jurisdictions against being superseded by a powerful supranational criminal authority, be it on a European or a global level (Perron, 1997, p. 296), the developments named above have led to great gains in importance for studies of foreign criminal justice systems, both as an academic discipline and as a practical effort (Jung, 1998, 2005). The goal of comparison is not, as the Austrian pioneer of comparative criminal law Franz von Liszt had predicted more than a century ago, the creation of a worldwide common law in criminal matters (von Liszt, 1894, pp. xxi–xxiv), yet the purpose of comparative analysis today goes far beyond finding out about foreign

statutes applicable in exceptional cases. Creating law for international tribunals is a project that requires the blending of various national systems into an amalgam that is both satisfactory by standards of criminal law theory and workable in practice. Given the time pressure under which the authors of the statutes and procedural rules for the international tribunals had to operate, the results are, though not perfect, quite impressive (for an overview of the issues involved, see Safferling, 2001; Cassese, Gaeta and Jones, 2002; Cassese, 2003, pp. 327–405); they demonstrate the viability and creativity of comparative criminal law as a practical discipline.

Like the advent of a practicable international criminal law, the gradual development of something akin to an 'EU criminal law' has given a boost to comparison. A multi-state comparative scholarly effort has resulted in a legislative draft named 'Corpus juris portant dispositions pénales pour la protection des intérêts financiers de l'Union européenne' containing both substantive law and the outline of proceedings to deal with violations of the financial interests of the European Union, for example, fraud, corruption and unauthorized disclosure of secrets (latest version in Delmas-Marty and Vervaele, 2000, pp. 189–213; for a critical analysis see Huber, 2000). In the wake of this draft and of several documents produced by the European Commission, a large body of literature on 'European Criminal Law' has developed (see, e.g., Satzger, 2001; Pradel and Corstens, 2003).

The evolution of a 'Unionized' criminal law and procedure in Europe is not without problems, however. Critics have raised the questions whether the European Union possesses legal authority to regulate criminal matters, whether there is a need and indeed a possibility to 'harmonize' national criminal laws, and whether the actual enactments of the European Union reflect the philosophical traditions and the common spirit of criminal legislation in Europe. With regard to the first of these problems, the European Community clearly had no mandate to make criminal laws, and with the European Union the issue is open to debate, but under Article III-172 of the proposed European constitution the organs of the European Union may promulgate minimal standards for criminal provisions and thereby oblige all member states to adjust their national laws accordingly. The second question, namely whether it is necessary and useful to streamline national criminal laws, for example in the areas of drug traffic, terrorism, corruption, counterfeiting and organized crime, has been answered by normative reality. Since 2000, the organs of the European Union have, by various framework decisions, regulated these areas, and they will certainly continue to do so regardless of the fate of the European constitution. Under European Union law, framework decisions are binding upon member states. Yet European decision making in criminal matters is not a one-way street: before suggesting minimum standards, the European Commission looks

into existing national laws to find out what national practices in defining offences and in calculating sentences for individual infractions exist (Vogel, 2002, pp. 520–21). ‘Unionization’ thus opens up another field for comparatists. The remaining issue under discussion is not so much the legitimacy of harmonization but its ideological foundation and political direction. Whereas the organs of the European Union tend to employ criminal law as a tool for furthering their interest in efficient bureaucratic regulation, a competing school of thought claims a common European tradition of using criminal law with restraint and of limiting its application to the most serious violations of definable individual or communal interests (Manoledakis, 2000; Schünemann, 2002, pp. 513–15; Braum, 2003; Weigend, 2004).

2 Methodology

2.1 Problems of comparing

Comparativists employ different methods depending on the purpose of their endeavour. When they look for foreign law applicable to a particular case or hypothetical situation they will study the appropriate statutory or judge-made law and its interpretation by the courts. This may create difficulties if the foreign jurists’ methods of interpreting law are different from one’s own, but such difficulties can be overcome. More serious problems can arise when comparison is conducted with law reform or harmonization of laws in mind. In that situation, it is not sufficient to study isolated legal norms; rather, the researcher must look at the foreign system as a whole to determine how that system resolves the issue in question. If one has, for example, the task of finding out whether murderers in foreign legal systems are punished by imprisonment for life, one must look beyond the criminal code provision for ‘murder’ because the foreign law may have different categories for voluntary homicide; and one must look beyond the criminal code because the actual length of the sentence may be determined by sentencing law, the law of corrections or even by clemency practices. In order to obtain a complete picture, the researcher will even have to take procedural law and practice into account, because there may be procedural devices that lead to mitigation or aggravation of punishment. Foreign laws can indeed be understood correctly only with their history and with relevant criminological data in mind. The necessity of immersing oneself in the foreign system as a whole increases with the breadth of the topic one wishes to study; if, for example, the focus is on ‘prosecutorial discretion’, not only do the structure of the criminal process and the interaction between police, prosecutors, judges and defence lawyers need to be taken into account, but the constitutional and political system of the country in question, especially the relationship between the executive and the judicial branch, comes into play. In view of these difficulties, it is not advisable to undertake

a journey into foreign legal territory without a guide or interpreter that has practical knowledge of the system under study (cf. Jescheck, 1974, pp. 772–3; Perron, 1997, pp. 286–94; Jung, 1998, p. 2; for a philosophical analysis see Ewald, 1998).

2.2 Law 'families' and comparative evaluation

As is the case in private law, criminal law comparativists often group legal systems into large 'families' to make comparison more manageable. Until the 1980s, it was customary to distinguish the 'families' of common law (mainly limited to the English-speaking world), civil law, socialist law and Islamic law. The demise of socialist law in any specific sense has since reduced the number of 'families', and it is moreover questionable whether Islamic law as a religious law can adequately be compared with secular legal systems. These questions apart, the division of 'families' has generally come under criticism because it overemphasizes differences between the large groups and on the other hand places in the same category legal systems that have little in common (see, e.g., Fairchild, 1993, pp. 27–9; Jung, 1998, p. 3). Traditionally, one distinguished between common law and civil law systems by the method of creating law: judge-made law was to be the hallmark of the common law whereas civil law systems were said to rely exclusively on statutes passed by parliament. This criterion has, however, lost much of its significance, at least in the area of criminal law and criminal procedure (cf. Cadoppi, 2004, pp. 437–53). It has also been pointed out that a common language may be more responsible for similarities in legal solutions than a country's belonging to any particular 'family' (Fletcher, 1998b, p. 697).

A different way of categorizing legal systems is by the underlying political structure. A fruitful approach along those lines has been advanced by Mirjan Damaska who, for the purpose of comparing procedural systems, developed models of coordinate and hierarchical organization of state authority (Damaska, 1986). Similarly, Mireille Delmas-Marty has contrasted liberal, authoritarian and totalitarian models of state and has described the way criminal policy is typically shaped in each of these models (Delmas-Marty, 1992). The advantage of these approaches is that they delineate ideal types rather than trying to press existing legal systems into one common mould. Clearly, ideal types will not be found in pure form in the real world; but models can be powerful tools for comparing existing systems according to flexible criteria.

For the purpose both of informing domestic law reform and of creating truly international law (such as statutes of international courts), it is necessary to some extent to weigh and evaluate the relative 'quality' of solutions found in different legal systems. It is an open question whether evaluation is still the task of comparativists or rather belongs to the field of legal policy,

but in any event the question arises of how one can determine whether one solution for a crime-related problem is 'better' than another. As long as only domestic law reform is at stake, such quality judgments will be determined mainly by the specific conditions and needs of the receiving system: any transplant from abroad has to fit into the domestic environment.

The problem is more acute when international consensus is to be reached, as, for example, for defining norms with EU-wide applicability or procedural rules of an international tribunal. In that case, the issue in question (e.g., whether to grant the prosecuting agency discretion to select some cases for prosecution and to neglect others) must at the outset be defined in neutral terms. Selecting the 'best' solution among the various alternatives that exist in national systems will then be the result of a blend of functional and systematic thinking (cf. Vogel, 2002a, pp. 522–4). Relevant questions to be asked include: what are the policy effects one wishes to reach?; what normative principles are deemed indispensable?; what are the practical effects of various solutions?; which of the more 'functional' solutions can be reconciled with the normative principles regarded as binding?; which of these solutions are consistent with the normative context of the legal instrument in question? This list of queries, some of which require a fair amount of speculation to resolve, not only shows the complexity of comparative analysis but also the fact that international harmonization and supranational legislation depend more on policy decisions than on a 'correct' evaluation of comparative findings. There may be linguistic similarities among national legal norms indicating similar ways of thinking about certain issues (e.g., many legal systems seem to distinguish between justifying formally forbidden conduct and merely regarding it as non-punishable), but there do not exist any universal ontological structures that might permit us to easily 'find' the law (see Neumann, 2000, pp. 128–9). Comparison therefore does not tell us much about 'preferred' solutions: what works in France need not work the same way in Spain, and it is in fact very unlikely that any particular French practice will have the same effect in a foreign legal, institutional and social environment. Comparison can be helpful, however, in showing failures, risks and consequences to be expected. If, for example, broad prosecutorial discretion in various legal systems is criticized because prosecutors lack political control and victims have no recourse against having their cases dismissed, then a lawmaker that opts for prosecutorial discretion will have to think about resolving these typical problems.

Concerning the formation of supranational and international law, one may ask whether it is still permissible to search for the 'best' solution, which one would generally expect to find in the more elaborated and differentiated western legal systems, or whether a more democratic approach should be taken, looking at quantitative majorities within the community of nations

and emphasizing pluralistic compromise rather than legislative 'quality'. This is mainly a political issue. From the point of view of good lawmaking, it is certainly preferable to insist on finding the 'best' solution (which can well consist in an amalgam of various national models) rather than accommodating the greatest number of national interests.

3 Main issues

Comparison of criminal law and criminal procedure extends to a multitude of issues, from the broadest, such as the philosophical or political foundations of criminal justice systems, to very narrow questions. Only very few of these issues can be covered here.

3.1 Systematic v. positivist thinking

One important difference between legal systems, extending beyond the criminal law, concerns the role of legal science in interpreting and even making law. Owing to the historical role of legal scholars in rediscovering and adapting ancient Roman law to medieval and renaissance societies in central Europe, the systematic way of analysing and interconnecting legal issues typical of theory-oriented legal thinkers still plays an important role in several legal systems, especially on the European continent. Academics certainly cannot 'invent' new criminal prohibitions or claim prevalence over the courts in interpreting existing ones, but leading legal scholars still wield considerable authority in suggesting interpretations of the law in line with their theoretical concepts. For example, German criminal law to some extent still recognizes criminal responsibility of a person who consciously drinks so much alcohol that he is temporarily insane by the standards of the applicable s. 20 German Criminal Code. Although s. 20 explicitly declares that a person cannot be punished if he was insane at the time when he committed the criminal act, German doctrine has long recognized an exception if the offender voluntarily brings about the state of temporary insanity knowing that he will commit an offence while in that state. For lack of a statutory basis, German scholars have based this exception on a 19th-century doctrine called *actio libera in causa*, arguing that a person cannot rely on an excuse when he intentionally abused its existence to commit a crime. Until the late 1990s, German courts have applied that doctrine without even questioning its compatibility with the Criminal Code, and they still apply it in some cases (cf. 42 *Entscheidungen des Bundesgerichtshofes in Strafsachen* [1996], p. 235 at 238–43). This is but one example of the predominance of systematic thinking over a simple application of statutory law. In countries that follow this tradition, appellate courts tend to take scholarly opinion into account. Courts' written judgments often contain long passages debating law professors' theories, and scholars frequently publish articles criticizing

appellate court decisions. Legal science in these countries possesses a control function absent elsewhere (Schünemann, 2001, pp. 7–8).

In other legal systems, for example in France and England, the role of legal science is largely limited to interpreting and categorizing the law as laid down by the legislature and/or the courts. There is no great effort in independent theory building, and the attitude of scholars is more positivist than systematic (Vogel, 1998, p. 129, referring to France). Legal scholars seem to see their role mainly as transmitters of information between law-makers and practising lawyers. This difference has nothing to do with the ‘quality’ of the law or of legal scholarship in a given legal system; only if one regards system building as a virtue in itself would one give preference to an active participation of legal scholars in making law (cf. Tiedemann, 1998, p. 433; see also Neumann, 2000, p. 129, distinguishing between national and supranational system building).

3.2 Substantive criminal law: common ground and policy matters

Since World War II, national criminal laws have moved closer together in recognizing certain principles as binding – principles that have their roots in universally acknowledged human rights. The dignity of the person is widely recognized as inviolable, and the general principles of fairness and proportionality are to temper the state’s incursions into its citizens’ spheres of freedom and privacy. For the criminal law, these general principles have led to the recognition of more specific rules: criminal punishment cannot be imposed without a prior proscription of the conduct in question, usually by statute (principle of legality); criminal responsibility must not be extended without explicit legal authority to persons other than the principal actor; criminal responsibility presupposes an element of subjective fault; that is, the ability of the actor to avoid the criminal conduct (principle of guilt); sanctions must not be out of proportion with the seriousness of the offence (principle of proportionality) (cf. Tiedemann, 1998, pp. 416–22; see generally Fletcher, 1998a). It also seems beyond dispute that criminal prohibitions may only extend to socially harmful conduct (cf. Kaiafa-Gbandi, 2000, pp. 45–50); what is regarded as socially harmful is, however, an open question that receives differing answers in different legal systems.

The fact that the principles named above enjoy universal recognition does not mean that they have been implemented everywhere without exception. For lesser (regulatory) offences, a number of countries, including France and England, provide for criminal punishment without proof of the actor’s personal fault; and the concept of customary or judge-made criminal law still exists not only in international law but also in common law jurisdictions. One can nevertheless say that there is much common ground among national jurisdictions as far as the protection of basic interests of the citizen against

abuse of the punitive powers of the state is concerned. Such protection is frequently guaranteed in states' constitutions and international conventions.

There is, on the other hand, much room for diversity beyond those general principles. There are no internationally uniform standards, for example, in the broad area of limiting or excluding criminal responsibility in exceptional situations. There is hardly a legal system that fails to recognize self-defence and duress as grounds for excluding criminal liability, but definitions of what constitutes self-defence and duress vary. Some legal systems make a strict distinction between justifying otherwise criminal conduct and merely excusing it, whereas others treat all 'defences' against criminal charges alike (cf. Eser and Fletcher, 1987/8). Legal systems also differ widely in their attitude toward mistakes of law. Some still adhere to the ancient doctrine of 'error iuris nocet' (a mistake about the law is to the actor's detriment) whereas others grant an excuse when a defendant was unable, even with a serious effort, to learn about the criminal prohibition concerning his conduct. Differing concepts exist, moreover, for dealing with accessorial liability; some laws treat all participants in an offence equally, others make a clear distinction between various forms of perpetration and accessorial liability of instigators and helpers (cf. Vogel, 2002b). These differences, and many others, came to the fore in the late 1990s, when an international group of lawyers endeavoured to draft a 'general part' for the Statute of the International Criminal Court (see Ambos, 2002); their efforts resulted in compromise formulae that may not be totally satisfactory to legal scholars but reflect the fact that differences in practical operation are less pronounced than theoretical distinctions (cf. Tiedemann, 1998, pp. 430–1).

A similar phenomenon can be observed in the area of sanctioning. National systems differ widely as to the amount of discretion they grant courts in determining the sentence of a convicted offender, and as to general sentencing philosophy (for an overview of some sanctioning systems see Tonry and Frase, 2001). Some criminal codes only indicate broad sentencing ranges, leaving the fine-tuning to the judges; in other jurisdictions, the length of the sentence for any given offence is largely predetermined by guidelines promulgated by legislatures. In the end, however, it is ubiquitously a combination of the seriousness of the offence and the prior record of the offender that determines the outcome, although general sentence levels vary from one country to another.

3.3 Criminal procedure: adversarial and inquisitorial modes of proceeding, and areas of convergence

In the area of procedure law, there have long existed two distinct models of conducting the criminal process. According to the adversarial model, prevalent in common law jurisdictions, the (private or public) prosecutor and the

defendant are regarded as co-equal parties presenting their dispute to the trier of fact (a lay jury or a professional judge). Each party is responsible for presenting evidence favourable to its case; the judge has no proactive role at the trial but has to make sure that each side plays according to the rules. The prosecution 'wins' the case if it succeeds in convincing the trier of fact beyond a reasonable doubt that the defendant is guilty of the offence he is charged with. If the defendant fails to contest the charges and pleads guilty, there is no dispute to be resolved and hence no trial. The inquisitorial model, by contrast, conceives of the criminal process as an official investigation conducted by a neutral magistrate or judge. The judge is responsible for finding the facts (as well as the applicable law) and he has broad powers to make the state prosecutor as well as any private person come forward with relevant information. Only if the court has come to the conclusion that the defendant is guilty will the judges convict him.

Most modern criminal procedure systems reflect some sort of combination between these two models. A fairly undiluted version of the adversarial model is, however, still in place in several jurisdictions of the United States. But, even there, the postulated equality of arms between the prosecutor and the defendant is more fiction than fact given the strong legal position of the public prosecutor and the factual investigative superiority of the police. In England, the trial judge has broad authority to shape the fact-finding process and to comment on the evidence before the jury retires to deliberate (Otton, 2002, pp. 327–9).

Yet such 'inquisitorial' elements in the criminal procedure of common law jurisdictions are minor in comparison to the inroads that adversarial thinking has made into traditionally inquisitorial systems. Even the holding of a full trial at which the evidence is to be presented 'live' in open court, an undisputed feature of the criminal process everywhere since the early 19th century, is by its nature an adversarial component because a neutral inquisition could easily dispense with a public replay of the evidence collected by a magistrate. Yet there are many more adversarial elements in the majority of modern 'inquisitorial' criminal procedure systems. In an increasing number of originally inquisitorial jurisdictions, including Italy, Japan and Poland, it is the prosecutor and the defendant who present their respective 'cases' at the trial, although the court can ask for additional proof and introduce evidence by its own motion. There exists, moreover, a broad international movement toward criminal justice 'by consent'. Either by statutory authority or by informal practice, many 'inquisitorial' jurisdictions have adopted something akin to the guilty plea: agreements between the defence and the prosecution and/or the court as to the disposition of the case (see Langer, 2004). Such agreements, which lead to a waiver or a radical shortening of the trial, 'naturally' belong to the adversarial model; they do not fit

with the inquisitorial interest in finding the truth because they replace the finding of relevant facts with the defendant's submission to an agreed-upon sentence (see Weigend, 2003). Promoted by a general pressure toward efficiency and speed, elements of consensual and negotiated justice have nevertheless spread since the 1980s to most jurisdictions.

As is the case with substantive criminal law, the advent of supranational tribunals such as the International Criminal Court has led to a renewed interest in comparative criminal procedure and to a competition among procedural models for predominance in the international court's procedural rules. Not only because of the powerful political influence of common law countries such as the United States and the United Kingdom, the ad hoc tribunals for the former Yugoslavia and Rwanda as well as the International Criminal Court have been richly endowed with adversarial elements. In light of practical experience with complex cases, however, adverseness has been tempered by important concessions toward the inquisitorial ideal, especially the trial court's authority to search for the truth on its own initiative (Kreß, 2003; for a critical assessment of 'hybrid' procedures, see Damaska, 2003, pp. 121–2).

It will be interesting to follow the future development of procedural law both in domestic law and in international tribunals. It may well be that the ancient contrast between inquisitorial and adversarial modes of proceeding will lose its significance and will be overshadowed by the conflict between preserving the human rights of the defendant and an uncontrolled increase in powers of the state to gather information about crime through modern technology, boundless data collection and processing as well as refined psychological methods such as the use of undercover agents and informers (cf. Eser, 1996, pp. 98–112). It is in this area that careful comparison of laws and practices may be needed most in order to strengthen the position of the individual in the face of potentially overwhelming state power.

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21 The Czech Republic

Bohumil Havel

1 Introduction

The Czech Republic (Česká republika) is (both politically and legally) a unitarian state having the form of a republic, and, together with the Slovak Republic, it is the legal successor of the now defunct Czechoslovakia (1992). Although the legal order underwent a substantial deformation after the Communist regime seized power in 1948, the legal system of the Czech Lands has been traditionally classified as part of the Austrian law family (the basic private law codices of the Austrian monarchy applied in the Czechoslovak territory up to 1950). This historical development was disrupted first by the impact of a gradual ‘sovietization’ after 1948, followed by a germanization of law after 1989 (Knapp, 1996). The present-day Czech legal order is a complex structure consisting of post-Soviet normative solutions (civil law, labour law, family law) and German–Austrian and French solutions (commercial law). Using obsolete terminology, the current Czech legal system could be classified as a system belonging to the Socialist (post-communist) law, modified by the normativity of Austrian and German laws; however, the entire system is a part of the continental law system beyond any doubt.

Czech law is codified, and as regards its structure, strictly speaking, it follows German systematics, while, from a broader point of view, it follows Soviet systematics. While the individual codices are divided into general and special parts (modelled on the German BGB), their classification follows the Soviet doctrine. In the early 1950s, Czechoslovak law thus embarked on a path of manifestation of individual branches of law, frequently created ad hoc, and an entire system of codices regulating in particular the relationship between the state and the citizen was issued. This status persists even today, and in addition to the Civil, Commercial and Penal Code, there is also the Labour Code and the Family Act.

The Czech language is the official language, both in the publication of legal regulations and case law and in court hearings; the Slovak language enjoys a special status and its use without the requirement of certified translation is permitted.

Following the political changes of 1989, Czech law underwent a gradual process of deconstruction. Under the influence of Communist ideas, private law and the interests of the individual were suppressed, while étatistic public

law was promoted, not only in the theory and creation of the law, but also in its application. At present, recodifications of civil, family, commercial, bankruptcy and criminal laws are being prepared for further debate, although these texts mostly manifest an unequivocal return to traditional law, even though the new law will be difficult to classify in terms of methodology because of the broad range of its ideological models; we can say, however, that Czech private law will to a substantial extent follow the historical experience with Austrian law (cf. Eliáš and Zuklínová, 2001; Eliáš and Havel, 2002).

2 Constitutional law

The Constitution of the Czech Republic (*Ústava České republiky*) was enacted in 1992 and entered into force on 1 January 1993. This legal document, together with other laws, justified the political disintegration of Czechoslovakia, and directly ties in with the Charter of Fundamental Rights and Basic Freedoms. Unlike the former Constitution of 1960, the new Constitution reflected the return to parliamentary democracy, rule of law and protection of human and civil rights; the constitutional order as such does not deviate from democratic standards. The wording of the Constitution subscribes to Montesquieu's concept of tripartite government and regulates the legislative, executive and judicial powers separately. Further, the Czech constitutional system as provided for in the wording of the Constitution is further supplemented by a special regimentation of the Supreme Audit Office and the Czech National Bank, and, last but not least, the principles of territorial self-governance. Given the absence of democratic practices, many articles of the constitution are of a proclamatory and blanket nature, and are further specified in separate laws (political parties, local referendum, Constitutional Court's status, etc.). Fundamental human and civil rights are in principle express embodiments of international treaties binding on the Czech Republic, and for the *ultima ratio* of interpretation. The Constitution, the Charter of Fundamental Rights and Basic Freedoms, as well as other related constitutional laws, may be found in both Czech and English on the Constitutional Court's webpage (<http://www.concourt.cz>).

The legislative body (Parliament of the Czech Republic – *Parlament České republiky*) consists of two chambers, and its composition is the result of free elections using the principle of proportional representation in the case of the upper chamber, and majority representation in the case of the second chamber; there is no direct election. Although the two chambers of the Parliament generally ought to play analogous roles, the lower chamber (House of Representatives – *Poslanecká sněmovna*) plays a key role in the legislative and political process, while the upper chamber (Senate – *Senát*) only rarely plays a decisive part. While membership in one of the chambers

precludes membership in the other, it is not incompatible with Cabinet membership. Both chambers of the Parliament elect the country's president in a joint session, employing the majority principle. The president represents the country at international level and executes international treaties and laws; his significant rights include the right to veto the adoption of a law (the veto may be tackled by a repeated qualified approval of the bill in the House of Representatives).

In light of the experience of totalitarianism, the Charter of Fundamental Rights and Basic Freedoms sets out the individual's right to civil disobedience should the democratic order be disrupted (Article 23). Similarly, the Constitution prohibits the change of major attributes of a democratic state by a rule of law. The Constitution may only be amended by a constitutional statute (Article 9), i.e., a statute requiring a higher quorum. The abstract constitutional review is performed by the Constitutional Court seated in Brno (Ústavní soud); the Constitutional Court is entitled to repeal legal regulations or parts of legal regulations that are contrary to the constitutional order (the same includes ratified international treaties having a greater legal force than regular law *eo ipso*); however, not even the Constitutional Court has the authority to repeal a constitutional statute (including the Constitution). Other courts do not have this power but are entitled to submit a disputed case to the Constitutional Court.

The activities of the Constitutional Court include the review of individuals' complaints regarding violations of fundamental rights and basic freedoms; an independent ombudsman based in Brno also plays a certain role in this area. The findings, resolutions and opinions of the Constitutional Court are binding, and some of them are published in the Collection of Laws.

3 Civil and commercial law

The Civil Code currently in effect (*občanský zákoník*) entered into force in 1964, and, despite extensive amendments adopted as a result of the change of the political regime (in particular in 1991), its construction continues to exhibit the effects of Socialist deformation of law. The current Civil Code superseded the Civil Code of 1950 that was of a much higher legislative standard but that, in terms of ideas, changed the understanding of private law and introduced a different regime for the regulation of social relations.

The Civil Code consists of six parts: a general part, a part regulating third party rights, a part regulating civil offences, a part addressing succession, a part regulating obligations (including consumer contracts) and a final part. The above indicates that the Civil Code does not respect the structure and content of most of the traditional civil codes, when the 'branch' approach to law requires separate codices or laws for the regulation of family law,

copyright, labour law or private international law. As a result, while the Civil Code represents a general regulation, it has been modified to such a degree that one would hardly refer to it as a principle codex of private law. The Civil Code has been translated into English and the translation is kept up to date (Tradelinks, Prague, 2002).

The Czech legal order continues to include the Commercial Code (obchodní zákoník) that follows the pre-war provision of law and the economic code generally applicable up to 1991 (it regulated the relations between Socialist organizations). With some exceptions, the Commercial Code has the status of *lex specialis vis-à-vis* the Civil Code, and, in addition to commercial companies and related institutes, it also regulates the law of obligations; the Czech provision of law in the area of obligation is therefore duplicated, not only with regard to certain contract types, but also in terms of general normative solutions (statute of limitations, changes to obligations, etc.). Because it is more sophisticated, the Commercial Code, rather than the Civil Code, is frequently employed in general practice thanks to the unique option of choice of the Commercial Code as the governing legal regulation.

Although the Soviet Civil Code served as the ideological basis for the current Civil Code, the traditional Czech civil law is modelled on the Austrian Civil Code (ABGB), as well as the Austrian Commercial Code (AHGB). This conclusion applies not only to the interpretation of statutory provisions, where numerous provisions formulated in the period of 'real Socialism' are currently interpreted through the prism and doctrine of old civil law, but also to the teaching of civil law: crucial textbooks of civil and commercial law more or less draw on textbooks published while the old codices were in effect.

With the exception of the decision-making practice of the European Court of Justice and the European Court of Human Rights, foreign case law does not serve a practical role. The Constitutional Court, however, sometimes refers, by way of comparison, to decisions of constitutional courts of other countries, in particular Germany and France. As the defects in the civil law need to be overcome through interpretation, case law of the Czechoslovak Supreme Court dating from the time when the ABGB was in force plays an important role. These decisions are amply cited and applied in both practice and theory, and, in addition to the original official collections of such decisions, there are new private collections as well (e.g., Eliáš, 2006). While the case law of the present-day Supreme Court plays the same role, the quality of decisions in civil matters is questionable and unbalanced.

The duality, or rather triality, of civil law will be maintained even after the recodification, although a separate Civil Code, Commercial Act and

Labour Code are expected to be preserved. The Civil Code, formulated to a substantial extent by Karel Eliáš, will unify inter alia the provision of law in the area of obligations and, in terms of ideas, it will be modelled on not only the Austrian provision of law, but also the Swiss, German and Italian ones. The new codices are expected to enter into force in 2008.

4 Court system and law faculties

The Czech judicial system is based on the principle of two, or rather three, instances. District courts (*okresní soudy*) are the courts of first instance; they are in every district city and generally decide all disputes, except for those that fall, by operation of law, under the province of regional courts (*krajské soudy*) at first instance; there is a total of eight regional courts. A decision of a court of first instance may be appealed to a higher court; in the case of a regional court, a high court (*Vrchní soud v Praze* or *Vrchní soud v Olomouci*) serves as the appellate court. There is a special remedy available – post-judgment recourse (*dovolání*) – on which the Supreme Court in Brno (*Nejvyšší soud*) rules at third instance; its decision is final. In matters of administrative law, the supreme instance is the Supreme Administrative Court, also seated in Brno (*Nejvyšší správní soud*). The Czech Republic employs the appellate system of appeal, with the exception of post-judgment recourse, which uses cassation.

Czech law is a doctrinal law, with legal doctrine playing an important role, albeit not always a positive one (Havel, 2003). Most of the key issues of private law continue to be debated, including court decisions, although such discussions are often coloured by a Socialist perception of the law. Therefore, although the doctrine is of great importance in the application of the law, its significance frequently tends to be unproductive, and the helpless practice seeks assistance in commentaries and opinions of professors that are viewed as a canon regardless of their accuracy.

There are four law schools in the Czech Republic: in Prague, Brno, Pilsen and Olomouc. In addition to universities, there is also the Institute of State and Law of the Academy of Sciences that devotes its efforts to all branches of law, as well as its traditional area of comparatistics (e.g., Knapp, 1996, chief editor of *IECL*, vol. I). There are various professional associations in the Czech Republic but not at an academic level (e.g., Czech Bar Association – *ČAK*). An association of lawyers, *Všehrd*, which also engages in publication activities, is an exception in this regard.

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22 Damages (in tort)*

Siewert D. Lindenbergh

1 Introduction

A comparative study of the law concerning damages is like a comparison of fruits from different trees: one cannot understand the true nature of the fruit without studying the tree that it originates from. For this reason, comparative studies of the law of damages are hampered by the very nature of the differences between the three major European legal families – the English, the French and the German system, being the most representative examples – regarding the sources of damages. This concerns the differences in approach of delictual and contractual liability as well as the differences in approach of varying forms of delictual liability (various heads of tortious liability), each possibly or actually having their own regime for damages.

In this respect three major different systems can be found (Zweigert and Kötz, 1996). In English law, the regime regarding damages is dependent upon the nature of a variety of specific torts, and, in absence of a code, is to be found in case law as well as in literature (McGregor, 2003). According to French law, the concept of damages is only somewhat elaborated on in the Civil Code as far as contract is concerned (Arts 1149–1151 CC). As far as tort is concerned the law of damages is in practice formed by interpretation of the word ‘dommage’ in Arts 1382 and 1383 CC (general articles on tort) in case law and literature. Apart from the different regimes in contract and tort, French law does not, as far as the regimes of damages are concerned, distinguish between different torts or contracts. German law has accepted a general regime of damages (para. 249ff., BGB), which is applicable in tort as well as in contract, but several aspects, such as for instance recoverability of non-pecuniary loss, are again more elaborated on in the articles regarding delictual liability (para. 847, BGB) (see, on the interweaving of the law of damages in cases of delictual and contractual liability, von Bar, 1999, pp. 137ff.). Other European jurisdictions have essentially accepted systems that are similar to one of these three families (van Gerven, 1998).

Because of this substantial difference in systematic approaches regarding the origins of a claim for damages, comparative studies have chosen diverse perspectives. Some primarily concentrate on a comparison of the origins of the claim (van Gerven, 1998, 2000; Brüggemaier, 1999; Faure and Cousy,

* See also: Accident compensation; Personality rights; Tort law in general.

2001; Koch, 2002; Spier, 2003; Wurmnest, 2003; Zimmermann, 2002, 2003), some concentrate on protected interests (von Bar, 1999), but both provide relevant information on damages as well. Others concentrate on a specific topic in the area of damages, such as causation (Spier, 2000), contributory negligence (Spier, 2004) or non-pecuniary loss (Rogers, 2001). Again others focus on a comparison of various more or less specific practical cases (van Gerven, 1998, 2000) or examples in a questionnaire (Magnus, 2001; Rogers, 2001) or on a specific area, such as personal injury (Koch and Koziol, 2003; McIntosh and Holmes, 2003; Bona and Mead, 2003; Bona *et al.*, 2005), or pure economic loss (Banakas, 1996; Bussani and Palmer, 2003; van Boom *et al.*, 2003). It must, however, be noted that this is a matter of concentration, meaning that the choice for one perspective does not in these works generally result in ignoring the notion of other perspectives.

In addition to this choice of perspective, another difference in approach can be noted. Some publications choose first to describe the national 'state of the art' on certain topics, followed by a comparative study (Magnus, 2001; Rogers, 2001; Koch and Koziol, 2003; Bona and Mead, 2003; Bona *et al.*, 2005). Others (von Bar, 1999; van Gerven, 1998) choose to write a comparison, using national situations as examples and illustrations. Although the first option seems to be most informative, it must be borne in mind that any description of national jurisdictions is unavoidably coloured by the wish to compare, usually shown in a questionnaire forcing the authors to make a selection in their description from a certain perspective. This approach also inevitably has consequences for the size of the publications.

Apart from these internationally oriented works, there are of course numerous national studies that contain comparative analyses on more specific issues. For instance, in England the consultation papers of the Law Commission usually contain elaborate overviews of foreign law, as do many more specific studies. Although these studies are usually oriented from a national perspective on a certain topic, they do provide substantial information on foreign jurisdictions as well as on comparative issues.

Furthermore, it can be noted that courts are increasingly becoming aware of the notion of comparative arguments. In the Netherlands, for instance, it is not uncommon for the *Advocat-Generaal* to inform the Supreme Court on the state of the law in other European countries. And recently, in England, the House of Lords accepted a new rule on proof of causation, partly inspired by the situation in other European jurisdictions (*Fairchild v. Glenhaven Funeral Services Ltd* [2003] 1 A.C. 32). It can thus be said that the influence of comparative arguments has increased over the past years, not only as a result of an increasing flow of international comparative studies, but also because of nationally oriented works as well as more incidental court cases.

2 Functions of tort law, aims of damages

It seems to be related to the earlier mentioned diversity of the structures of the main legal families that some comparative works primarily pay attention to the functions of tort liability (e.g., van Gerven, 1998), whilst others appear to concentrate on the functions or aims of damages (e.g., Magnus, 2001). Although the functions and aims of tort law may be considered from a wider perspective than the aims of the law of damages, more specifically because a delict may give rise to other remedies than damages as well, it is clear that the awarding of damages is in practice by far the most important remedy in a case of a delictual liability. Thus it can be said that damages play a crucial role in serving the functions of tort law. It is for this reason that reparation of inflicted harm is without a doubt considered the primary function of tort law in any legal system (van Gerven, 2000, p. 740). From this point of view it is no surprise that it is generally accepted that compensation of loss is the main goal of the law of damages (Magnus, 2001, p. 187). More precisely, it can be said that the aim of damages is in fact to finance possible reparation and compensate remaining loss, thus offering a 'second best' for what cannot be repaired.

From this point of view it is not surprising that the concept of 'restitutio in integrum' or 'full compensation' appears to be a basic principle in all European jurisdictions (Magnus, 2001, p. 185 and, regarding personal injury, Bona and Mead, 2003, pp. 556ff.). However, jurisdictions diverge considerably on the elaboration of this principle as far as protected interests, acceptance of sorts of loss and limitation of liability are concerned (see on protected interests, for instance, van Gerven, 1998, and, on personal injury, again Bona and Mead, 2003).

Most comparative works also pay attention to additional aims or effects of the awarding of damages. Magnus (2001, p. 185), for example, discusses the aims of prevention, punishment, declaration of right and restitution, and concludes that these aims serve as additional considerations rather than that they can solely found or shape an award of damages. Exceptions in this respect are English and Irish law which to a limited extent recognize remedies that extend over compensation, such as exemplary, aggravated or nominal damages. Other jurisdictions do accept for instance under circumstances a specific role for the aim of prevention, meaning that the quantum of damages may be increased in relation to the nature of the act (*ibid.*, pp. 185ff).

3 Protected interests, sorts of loss

Various comparative works substantially address the question of protected interests (van Gerven, 1998, 2000; von Bar, 1999; Magnus, 2001). Specifically this matter appears to be influenced by the systematic differences in the legal

families, since it can be located both in the concept of tort (the scope of protection of the delict at stake) and in the concept of damage (compensatable loss). Van Gerven (1998, 2000) seems to have chosen the former perspective (tort), while von Bar (1999) and Magnus (2001) address the matter from the perspective of damage. Although these approaches differ fundamentally in their starting point, it appears that they both lead to a consideration of quite similar topics. Van Gerven (1998, 2000) considers the protection of life, physical integrity, health, freedom, ownership, property rights, economic interests and collective interests. Von Bar (1999) addresses some of the same topics in a description of the concept of damages, and reviews other interests (protection of life, physical integrity, health, freedom, honour etc.) separately. Magnus (2001) first describes different aspects of damages and then considers different cases in which the scope of protection is illustrated. Although it is for this difference in approach not easy to compare the results of these comparative works, it cannot, owing to the very nature of the material, be said that one of the approaches is to be favoured above the other.

As a matter of logic, the studies that address the question of protected interests from the perspective of the concept of damage review different aspects and sorts of loss from a more systematic and dogmatic point of view. Von Bar (1999), for instance, distinguishes fundamentally between injury and consequential loss, and between pecuniary and non-pecuniary loss. Magnus (2001) also considers further distinctions such as direct and indirect damage, actual and further damage, damage to persons, property and pure economic loss, and addresses matters of calculation, such as abstract and concrete calculation, standardization etc.

Interestingly, two areas of loss have been considered in comparative studies more thoroughly on a separate basis: pure economic loss and personal injury. The attention to personal injury as a separate field of study can be explained by its social importance and because of the increase of cross-border accidents, which emphasizes the possible differences between national jurisdictions. The attention to pure economic loss is probably due to the fact that this area of law is in all jurisdictions substantially influenced by policy arguments which can be embedded in different legal concepts, thus making a comparative approach most fruitful.

4 Pure economic loss

Pure economic loss, being the collective term for general loss not resulting from a specific infringement upon a protected interest, appears to be one of the most controversial issues in the law of damages, because it ultimately reflects the risk of expansion of liability both in the area of tort and in the area of contract. Since every legal system has its own techniques of limiting liability, and since the extent to which expansion or limitation takes place is

merely a matter of policy, the concept of pure economic loss appears to be an interesting subject for comparative research, because it shows the different manners in which policy arguments are, openly or not, legally founded and designed. It is, therefore, not surprising that the issue of pure economic loss is addressed separately in different comparative studies (von Bar, 1999, pp. 30ff.; van Gerven, 1998, p. 252; 2000, pp. 208ff.; Magnus, 2001, p. 217; Banakas, 1996; Bussani and Palmer, 2003; van Boom *et al.*, 2003. The most comprehensive on this issue are the latter three works).

A first hurdle seems to be the definition of pure economic loss, which is closely related to the heart of the matter. Von Bar (1999) distinguishes two major approaches in this respect. In one approach, pure economic loss is defined as loss occurring independent of injury to an object or to a person. In the other, it is defined as loss suffered not as a result of infringement upon a legally protected right or interest. These approaches have in common that they concern loss not resulting from bodily injury of the claimant or injury to his goods (Gilead, 1999, p. 203; Bussani and Palmer, 2003, p. 6: 'pure economic loss strikes the victim's wallet and nothing else'). They both reflect that pure economic loss can be seen as the more remote or less tangible effect of a tort, thus concerning the risk of expansion of liability. Pure economic loss may appear in quite different types of situations (Kötz, 1994), such as damage as a result of unfair competition, damage suffered by a third party as a result of personal injury, damage suffered as a result of reliance upon a negligent statement or damage suffered by a third party resulting from the damaging of a cable leading to a power cut.

Comparison of the law regarding pure economic loss again reflects basic divergences between the three different legal families (van Boom *et al.*, 2003, pp. 4ff.; Bussani and Palmer, 2003, pp. 530 ff.), but the division does not in this respect appear to be between the common law family and the Roman law family, but more between the liberal French approach, not recognizing the problem of pure economic loss as such, on the one hand, and the German and British approaches, which show sincere reluctance to accept compensation of pure economic loss, on the other. In fact, however, each system appears to be trying to find a reasonable middle course between either excluding the right to compensation of pure economic loss altogether or accepting full compensation of every pure economic loss. The tools for limitation of liability in this respect are found either in limiting the scope of protection or in the concept of causation, both concepts being able to embrace policy arguments to keep possible opening of floodgates against liability manageable. Because of the many different types of cases and the substantial dogmatic differences in approach, especially regarding the issue of pure economic loss, a case-by-case study seems to be most fruitful and almost indispensable. In this respect the comparative study of Bussani and

Palmer (2003) seems most informative. This study is also comprehensive because it adds a historical perspective (by James Gordley) as well as economic analyses (by Jürgen G. Backhaus and Francesco Parisi), which can also be found in van Boom *et al.* (2003) (by Giuseppe Dari Mattiacci).

5 Personal injury

The specific attention paid by comparativists to the area of personal injury can probably be explained by the practical issues that cross-border accidents raise, as well as by the social importance of personal injury compensation.

The approaches of the different studies vary considerably. McIntosh and Holmes (2003) primarily concentrate on a comparison of the levels of the damage awards and on the methods of calculation. Their conclusion is that the compensation awards vary considerably from jurisdiction to jurisdiction. Bona and Mead (2003) explicitly choose not to study and compare the amounts, but to concentrate on substantive legal know-how regarding the position of personal injury compensation in relation to other compensation mechanisms and the sorts of recoverable loss, while other issues such as methods of quantification, limitation, issue and service of procedure and the issue of harmonization are addressed as well, all according to a general questionnaire. A similar approach is followed by Bona, Mead and Lindenbergh (2005) regarding compensation for secondary victims in the event of injury or death of the primary victim. Koch and Koziol (2003), who also worked with a general questionnaire, reflect on the interplay of civil liability and social security, the burden of proof, contributory negligence, recoverable loss in case of personal injury and death, the extent and means of compensation and the relevance of third party insurance for the victim. In addition, they compare three specific cases (a paraplegic, a knee operation and loss of maintenance). Furthermore, a comparative analysis is added.

Compared to earlier studies in this area (Pfennigstorf, 1993), these studies are all quite elaborate. They show a great variety of legal approaches and solutions to quite similar problems that compensation of personal injury gives rise to. They also show the importance of a two-way approach: on the one hand the systematic approach of the structure of the legal system and its concepts; on the other hand the more practical comparison of levels of awards, because a jurisdiction generous in its systematics appears not always to be as generous in its actual compensation (Bona, Mead and Lindenbergh, 2005: comparative chapter).

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23 England and Wales

Damian Smith

1 Introduction

The United Kingdom of Great Britain and Northern Ireland ('The United Kingdom') is composed of England, Scotland and Wales (together, 'Great Britain') and Northern Ireland. While England and Wales share a legal system and set of civil procedural rules, Scotland and Northern Ireland have their own systems. The Northern Irish legal system mirrors, to a broad extent, the English system. The same cannot be said of Scottish law.

England and Wales constitute a common law jurisdiction. In the absence of a civil law code, English laws are set out in primary and secondary legislation and in landmark legal judgments. Depending upon the level of the court in which a judgment is given, a legal judgment may constitute a precedent. The ratio decidendi of a court's judgment might, accordingly, be binding upon other courts dealing with similar matters. This is considered further below.

In practice, English is the language that is predominantly used in all the courts of England and Wales. Nevertheless, pursuant to the Welsh Language Act 1993, Welsh may be used in proceedings before courts situated in Wales. In most other cases, the use of the Welsh language in English courts will be subject to the judge's permission.

2 Constitutional law

The constitution of the United Kingdom is often described as being 'unwritten'. While the United Kingdom's constitution is not contained within a single written document, many of its contents are reduced into writing. Consider, for example, the Parliament Acts of 1911 and 1949. These Acts clarify the means by which legislation is passed and define the roles and powers of parliament's two Houses (as described below) in that process. Other sources of the United Kingdom's constitution are case law and parliamentary 'conventions'. Contrary to the position in a number of other countries, the United Kingdom's constitution may be amended by an Act of Parliament.

The Queen is the Head of State. The Queen formally appoints the head of the government, the Prime Minister. The United Kingdom parliament is based in the Palace of Westminster, in London. It is a bicameral parliament. Members of the parliament's first chamber, the House of Commons, are

elected directly. The Prime Minister is usually the leader of the party with the majority of members in the House of Commons. Members of the second chamber, the House of Lords, are not elected directly. This second chamber is, instead, composed of hereditary and life 'peers' (titles which have been, respectively, inherited or bestowed by the Prime Minister pursuant to the Life Peerages Act, 1958) together with Church of England bishops and law lords. The composition of the House of Lords is currently undergoing reform.

Partial devolution means that Scotland now has its own parliament (pursuant to the Scotland Act 1998), Wales has its own National Assembly (see the Government of Wales Act 1998) and Northern Ireland has its own Legislative Assembly (following the Northern Ireland Act 1998). Such bodies have the power to draft and implement policies in a range of different fields. Certain matters are, however, reserved and must be legislated for in the Houses of Parliament.

The United Kingdom operates a dualist system with regard to international treaties and European Union law. International treaties must therefore be incorporated into the domestic legal order before they can take legal effect.

The doctrine of 'parliamentary sovereignty' means that English courts cannot question the constitutionality of primary legislation. Secondary legislation may, however, be declared *ultra vires* by the courts.

Notwithstanding the above, the Human Rights Act 1998 enables certain courts to make a 'declaration of incompatibility' with regard to primary and secondary legislation. This may be done where the court considers that a provision in the legislation is incompatible with certain rights enshrined in the European Convention of Human Rights. With regard to primary legislation, the Act introduces a new parliamentary procedure by which remedial action might subsequently be taken by parliament. With regard to most secondary legislation, the courts may disapply or quash the relevant law.

3 Civil and commercial law

Given that it is a common law jurisdiction, the laws applied in England and Wales are not contained within a civil code. The law is instead found in statutes (such as the Contract (Rights of Third Parties) Act 1999 and the Limitation Act 1980) and the *ratio decidendi* of precedent-setting case law (consider, e.g., *Donoghue v. Stevenson* [1932] AC 562).

Acts of parliament are generally very detailed. They may therefore resemble codes in many respects. This can be seen, for example, in the comprehensive regimes established under the Sale of Goods Act 1979 and the Supply of Goods and Services Act 1982. Other Acts are intended to incorporate international obligations into domestic law and to assimilate such obligations

with existing law. Consider, for example, the Civil Jurisdiction and Judgments Act 1982. Acts might also be intended to rationalise common law developments and/or to fill 'gaps' that have arisen in case law. This can be seen from many sections in, for example, the Private International Law (Miscellaneous Provisions) Act 1995.

All legislation is published under the authority of Her Majesty's Stationery Office (HMSO). All legislation is now published in print and on the Internet. Acts of Parliament from 1988 onwards can be found on-line at www.legislation.hmso.gov.uk. Printed copies of legislation pre- and post-1988 are available from The Stationery Office (TSO), the official publisher to the United Kingdom parliament (www.tso.co.uk/bookshop/bookstore.asp?FO=42841).

4 Court system and law faculties

The legal profession in England and Wales is divided into two branches; solicitors and barristers. The governing body for solicitors is The Law Society (www.lawsociety.org.uk/home.law). The Bar Council serves a similar function for barristers (www.barcouncil.org.uk). Barristers can appear before any court in England and Wales. Solicitors may only appear before certain tribunals and 'lower' domestic courts unless they obtain 'higher rights of audience' by becoming a 'solicitor advocate' pursuant to the Courts and Legal Services Act 1990.

The civil court structure of England and Wales is, in summary, divided into four tiers. The lowest tier comprises the county courts. England and Wales are divided into 'Districts', each of which has at least one county court. There are approximately 218 such courts. Districts are grouped into 'Circuits'. Cases in the county courts are heard before district judges or (more senior) circuit judges. Above the county courts is the High Court. The High Court is divided into three separate 'Divisions': the Queen's Bench Division, the Chancery Division and the Family Division. Each division deals with different categories of case. While the High Court is based at the Royal Courts of Justice in London, High Court cases are also heard at High Court 'centres' across England and Wales. Above the High Court is the Court of Appeal (Civil Division). Its judges usually sit in the Royal Courts of Justice in London. The highest court in the jurisdiction, above the Court of Appeal, is the House of Lords. It is based in Westminster. In civil cases, it hears appeals on points of law for the United Kingdom as a whole. In criminal cases, it does so for England, Wales and Northern Ireland.

The High Court's decisions are binding on county courts. The High Court is not bound by its own decisions, but such decisions are 'persuasive authority'. The Court of Appeal's decisions are binding on all lower courts. It is bound by its own decisions unless (i) there are two conflicting decisions,

(ii) the earlier decision has been impliedly overruled by the House of Lords, or (iii) the earlier decision was made *per incuriam*. Decisions of the House of Lords are binding on all lower courts. Other than in exceptional circumstances, the House of Lords will follow its earlier decisions.

Appeals from county courts are heard before the Court of Appeal or, in some cases, before the High Court. Appeals from the High Court are heard by the Court of Appeal or, in special circumstances, are remitted directly to the House of Lords. Appeals from the Court of Appeal are heard by the House of Lords.

Historically, the Judicial Committee of the Privy Council ('the Privy Council') heard appeals from courts based in Britain's colonies. It now hears appeals from various Commonwealth countries, from the United Kingdom Overseas Territories, from the Channel Islands and from certain professional bodies (e.g., the Disciplinary Committee of the Royal College of Veterinary Surgeons). The Privy Council's role has adapted over the years. Canada, India and Australia have all discontinued the practice of referring appeals to the Privy Council. However, the Council still hears appeals from many other countries. It is also the court of final appeal in respect of many issues arising under the 'devolution' acts passed in 1998 (as referred to above).

Given England's history, and given its close links with the Commonwealth and a wealth of other nations, English law has had, and continues to have, an influence on the law practised in other jurisdictions.

Since 1 April 1998, the county courts, the High Court and the Court of Appeal (Civil Division) in England and Wales have operated pursuant to the same set of procedural rules; 'The Civil Procedure Rules' ('the CPR' or, as its published form is referred to in practice, 'the White Book'). The conduct of civil proceedings before the House of Lords is governed by a separate set of practice directions and standing orders (in practice referred to as 'the Blue Book', because of its distinctive colour).

In addition to the courts, there are a number of tribunals dealing with specialised matters, such as employment law cases and certain tax disputes.

There are over 100 higher education institutions offering degrees in the United Kingdom. Over 75 of these offer courses in law. The Quality Assurance Agency for Higher Education (www.qaa.ac.uk/reviews) periodically publishes reports on such institutions. *The Times*, a daily newspaper, also publishes a respected guide to such universities each year. This guide ranks the universities by subject. The results can be found at www.timesonline.co.uk/. The 2005 report in *The Times* ranked the universities in the following order for law: Cambridge, Oxford, Durham, University College London (UCL), Manchester, London School of Economics (LSE), Nottingham, King's College London, Edinburgh and Leeds.

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24 European Civil Code*

Nils Jansen

The project of a European Civil Code forms part of the larger process to harmonize European private law (cf. Smits, 2000; Kramer, 2001). It combines two elements that for a long time seemed to have lost any political significance. The first is the idea of unifying private law, which during the 20th century had been of mere academic interest. The common structures and principles of European private law as well as differences with regard to single rules were the subject of comparative research, not political argument. Of course, there are now a number of European directives also on matters of private law. However, these directives typically concern only limited areas of the law; they aim less at unification than at progressive, substantive change. They strengthen the position of consumers and they enhance competition within the common market; they do not primarily aim to establish unifying structures of legal thinking. The second element is the Enlightenment's idea of a codification, a specific historical phenomenon that originated in late 17th- and 18th-century legal science and was often regarded as outdated in the second half of the 20th century. Of course the Dutch *Nieuw Burgerlijk Wetboek* was finally introduced as recently as 1992 and the *Code Civil* of Quebec in 1994. But for many lawyers 'decodification', not codification, characterized modern private law: the dissolution of codified law into special statutes, large layers of judge-made law and special rules for different social groups (cf. Caroni, 2003, but see Zimmermann, 1995).

During the last decade of the 20th century, however, this picture changed fundamentally, and the idea of a European Civil Code has become a highly disputed topic of European private law and legal politics. As early as 1989 (Resolution A2-157/89, Official Journal C 158, 26/06/1989 P. 0400) and again in 1994 (Resolution A3-0329/94, Official Journal C 205, 25/07/1994 P. 0518) and 2000 (Resolution B5-0228, 0229, 0230/2000, Official Journal C 377, 29/12/2000 P. 0323 – 0329), the European Parliament had forcefully demanded a European Civil Code. After the European Council had, in response to that, asked to consider the necessity of such a code, the Commission issued in summer 2001 a Communication on European contract law (COM (2001) 398/F of 09/07/2001) that initiated an intense debate (on this, see Jansen, 2004,

* See also: Comparative law and economics; Legal culture; Legal history and comparative law; Transnational law.

pp. 2ff.; Grundmann and Stuyck, 2002). At present a European Civil Code does not appear feasible within the immediate future, and it is impossible to predict the outcome of today's developments (see section 6, below).

1 Discussing codification

Codification projects have often been controversial, for political or legal reasons. The dispute between Thibaut and Savigny about a codification of German private law is a famous example, often invoked in the present discussion of a European Civil Code. There may be good reasons both for maintaining the current fragmented state of law and for a new codification. While some legal actors might hope to benefit from the introduction of a new code, others may fear finding themselves on the losing side. Thus there cannot be one right answer to the political question of a European Civil Code; for the time being, it must suffice to understand the various arguments and motives favouring a European Civil Code as well as opposing it (cf. Basedow, 2000, pp. 467ff.; Van Gerven, 2002; Jansen, 2004, pp. 6ff.).

Traditionally, codification is seen as a means not only of unifying national law, but also of publicly informing citizens about their duties and rights, for authoritatively establishing fundamental values and for doctrinally systematizing the law. Thus the main objective of the Dutch civil code was to improve the state of the law. On the European level, however, the central argument in favour of a code is purely unificatory: it is based on the instrumental consideration that legal diversity causes major obstacles to a common market. Of course, there is probably some truth in this argument, especially from the point of view of a legal advisor, who is used to acting on precise legal information. In the end, however, this common market argument is speculative and has yet to be empirically confirmed; and it is even more doubtful whether possible benefits from a code outweigh the cost of a far-reaching reform of private law (Jansen, 2004, pp. 7ff., 12; cf. Schmid, 2001, pp. 278f.). None the less, the common market argument appears to be widely accepted (Resolution of the European Parliament A5-0384/2001, Official Journal C 140 E, 15/11/2001 P. 0538-0542; von Bar, Lando and Swann, 2002, nn. 11ff.; Staudenmayer, 2001, p. 487; Basedow, 1996).

Probably the predominance of the common market argument is – at least in part – due to the fact that such a pragmatic line of argument helps to hide seemingly less cogent, more controversial idealistic–political motives that have always been important for a unifying civil code, namely the search for a community's identity as a legally integrated society (Jansen, 2004, pp. 19ff.; Fauvarque-Cosson, 2002, pp. 471f.; cf. also Lurger, 2002, pp. 128ff.; Lando, 2003, p. 2; for such ideals underlying national codifications Dölemeier, 1982a, p. 1427; Dölemeier, 1982b, pp. 1564, 1575, 1602; cf. Behrend, 1873, pp. 292, 301ff.; for the European Union, see Hallstein, 1964; von Bar, 2002,

p. 385). Thus not everybody regards the prospect of a common European Civil Code with enthusiasm. Lawyers, who see private law as an expression of a collective identity and national culture, tend to oppose the idea of a European codification. They emphasize intrinsic connections between the law on the one hand and language, culture and national history on the other. They object to sacrificing cultural assets for economic interests and value cultural and legal diversity highly. Some oppose unification altogether, others only the idea of a European code. For an alleged lack of a common legal culture in Europe, these critics dismiss the idea of unifying private law by means of a civil code as currently unwise or even impossible to achieve (cf. Collins, 1995; Rittner, 1995, pp. 855ff.; Legrand, 1997; Markesinis, 1997; Fauvarque-Cosson, 2002; Smits, 2002, pp. 28 ff.). Indeed, identity cannot be constructed abstractly; it must develop in a historical process over time (Schäfer and Bankowski, 2000, pp. 25ff.). Therefore unifying and improving the European law of conflicts, instead of introducing a civil code, may be regarded as a preferable alternative for fulfilling the European market's demands (Taupitz, 1995, pp. 28 ff.; Sonnenberger, 1998, pp. 983f.).

Of course, all these arguments must be taken seriously when coming to final decisions. However, an abstract discussion is probably not very helpful. On the one hand, a European Civil Code could not achieve legal unity unless it was entrusted to a court that had the power and resources to guard its application and to control legal development; astonishingly, this point is rarely mentioned in current debates. The expense of such a court would be the monetary price for a unified European private law. On the other hand, answers to questions of the possibility, legitimacy and desirability of a European Code must depend, *inter alia*, on the form of such an authoritative set of rules, on different possible modes of application and, of course, on the scope and content of a common code.

2 Options

In most countries on the European continent, private law is based on a national code. Originally, these codifications did not fundamentally change earlier law; they just put it into a supposedly rational, more accessible form (Zweigert and Kötz, 1998). Thus codifications are the standard form of restating private law within the civil law tradition (Zimmermann, 1995). Such codifications are characterized by a set of specific features. First, they are issued as formal laws, and they are therefore binding in the sense that addressees may not normally opt for another legal order. Secondly, they are meant to formulate a comprehensive picture of private law; and thirdly, they supposedly achieve that aim by reformulating private law within a rational system. None of these features may be taken for granted when speaking about a European Civil Code.

2.1 *Restating European private law?*

American experience shows that authoritative sets of legal rules do not have to be a binding law issued by a state or a comparable political authority. Professional restatements of the law (on these, see Schindler, 1998), issued by a private body (the American Law Institute), may be an alternative. Originally, these restatements were simply understood as objective descriptions of basic common rules of the law. They were regarded as necessary in order to curb the excesses of individual diversity that lawyers feared would result from the extensive private law jurisdiction of the individual American states. Nowadays, however, restatements have also become a means of slow, incremental legal change. They may give authoritative weight to specific developments or even introduce new ideas and rules. This is so despite their lack of formal authority. They are not binding because they are understood as legal commands, but because of the intellectual authority of the individual draftsmen and, today, the American Law Institute.

The American example of restatements of the law has been followed by European research groups, first, and most famously, by the Lando Commission on European Contract Law. The aim of these groups was to reformulate the common heritage of private law in the form of abstract rules ('principles'). The most outstanding result of such work is by now the Principles of European Contract Law (Lando and Beale, 2000; Lando, Clive, Prüm and Zimmermann, 2003); more recently, the European Group on Tort Law has also issued Principles of European Tort Law (European Group on Tort Law, 2005; Koziol, 2004). However, it would be wrong to regard these texts as genuine restatements in the American sense (Hesslink, 2001, pp. 5ff., 8ff.; Kramer, 1988, p. 484; Michaels, 1998, pp. 585ff.). First the authors of the American restatements could at least presume that there was a unified, single American common law. But such a presumption was not plausible in 20th-century Europe, since private law was mainly laid down in codes and thus represented not only governmental but also national and cultural diversity. Therefore, the groups could not even pretend to follow the idea of simply describing modern European private law. Instead, they consciously opted for 'a more creative process' (Lando, 1983, p. 657). They often chose what they regarded as preferable out of different approaches, or even proposed a new rule. Thus their work may form an important step towards a common culture of European private law, but their proposals cannot always be understood as an expression of such an identity. Secondly, the European principles will not normally be applicable before national courts; judges will continue to apply the national code. Therefore European principles cannot gain the outstanding status of their American counterparts; at best, they will become additional arguments in legal discourse. Despite all this, within a short period, the Principles of European Contract Law have

achieved surprisingly high authority. They are often applied in international arbitration because they are regarded as politically neutral rules that reflect most closely the needs of all parties, since they were formulated free from the influence of interest groups. Meanwhile they have even been relied on by the House of Lords, and for any national reform they must be regarded, both technically and normatively, as the state of art of European private law.

2.2 A model code

Private restatements are not the only alternative to the idea of a national code. Another one is the concept of a model code that has been used (with little success) in the early state of unification of German commercial law (cf. Laufke, 1961, pp. 12f., 16ff.) and with apparently more success in the United States (Uniform Commercial Code; cf. Kramer, 1988, pp. 483f.). Here, the model code itself is not regarded as valid or applicable law; it must rather be implemented as such by different states in order to become valid law. The Principles of European Contract Law and other academic proposals, like the preliminary draft of a Code of European Contract Law by the Académie des Privatistes Européens (2001), claim to be suitable candidates for such a European model law. Such a model code has the advantage of unifying the law without demanding a sacrifice of national sovereignty. The price of national sovereignty, however, consists in the risk of single states not implementing the model code or a future change of provisions (cf. Reimann and Hahn, 2004, pp. 149f.; Kramer, 2001, p. 104).

2.3 Modes of application

Unification of private law is not only seen pragmatically as a possible means of achieving secondary benefits, but also as an end in itself. Likewise, however, unification does have a non-monetary price: cultural and legal diversity may justly be regarded as important values, and in some countries national codes have become part of the national identity (for all the above, see section 1). Thus there may be good reasons for introducing a European Civil Code not to replace but to supplement national legal orders. This would be the case not only if a European code were applicable only to intra-European trans-border transactions, but also if European citizens were given the choice between different laws. This is the basic idea of 'opt-in' and 'opt-out models' of supranational law (cf. Art. 6 CISG) currently favoured by European politicians also for a European Code: in the first case, the national laws would continue to be normally applicable, and citizens would have the choice of opting for the European law. In the second model of an 'opt-out code', European law would be dispositive not only in the sense that parties could contract otherwise, but also in the sense that they could avoid the European law altogether by choosing a national state's law

(Communication from the Commission – European Contract Law and the revision of the *acquis*: the way forward, COM (2004) 651/F of 11/10/2004, Annex II; Staudenmayer, 2003, pp. 835ff.; Basedow, 2004). However, any such approach, which adds a new system to the European picture, leads to an even larger degree of legal complexity. An improvement of the European Union's private law does not necessarily mean an improvement of the state of European private law.

3 The question of scope: contract law or civil code?

The question of scope is crucial for the plausibility and success of any codification project. It depends not only on the economic and political aims of such a code, but also on its mode of application and on the actual state of homogeneity or diversity of the present law in Europe. Therefore, at present, a codification of family law and succession does not seem feasible. And, within the law of obligations, contracts reveal a much greater degree of conceptual and intellectual homogeneity than the law of torts and restitution (Jansen, 2004, pp. 23ff., 31ff., 40ff.). None the less, the more idealistically motivated European Parliament has always opted for a comprehensive codification of the 'patrimonial law' (including obligations and property). The Commission, on the other hand, has pragmatically confined its immediate ambitions to contract law, which is of greater relevance for the common market and probably easier to unify than other areas of patrimonial law.

However, it is often argued that contractual rules are typically so deeply embedded into the general structure of the law of obligations that a contract law could only be workable if it included at least the law of restitution and delict (Basedow, 2000, pp. 474f., 483; von Bar, Lando and Swann, 2002, nn. 29–40). In fact, some supplementary rules, for example for void contracts, may be necessary for making any contract law work. But as long as European contract law is conceived as an optional instrument, it can include only rules that may plausibly be regarded as an object of legal choice. This is not the case, *inter alia*, for extracontractual liability outside a contractual relation and for a large number of restitutionary claims.

More difficult questions arise where optional instruments cannot be a feasible solution because choice is no option. This is so where the law typically involves the interests of persons other than those involved in a contract; an example is the law of property and especially the question of securities (Jansen, 2004, pp. 16ff., 59ff.). Here, in transnational transactions, it is at present difficult to agree effectively on securities in movables. Different national systems are based on different rules and even different kinds of securities that are normally not recognized by other legal systems as long as that would endanger securities agreed upon according to domestic rules. Here, the common market indeed needs common, unified rules.

4 Systematizing European private law

The idea of a civil code has traditionally been closely connected to the idea of the law as a system: a code claims to offer a complete, comprehensive description of the law, and such a claim, it is widely thought, can be maintained only by a systematic approach that logically ensures completeness. Common lawyers may doubt this argument and rely on their intuition of law's completeness being founded on a set of principles (Dworkin, 1985, pp. 119ff.); they may also point to civil lawyers' conceiving of their private law not as formal systems of rules but of normative systems of principles (Canaris, 1983, pp. 46ff.). None the less, systems are helpful for organizing, structuring and thus understanding the law, and therefore there are no arguments in favour of an unsystematized code. Thus a European Civil Code will presuppose a European system of private law.

The idea of systematizing the law is a common heritage of European legal thinking. It received important impulses from the French humanist lawyers, from the natural law school and from German legal doctrine in the 19th century. As a result, civilian codes are based on systematic assumptions, and a systematic understanding is also plausible for the common law (see Birks, 2000). However, although kindred spirits, the national systems are no longer identical. After codification, they became more and more isolated from each other, and they chose different solutions for new problems. Therefore intellectual diversity is a typical feature of European law developed after 1800, at the same time as it unveils fundamental deficiencies and common problems of the different national approaches (Jansen, 2004). This is likely to explain the authors of principles of European private law opting for 'creative', innovative solutions. For a European civil code it would likewise be desirable to use the occasion to foster innovation and improvement of the law.

This is even more the case since modern 'political', often instrumental rules of secondary European private law are not easily integrated into the traditional systems, which are based mainly on traditional ideas of corrective justice. Some authors therefore even argue that European private law should be constructed exclusively on the basis of the *acquis communautaire*, not on the heritage of the common tradition of European law (Grundmann, 2004, pp. 1263ff.; Riesenhuber, 2003). However, this *acquis* is far too thin to bear such a burden (cf. Mansel, 2004, pp. 396ff., 451ff.; Jansen, 2005); and it is doubtful whether the *acquis* could be understood at all independently of the tradition of European legal thinking. None the less, a European Civil Code would not deserve its name if it did not successfully melt traditional and modern ideas of European legal thinking into an overarching new system.

5 Constitutional framework

The question of the competence of the European Union to legislate comprehensively on matters of private law has from the beginning been a core topic of the political European Civil Code debate (cf. Tilmann and Van Gerven, 1999, pp. 190ff.; Basedow, 1996, pp. 1186ff.; Basedow, 2000, pp. 273ff.). This discussion is closely connected to the question of the adequate legal instrument: directive, regulation or international agreement. There is a common understanding that Art. 95 TEC, the central competence norm, normally allows only the measure of a directive, but this is apparently not an adequate instrument for a systematic and conceptual unification of European private law. Among the Union's instruments only a regulation could serve the aim of unification. It may therefore be argued that a civil code is an exceptional case where Art. 95 TEC also justifies a regulation (Basedow, 2000, pp. 478ff.; Schmid, 2001, p. 282). However, even independently of the European Court of Justice's recent expression of more restrictive views on the European Union's competences for legal harmonization (ECJ Judgment of 5.10.2000 – Case C-376/98 *Germany v. European Parliament and Council*, [2000] ECR I-08419, nn. 81ff.), it appears doubtful whether there is at present a comprehensive competence for a European Civil Code at all. Art. 95 TEC would, at best, allow for rules that were applicable only for transnational transactions and restricted to narrowly confined areas of patrimonial law (Pechstein, 1999; Schmid, 2001, pp. 282f.; Van Gerven, 2002, pp. 164ff.).

In the end, however, the question is a political one: if it were possible to reach a general agreement on a European Civil Code, it would probably also be possible to enlarge the competences of the European Union or simply to agree on an international treatise; likewise, the exceptional competence of Art. 308 TEC has occasionally been used in matters of private law. Among these options, some authors favour the way of a treatise because this gives the national parliaments a fair share in the political process and would thus base the code on a broader democratic consensus. But this option makes every future change of the common text very difficult; it leaves European law between the dangers of petrification and future disunity (cf. section 2.2).

6 Present state of affairs and future prospects

In view of all the questions and controversies at the prospect of a European Civil Code, the European Commission has wisely decided to treat the unification of European private law pragmatically. At present, a comprehensive code is no longer on the Commission's political agenda. Instead, the Commission is working on the still vague idea of a 'common frame of reference' that will probably contain three elements: a statement of fundamental

principles of European contract law; the definition of abstract legal concepts like contract, fault or damage; and finally model rules on general contract law, sale, insurance and perhaps securities in movable property.

The primary function of this frame of reference is to set a standard for the harmonization and integration of the European Union's present and future private law, but the frame of reference is also meant to be applicable in arbitral jurisdiction and to establish a measure for the future transformation of directives into national law or for reforms of national private law. However, despite these far-reaching ambitions and although being a legislator's project the frame is not intended to become a formal legal act, but a non-binding instrument. (See the communications of the European Commission: *A more coherent European contract law – an action plan*, COM (2003) 68/F of 12/02/2003; *European Contract Law and the revision of the acquis: the way forward*, COM (2004) 651/F of 11/10/2004.) Methodologically, the Commission appears to combine the techniques of restatements and model laws. Therefore the European Court of Justice may use the frame of reference as a legal argument, but it will probably not be able to monitor its correct interpretation by national legislators and courts. Thus, formally, the common frame of reference will have only argumentative weight, which will however be substantial because of the Commission's political authority.

All in all the Commission aims at establishing intellectual unity without codification. The frame is meant to be just one (decisive) step in a slow process of unifying and reintegrating European private law. Accordingly, the Commission appears being prepared to formulate this frame of reference on the basis of the *acquis communautaire*, but to base it also on the *acquis commun*: the common heritage of European private law as it is expressed in the national systems (cf. Kötz, 2002; Jansen, 2005).

Whereas the Commission apparently does not understand its way of unifying European private law as necessarily leading to a common code, private groups of scholars are already working on rules of a future codification. The *Principles of European Contract Law* and the *Principles of European Tort Law* (see above, section 2.1) have been first important steps in this direction; likewise the *Académie des Privatistes Européens* has already formulated a first model code (2001). It stands, however, on the narrow footing of English and Italian contract law. Today the Study Group on a European Civil Code, a large international network of comparative lawyers, is formulating a new set of model rules for a future European codification on a much broader comparative basis (cf. von Bar, 2000; for a comprehensive overview of present projects and European research groups, see Fuchs, 2003; Wurmnest, 2003).

Where such discussions and projects will lead remains an open question. A codification of European private law is an option.

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25 Family law*

David Bradley

1 Introduction

Glendon has questioned the very existence of comparative family law (Glendon, 1987a, p. 1). Many other comparatists view laws regulating domestic relationships as particularly problematic. There are, however, optimistic perspectives on the viability and utility of comparative analysis in this area of legal policy. Family law is a contested field of comparative law.

2 Problems, perspectives and issues

Problems derive from perceptions that a system of family law closely reflects conditions in which it has developed. Comparatists adopting this 'mirror' perspective (Ewald, 1995, p. 492) not infrequently invoke Montesquieu (Kahn-Freund, 1974, pp. 26–7; Glendon, 1987a, p. 2). There was no concept of family or domestic relations law when *The Spirit of the Laws* was published: this would not emerge until the 19th century (Müller-Freienfels, 2003, p. 31). From a contemporary standpoint, however, family law might appear to epitomize Montesquieu's assessment that it is purely fortuitous if the laws of one society are suitable for another (Montesquieu, 1750, pp. 104–5).

This negative perspective is well represented in commentaries on legal policy in developed countries. If the Paris Congress of Comparative Law in 1900 is taken as inaugurating modern comparative law, the life of the subject reflects reservations over family law. And there appears to have been ample evidence to support these caveats.

The Paris Congress presented comparative law as a subject for scientific investigation alongside emerging disciplines of political science, psychoanalysis and eugenics. Links between sociology and comparative law were strong (Hall, 1963, p. 17). It might therefore have appeared appropriate to include family law in the project that utilized comparative law to identify principles dictating legal development in society (Ancel, 1971, p. 19). However, Lambert, the general rapporteur at the Congress, subsequently emphasized the distinctiveness of family laws, 'qui constituent le domaine propre du droit de l'intimité nationale et resteront toujours les plus sûrs asiles du particularisme juridique' (Müller-Freienfels, 1968, p. 175 n2). Pollock and Maitland were also sceptical that family laws, representing

* See also: Legal culture; Legal transplants.

differences between 'backward' and 'more successful races', followed similar paths (Pollock and Maitland, 1895, p. 253).

The structure of legislation itself demonstrated different lines of development. The French Civil Code, drafted in the aftermath of revolutionary antipathy to the family, emphasized a law of persons (Müller-Freienfels, 2003, pp. 34–5). The BGB drew on German systematization, 'a highly developed cultural product' and was structured on the family (*ibid.* pp. 37–9). In England, there had been no 'rational' codification of family law; rather incremental modification of a 'natural' religious order. A modest harmonization initiative in the 19th century, restricted to marriage laws within Great Britain and Ireland, had failed. English law lacked even a comprehensive statutory provision governing marital capacity. Family law contributed to a distinctive, reassuring account of English history and superiority (Jones, 2003). One quip was that England was Protestant before the Reformation and Catholic after it (Helmoltz, 1990, p. 4).

In the inter-war period, as a stronger, instrumentalist approach influenced comparative law, Lambert advocated harmonization in commercial fields, but rejected this for family law. Comparative family law was relegated to a minor role, ancillary to private international law (Lambert, 1931, p. 128). Wigmore made the same point (Wigmore, 1926, p. 256). Issues such as the status of husband and wife demonstrated the unreality of harmonization. Thus German law was explicitly patriarchal and National Socialism did little to disturb this. Reforms in Scandinavia in the period 1915 to 1927 promoted women's independence and reflected a political culture in which social democracy would become a major force.

After World War II, Gutteridge emphasized comparative law as method, but largely dismissed family law, noting race, religion and politics as problematic influences. Comparative analysis could identify high standards, he considered, but family law had limited appeal 'except for the purposes of propaganda with which lawyers are not concerned' (Gutteridge, 1946, p. 32). Restrictions on interracial marriage in American states, with no direct European counterpart after annulment of Nazi Nuremberg laws, supported Gutteridge's conclusion, as did different commitments to religious values in post-war, West European divorce laws. At one extreme, the Irish Constitution, affirming Catholicism and independence from England, precluded divorce. At the other, the Swiss Civil Code, offering a flexible system for different cantons, included no-fault provisions attributable to earlier anti-clericalism and the strength of the Radical Party.

In the late 1960s, Müller-Freienfels identified barriers to unification of family law, but was optimistic regarding regional harmonization founded on shared values (Müller-Freienfels, 1968, pp. 176–7). In Western Europe, the Convention on Human Rights formally inaugurated an 'age of rights'

with the potential to undermine laws based on religious values. Development of European welfare states further weakened traditional legal policy, while the European Community indirectly increased pressure for uniformity. However, within a decade of Müller-Freienfels' optimistic forecast, Kahn-Freund judged harmonization of West European family laws a hopeless endeavour (Kahn-Freund, 1978, p. 141).

'Unparalleled upheaval' of family law in Europe was under way (Glendon, 1977, p. 1; Glendon, 1989). Salient features of this transformation included liberalization of principles of sexual morality expressed in legal policy and a focus on child welfare, but differences emerged on sensitive issues including inheritance rights for children of extramarital relationships. In 1975, Finland followed Scandinavian jurisdictions in establishing parity with 'legitimate' children, whereas French, German and English reforms all maintained different forms of discrimination.

Glendon's doubts in the late 1980s regarding the existence of comparative family law were prompted by absence of abortion legislation in Ireland (Glendon, 1987a). Her more extensive, contemporaneous survey also noted different models of abortion law in Western Europe and the United States (Glendon, 1987b). Closer scrutiny would reveal differences within these categories, not surprisingly as abortion regulation was acutely problematic, involving state-church relations and socioeconomic and gender inequality. Thus Austria's liberal abortion regime was established merely through exemptions to the criminal law, in contrast to more permissive and positive Swedish legislation. This reflected differing commitments to gender equality. Extension of Glendon's study would also have exposed significant differences within the Soviet bloc (Zielinska, 1993) and with developing countries (Eser, 1994, p. 19).

Successive editions of Zweigert and Kötz's *Introduction to Comparative Law* recommended avoidance of family law, conditioned by different moral and political values (Zweigert and Kötz, 1987, p. 36; Zweigert and Kötz, 1998, p. 40). This appeared fully justified, given legislation spanning Sweden's Law on Homosexual Cohabitation of 1987 to the introduction of same-sex marriage in Belgium in 2003. This was a seminal development in family law involving rejection of a political ideology and centuries of religious dogma. Predictably, therefore, all these laws were different, as originally enacted or subsequently amended.

The argument reiterated throughout the 20th century, that comparative family law is problematic, if not impenetrable and unproductive, continues to be reflected in current discussion of a European Civil Code (Möllers, 2002, p. 796). All this, however, has been challenged.

One view is that family laws are readily transplantable. Watson's perspective on legal transplants is presented in 'weak' and 'strong' forms (Ewald,

1995, p. 491), but includes four particularly significant propositions. First, objections that family laws present particular difficulties for the transplants thesis are dismissed (Watson, 1993, p. 98). Second, family law is, in fact, called in aid to refute any notion of a national spirit of the laws. This must be an illusion, the transplants argument runs, if identical marital property regimes exist in 'very different' societies and there are also different regimes in 'very similar' communities (Watson, 1993, pp. 107–8; Ewald, 1995, p. 490). Third, Watson suggests that 'massive successful borrowing is commonplace in law' (Watson, 2000, p. 12). Fourth, he is particularly dismissive of the influence of political factors on legal policy. The 'lesson of history', Watson concludes, 'is of a general lack of concern from political rulers: they and their immediate underlings can be, and often have been and are, indifferent to the nature of the legal rules in operation' (Watson, 1991, p. 97).

A more accommodating view of mirror perspectives is that family laws have varied significantly, but there is now spontaneous, 'bottom up' convergence of legal policy. This assessment has been noted in relation to family law in general and also specific issues including marital property and illegitimacy (Bradley, 2003a, pp. 80–1). On one view, divergence in European family laws merely involves a difference in the timing of reforms (Antokolskaia, 2003, p. 41).

All areas, noted above in support of negative perspectives on comparative family law, do indicate some convergence. England now has legislation detailing restrictions on marital capacity. Racist marriage laws are historical curiosities. So also are provisions discriminating between husband and wife. Moreover, jurisdictions such as Scotland have shifted towards a European property model. Developments in Ireland demonstrate change in even the most restrictive divorce and abortion regimes. German, French and English inheritance reforms support claims of the demise of illegitimacy. Improvements in the status of same-sex partnerships appear incremental, but inevitable: one inference from a 'standard sequences' theory is of the progressive enhancement of legal rights (Merin, 2002, pp. 326–33).

Another optimistic perspective implies that family law can be treated as well as classified as private law, in the sense that legal policy is concerned principally, if not exclusively, with the rights of parties to domestic relationships *inter se*. From this positivist standpoint, a system of family law serves no broader objectives in society and can also be segregated from aspects of 'public' and criminal law, not least, issues such as abortion.

This perspective underpins the Commission on European Family Law (CEFL) and its 'main goal' (Boele-Woelki, 2004, p. 1), which is to develop principles for harmonization of family law in Europe. Members of the Commission are untroubled by comparative family law's dubious reputation (Boele-Woelki, 2003, p. v). Differences in legal policy are attributed to

'so-called [*sic*] cultural constraints' (Boele-Woelki, 2004, p. 1). The CEFL originally presented itself as investigating feasibility of its project. In fact, it was already confidently at work on divorce and maintenance (Boele-Woelki, 2003, p. v; Martiny, 2003, p. 529). The Commission's method, which has involved dissecting and isolating aspects of legal policy prior to constructing model laws, indicates its lack of concern with factors determining divorce and support legislation in different jurisdictions and, in particular, with integration of legal policy in particular political programmes.

A preoccupation with private international law figures prominently in the CEFL and may account for its confidence. Characterization of family law as essentially 'private law' has been a dominant perspective in common law jurisdictions (Freeman, 1997, p. 318), but the sense of assurance in the Commission may owe something to civilian and specifically German legal culture. The CEFL has referred to 'scientific' processes in its methodology (Boele-Woelki, 2004, p. 2). This is reminiscent of the Historical School in 19th-century Germany where jurists were 'natural oracles' (Van Caenegem, 1987, p. 52). And when codification eventually triumphed, it was intended that bureaucrats and professional lawyers would maintain control (John, 1989, p. 245). The obvious difference is, however, that the CEFL is not developing a national family law, but focuses on the rights of parties in domestic relationships to construct pan-European family legislation.

Alongside the general controversy over comparative family law, a further factor compounds uncertainty. The line between opposing positions is blurred. Thus Gutteridge noted Nordic harmonization 'even in the case of family law' (Gutteridge, 1946, p. 153). Zweigert and Kötz made the same point and tentatively referred to the possibility of Nordic cooperation as a model for Europe (Zweigert and Kötz, 1998, p. 284). Kahn-Freund disputed the transplants thesis but noted assimilation of aspects of family law (Kahn-Freund, 1974). And Glendon's attempt to moderate controversy over abortion in America implies that European reform processes, if not laws, could achieve this (Glendon, 1987b).

There are two principal issues for comparatists. First, are systems of family law intimately associated with particular jurisdictions? Second, if they are, what does this association involve? On this latter issue, there is no precision even among mirror theorists noted above. Pollock and Maitland implied that institutional factors were involved (Pollock and Maitland, 1895, p. 253). Wigmore referred to 'national sentiments and traditions' as the basis of family laws (Wigmore, 1926, p. 256). Gutteridge mentioned race, religion and politics (Gutteridge, 1946, p. 32), and Kahn-Freund noted social and historical factors, as well as national 'power structures' (Kahn-Freund, 1974, pp. 13, 27). Müller-Freienfels added psychological influences (Müller-Freienfels, 1968, p. 175) and Zweigert and Kötz included moral

considerations (Zweigert and Kötz, 1998, p. 40). Among convergence theorists, Pintens has referred to commitment to national family laws as involving 'cultural baggage' (Pintens and Vanwinckelen, 2001, p. 14–15).

The case for including family law within a European Civil Code has been challenged (Smits, 2002, p. 6), but the CEFL has argued that free movement is impeded by differences in national systems (Boele-Woelki, 2004, p. 7). Within the European Union, concern with family law is intensifying: a process of 'Europeanization' is under way (Lowe, 2003). The CEFL has no official remit, but its project suggests a new *ius commune* in the 21st Century, broader in scope and application to medieval canon law, from which West European marriage laws are derived. In Europe at least, the resolution of controversy and uncertainties surrounding comparative family law may be of more than academic interest.

3 Political economy, political culture and the political process

No politician, in any jurisdiction, will disregard family law. This is an indispensable medium to advance political objectives. There is no shortage of illustrations. Comprehensive reforms in revolutionary France are a salient example of legal policy consolidating a new political order. Lenin acclaimed marriage and divorce reforms, introduced within weeks of the Bolshevik Revolution, as a mark of superiority over bourgeois society. This would be a continuing refrain. The family law elements in Mussolini's Lateran Pact and Nazi Nuremberg laws were intended to reinforce fascism, as was Franco's annulment of divorce and abortion introduced by Spanish Republicans. Liberalization of abortion law and recognition of cohabitation in Yugoslavia reflected the country's relatively independent position within the Soviet bloc (Šarčević, 1989; Zielinska, 1993, pp. 52–3). Ceaușescu's obsessive proscription of abortion in Romania demonstrated the extent to which megalomania complements totalitarianism.

Family law supports political interests in democratic societies. A fault line is apparent in the evolution of legal policy. Protagonists contesting reforms have included those with an investment in a secular state and their opponents committed to principles of social organization founded on religious values. Family law reform provides unrivalled opportunities to establish political ideology. Underpinning controversy over central issues such as the status of same-sex relationships are fundamentally different perspectives. Human agency is viewed as essentially rational or, from a conservative and religious perspective, as flawed and consequently to be controlled, particularly in relation to sexual activity.

Political interests will have an investment in all aspects of legal policy. A system of family law will tend to emphasize a traditional concept of the family and individual morality or, alternatively, collectivism and

egalitarianism as the basis of social order. Legal policy may therefore complement social welfare policy, for instance 'advanced' Scandinavian welfare states, and state corporatist and residual welfare models in the Federal Republic of Germany and England respectively (Bradley, 2000). Consequently, family law can impact on taxation. Particular interest groups, such as mediators, will also have an investment in family law and will seek to colonize territory held by lawyers.

Family laws have implications for gender and labour market policies and for socioeconomic inequality. In Sweden, for example, maintenance has been curtailed to promote women's independence. Gender equality has been a constant refrain from social democratic elites, but has not been achieved. Patriarchy or class interests are responsible (Bradley, 1990; Bradley, 2001b). The Swedish welfare state is built on discrimination. Ideologues such as Alva Myrdal (who valued her own independence and was no stranger to privilege (Jackson, 1997, p.25)) advocated sterilization of the 'deficient' (Bradley, 1998d).

Family law is political discourse. Thus, in England, child support legislation, enacted in 1991 under a neoconservative administration, was presented as putting children's interests first, but formed part of a broader agenda. This measure was introduced when inequality was increasing and intended to secure the national interest by curtailing welfare provision. New child laws were also intended to 'civilize' the market.

Marriage law figured prominently in Bismarck's *Kulturkampf* and consolidation of power in 19th-century Germany. Subsequent developments relating to formalities for marriage and attempts at reform read as political history in Portugal, Bolshevik Russia, Finland, Italy, Denmark, Sweden and England. Family law reforms may also promote regional autonomy: the Catalan Family Code and regional legislation in Spain regulating non-marital relationships provide an illustration. And in post-communist societies, new family laws confirm re-emergence of sovereign states: this is clear from conservative features of the new Lithuanian Civil Code.

Legal policy has disparate objectives, but there is an underlying principle. Family law is a component of political economy.

The development and structure of family laws will also depend on aspects of political culture, including the strength of political parties. Legal policy in the Scandinavian countries illustrates this. Even the relatively homogeneous Danish, Swedish and Norwegian family law systems have differed in significant respects. In Denmark, Social Democrats and Radical Liberals have on occasion pioneered liberal laws on issues such as abortion and homosexuality, but these have not matched more radical reforms reflecting the dominance of Swedish social democracy. And notwithstanding progressive innovations in Norwegian family law, the strength of a traditional

subculture, evidenced by the role of the Christian People's Party, is apparent in divorce legislation and aspects of legal policy relating to women, notably in marital property, support and abortion laws (Bradley, 1996).

A further aspect of political culture involves prevailing values and mores. In developing contemporary family laws, political interests must accommodate differing commitments to religious values, varying susceptibilities to social engineering and dissimilar orientations to the state. The detail of legal policy testifies to the significance of religious values, for example in contrasting Dutch and French laws on same-sex relationships (Bradley, 2001a). Public opinion in the Netherlands, conditioned by a 'politics of accommodation' and commitment to human rights, facilitated introduction of same-sex marriage. In France, reformers were noticeably inhibited in breaching religious taboos on homosexuality and also had to negotiate a republican concept of citizenship. The result was the PaCS – an *ersatz* marriage.

With regard to social engineering, abortion rights are manifestly more secure in Sweden, where opinion is conditioned by collectivism, social inclusion and extensive welfare provision, than in the atomistic, market-oriented United States with abortion and same-sex marriage constituting 'central battlegrounds in . . . cultural wars' (Grossberg, 2000, p. 22). And English and German law demonstrate different orientations to the state. English political traditions are rooted in individualism and family autonomy. Antipathy to a 'nanny' (i.e., interventionist) state has reinforced a strong commitment to separate property. Society has absorbed the state in England, it has been argued (Johnson, 1978, p. 182). Characterization of community property as the essence of marriage in the Federal Republic of Germany indicates a more positive view of the state.

Alongside political economy and culture, political processes constitute a third, inter-related factor conditioning family laws. A system of family law, in common with other discourses, produces and transmits power. Control of the reform agenda, and of the presentation and examination of legal policy, is essential for political actors.

In Sweden, for example, investigative commissions and the remiss system have contributed to the legitimacy of innovative family laws. In fact, there has been political manipulation of the reform process. Notable examples include directives for revision of family law, issued by a Social Democrat administration in 1969 and, more recently, the decision to override majority opinion and sanction same-sex adoption. There has also been no urgency to establish commissions to investigate delicate issues such as the effect of liberal divorce reforms on children (Popenoe, 1988, p. 314).

The impact of political processes is also apparent in common law jurisdictions. For example, in New Zealand there has been greater willingness

to curtail judicial powers than in England: the result is a stronger commitment to equal division of property on divorce and to an egalitarian society. And constitutional provisions in Canada have dictated faster progression to same-sex marriage than in England, traditionally a nation of 'institutions rather than constitutions' (Bradley, 2003b, p. 129).

Developments in family law since the Reformation have delineated differences between nation states. Laws regulating domestic relationships do not simply reflect historical traditions, nor do they represent the spirit of a jurisdiction in some neutral sense. Family laws have an active, contemporary and continuing role in promoting political interests. Legal policy ranks alongside fiscal and welfare policy as an element of national sovereignty.

Analysis of the political and institutional dimensions of legal policy will explain a system of family law and its detailed provisions. This approach resolves controversies regarding comparative family law. It exposes limits of legal transplantation, oversimplification involved in the convergence thesis and the misconception that family law is merely 'private' law.

Watson's claim in support of the transplants thesis, of political indifference to legal policy, appears exaggerated (Watson, 1991, p. 97). Medieval canon law reflected the authority of the Church in relation to both the secular power and everyday life. The lesson of modern history is that political ideology and priorities exert a significant influence on family laws. Politicians cannot be indifferent, not least as legal policy in this area consolidates political power, establishes a basis for social order and influences distribution of revenues.

The existence of 'the same' marital property regimes in 'very different' societies (adopting Watson's example and terminology: Watson, 1993, pp. 107–8) does not support arguments that there is no national spirit of the laws. Similar property regimes, or other family laws, can satisfy different, even opposing, political objectives. Montesquieu's point on exceptional circumstances for a law to operate in another jurisdiction is overstated, but what is essential is that transplantation of family laws is acceptable to political interests. For example, separate property constituted law for the plutocracy in England and was also the regime for the aristocracy in Tsarist Russia. However, separate property was initially carried forward after the October Revolution. The first RSFSR Family Code of 1918 explicitly rejected a community system. This reflected a commitment to equality and was also consistent with early revolutionary ideals. Society would be self-regulating with the demise of capitalism and marriage would remain uncontaminated by materialism. When pragmatism began to replace idealism in the Soviet Union, community property was adopted. However, in contrast to democratic societies, contractual freedom was curtailed: the Soviet state dictated compliance with its norms and required support for women on divorce.

With regard to Watson's claim that 'massive successful borrowing is commonplace' (Watson, 2000, p. 12), what are the criteria for success? Significant features of family law have been modified when transplantation has occurred. Acceptance in the Turkish Civil Code of 1926 of much of Swiss law is cited as a particularly successful transplant (Watson, 1993, p. 98; Watson, 2000, pp. 8–9). However, this Code modified provisions relating to marital capacity, in particular marriage age, as well as aspects of support and divorce law and, in addition, rejected the prescribed Swiss marital property regime. Why, given the degree of uniformity between the two Codes on other issues? The Turkish Minister of Justice himself emphasized the general importance of the Swiss Code for secular modernization (Essad, 1926, pp. xiii–xvii), but these particular provisions were manifestly too inconvenient or controversial.

How 'massive' and 'commonplace' is transplantation? It is instructive to note failure and reasons for this. For example, the English Law Commission has deferred to political and institutional considerations and rejected foreign laws on divorce, property redistribution and establishing paternity. When the Law Commission did propose co-ownership of the matrimonial home, this was rejected as involving unacceptable state intervention. De Cruz views contemporary, ubiquitous concern with the welfare of the child as a successful family law transplant (De Cruz, 2002), but differences exist on fundamental issues. Thus, in England, governments have continually rejected Nordic social engineering and measures protecting children from parental violence.

In any event, characterization in the transplants thesis of societies as 'very different' or 'very similar' (Watson, 1993, pp. 107–8) appears a crude if not meaningless quantification of cultural differences (Bradley, 1999b, p. 142). One particular case study meets charges of speculation regarding the determinants of legal policy and provides a revealing illustration of the nature of transplantation. This involves the reception of Swedish family laws in Finland. It is particularly interesting from the transplants perspective, given the common legal heritage of these two jurisdictions and the general inclination in Finland to follow Swedish policy in various fields.

What emerges is a consistent and systematic pattern of difference in family law that is compatible with variations in social and economic policy and, in addition, reflects differences in political culture and processes (Bradley, 1998a, 1998b, 1998c, 1999a). These disparities were also apparent in the past. For example, all Nordic countries, including Iceland, enacted sterilization laws in the inter-war period, but legislation in Finland and Sweden fulfilled different objectives and was consistent with divergence in family laws (Bradley, 1998d).

In general, political and institutional considerations determine acceptance, modification and rejection of transplants and are central to different systems of family law.

So far as convergence is concerned, general trends – liberty, equality and secularity – are clearly apparent in the family laws of developed countries (Bradley, 1996, p. 238). Response to social and demographic change has been inescapable, but has also varied significantly. Thus a different ethic pervades the substance and process of reforms in Sweden and England: the detail of Swedish family laws demonstrates proactive endorsement of secular values; English legal policy indicates a reactive response to change.

Scandinavian family laws appear to be a talisman for convergence theorists (Pintens and Vanwinckelen, 2001, p. 16). However, a new investigation, initiated by the Nordic Council in 1998, revealed substantial differences in legal policy and questions which the investigators could not answer (Lødrup, 2001). In fact, explanations can be found in political factors in Sweden, Denmark and Norway (Bradley, 1996).

Family laws diverge on the most basic provisions such as formalities for marriage. In the future, traditional ‘moral’ concerns may be replaced by a purely economic agenda. Issues such as pension division will become increasingly important. On this, however, there are at present major differences in jurisdictions such as Sweden, the Federal Republic of Germany and England, and divergence here is consistent with welfare models (Bradley, 2003a, p. 100). Child law will become an increasingly important medium to promote political interests, but here again legal policy has varied. In Australia, for example, there has been a much more considered approach to child support reform than in England (Maclean, 1994).

In general, convergence in family law will depend on ‘top down’ pressure, including development of a global economy and cosmopolitan human rights law or, in Europe, political integration. Uniform family laws will signal the demise of nation states, if not the end of politics.

This leaves the argument, represented in the CEFL, that family law is merely private law. Jurisdictions will adopt the Commission’s recommendations if this is politically expedient or if the European Union acquires new competence relating to family law. If German codification is the inspiration for the CEFL’s project, it can be noted that family law provisions of the BGB reflected political priorities when it was legislated (John, 1989, pp. 217–18). However, there is little indication that the CEFL recognizes the political implications of its recommendations.

To construct a model divorce law, the CEFL surveyed the complexities of divorce legislation in Europe. It then represented majority opinion on basic features such as duration of marriage before divorce and retention of fault as the ‘common core’. This approach proved impossible on other

issues, such as the length of separation grounds. Here the CEFL resorted to subjective opinion as to whether the divorce process should be more or less paternalistic, in order to construct 'better' law. Consequently, it has ignored political considerations that have conditioned different models of divorce law in Europe, including the wrangling between Social Democrats and their opponents over German divorce legislation in 1976, the negotiations between the Church of England and Law Commission which produced modest divorce reform in England in 1969, and the controversy over divorce which split the post-Franco government in Spain. For maintenance, the CEFL has proposed a framework law that leaves national courts a broad discretion. This also disregards the way in which legislation has involved different commitments to gender equality, most conspicuously in Sweden, Germany and England.

A contemporaneous divorce reform, introduced in France in 2004, puts the model constructed by the CEFL in perspective. This reform established a complex divorce regime which reflected the priorities of a conservative administration and drew on French political traditions. The compromise between Republican and Catholic interests in the French divorce reform of 1975 was modified, but not abandoned. Unlike earlier socialist reform initiatives, the new French legislation preserved the fault principle. The French legislature and CEFL clearly have different views on what constitutes 'better' divorce law.

The point is the same as for transplants and convergence theories: the detailed structure of legislation is the product of political economy, culture and processes. The agenda of family law will inevitably change, but no politician will ignore this field or can afford to do so. Comparative analysis of family laws does not involve 'private' law in any real sense.

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26 German law

Martin J. Schermaier

1 Germany and its law

It may surprise other Europeans just how closely Germans identify themselves with their legal system and their law. The familiar claim that Germany is ruled by ‘law and order’ does not adequately reflect this phenomenon. Law, rules and the enforcement of rules play a greater role in German daily life than in other European countries: you will not find any daily newspaper which does not report court proceedings of local or national importance; there is scarcely any evening news without a ‘Report from Karlsruhe’, the location of the most important German superior courts. The number of lawyers is very high by European standards (one lawyer per 600 inhabitants). German law, above all civil law, is still regarded as among the best in the world. Following the opening up of Eastern Europe, many countries have restructured and codified their domestic law using the German legal system as their model. German legal education also enjoys a high reputation. German law graduates possess good methodical abilities, adopt a case and problem-oriented approach and an increasing number have studied other European legal systems as well as their own.

There are many explanations for these phenomena. However, history undoubtedly offers the best way of explaining the relationship between the Germans and their law. The two most important internal factors which have determined the legal consciousness of the Germans are the tradition of ‘Gelehrtes Recht’ (Roman and canon law) in Germany, which goes back hundreds of years, and the art of systematization which flourished mainly in Germany during the period of rational law (‘Vernunftrecht’). A profound external event was the dictatorship of the Third Reich. This makes the lawyers of post-war Germany pay special attention to the rights of the individual and the legality of state acts.

2 History of German law

2.1 *Old empire and Roman law*

The history of Roman law in Europe is peculiarly bound up with German history. The German emperors, who regarded themselves as the successors to the Roman emperors (*translatio imperii*), already implemented Roman law from the 12th century in order to reinforce their authority, especially against the Pope (Koschaker, 1966; Wieacker, 1967). In a new decree for the

Reichskammergericht (1495), the German Emperor Maximilian finally instructed his judges to pass judgment according to Roman canon law (i.e. according to the law which was 'gemein': common to the whole empire), unless the validity of other rules was not in question. This instruction represented a political gesture of great import: Roman law is the law of the Empire. Because it was also written law and taught at universities, next to canon law, it influenced and even partly subdued local law. The legend which arose at this time, that the Emperor Lothar had already adopted Roman law in 1135 (the 'Lotharlegende'), is a good reflection of the *Zeitgeist* during the 'reception of Roman law'.

2.2 Legal science and pandectism

The continuity of the empire guaranteed the continuity of *Gemeines Recht* ('common law'). In practice, however, customary law persisted or coalesced in a peculiar way with Roman and canon law. The 'common law' resembled a frame which loosely held the numerous legal systems in the Empire together, primarily by means of university education and legal publications which, for the most part at least, dealt with 'common' (Roman and canon) law. This was unaffected by the dissolution of the Empire (1806) because legal education and scholarship became more prominent. The Code civil (1804) was much admired and caused many who longed for legal unity to call for the national codification of civil law. However, Friedrich Carl von Savigny, one of the greatest German jurists, rejected such calls (Savigny, 1814): before codification could be undertaken, legal scholarship had to develop a uniform system of civil law, free of any contradictions, using the Roman sources as a basis. The research he carried out restored the science of 'modern Roman law' and allowed legal scholarship in Germany to flourish. The most important source of this scholarship were the *Pandects* (or *Digests*), that part of the *Corpus iuris civilis* which contained the texts of classical Roman jurists. Therefore, one later termed this school 'Pandectism', scholarship derived from the *Pandects*. German civil law was codified on the basis of this scholarship at the end of the 19th century, thereby giving rise to the *BGB*, which entered into force on 1 January 1900.

2.3 The political unification of Germany

Since the Peace Treaty of Westphalia (1648) political power had lain in the hands of the numerous principalities, which were mainly interested in their own military, economic and legal organization. The old Empire, the Holy Roman Empire of the German nation, remained the constitutional bond which held the territories together. This bond finally broke in 1806 under pressure from Napoleon. The German Federation (1815), founded at the Vienna Congress and to which all German states belonged, also fell apart

owing to the rivalry of the two most important federal states, Prussia and Austria. Once Austria had been defeated in Königgrätz (1866), Prussia could realize its idea of a 'small German solution' (Kleindeutsche Lösung) and in 1871 established (following the North-German Federation) the German Empire. This arrangement allowed the Länder (states) to retain their own powers concerning legislation and administration, thereby preserving the federal structure of the old Empire in later constitutions up to the present day.

In terms of international law, modern Germany is the successor to the German Empire. However, its constitution reflects the turbulent political developments of the 20th century. The military defeat of the German Empire in the First World War led to revolution, which ultimately replaced the monarchy with a republican constitution: the 'Weimar Constitution' (1919). The first or rather 'Weimar' Republic was dissolved after only 14 years by Hitler's dictatorship (1933). The shock that Hitler was able to seize power within a constitutional framework has proved decisive in shaping constitutional policy since 1945. As a rule, the national socialist dictatorship (1933–45), the failure of all constitutional institutions and structures and the awareness of individual fallacy has profoundly influenced the self-awareness of lawyers since 1945. This also explains the great importance of the 'Basic Law' (Grundgesetz), which the new Federal Republic of Germany passed into law in 1949, and the Federal Constitutional Court, which was first elected in 1951. The reunification of the two German states consisting of the zones occupied by the Soviets on the one hand and the US, French and British forces on the other took place in 1990 by the 'accession' of the GDR to the state and constitution of the FRG. This accession did not call for formulation of a new constitution, in particular a new 'Basic Law'.

2.4 Legislation

The German Federation (1815–66) had already created important codifications which applied in all states. The founding of the Empire (1871) triggered a wave of legislative projects to ensure that legal unity would follow national unity. In 1877, the Imperial Judicature Acts were passed which entered into force on 1 January 1879 (Court Constitution Act, Criminal Procedural Code, Civil Procedural Code and Bankruptcy Act). The Empire had already obtained a uniform criminal law in 1871 when the Penal Code (Strafgesetzbuch), created for the North German Federation (1870) on the initiative of Prussia, was proclaimed as an Imperial Act. The preparatory work for the later Bürgerliches Gesetzbuch (BGB) started in 1874. Following intensive consultations, the 'First Draft' was presented in 1887 and published, together with explanatory notes (i.e., the 'Motiven'), in 1888. The First Draft was criticized and debated intensively. On the basis of the

First Draft and the accompanying criticism, the 'Second Commission' was set up in 1890 and worked on a new draft (the 'Second Draft') until 1895. This was debated in the Imperial Council and enacted in 1896. The BGB entered into force on 1 January 1900. The Act on Companies with Limited Liability (GmbHG) had already been passed in 1892 and a new Commercial Code (Handelsgesetzbuch, HGB) followed in 1897, which also entered into force on 1 January 1900. The Acts codified between 1870 and 1871 (Criminal Law Code) and 1900 (BGB, HGB) still form a core element of German law although they have been partly amended and modernized.

The Basic Law (Grundgesetz, GG), the written constitution of the German Federal Republic, was promulgated on 23 May 1949. It governs the principles of the German state and contains, at the beginning, a catalogue of basic rights. Although the most important statutes of civil and criminal law are clearly older than the Basic Law, its name is well-deserved: the Basic Law represents the foundation of the German legal system and since 1949 all earlier statutes have been interpreted and applied in accordance with its principles. After all, the BGB is merely an ordinary statute and therefore subordinate to the GG, although, at the same time, it represents its substantive counterpart: the second pillar of the German legal system. Whereas the GG regulates the constitution of the state and the basic rights of the individual which the state must respect and protect, the BGB contains rules which are essential in balancing the interests among individuals.

2.5 Germany and Europe

European integration is essentially the reaction to the National Socialist dictatorship and the catastrophe of World War II. The economic rebuilding of Germany was to take place in concert with, and thereby under the control of, other European states. To this end, the European Community for Coal and Steel was established in 1951 and in 1957 this was followed by the European Economic Community and the European Atomic Community. These three communities heralded the birth of European integration and contained the germ of its further development, which culminated in the Treaty on European Union (Maastricht) in 1992. Not least, the integration of Germany into the European Communities and the close cooperation with France that this entailed made reunification with the former GDR not only possible but also easier. Germany has been a member of the European Council since 13 July 1950, but has only been a member of the UN since 18 September 1973. The European Convention on Human Rights (ECHR) was ratified in Germany on 5 December 1952 and entered into force on 3 September 1953. In Germany, the ECHR has the technical status of an ordinary statute and is therefore subordinate to the constitution. However,

the Federal Constitutional Court has confirmed its precedence over German law by holding that the German Basic Rights (codified in the GG) are to be interpreted in accordance with the ECHR.

3 State organization

3.1 Constitution and constitutional principles

The German constitution strictly separates the legislative, judicial and executive powers. As in all multi-party democracies the legislature and executive are usually connected owing to the fact that the most powerful parties also form the government. This can be seen, at federal level, from the Federal Chancellor and Federal Ministers and, at state level, from the Presiding Minister and the Ministers.

The three foundations of the German constitution are the principle of democracy, the rule of law and the federal state system. According to the democracy principle, all state power springs from 'the people' (Art. 20 (2) GG): legislation is passed by the elected parliament which, at the same time, controls the government and the executive power. Courts pass judgments 'in the name of the people'. The rule of law (section 6, below) governs constitutional reality: all acts of the executive and judiciary must be lawful and thereby compatible with the GG. The rule of law also guarantees a comprehensive legal protection of the individual, not only against state interference but also against legal infringements by individuals. The federal state principle states that the German Federal Republic is organized as a federal state (Art. 20 (1); Art. 79 (3) GG). This follows the tradition of the Weimar Republic and earlier German forms of state and can also be regarded as a reaction to the National Socialists' unitary and centralistic state. Both the federation and Länder possess the qualities of a state. Art. 30 GG contains the basic rules governing the distribution of power: the exercise of state powers and performance of state tasks are the responsibility of the states, unless the GG provides or permits otherwise (Subsidiaritätsprinzip, principle of subsidiarity). The rules governing the allocation of powers are complicated and their details frequently give rise to legal disputes between the federation and the states before the Federal Constitutional Court.

3.2 State organs

The Federal President is the Federal Republic's Head of State. He appoints the Federal Chancellor, federal judges, officials and officers and represents the state in international law. Unlike his counterpart in presidential democracies he does not have any general executive powers. His position is similar to that of a monarch in the constitutional monarchies of the west. The German Federal Government, headed by the Federal Chancellor, is elected by the Federal Parliament and appointed by the Federal President.

The German Federal Parliament (Bundestag) is the elected representative assembly at federal level. Its counterpart at state level is the state parliament. The members of parliament (about 600) are re-elected every four years. The Federal Parliament elects the Federal Chancellor and, together with the representatives of the states, the Federal President. Being the first chamber, it exercises the legislative power of the federation. The second chamber forms the Federal Council (Bundesrat) which is made up of representatives of the states. The political majorities are often different in the Federal Parliament and Federal Council and parties repeatedly delay important legislative measures. The Federal Constitutional Court (Bundesverfassungsgericht, BVerfG) monitors compliance with the constitutional order; it was created in 1951 and is located in Karlsruhe. Besides various other powers, the BVerfG has the authority to review Acts in order to ensure that they conform to the constitution (Normenkontrolle), and check whether measures adopted by the state administration contravene the Basic Rights (Verfassungsbeschwerde). An application for judicial review does not require an actual case and can be made by the federal or state government or one-third of the members of the Federal Parliament. Where there is an actual case, any court can ask the BVerfG whether a statutory provision conforms to the constitution. An individual can only make a constitutional complaint against a state act and only once the ordinary appeals procedure has been exhausted.

4 Court structure

4.1 Ordinary courts

Jurisdiction over civil and criminal matters is exercised by a three-stage court system consisting of four levels: the Local Court (Amtsgericht, AG), the Regional Courts (Landgericht, LG), the Regional Appeal Court (Oberlandesgericht, OLG) and the Federal Court of Justice (Bundesgerichtshof, BGH). Depending on the value of the claim (in civil cases) or the possible penalties (in criminal cases) jurisdiction lies with the Local (AG) or Regional (LG) Courts. Disputes relating to the law of tenancy and family law fall within the exclusive jurisdiction of the AG, whereas cases of state liability are to be brought before the LG. If the trial court was the AG, then appeals are made to the LG; if the latter was the trial court then the appeal lies with the OLG. The BGH can sit as an appeal court in all cases, provided that the previous court or the BGH itself has granted leave to appeal. Whereas both the first and second instance courts review the facts of the case, the BGH only reviews the legal assessment of the facts. If, in criminal cases, the AG decided as first instance, the line of possible appeals ends up at the OLG. Juries are no longer provided for in criminal cases, but in certain cases lay people form part in the tribunal. State prosecutors act as public prosecutors in criminal cases.

4.2 *Special courts*

Besides the ordinary courts there are special courts for reviewing general administration (Administrative Courts, Administrative Appeals Court, Federal Administrative Court) and administrative acts of financial bodies (Financial Court, Federal Financial Court) as well as deciding disputes arising from employment relationships (Employment Tribunal, Regional Employment Appeals Tribunal, Federal Employment Tribunal) and disputes relating to social welfare law (Social Insurance Tribunal, Regional Social Insurance Appeals Tribunal, Federal Social Insurance Tribunal). Lay people are involved in employment, social insurance and commercial proceedings, in order to provide expertise in their capacity as occupants.

5 **Legal education and legal professions**

The education of all jurists acting as judges, state prosecutors or solicitors is based on the qualification for judicial office. Although only a small number of graduates actually embark upon a judicial career, Germany holds fast to this ideal of a 'uniform legal education'. Legal education follows a two-stage system: theoretical education at a university is followed by practical education as a trainee at courts, administrative offices and solicitors' firms. University education is concluded by the 'First Examination'. This consists of a university examination (30 per cent) and an examination before a state commission (70 per cent) consisting of judges, solicitors and university lecturers. Practical training (the *Referendariat*) concludes with the 'Second State Examination in Law'. State examinations are organized by a Judicial Examination Office (*Justizprüfungsamt, JPA*) set up at Regional Appeal Courts (*OLG*) and at the Ministries of Justice of every state. State examinations guarantee a uniform education throughout the Federal Republic but, as far as the first examination is concerned, suppress competition between law faculties. This proved the reason for reforming legal education (in 2003), which allocated the university examination at least 30 per cent of the mark in the First Examination. Prior to the reform, the first law exam was also organized exclusively by the state ('First State Examination'). The reform of the First Examination is probably the first step towards an examination wholly controlled by the universities, which German law faculties could then use to fashion their education system in accordance with those of other European countries.

The courts recruit junior staff from the best graduates (those who obtain more than nine of 18 possible points in the exams). Those who have passed their Second Examination (*Assessorexamen*) can take up a position as a judge or state prosecutor. In 2002 there were approximately 21 000 judges and 5000 state prosecutors. Although their number has not increased in recent years, the number of solicitors has quintupled since 1975. Today

there are over 133 000 solicitors and to this number must be added approximately 10 000 notaries, among whom many (in areas with a Prussian tradition) are also active as solicitors. The number of qualified solicitors grows each year. Approximately 100 000 students are currently studying Jura; the plural (jura = 'the laws') recalls the age when two laws were taught at universities: Roman and canon law. Each year approximately 18 000 students commence their legal studies. Since all those who complete their Second Examination can practise as a solicitor, the competition on the market for legal services is still set to increase.

6 The rule of law

Basic rights and the rule of law characterize German legal practice and science in different ways. Generally speaking, German jurisprudence is weighted towards realizing the basic rights in all areas of life. There are two possible explanations for this: on the one hand, the strong emphasis of 'subjective law', derived from the concept of 'person' under natural law and the Roman concept of the *actio* and 'claim'; on the other hand, one must also consider the traumatic experience of fascist and communist systems, which did not recognize individual rights but instead the rights of the collective over those of the individual. Since 1949, the catalogue of basic rights in the GG has therefore promoted an individualistic and liberal image of a person, which was respected before 1933 as an unwritten principle and expressed in the BGB. Today, the doctrine of the basic rights governs even private law, which has realized such principles throughout history. For decades, German legal science has debated the question as to whether and to what extent the basic rights also apply in private law under the banner 'Drittwirkung der Grundrechte' (Canaris, 1984). At a similar level one finds the discussion as to whether and how far the basic rights guaranteed by the EC Treaty influence contractual relationships between private parties (Remien, 2003).

According to the rule of law, every administrative act and every judicial decision must have a legal basis and thereby be condoned by the constitution. Legal practice and legal science accordingly regard the application of rules as giving rise to three issues: the interrelationship of rules, interpretation of statutes and subsumption. In relation to the interrelationship of rules, federal law generally has priority over state law (Art. 31 GG). Within federal or state law the concept of the staggered structure (*Stufenbau*) of the legal system developed by Merkel and Kelsen applies: the basic rights take priority over ordinary constitutional law, constitutional law takes priority over ordinary statute law, however federal statutes also take priority over the constitutional law of the states. A great deal of methodical reflection is devoted to the interpretation of rules. The question as to whether the

aim of interpretation is to realize the intention of the legislator or the objective purpose of a rule is debated just as intensively as the different criteria which govern interpretation (Larenz and Canaris, 2003; Engisch, 1997). Such theoretical questions appear in legal practice and, above all, in legal education in a most peculiar way: since every legal act and every decision has to have a legal basis, the interpretation of the rule is the prerequisite of subsumption, i.e., the allocation of a set of facts to a rule. Legal education is almost obsessed with teaching students the technique of subsumption. For example, every solution to a case in civil law hinges upon which legal provision ('cause of action') a claim can be based upon. Therefore, lawyers examine in great detail whether the relevant facts satisfy all the requirements contained in the statutory provision. This very technical approach to the application of law characterizes the way German jurists think: those who deal with disputes do not think primarily about conflicts of interest and principles but about the rules which could be relevant.

7 The system and methods of private law

7.1 System and concepts

The German codifications of civil law, above all the BGB, are a model of systematic clarity and conceptual fine-tuning: concepts are employed uniformly, individual legal institutions clearly delineated and claims do not overlap. Only in a largely lacunae-free statute such as the BGB would the method of subsumption (solving cases according to 'causes of action') be at all possible. Here, method and system complement each other. However, this also has negative aspects: the reliability of system and concepts misleads practitioners and scholars into relying on the interpretation of concepts instead of enquiring in each case about the role which the concept plays within the statutory system of principles. As a result, legal practice and theory has been turned into a 'calculation with concepts' (Hattenhauer, 1987). A well-known example is the way in which one determines the scope of an enrichment claim: owing to the fact that the BGB (§. 812) recognizes two enrichment claims (one which is used to demand the return of mistaken performance and the other which is used in relation to other enrichments), the concept of 'performance' is used in order to decide who may proceed against whom in each case (du Plessis and Zimmermann, 1994). In complicated cases, however (especially those concerning the legal relations between three or more persons), this sometimes does not produce a sensible result. Nevertheless, in this and other cases, lawyers prefer to rely on the concept instead of enquiring about interests, evaluations and principles. This also leads to what non-German lawyers consider strange debates, for example, concerning the question as to whether 'performance' is only that which the recipient is allowed to think is the performance.

7.2 Analytical, interest-based and principle-based jurisprudence

One refers to this sort of jurisprudence as *Begriffsjurisprudenz* (analytical jurisprudence). It already dominated the late Pandect school of scholarship and the early teachings on the BGB and received new impetus after 1945. The inter-war period saw the founding of the opposite school of *Interessenjurisprudenz* (i.e., interest-based jurisprudence). This school of thought believed that the purpose of civil law rules was to protect and balance the interests of the parties to the dispute. Those who had to resolve a conflict of interests were to deduce the applicable rule from the purpose of the statutory rule. Since statutory rules always protect abstract and not actual interests, others also argued that the principles contained in the statutory rules should be extracted and civil law doctrines developed on their basis. This *Wertungsjurisprudenz* (principle-based jurisprudence), a by-product of *Interessenjurisprudenz*, is still followed today by some scholars. They look for those principles underlying the concepts and institutions which govern the legal system (Bydlinski, 1996). Reducing legal science to principles facilitates comparison with other legal systems and only then does one realize the common principles of European legal systems. Projects like those of the Lando Group (Principles of European Contract Law) and the Gandolfi Group (Code européen des contrats, Avant-projet) would not be possible without a principle-based legal science.

7.3 New developments

In recent years, two new methods seem to have superseded the theoretical dispute and, like principle-based jurisprudence, attempt to create a principle-based legal science. The economic analysis of private law arrived in Germany from America and has proved very popular, particularly among legal theorists (Eidenmüller, 1998). Legal historians and comparativists have discovered the field of historical legal comparison. They attempt to explain the system and function of German civil law and also to reveal the fundamental principles of European civil law by investigating the historical development of European systems of private law. In particular, this field of research endeavours to point out the similarities of civil law and common law and to show that English and continental legal systems are 'mixed legal systems' to an equal degree. Although the mixtures may be different, they stem from the same cultural, legal and historical elements (Zimmermann, 2001). One tangible product of such research is the 'Historical-Critical Commentary of the BGB' (Schmoeckel, Rückert and Zimmermann, 2003).

7.4 Science and practice

When the BGB was codified (1896/1900) 'science and practice' were entrusted with finding answers to a number of questions. At that time, a

highly developed case law (especially that of the Reichsgericht) was at odds with a systematic and theoretical legal scholarship based upon Roman law. Both had influenced the development of civil law in the latter part of the 19th century. Case law respected the achievements of science and, in turn, scholarship ranked the decisions of the supreme courts alongside the authoritative texts of the *Corpus iuris civilis*. This remained unchanged during the first twenty years of the 20th century. However, from the 1930s and especially after 1945, the balance shifted crucially. Scholarship, presumably cut off from its roots owing to codification, largely confined itself to collecting, annotating and systematically arranging the decisions of courts. It no longer produced innovative theoretical suggestions; the further development of civil law was left to the judiciary (especially the BGH). In the debate concerning the ‘modernization of the law of obligations’ (*Schuldrechtsmodernisierung 2002*), this development led to ‘case law’ being entrusted with finding answers to open questions; apparently, it seemed that nothing was expected from legal scholarship.

Since the 16th century, when the decisions of the Reichskammergericht were first published and annotated, there has been a tradition of collecting and preparing judgments concerning private law. In the 19th century, legal journals were established which concentrated partly or wholly on publishing judgments. The founding of a supreme court of appeal for the German Empire – the Reichsgericht (1879) – gave rise to a series of official publications of its decisions; one series for civil law (RGZ) and another for criminal (RGSt) judgments. The Bundesgerichtshof (BGH, since 1949) continued this tradition (BGHZ, BGHSt). Today, all BGH judgments as well as important judgments by the lower courts are published in journals and, more importantly, in databanks and via the Internet. Despite the increasing importance of case law and the diminishing importance of theoretical legal scholarship, the German legal system is not based on case law. Judgments do not bind either the supreme courts or lower courts. However, the BGH and lower courts must ensure the uniformity of case law and pass similar judgments where the facts of cases are comparable.

8 German law and other legal systems

8.1 Legal comparison

Roman and canon law served to connect German legal scholarship to the jurisprudence of other countries for hundreds of years. Therefore, at the end of the 18th century, one could point to the existence of a European *ius commune*. National codifications have preserved the differences between individual legal systems which existed in practice. This gave rise to comparative research and only since then (the 19th century) has it been possible to observe and describe mutual influences on national legal systems

(Ranieri, 2002). Modern comparative law in Germany can be traced back to Ernst Rabel, an Austrian Romanist and civil law scholar who, being Jewish, was forced to emigrate to the USA in 1937. It was on his initiative that the Munich Institute for Comparative Law (1916), the Hamburg Kaiser-Wilhelm-Institute for Comparative Law (1926) and the modern Max-Planck-Institute for Foreign and International Private Law (Kunze, 2004) were founded. Perhaps his most significant works were the comparative investigations into the law on sales (1936/1958) and the draft of the Hague Sales Convention (1935/1964). At the same time, Rabel did not find German comparative law which had already produced important names and significant works in the 19th century (Zachariä von Lingenthal, Bachofen, Windscheid, Kohler). Yet nowadays it leads a twilight existence outside specialist institutions. It is an offshoot rather than a foundation of theoretical research. This might be explained by the positivistic tendency of modern civil law scholarship. However, even in the ratio decidendi of judgments, comparative references play almost no role at all (Kötz, 1999).

8.2 *The influence of German law*

German law, and civil law in particular, has influenced other legal systems in different ways and to a varying degree. Samuel Pufendorf's system of natural law, for example, found support in France and England. The German Pandect school of the 19th century influenced scholarship and legislation throughout Europe and beyond. This is true both for the technique of analytical jurisprudence and for substantive inventions such as the culpa in contrahendo. The systematic advances of the Pandect school and the example of the BGB in particular gave rise to a number of codifications and re-enactments, for instance in Japan (1898), Switzerland (OR 1911/ZGB 1912) and, following their lead, Turkey (1923), in Austria (in the third partial re-enactment of the ABGB, 1916), Brazil (1916), China (1929), Peru (1936), Italy (1942), Greece (1940/46) and, to a certain degree, in the Netherlands as well (1992). In the second half of the 20th century the star of the BGB and German legal scholarship waned (Sandrock, 2001). This was partly due to the fact that between 1933 and 1945 Germany had driven out many of its best legal scholars and partly due to the growth in analytical jurisprudence after 1945. Its roundabout and impenetrable arguments and particularly the splintered casuistry, which it had created by using general clauses to form exceptions to the rule (Canaris, 2000), dampened the popularity of the BGB abroad. Recent incursions into the BGB 1900, most notably by the Act Modernizing the Law of Obligations (Schuldrechtsmodernisierungsgesetz 2002), might increase this tendency since they do not represent any innovations but merely fossilize the status quo of unwritten judge-made law in statute.

8.3 *Influence on German law*

Particularly during its ascendancy, German civil law was in active contact with other legal systems. A comparative survey played a particularly important role in the codification of the BGB. If, in those days, the investigation of other ideas and solutions was important, the post-war period has seen institutions and models from other legal systems adopted unquestioningly in order to fill real or imagined lacunae in German civil law. This development includes the so-called 'new' contracts such as factoring, leasing and franchising (for which the BGB itself offered regulatory models), as well as the concept of 'Nichterfüllung' (non-performance), which was familiar from the Hague Law on Sales and UN Law on Sales and which was intended to form the central model of the German Leistungsstörungenrecht (Zimmermann, 2002). Owing to a fixation on the concept of 'impossibility' one failed to recognize that the Leistungsstörungenrecht of the BGB 1900 required Nichterfüllung in any case (Huber, 2001). The institution of the 'Treuhand' (trust) received a needed boost by importing certain aspects from the English trust (Helmholz and Zimmermann, 1998). The BGB 1900 had not codified the Treuhand (fiducia) as an autonomous legal institution, and only recognized it in special forms such as guardianship or executorships. Soon after 1900, however, legal practice needed a general concept of trust (for instance, when creating secured transactions). In legal theory and method the influence of US legal scholarship has become noticeable in recent decades: this applies to legal realism and its more recent manifestations (such as the law and economics movement) as well as to John Rawls's theory of justice or Ronald Dworkin's theory of principles.

8.4 *European and German law*

German civil law has often precipitated European Directives on consumer protection either because it already possessed corresponding statutory provisions prior to their enactment (e.g., in relation to abusive clauses in general terms and conditions of business or package tours) or because science and practice had developed substantively equivalent instruments (as in the law on product liability). At the same time, European Directives have influenced German law on many occasions. One can see this most clearly from Directive 99/44 EC (sale of consumer goods), which impelled Germany to reform not only the law on defective goods but the whole of the law on breach of contract (Grundmann, 2001). Moreover, the 'Schuldrechtsmodernisierungsgesetz' (2002) formulated thereafter also shows the difficulties of implementing Directives into national law: new institutions collide with old ones, specific solutions do not accord with general concepts. For this reason, Germany puts its hopes in an integrative European legislation: either in the form of a classical civil law code or at least in the form of a Common Frame of

Reference akin to the US Restatements. A large number of scholars are working in different ways towards this aim: the Study Group on a European Civil Code under the auspices of Christian von Bar (Osnabrück) is working on the draft of a civil law code whereas the European Research Group on Existing EC Private Law (Acquis Group) under Reiner Schulze (Münster) and Hans Schulte-Nölke (Bielefeld) is attempting to identify civil law principles in existing primary or secondary European law. Reinhard Zimmermann (Hamburg) has warned against premature codification. Just as the German BGB was only able to emerge on the basis of a highly developed civil law scholarship, a European codification must be the result of a European civil law scholarship (Zimmermann, 1996b).

However, a European legal scholarship in this sense is still some way off. All the same, many German law faculties have recently created Chairs of European Civil Law and legal publications are also devoting increased attention to European legal history and comparative law. In addition, relevant journals have also been founded, above all the *Zeitschrift für Europäisches Privatrecht* (since 1993). German legal education is lagging behind this development somewhat: it is almost fixated on educating its graduates in German law. Courses in European law, legal history and comparative law are often non-compulsory. Supplementary courses in French, English and Spanish law (in their respective languages) are only sporadically offered. It remains to be hoped that this new tendency to leave education and examination up to the law faculties will lead to an internationalization of legal education.

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27 Greece

Eugenia Dacoronia

1 Introduction

Greece (Ελλάδα), officially called Hellas, belongs to the Romanic families of law. Its legal system is located somewhere in between the French and the German Legal Family, although it seems to approach the German one much more. The influence of French legislation and doctrine may be traced back to the first revolutionary assemblies (Epidaurus, 1822, Astros, 1823, Trizena, 1827), which adopted liberal and democratic constitutions modelled on the French Declaration of Human Rights. Nowadays, the influence of French models is confined to commercial and administrative law. As far as the civil law is concerned, it was influenced by the work of the German Pandectists while the redaction of the German Civil Code (BGB) was used as a pattern for the Greek Civil Code (GCC). Regarding criminal law, the Penal Law of 1833 and the Criminal Procedure Act of 1834 – both drafted by the Bavarian lawyer G.L. Maurer and based on Bavarian models – after being applied for more than a century and amended several times, were replaced by the Penal Code and the Code of Criminal Procedure of 1950 which entered into force on 1 January 1951. In Greece there is uniformity of law. The only official national language is Greek: Greek is the language used in all statutes and in all court proceedings as well.

2 Constitutional law

The constitution of Greece (Εύνταγμα της Ελλάδας) is written. It was adopted by a specially empowered Parliament in 1975, less than a year after the fall of a seven-year military dictatorship. The first constitutional amendment was adopted in 1986, which significantly reduced the power of the President in favour of the Parliament and the Prime Minister. In 2001, a new, more extensive revision of the constitution was voted and a total of 79 articles were amended. The revised constitution introduced new individual rights (such as the protection of genetic identity or the protection of personal data from electronic processing) and new rules of transparency in political life (regarding, e.g., the financing of the political parties, electoral expenditures and the relations of media owners with the state). It reorganized the operation of the Parliament and it reinforced decentralization. The constitution can be found in Greek English and German on the site <http://www.parliament.gr>. In English it is also available through

<http://www.mfa.gr/syntagma>; the 1975 constitution as revised in 1986 has been translated into French by S. Koutsoubinas, A. Pantelis and E. Spiliotopoulos (Édition du Service des Études de la Chambre des Députés, Athènes 1992). The revised constitution of 2001 has been translated only into English, by D. Th. Tsatsos and X. I. Condiades (2001, Ant. N. Sakkoulas Publishers).

The constitution contains chapters on fundamental rights, judiciary, legislature, government, political parties, parliament, the President of the Republic, administration, decentralization and revision of the constitution. The constitution provides that Greece is a 'presidential parliamentary democracy' (Art.1) and bars the restoration of the monarchy (Art.110). President Karolos Papoulias is the present chief of state. His mandate ends in the year 2010.

Parliament (Βουλή) consists of one chamber with between 200 and 300 (traditionally 300) members, elected for a term of four years in a direct, general and secret ballot (Art.51, ss.1,3). The Greek constitutional system is a monist one: members of the government remain members of the parliament. The legislative power is exercised either by the parliament sitting in pleno (regarding the most important subject matters, which are listed in Art.72, s.1), or by the permanent parliamentary committees in any other case (Art.72, s.2).

The courts are bound by the constitution not to apply laws the contents of which are contrary to the Constitution (Art.93, s.4). In case, however, opposite judgements on the unconstitutionality of a law have been pronounced by the Supreme Courts, for example Areios Pagos, the Council of the State and the Court of Auditors, then only the Supreme Special Court can annul an act of parliament on the grounds of unconstitutionality (Art.100).

A statutory provision declared to be unconstitutional by this court is null and void from the pronouncement of the judgment or from the time stated in the judgment (Art.100, s.4 sent. *b*). This judgement is binding erga omnes.

Greece is a unitary state, administratively divided into municipalities and communities, prefectures and districts. The districts are directly subordinate to the central government, while the prefectures, municipalities and communities, which comprise the so-called 'local government corporations', are administratively as well as financially independent from the central government (Art.102, s.2). Under Art.102, s.1 of the constitution, the administration of local affairs belongs to the local government corporations (principle of decentralization), each one of which is entrusted by acts of Parliament with significant decision-making powers within its region. Although the local government corporations are, as mentioned above, independent from the central government, they are subject to state supervision, which, however, is limited to the legality of their activity (Art.102, s.4).

3 Civil and commercial law

The codification project on civil law started in 1930 with the appointment of a five-member committee and resulted in the passage of the Civil Code (Αστικός Κώδικας) of 1940, which was scheduled to become effective on 1 July 1941. By that time, however, Greece had been overrun by the Axis forces. After the liberation of the country a revised version was put into effect in 1945; it was subsequently repealed and the original 1940 Code was given the force of law retroactively from 23 February 1946. The GCC has been translated into English by C. Taliadoros (2000). There also exist translations in French by P. Mamopoulos (3rd edn, 2000) and in German by D. Gogos (1951).

The GCC is divided into five books (General Principles, Law of Obligations, Property Law, Family Law and Law of Succession) and comprises 2035 articles. The sources of law are legislation and customs, 'the generally accepted rules of international law', and, of course, those rules of Community law that have direct force in member states. Although jurisprudence does not qualify as a source of law under the Greek legal system, judicial decisions are largely taken into consideration when 'interpreting' legislation or deciding a case.

The model followed by the GCC was primarily the BGB, though the national (chiefly Byzantine) legal tradition was not ignored. A typical example of the national legal tradition is the introduction on a wide scale of general clauses into the GCC, such as good faith and good morals, which are based on the principle of equity. Thus, in the GCC, there exist explicit provisions on the civil protection of personality (Art.57), on the prohibition of the abuse of right (Art.281), on the possibility of dissolution or adjustment of a contract by reason of an unforeseen change in circumstances (Art.388) etc., provisions which are not encountered in the BGB and which have been recognized in Germany subsequently only through court rulings.

The provisions of the GCC on Family Law have been largely amended and modernized by laws 1250/1982, which introduced civil marriage; 1329/1983, which amended or repealed most of the articles of Family Law in the light of the right of equality between men and women explicitly declared in Art.4, s.2 of the Greek Constitution; 2447/1996 on the adoption of minors; and 2521/1997, which introduced (a) the possibility of contesting paternity by the man with whom the mother had a permanent relationship, with sexual intercourse at the time of the child's conception, and (b) the possibility for spouses to adopt even when only one of them meets the requirements for the adoption. Finally, law 3089/2002 deals with medically assisted human reproduction (artificial insemination). Apart from the amendments to Family Law, law 3043/2002, which incorporated

Directive 1999/44/EC, altered certain provisions of the GCC regarding the Law of Sale and in particular the provisions on the liability of the seller for inherent defects and lack of agreed quality in the goods.

Regarding commercial law, which constitutes a special branch of law in Greece, the Greek state adopted in 1828 the Napoleonic Code of Commerce of France of 1807 to regulate commercial relations. Subsequently, the Code underwent many amendments so that only a few articles of Book I still remain in force. During the years following its enactment, several attempts were also made to revise it, which, however, remained uncompleted. Moreover, special commercial legislation governs the relations in law of businessmen and commercial transactions, clearly distinguishing commercial law from civil law in the Greek legal system.

4 Court system and law faculties

There are civil, criminal and administrative courts of law. Civil cases and criminal offences are tried before the Courts of First Instance. Appeal is allowed to one of the 14 Courts of Appeal. The Supreme Court in civil and criminal matters (Άρειος Πάγος, Areios Pagos) sitting in Athens and normally hearing cases in panels of five judges or in full bench with all justices entitled to participate, is a court of cassation: it confines its extraordinary review to questions of law, not having authority to judge on basis of the facts of the case. As far as the administrative cases are concerned, the Council of State, established in 1928 on the model of the French Conseil d'Etat, is an administrative court of first and last instance with jurisdiction over applications for review ('petitions for annulment') of administrative acts for violations of law or abuse of discretionary power. The Council of State is also the supreme court on final appeals against judgments of the lower administrative courts of first and second instance, which are assigned with 'substantive' administrative disputes.

There are three Law Faculties in Greece, located in Athens, Thessaloniki and Komotini. The Greek Constitution dictates that education at university level shall be provided exclusively by institutions constituting legal persons of public law (Art.16, s.5) and forbids the establishment of university-level institutions by private persons (Art.16, s.8). Organized discussion among legal scholars takes place in several societies, such as the Athens Lawyers Association, the Association of the Greek civil law attorneys and the Association of the Greek commercial law attorneys.

Legal doctrine, though not constituting a source of law, plays an important role in the Greek legal system; court decisions often cite the names of legal scholars whose opinions have been taken into consideration.

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28 Insolvency law*

Bob Wessels

1 General

The domain of insolvency law is concerned with the prevention, regulation and administering of the discontinuity in legal relationships of a person (legal person or natural person) which finds itself in financial problems. The inability to fulfil payment obligations and the legal consequences that go with this form the core content of most countries' existing national insolvency legislation. It is widely known that individual countries' national legal systems with regard to insolvency differ quite extensively. In general four reasons form the basis for this assessment.

1. Differences in market structure: where 'insolvency' is related to the economic and financial structure of a market, and many market regulations take place within the confinements of a national state, a government influences this structure, e.g., countries with a market-led economy versus countries with a more social economic policy. The latter for instance contain the now former Eastern European countries, with economies in transition. In addition, the tradition of the way business is financed will influence the robustness of rights of a creditor; e.g., in some markets the financing of business through stock-listed shares or bonds is well developed, in others the common method of finance is through (secured) credit either from of a bank or from members of the family.
2. Differences in general legal system: as in other legal domains, insolvency law is under the influence of the overall legal system of a country, being a common law jurisdiction or a civil law jurisdiction. In the former, in general the importance of case law, with an active role for a court, is stressed in comparison with countries based on statute law (law in codes). Some groups of countries may have a general legal system being influenced by relative new sources of law, e.g., in Europe, the so-called '*acquis communautaire*' (Smits, 2004).
3. Differences in structure of private law: in many countries the structure of general civil law and commercial law is a matter of continuous discussion. Some countries aim to insert both into one code (the Netherlands); others (Belgium, Germany, France) use different codes

* See also: Consumer law; Personal and real security; Transfer of movables.

and some adjust the judicial framework accordingly. In some countries specialized bankruptcy courts decide with regard to insolvency proceedings (USA); in most others the general civil or commercial law courts do have jurisdiction in these matters. Some law faculties organize courses and lectures on insolvency law within classes on procedural law, others in connection to the laws on security; others again treat insolvency law as an independent field of law. Some academics do regard international insolvency law as a matter of national law (because its related provisions are formally included in a nation's Insolvency Act), others see this part of law as a topic of private international law.

4. Differences in insolvency law itself: in relation to the existing market organization, the goals of insolvency proceedings may differ – plain liquidation of assets or, in addition, reorganization in an aim to rescue the enterprise and/or to preserve existing employment. Some insolvency law systems do not provide for insolvency proceedings for certain types of debtors or have (only recently) introduced specific proceedings, such as debt discharge proceedings for natural persons.

In all, 'national attitudes towards the phenomenon of insolvency are extremely variable, as are the social and legal consequences for the debtors concerned' (Fletcher, 1999, p. 4).

2 Short history of comparative insolvency law

Given these differences, one can understand that a general standard work with regard to comparative insolvency law is still lacking. Academics around the turn of the 19th to 20th century developed theories and ideas aiming at the solution of the typical questions of private international law (applicable law; international jurisdiction of a court; recognition of a judgment opening insolvency proceedings; recognition of a liquidator's powers abroad): see Jitta (1895) and Meili (1900). From an international angle, these questions have dominated legal thinking until the last decade (Nadelmann, 1942–43; Blom-Cooper, 1954; the essays in Voskuil *et al.*, 1989). Around the 1990s, with Dalhuisen (1968) as a forerunner, treatment of insolvency issues in a comparative context rises. These publications contain (a) reviews of insolvency law systems of specific countries (with an overview of current developments and future prospects), (b) descriptions of a country's treatment of certain specific issues, like the ranking of creditors, voidable transactions or personal liability of company directors, (c) a comparison of certain underlying principles or the specific elements of the available insolvency proceedings, mainly with regard to the US, the UK and Canada (Fletcher, 1990, 1992; Rajak *et al.*, 1993; Ziegel, 1994) and (d) the

treatment of topics of international insolvency law (Ziegel, 1994; Leonard and Besant, 1994; Cooper and Jarvis, 1996). Lawyers and legal academics, with good reason, are aware of the limited results that comparing legal systems may offer, see Gilson's caution: 'bankruptcy systems in different countries cannot be meaningfully compared without controlling for differences in the legal, regulatory, and economic environment in which firms operate' (Ziegel, 1994, p. 266).

3 Prominent principles of domestic law

However, in legal literature of the last decade some common features have been identified, which may be regarded as quite generally accepted prominent principles of insolvency law.

1. The principle of collectivity. Insolvency law results in a system within which actions by individual creditors against the debtor are frozen as these are replaced by the idea of the rule of joint execution against the assets of the insolvent debtor.
2. The notion of a common pool. As a result of the first principle the piecemeal execution of assets by creditors is stayed and replaced by a right to claim for a dividend against the pool. The rule of joint execution concerns all assets in the pool, which is available to pay all creditors' claims.
3. Equal treatment of creditors. The principle of *pari passu* payment to creditors means the pro rata payment out of the assets according to their claims.
4. The principle of respect for pre-insolvency rights. In general, insolvency law systems respect duly acquired and perfected rights prior to the commencement of proceedings. Here another principle comes into play: the principle of certainty and predictability of secured rights, created in the context of providing credit.

In 1995, Wood observes that the first principle is almost universally followed, but that the second proposition is eroded by exceptions and the third proposition 'is a piece of ideology which is nowhere honoured' (Wood, 1995, p. 2). The aforementioned principles are connected to a type of proceeding one generally finds and which has its focus on the liquidation of a debtor's assets. A common dominator which now, ten years later, is widely encountered is related to point (5).

5. Several proceedings. Many legislations contain a proceeding (in addition to liquidation) which is based on the principle of a composition or an arrangement concluded between the debtor and his creditors, which is binding upon a given percentage of a dissenting minority of creditors (sometimes referred to as 'cram-down'). A characteristic

feature of these types of proceedings, aiming at reorganization of the debtor's business, is the fact that attempts to restructure or reorganize enterprises can only be initiated by the debtor himself or at least not against his will.

6. Flexibility of insolvency legislation. Many countries furthermore have come to understand that the existing legal framework does not meet the challenge 'to achieve economic results that are potentially better than those that might be achieved under liquidation, by preserving and potentially improving the company's business through rationalization' (Parry, in Gromek Broc and Parry, 2004, p. 2). The Chapter 11 rescue proceeding, introduced under the U.S. Bankruptcy Reform Act 1978, has been an example for legislators in quite a number of countries to amend their legislation (e.g., Germany, 1999) or to introduce a model based on the rationale behind these proceedings (e.g., France in 2005).

4 Guiding approaches to international insolvency law

In spite of the above, Fletcher rightly acknowledges that within insolvency law 'the dissimilarities are so numerous, and so substantial, as to oblige the realist to accept that the world essentially consists of separate, self-contained systems' (Fletcher, 1999, p. 10). The same seems true for the treatment of international insolvency cases, being 'instances of cross-border insolvency', which include 'cases where the insolvent debtor has assets in more than one State or where some of the creditors of the debtor are not from the State where the insolvency proceeding is taking place' (Guide to Enactment, 1997, no. 1). International insolvency law contains 'the body of rules, which concern facts with an international element that are relevant in the context of insolvency law' (Kolmann, 2001, p. 3) and in this domain also many states have created their own rules, as 'International insolvency law is national law, because every State has to determine how it reacts to cross-border issues in insolvency proceedings', see Stephan (2003), s. 335, no. 3.

International insolvency cases cause a great number of sometimes rather complex legal questions, like the international jurisdiction of a court, the law applicable to the insolvency proceedings and on the substantial and procedural effects of these proceedings, for example, on the legal position of creditors from abroad, the issue of recognition of proceedings which have been opened abroad, the powers of a liquidator or administrator who has been appointed abroad, etc. From way back, the issues to be solved concerning cross-border insolvencies are being approached from two points of departure, universality and territoriality.

In the universality model an insolvency proceeding is seen as a unique proceeding reflecting unity of the estate. The proceedings should contain

all of the debtor's assets, wherever these assets are located. In this approach the whole estate will be administered and reorganized or liquidated according to the rules of the law of the country where the debtor has his domicile (or registered office or a similar reference location) and in which country the proceedings have been opened. The applicable law to the proceedings and its legal and procedural consequences is the law of the state in which the insolvency measure has been issued. This law is referred to as 'lex concursus', 'lex forum concursus' (or forum law), being the law ('lex') of the country where a court ('forum') opened an insolvency proceeding (dealing with concurring claims of creditors: 'concursum') and which court is (or has been) charged with hearing, conduct and closure of the proceedings. The liquidator (or administrator) in this approach is charged with the liquidation (or reorganization) of the debtor's assets all over the world of which the debtor himself (partly) has been divested respectively charged with the supervision of the administration of his affairs. The 'lex concursus' determines all consequences of these proceedings, for example, with regard to current contracts, the powers of an administrator and the bases and system of distributing dividends to creditors.

The territoriality model takes as a basic idea that the respective insolvency measure only will have legal effects within the jurisdiction of the state a court of which has opened the insolvency proceedings. The legal effects of these proceedings therefore will stop abruptly at this state's borders. The limitations these proceedings will bring to a debtor's legal authority to administer his assets are not applicable abroad. Assets in other countries will not be affected by these proceedings and the administrator who is appointed will not have any powers abroad.

These points of departure are both ends on a scale. Several other theories or approaches have been developed (LoPucki, Rasmussen, Von Wilmski); see Andersen (2000), Tung (2001, p. 45), Kolmann (2001, p. 468), Wessels (2003, p. 10), Westbrook (2004). In practice, most countries modify or limit the sharp edges of these theories and have introduced modified or mixed models, see Bufford *et al.* (2001, p. 4). These models 'in between' mostly are referred to as 'modified', 'limited' or 'controlled' universalism, as most of them in their core have a universalist element. The EU Insolvency Regulation (see below) is based on a mixed model, also referred to as 'coordinated' universality; see Wessels (2003) or 'Mitigated Europeanism' (thus Veder, 2004, p. 107).

5 Forms of regulation

Basically three forms of regulation have been applied within which the primary goal of preventing or resolving conflicts between systems of insolvency law in international insolvency cases. Some of these forms, directly

or indirectly, led to the alignment or the harmonization of (parts of) insolvency law. They are (i) unilateral regulation, (ii) conventions and treaties, and (iii) regional regulation.

Unilateral regulation. Admitting that a model of (pure) universality would be unfeasible without the support of a worldwide treaty, some states have created in the last quarter of the 20th century their own regulation for providing solutions in international cases. The best-known examples are Section 304 US Bankruptcy Code (1978) and Section 426 UK Insolvency Act 1986 (Fletcher, 1999, p. 187; Gropper, 2004). The central idea is to give assistance to a foreign representative of an insolvency proceeding. Compared to Section 426 Insolvency Act 1986 it is noticeable that the approach of Section 304 U.S. Bankruptcy Code is universal, as foreign representatives of all nations may receive assistance through an ‘ancillary proceeding’, where the English approach is limited to some 20 odd (mainly former Commonwealth) countries. These provisions, however, are similar in that both give discretion to the individual court, although the US court will be guided by the elements, laid down in Section 304(c), which is seen as providing more certainty and generally is a more helpful model than Section 426 (Lightman and Gale, 2004). The model of unilateral regulation is followed by some 20 countries, including Australia, Canada, India and New Zealand. This unilateral approach has recently (2003, 2004) been followed by Germany, Romania, Poland and Belgium (Wessels, 2004, p. 201).

Conventions and treaties. To overcome contrasting approaches to international insolvency cases groups of countries have concluded conventions to align certain legal matters. The phenomenon started already in the 12th century. For historic data see Wood (1995, p. 291) and Omar (2004b). In a period of over a hundred years, mainly between the 1880s and the 1990s, some 25 bilateral conventions have been concluded, mainly between continental European states, aiming at recognition of foreign insolvency proceedings. Mutual recognition was laid down in different forms. In many instances these treaties contain provisions with regard to applicable law. The method of bilateral treaty seems outmoded (Wessels, 1999, p. 247). Since 31 May 2002, the EU Insolvency Regulation (InsReg) has replaced, in respect of the matters referred to therein, in the relations between EU member states, these conventions. Where these had been concluded since the early 1990s between several Central and Eastern European states, they have been replaced too by the EU Insolvency Regulation as of 1 May 2004.

Regional regulation. Regional initiatives often flow from countries or (economic) groups of countries with a similar or a comparable range of thoughts on economic and legal issues, shared legal cultures and close commercial relationships. The following regions should be mentioned.

Latin America

The Montevideo Treaty on International Commercial Law of 1889 has been concluded between or ratified by Argentina, Bolivia, Columbia, Paraguay, Peru and Uruguay. Its subject is 'international commercial law'. In 1940, Argentina, Paraguay and Uruguay approved a revision, the Montevideo Treaty on International Commercial Terrestrial Law (Wood, 1995, p. 295). Fletcher (1999, p. 231) concludes: 'Given the abundance of common legal heritage among the members of this regional grouping of states, it is initially somewhat surprising to discover that the Montevideo Treaties make only a modest attempt to impose a unified, regional approach to the process of administration and distribution of a multi-jurisdictional estate.' The Havana Convention on Private International Law of 1928, concluded between 15 Latin-American and Middle-American states, builds on the concept of unity of insolvency proceedings and universality in its effect, resulting in the 'extraterritorial effect' for the proceeding as well as for the powers and functions of a trustee.

Northern Europe

The Nordic Bankruptcy Convention was concluded in 1933, between Denmark, Finland, Iceland, Norway and Sweden. The Convention, revised in 1977 and 1982, is built on the very similar resemblance of the legal systems and the conformity in approaches to insolvency law of these countries. The Convention in principle is based, within its Nordic territory, on universality of the insolvency proceeding opened in one of the states, applies within the whole territory the *lex concursus* and attributes the administrator with wide-ranging powers, to be exercised in all five countries. In respect to the matters referred to therein, with regard to Finland and Sweden the Convention has been replaced by the EU Insolvency Regulation. See Bogdan (1994).

North America

The North American Free Trade Agreement (NAFTA), concluded in 1994 between the USA, Canada and Mexico, has led to a renewed interest in searching for a solution of cross-border insolvencies within the aforementioned states. In the context of NAFTA certain rules have been concluded under the auspices of the American Law Institute (ALI). In 1994, ALI, for the first time in its existence, took up a topic of private international law, the 'Transnational Insolvency Project', as part of the process of economic integration between the signatories of NAFTA. The project's eventual goal was to develop principles and procedures for managing the general default of a debtor having its centre of interest in a NAFTA country and assets, creditors, debtors and operations in more than one

NAFTA country (Westbrook, 2001a). In 2001, ALI approved a set of principles, drafted in the context of the Transnational Insolvency Project, called 'Principles of Cooperation in Transnational Insolvency Cases Among the Members of the North American Free Trade Agreement' (Spring, 2001; Beavers, 2003). These 'Principles' comprise seven 'General Principles', 27 'Procedural Principles' and seven 'Recommendations for Legislation or International Agreement'. Added to these Principles is an Appendix: 'Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases' (Westbrook, 2001b). The Guidelines have been applied by courts in Canada and the USA several times, the first in *Re Matlack* (Pepall, 2004, p. 10).

Central Africa

OHADA is the abbreviation of 'Organisation pour l'Harmonisation en Afrique du Droit des Affaires', in English: Organization for the Harmonization of Business Law in Africa (sometimes: OHBLA). The Treaty was signed in 1993 and, after having received the required number of ratifications, came into effect in July 1995. OHADA has 16 members, especially West African and Central African countries that have in common the French language and the French legal tradition. The Treaty focuses on economic collaboration and integration by means of harmonizations of laws, laid down in standardized Acts. OHADA has a 'Standard Act Relating to Organisation of Collateral, Collection and Enforcement Procedures and Bankruptcy Proceedings'. Within this legal framework the 'Uniform Act Organising Collective Proceedings for Wiping Off Debts' has been introduced. The Uniform Act entered into force on 1 January 1999 (Issa-Sayegh, 1999). It reflects in its key points French national insolvency law, including three insolvency proceedings, as it stood in the mid-1990s (Agboyibor, 1999). The Uniform Act contains in Arts 247–56 ten provisions related to international insolvency law (Assogbavi, 2000; Owusah-Ansah, 2004). The Act excludes from its scope debtors which do not act in the course of a profession or a business. Moreover, the Act excludes farmers and craftsmen. With regard to the international provisions of the Uniform Act itself, the similarities with the EU Insolvency Regulation are striking (Wessels, 2006).

Europe

On 31 May 2002 the Regulation (EC) no. 1346/2000 of 29 May 2000 on insolvency proceedings (InsReg) entered into force. A Regulation is a European Community law measure which is binding and directly applicable in member states. The Regulation does not apply to Denmark. The goals of the Regulation, with 47 articles, are to enable cross-border insolvency proceedings to operate efficiently and effectively, to provide for

coordination of the measures to be taken with regard to the debtor's assets and to avoid forum shopping. The InsReg, therefore, provides rules for the international jurisdiction of courts in a member state for the opening of insolvency proceedings, the (automatic) recognition of these proceedings in other member states and the powers of the 'liquidator' in the other member states. The Regulation also deals with important choice of law (or private international law) provisions. The InsReg applies entirely and directly to the ten member states, which joined the EU in 1 May 2004 (Duursma-Kepplinger *et al.*, 2002; Wessels, 2004, p. 1; Israël, 2004). For a first assessment, see Wessels (2004, p. 155), Mankowski (2004), Taylor (2004). Art. 1(1) EU InsReg excludes from its scope insolvency proceedings concerning insurance undertakings, credit institutions, investment undertakings, holding funds or securities for third parties, and collective investment undertakings (Deguée, 2004; Wessels, 2004, p. 259).

South-East Asia

Under the auspices of the Asian Development Bank (ADB) progress is made in developing a regional regulation of insolvency law, which in principle will be applied to Indonesia, the Philippines and Korea (RETA report, 2000; Interim Report, June 2004). Two strands of development are crucial: first, the renewal of insolvency law, for which in the report 16 'Good Practice Standards for Insolvency Law' have been suggested; second, it was recommended that alignment of a system of securities law with the insolvency law be developed.

6 Convergence

Under the heading 'convergence' I assemble a number of tendencies that reflect the fact that those who are involved in insolvency law (states, insolvency practitioners, courts, academics) are not thrown back on their own national set of legislation or rules. The first group reflects general movements in national legislations. The other group of sources provides materials which may offer legitimacy in that they come to the surface through (circles in) society, reflecting fairly generally accepted thoughts or practices. It should be noted, though, that the treatment below aims to be just an interim enumeration as the materials are a selection and differ in the sources they are derived from, their legally binding character, the goals they aim to achieve and the different legal underpinnings, let alone the willingness of states and other actors (courts, practitioners, institutions) to appreciate, to adopt or to operate conscientiously their terms. The aforementioned groups of tendencies are: harmonization through legislation, soft law, modelling and guiding, and principles.

6.1 Harmonization through legislation

As demonstrated under ‘regional regulation’, some of the examples align or harmonize certain features or topics of (international) insolvency law. Uniform or harmonized law is aimed at the avoidance or the regulation of the problems which arise when two or more different rules of different countries exist. In Europe many countries have revised and amended their legislation on insolvency law over the last two decades. Here one may detect two tendencies. The first is consumer insolvency. Since the 1980s in over ten EU countries specific legislation has been introduced to deal with consumer debt. Enacted proceedings often mirror the so-called ‘fresh-start’ doctrine, as laid down in Chapter 13 U.S. Bankruptcy Code (Huls, 1994; Jurisch, 2002). The Netherlands, Belgium and Germany followed in the late 1990s.

Corporate rescue is the second tendency. Substantial revision has taken place in countries like England and Scotland, France and Belgium and, in 1999, Germany and Italy. Poland and Romania followed in 2003, Spain in 2004, while in France (again) and in The Netherlands a substantial revision is under way. Although even the more recent insolvency laws in several European countries continue to show substantial differences in underlying policy considerations, in structure and in content of these laws, in most of these jurisdictions there is openness towards corporate rescue procedures, which are an alternative to liquidation procedures. In many of these countries the US Chapter 11 procedure has served as a model for legislators (Gromek Broc and Parry, 2004).

6.2 Soft law

Generally ‘soft law’ is understood to mean a way of regulating certain issues in a non-enforceable way, created by (directly) involved participants in a certain sector or field (individuals, representative organizations) by means of mutual discussion and agreement. Soft law expresses itself in forms such as a model-contract, ‘precedents’, ‘standards’, guidelines, records of certain customs, codes or protocols. Most notable for insolvency law in this respect are the following.

Cross-Border Insolvency Concordat of 1995 This Concordat is drafted by Committee J on Insolvency, Restructuring and Creditors’ Rights, a section of the Legal Practice Division of the International Bar Association. It contains a design for the approach and harmonization of cross-border insolvency proceedings, aimed at a better collaboration and ‘equity’. The idea of a cross-border concordat (or protocol) was realized in practice, during international insolvency cases, such as *Re Maxwell Communication Corporation plc* [1992] B.C.L.C. 465, and *Re Olympia & York Developments Ltd. v. Royal Trust Co* (1993), 20 C.B.R. (3d) 165. The experiences gained during

these cases were shared with others, discussed and finally described in the Concordat (Nielsen, Sigal and Wagner, 1996; Culmer, 1999; Wittinghofer, 2004).

Principles for A Global Approach to Multi-Creditor Workouts Under the auspices of Insol International, the worldwide federation of national organizations of accountants and lawyers, specializing in the broad field of insolvency (law), these principles were issued in 2000. There are eight principles, indicating 'best practice': how to act when a company, with a larger number of (foreign) creditors, is in financial troubles (Bond, 2001). The Principles are jurisdiction-neutral and therefore can be made in principle applicable, whatever the legal system in that specific country. The publication of the Principles demonstrates that they are being endorsed by the World Bank, the Bank of England and the British Bankers Association. In several jurisdictions (e.g., Korea, Indonesia, Turkey) this approach is being followed (World Bank, 2004; Pomerleano and Shaw, 2005).

6.3 *Modelling and guiding*

With a focus on harmonization and basically containing 'soft law' drafters of insolvency, legislation may be strongly assisted by two tools, both provided by the United Nations Commission on International Trade Law (UNCITRAL). UNCITRAL, sometimes known as the commercial arm of the UN, was established in 1966 to provide a more active role for the UN in pushing back differences in national legal systems in the domain of international trade. In several legal fields UNCITRAL has contributed to the alignment, harmonization or unification of international commercial law: for example, The Vienna Convention on International Sales of Goods (CISG) of 1980, the UNCITRAL Arbitration Rules 1976, the Model Law on International Commercial Arbitration of 1985 and the UNCITRAL Model Law on Electronic Commerce of 1996. A 'Model Law' is an instrument for legislation, which in itself is not legally binding, but focuses on a way of harmonizing national law. A Model Law may be viewed as a (strong) recommendation to individual states to incorporate the literary text of the Model into national legislation.

In 1997, the UNCITRAL Model Law on Cross-Border Insolvency was approved. It sets a world standard for national legislative provisions with regard to international insolvency (Kono, 2000), which Model was quite closely followed in drafting a new Chapter 15 to the U.S. Bankruptcy Code (Gerber, 2003; Wessels, 2004, p. 41) in force as of 17 October 2005. The Model Law has been followed by for example, Mexico, Japan, South Africa, Spain and Romania among others, and its introduction is to be expected in the UK in 2006.

In 2000, UNCITRAL started the preparation of a comprehensive statement of key objectives and core features for a strong insolvency, debtor–creditor regime, including considerations of out-of-court restructuring, and a legislative guide containing flexible approaches to the implementation of such objectives and features, including a discussion of the alternative approaches possible and the perceived benefits and detriments of such approaches. In autumn 2004, the work led to UNCITRAL’s Legislative Guide on Insolvency Law (Clift, 2002; Cooper, 2004). The Guide presents a comprehensive exposition of the core objectives and the structure of an effective and efficient commercial insolvency system. Every key provision which is recommended to be included in a national law is discussed and the possible treatment is evaluated. The Guide furthermore takes positions on controversial issues such as automatic stay, post-filing finance, treatment of financial market transaction and the overriding of contract terms for termination.

In the aftermath of the Asian financial crisis of 1997–98, the World Bank started an initiative to improve the future stability of the international financial system. The World Bank considers it of importance to identify principles and guidelines for sound insolvency systems and for the strengthening of related debtor–creditor rights in emerging markets. This has led to the acceptance by the Bank in 2001 of the ‘Principles and Guidelines for Effective Insolvency and Creditor Rights Systems’. These contain 35 Principles the World Bank is using in its global programme of ‘country assessment’.

6.4 Principles

As it was considered too difficult to implement a universal proceeding without modifying, by the application of the law of the state of the opening of proceedings, pre-existing rights created prior to the insolvency under the different national laws of the member states, in the greater part of Europe the Insolvency Regulation was introduced. The Regulation may be seen as a symbol of the great diversity of national insolvency laws too, where it aims to coordinate over 80 types of insolvency proceedings in 24 countries. Two developments deserve attention. The first, an ‘International Working Group on European Insolvency Law’ (founded in 1999, representing ten member states), has studied the question how these differences can be reconciled with the continuing economic integration of Europe, especially where the activities of companies that transgress national borders are regulated by European legislation. After thorough study it concluded that aforementioned diversities do not mean that national insolvency laws do not share common characteristics. These common elements were captured in the Principles of European Insolvency Law (2003), 14 in number, being

presented as reflecting 'the *essence* of insolvency proceedings in Europe as they reflect, on a more abstract level, the common characteristics of the insolvency laws of the European Member States' (McBryde *et al.*, 2003; Wessels, 2004, p. 212).

The European Bank for Reconstruction and Development (EBRD) plays an important role in the changing of the former Eastern bloc countries into market economies. EBRD, established in 1991, serves as an international financial institution promoting private and entrepreneurial initiative in 27 'countries of operation'. One of the five core commercial law areas the EBRD is focusing on is insolvency. The general point of view of EBRD at present is, that, whenever EBRD acts as lender or promotor to a certain project, the respective country will have to take into account the Principles of the World Bank (see above). Based on measurement against international standards (UNCITRAL Legislative Guide, the World Bank's Principles) EBRD has defined a set of ten core principles for a modern insolvency law regime (ILR), intended to be the foundation of an ILR (see EBRD, 2004).

7 Current and future trends

It flows from the above that future trends in legislation are to be seen in the areas of 'corporate rescue' and of 'internationalization' (Omar, 2004b). In this context an evaluation of 'consumer bankruptcy' may be another (Insol International, 2001; Ramsay and Niemi-Kiesilainen, 2003). Comparative insolvency law research in comparing substantial rights or legal regimes will continue (Bütter, 2002; Balcerowicz *et al.*, 2004). The tendency referred to above as 'convergence' will provide an additional field of research, especially in evaluating the application of the results of the sources mentioned to certain regions of the world (Levin *et al.*, 2004), in analysing and comparing models or principles (comparing UNCITRAL Model Law and EU Insolvency Regulation: Berends, 1998), in the way the Model Law is introduced in several countries (Khumalo, 2004), in comparing certain topics within these legal frameworks (Veder, 2004), in the application of regional regulation (Wessels, 2004, p. 155; see, for court cases on the EU Insolvency Regulation, www.eir-database.com) or the realization of this type of regulation in several countries (Wessels, 2004, p. 229).

Where in the field of international insolvency law several of the sources, referred to above, are based on the concept of communication and cooperation (between courts or insolvency practitioners), this theme clearly is open for further analyses (Krings, 1997; Leonard, 2004; Israël 2004). A recurring theme, especially in the field of Law and Economics, is the general debate on whether managing of 'insolvency' of all corporate debtors, especially those with a dispersed ownership structure and financed by multiple

creditors, is best served within the restraints of judicial proceedings instead of using alternatives, based on a contractual approach (Franken, 2004), and whether the latter approach is fundamentally sustainable without a serious discussion of the role of secured-credit law (Westbrook, 2004). And will 'contractualization' be accompanied by 'de-proceduralization' in that, instead of the resolving role of the traditional judiciary court system, it will be augmented or partly replaced by forms of conciliation (arbitration; mediation)?

Within Europe a theme for the future seems to be how best to gear, align or integrate matters of corporate law and corporate insolvency. EU Directives on company law only haphazardly touch on insolvency (Omar, 2004a), where the effectiveness of a credible corporate insolvency regime is only achievable with, for example, an efficient framework of creditor protection (Kraakman *et al.*, 2004), an aligned system of director's liability (Insol International, 2005) and a coordinated approach to corporate groups (Henry, 2004). After Enron, WorldCom and Parmalat, should corporate behaviour not be addressed in a well-considered coordinated way, within which corporate debt or corporate insolvency as a whole is an integral part of the overall attunement of EU measures with regard to corporate governance? Here, comparative research may act as a tuning fork with a full tone.

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29 Insurance law*

Herman Cousy

1 Generalities

1.1 *Insurance as a contract, a technique and an industry*

Cambridge professor Malcolm Clarke begins his treatise on ‘The law of insurance contracts’ with the following remarkable statement: ‘The English courts know an elephant when they see one, so too a contract of insurance. Judges speak, for example, of “those who are generally accepted as being insurers”’. Until 1 December 2001, the legislation under which the conduct was regulated in the United Kingdom did not attempt a definition or description of insurance’ (Clarke, 2002). Not only under the English tradition but also elsewhere a certain reluctance to give a unique and general definition of insurance can be noticed. This reluctance is partly due to the fact that two different sorts of insurance, namely indemnitory and non-indemnitory insurance (see Section 2.3 below) are so far apart as to make a legal definition of insurance in general hazardous. In addition the (private law) definition of the contract of insurance, that usually makes reference to the concept of ‘insurer’ and the (public law) definition of an insurer, that in turn refers to exercising the activity of insurance, are closely interrelated so as to make separate statutory definitions incomplete.

Scruples and details left aside, a common denominator of usual definitions would say that insurance is a contract whereby, in return for a (variable or fixed) premium, one party, the insurer, promises the other party (the policyholder) to give coverage (by money payment or otherwise) under the conditions and within the limits stipulated in the contract, upon the happening of the (contractually defined) uncertain event.

Whereas the concept of ‘risk’ plays a central role in insurance, it rarely appears in legal definitions. In practice and in doctrinal writings, ‘risk’ is used in different senses: risk as the uncertain event (e.g., a fire), risk as the object of cover (e.g., the house), risk as the probability of occurrence of the insured event, risk as the magnitude of the loss. Typical of the development of modern insurance is the widening of the concept of insurable risks. Whereas such risks were traditionally restricted to ‘Act of God’-type events (sudden, unforeseeable events, caused by exterior forces), modern insurance law has slowly but steadily grown into a degree of sophistication and

* See also: Accident compensation; Social security; Tort law in general.

maturity that allows the coverage of risks that are less aleatory (in French, 'les risques potestatifs', in which the insured plays a greater – although not an exclusive – role in making the insured event occur) (Kullman, 2003, p. 95); of 'composite risks' (where the realization of the risk implies the occurrence of several successive events, as, e.g., in liability insurance or credit insurance or health insurance) and of 'putative risks' (where the uncertainty of the occurrence of the insured event exists only in the mind of the parties, and where the concept of risk is thus 'subjective').

Historically, marine insurance has often preceded non-marine insurance, and, like all other law relating to the sea, marine insurance law has until this day conserved its idiosyncrasies. Most legislations still treat marine and non-marine insurance separately and quite differently. Although being generally considered as insurance, contracts of reinsurance ('reinsurance treaties') are more often than not excluded from the field of application of insurance legislation, and so are the 'social insurances' (covering 'social risks' like illness, old age, unemployment etc.).

Another basic distinction between two types of insurance is based on the modalities of the payment of the premium: the distinction between fixed premium insurance and the mutual insurance (where the amount of the contribution varies with the actually incurred losses). Out of this distinction developed two types of organization of the insurance undertakings: the insurance company on the one hand and the mutual insurance association on the other. Whereas the last form may have been successful in many countries in the early stages of modern insurance, the quest for access to equity funds appears to have encouraged a trend toward 'demutualization'.

The contract of insurance is based on a complicated financial operation and technique in which certain risks of harm to health and wealth are handled by a system of compensation, the cost of which is spread out over a group of risk bearers. In a 'risk society' like ours, good governance implies 'risk governance' (Kourilsky and Viney, 2000) in which insurance is a vital instrument. According to a famous definition by the French author Chaufton, the technique of insurance is based on 'la compensation des effets du hasard sur le patrimoine de l'homme par la mutualité organisée suivant les lois de la statistique' (Chaufton, 1884, I, p. 347). Two elements are thus essential in the definition of what is (technically) an operation of insurance: first the element of 'mutualization', which implies the formation of groups of risk bearers ('risk pools') in such a manner that it is both fair and efficient to spread the cost of the occurring insured event among the members of such group, and secondly, the use of statistics which is needed to enable the insurer to calculate the probable cost of the coverage and the premium in advance. As was observed in the well known *Commission v. Germany* (1984) case of the E.C. Court of Justice, one of the characteristics

of insurance lies in the fact that 'insurance is a particularly sensitive area from the point of view of the protection of the consumer both as a policyholder and as an insured person, because of the specific nature of the services provided by the insurer, which is limited to future events, the occurrence of which is uncertain at the time where the contract is concluded. The phenomenon to which the court is referring is well known in economic literature as 'the inversion of the production cycle'. It is this special characteristic of the insurance industry which explains the need for a supervisory legislation and regulation. Whereas early insurance supervision law saw the light around the end of the 19th and the beginning of the 20th century (e.g. in Germany), other legal systems were later in introducing generalized control. In a number of EC member states, the three generations of internal market directives (between 1973 and 1992, in life and non-life insurance) played an important role in the generalization, and of course in the harmonization, of systems of insurance supervision and regulation.

Insurance is also one of the major branches of the financial services industry (according to a common classification in EC law, next to the credit institutions and to investment services). Insurance and reinsurance undertakings and insurance and reinsurance intermediaries operate in markets that are becoming ever larger and at the same time probably also more competitive. Whereas insurance markets used to be mainly organized on a national scale, they now grow into regional markets (as in the European Union or other regionally integrated entities such as Mercosur). Some branches, like industrial insurance for large risks and marine insurance, and also reinsurance, have *ab initio* been more international and in some cases even global in their structure and organization. The degree of integration and the methods of achieving it have been especially remarkable in the European Union, where the integration of insurance markets was first pursued (between 1985 and 1992) by the promulgation of the three generations of so-called 'internal market' directives, and has since then been widened and deepened by new community legislation issued in the framework of the 'Financial Services Action Plan' (1999–2004) of the European Commission.

A general comparative overview, which will mainly although not exclusively concentrate on the European scenery of insurance law, covering insurance as a contract, as a risk governance technique and as a financial services industry, reveals a Janus-faced outlook. On the one hand insurance and insurance law present a remarkable number of similarities because of the presence in all the national legal systems of common basic structures, doctrines and characteristics (Section 2, below). On the other hand a broad comparative overview equally shows that profound differences exist, due to the variety of business cultures and of socio-economical settings and to differences in legal traditions (Section 3, below). A brief look at future

developments and orientations will again show a tendency toward convergence and further integration, both from an economic and from a legal point of view.

1.2 Comparative insurance law literature

It would appear that, in the field of comparative insurance law, doctrinal efforts remained mainly confined to vertical comparison, putting a description of one system next to another. Both at the occasion of its world conferences and in a number of other publications (Fontaine 1990, 1992; Cousy, and Frédéricq s.d.), the Association Internationale de Droit des Assurances (AIDA) has mainly concentrated on the method of vertical comparative description, while at the same time making efforts to do more horizontal and functional comparative work in the occasional publications of the so-called 'working parties'. A recent publication of the Comité Européen des Assurances (in French and English) on European Insurance Contract Laws (2004) equally makes use of the vertical method. Efforts at horizontal comparison are found mainly in monographs and academic dissertations. A thorough effort to achieve a more systematic horizontal comparison of insurance contract law themes was made in a recent publication of the Hamburg Max Planck Institut für ausländisches und internationales Privatrecht (Basedow and Fock, 2002). A shorter version is found in the *Encyclopédie de l'assurance* (Binon, 1998). Moves towards more exercises in horizontal comparison emanated from the revival at the beginning of the 21st century of the interest in the harmonization of insurance contract law, which to some extent was triggered by the Communications of the European Commission on Insurance Contract Law (2001) and on a more coherent European Insurance Contract Law (2003).

2 Common characteristics

2.1 Common historical background

Whereas it is fashionable to trace the earliest instances of mutualization of losses (and thus the early predecessors of modern insurance) back to Hammurabi's Code and to see early predecessors of insurance in such formulas as 'bottomry' and 'tontine', modern insurance is a relatively young discipline and technique and so is the law (van Niekerk, 1998). In reality, the modern history of insurance only started when insurers succeeded in combining the formation of risk groups of risk bearers (mutualization) with the use of statistics and mortality tables (enabling them to calculate accurately the premium). Lacking Roman law origins, insurance law finds its early expressions in the usages and regulations that, from the 16th century onwards, were codified, mainly in such places and countries where sea trade and early forms of marine insurance were flourishing (successively

Italy, Spain, France, the Baltic region and England) (van Barneveld, 1978). In Europe these early ‘codifications’ of (mainly marine) insurance law would eventually result in major legislative monuments like Colbert’s *Ordonnance de la Marine* (1681) and, later on, the Napoleonic *Code de Commerce* (1807) in France or the Prussian *Allgemeine Landrecht*, and later on the *Handelsgesetzbuch*, in Germany (Honsell, 1998). Among the various national legislations on marine, and thereafter non-marine insurance, one that must be specially mentioned is the British *Marine Insurance Act* (1906), famous as an early legislative monument in a common law area.

Thriving on the enormous and ever-expanding social and economic weight and significance of insurance as an instrument of risk governance and as an industry, insurance contract law slowly but gradually obtained more standing and maturity as a fully grown branch of private law. Whereas the Napoleonic *Code Civil* quite symbolically committed the insurance contract (classified together with gaming and gambling under the chapter of the rather marginalized category of ‘aleatory contracts’) to the sphere of maritime law, several legislations (such as Italy’s *Codice Civile* and, quite recently, the new Dutch *Civil Code*) have incorporated the insurance contract into their civil law codification. This move can be interpreted as a gain of status of the contract of insurance in the civil society. Toward the end of the (20th) century, many legislators have made efforts to update and renew their insurance contract legislation (e.g., Belgium, Greece, Spain, Netherlands, Germany, Sweden). One of the reasons for this massive legislative activity may be that in many countries (with the possible exception of those countries where extensive Alternative Dispute Resolution (ADR) mechanisms have been set up) insurance has given rise to a continuous and unabated flow of disputes and litigation. It is often claimed that the resulting court decisions and case law have been instrumental in the development of legal doctrine, especially so in the common law. One might even assume that some of the insurance law concepts have served as a forerunner of certain developments in civil law: one thinks, for example, of the implications of the requirement of good faith, the duty of mitigation of damages, the obligation of information and warning obligations of the professional service provider.

2.2 *Common principles of insurance contract law*

On opening a textbook or treatise on insurance law, one cannot fail to observe that in the various legal systems the same fundamental principles are governing insurance contract law. Examples of such common basic doctrines and principles are the doctrine of insurable interest, the indemnity principle, the principle of utmost good faith, and the need for special protection of the insured against the possible ‘one-sidedness’ of the insurance

policy conditions. The doctrine of insurable interest (*intérêt d'assurance* – France; *Versicherte Interesse* – Germany) that requires the insured to possess an interest in the non-occurrence of the insured event relates to the aleatory nature of the insurance contract and serves in distinguishing between the valid contract of insurance and the legally unenforceable gambling agreements. The indemnity principle (*le principe indemnitaire* – France; *Bereicherungsverbot* – Germany), which implies that the insured may not get better off because of the insurance coverage, serves to fight the fear of voluntary claims, a fear that has haunted lawmakers all through the history of insurance legislation. Applying this indemnity principle, all legal systems have developed quite comparable rules concerning the subrogation of the insurer, concerning over and under insurance, and concerning multiple insurance coverage. However, all legal systems accept that the indemnity principle does not apply to such insurances, such as life insurance, where the object of insurance is not the coverage of a loss but the payment of a fixed sum. Insurance is ‘*uberrimae fidei*’. Such is the famous rule of section 17 of the Marine Insurance Act, 1906 that expresses the idea that insurance requires a special degree of good faith: in other words, that insurance is ‘a contract of the utmost good faith’. The special role that the principle of good faith plays in the insurance contract lies at the basis of a number of rules that are specific to insurance. Taken in its objective sense of an (unwritten) rule of decent behaviour in contractual relations, the good faith rule is indeed at the basis of such typical insurance-linked obligations, like the policyholder’s duty to adequately and, in the law of some countries, spontaneously to describe the risk and its later aggravations, or of the insured’s obligation to mitigate the loss after occurrence of the insured event.

There is finally a fourth common principle that relates to the special need for protection of the insured arising out of the fact that the insurance contract is a standard contract. The one-sidedness of the insurance policy conditions was fought against at the legislative level (by means of unfair terms legislation or compulsory or semi-compulsory contract legislation), at the administrative level (by means of control of insurance clauses by supervisory authorities) and at the judicial level (by means of consumer insured-friendly interpretation). Here again the mechanisms of correction may have been in some legal systems the forerunners of those that would later be used against unfair clauses in other consumer contracts.

2.3 Common classifications

All legal systems make a fundamental difference between those insurances branches where the insurer assumes the obligation to cover a calculable and well-defined patrimonial loss (as when goods are damaged or lost, or

where a liability or the need to make and pay certain expenditures is incurred) and those where the insurer promises to pay a fixed sum of money. European continental legal systems used to make general classifications on the basis of the distinction between assurances de dommages (France), Schadensversicherung (Germany), assicurazione contro i danni (Italy) on the one hand, and assurances de personnes (France), assicurazione di persone (Italy) on the other hand, or on the basis of the (rougher) distinction between life and non-life insurance.

In an effort to obtain some clarification in the matter and on the terminology, guidance may be sought in the double distinction that was introduced by the 1992 Belgian (non-marine) insurance contract legislation. A first distinction is made between insurance with an indemnitory character (where the insurer's obligation is to pay what is needed to cover a loss suffered by the insured) and insurance for a fixed sum (where the amount of the insurer's obligation is independent of the amount of the loss). A second distinction is made between 'assurance de dommages' where the risk relates to a patrimonial loss, and 'assurance de personnes', where the risk relates to the physical sphere of a human being (duration of life, physical integrity, family situation). Whereas all 'assurances de dommages' are indemnitory and all life insurance is non-indemnitory, some insurances of persons (other than life insurance) may be either one, according to the terms of the contract.

3 Differences and divergence

3.1 Two cultures of insurance

It has appeared that a distinction can be made between two profoundly diverging models of organization of the insurance business and indeed between two 'cultures' of insurance. For a long time the two models or cultures have coexisted alongside each other in Europe, but also elsewhere. The profound differences between them were at the core of some of the difficulties that have been encountered by the makers of the regulatory framework of the European 'internal market' for insurance. According to the terminology that was introduced by Michel Albert (Albert, 1991), the distinction is usually referred to as the one between the 'alpine model' and the 'maritime model'. The reference to geographical connotations takes nothing away from the universal applicability of the models described. Although the classification of insurance law systems partially runs along different lines (like the distinction between common law and civil law systems), the 'cultural' differences between insurance markets and business cultures are highly relevant to the comparative approach to the underlying legal cultures, and especially to the differences in the (public law) framework for the regulation and supervision of the insurance industry (Albert, 1993).

Typical of the alpine tradition of insurance is (or rather 'was') that insurance is essentially considered as an act of solidarity. Therefore access to insurance is kept broadly and the degree of selectivity of the insurer at the moment of underwriting and in the course of the contract is therefore limited. Nor will the 'alpine' insurer be inclined to make extensive efforts of differentiation and classification of the risk with a view to making risk pools and segmenting premium tariffs. In this manner good and bad risks are treated alike, and premium tariffs are rather flat. Such premium levels must of course be sufficiently high to enable the insurer to cover also the bad risks. In the alpine model insurance is heavily controlled and the supervisory authority does not limit itself to taking care of the global solvency of the insurance undertaking, but will typically check on insurance conditions and premium tariffs ('*contrôle matériel*'). In the typical alpine supervisory regime, prior approval of such tariffs and conditions by the supervisory authority must be obtained before the insurance policy is brought into the market ('*contrôle matériel a priori*'). In the alpine model, the pricing of the insurance and, more generally, the business of insurance is not done or run in a highly competitive manner. Because of heavy and prudent supervision control, bankruptcies are rare. Since there is little price competition, clients remain loyal to their insurer for long periods, if not for a lifetime. And so do shareholders, since insurance shares yield a low but steady and reliable return. Also with respect to the ways and methods of insurance distribution and mediation, there are characteristics that are specific to the two cultures of insurance. Although differences exist between the various European national markets, the general tendency of the alpine model is that insurance is not bought, but sold, by agents, 'tied agents' most of the time, who can be considered as the insurer's long arm and representative. In continental Europe insurance intermediation has traditionally not been the object of much legislation or regulation.

In the maritime insurance tradition, insurance can be described as a product which is bought in a competitive market at a bargained for price. As a result premium levels are competitive and sharp, and therefore the insurer has to watch out not to underwrite bad risks. The insurer will be highly selective at the time of underwriting because the sharp pricing obliges the insurer to keep bad risk out of his portfolio. If the insurer agrees to underwrite less good risks, the insurer will carefully apply segmentation of tariffs between good and less good risks. Government supervision is rather loose, and certainly does not concern policy conditions and premium tariffs. In a competitive insurance market the supervisory authority is not guaranteeing the insurance company's solvency: here bankruptcies of insurance companies are not unthinkable. The solution is that guarantee funds are set up by the industry to cover those who were left in the cold by

a failing insurer. In the Anglo-Saxon tradition, insurance contracts are typically of short duration, so as to allow dissatisfied clients to move on from one insurer to a (hopefully) better one. Insurance companies are in the business of making profit and their shares are treated accordingly. In the maritime model of insurance, insurance is not sold, but bought. In the maritime tradition the typical intermediary is the broker, and not the insurance agent. Traditionally and typically, the broker's profession is heavily regulated and controlled, in the Anglo-Saxon tradition, mainly by professional brokers' organizations. His performance is client-oriented, and he is, with respect to the choice of (life) insurance products, under a sort of 'obligation de résultat', the obligation to give the 'best advice' and offering the best solution in view of the client's needs.

While conceiving the legal framework for the internal market for insurance, the EC Commission and Council have, after some initial hesitation, clearly opted for a competitive market model close to the maritime model. However an insight in the profound differences between two cultures of insurance remains helpful to understand the huge difficulties that were and still are encountered on the path toward further integration. New member states and emerging markets can find guidance in it while making a conscious choice for their own model and culture of insurance.

The differences between the two insurance cultures are equally relevant for the purposes of an examination of comparative insurance contract legislation, not only as a general 'toile de fonds', but also in specific matters. The prohibition, by several articles of the third generation of EC insurance directives, of every 'ex ante' or even 'systematic ex post' control of insurance tariffs and conditions is of direct importance to insurance contract law. The idea that the supervisory authority must exercise control on behalf and in the interest of the general public and of the consumer, not only to preserve the financial solvency, but also to check insurance conditions and their price, was dear to a number of European member states of the alpine tradition. The third generation of EC insurance directives have prohibited this type of administrative protection, being considered too great a threat to innovation and competition. It will be up to the policyholder, his broker (if he has one), and to the courts to verify and to decide whether insurance policies are in accordance with mandatory rules and basic principles, on an 'ex post' basis.

3.2 Diverging insurance contract legislation

In spite of the undeniable presence of a number of underlying common principles or paradigms, the national (legislative and other) systems of insurance contract law do show numerous and important differences. The differences are not diminished but augmented by the tendency of a number

of national parliaments to issue new and (often) ever more detailed legislation. National legislations differ on a considerable (and increasing) number of issues. Only a few of them are mentioned hereafter on the basis of the (much more extensive) comparison made by Basedow and Fock (2002).

Differences concern the degree to which parties are free in concluding the contract (cf. the restrictions on the insurers' freedom of underwriting) and in determining the rights and obligations of the parties (compulsory, semi-compulsory and non-compulsory law). National laws differ on the issue of the exact manner and the precise timing of the formation of the contract, as well as on the role and effect of precontractual documents and policy conditions. Information duties (although not advisory duties) of the insurer are to a large extent governed by EC law, and so are the rules concerning a 'cooling-off period' for the policyholder. A theoretically interesting difference lies in the attitude of the legal systems toward past risks ('putative risk') and future risks. A practically very important difference concerns the regime of over- and underinsurance and multiple insurance.

Well known and both theoretically and practically important are the applicant's and policyholder's duties to describe fully and correctly the risk both at the time of the conclusion of the contract and later on, in the case of aggravation of risk; rules differ as to the nature of these duties (legal duties or 'Obliegenheiten'), as well as to their extent (spontaneous declaration or answering questions) and, especially as to their sanctions (radical or proportional sanctions). The question if and when the violation of contractual duties can be validly sanctioned with radical measures like loss of entitlement ('déchéance de la garantie') constitutes a breaking point between (most of) the continental legal systems and the English system, fiercely adhering to its system of 'warranties'.

Whereas the obligations of the insured upon occurrence of the insured event are fairly comparable in the various legal systems, important differences exist with respect to the way in which these duties or 'Obliegenheiten' are implemented, and also with respect to the conditions under which costs incurred by the insured to prevent and mitigate damage must be borne by the insurer.

Striking differences also exist with respect to matters such as the duration of insurance contracts and the possibility of their prolongation, the duration and the regime of prescription periods, the legal regime of co-insurance and collective insurance, the legal position of third parties and the transfer of insurance rights. All this is not to speak of the special branches of insurance, like liability insurance, or legal protection insurance, or life insurance, where the legal differences are perhaps even more profound, while being linked to the differences in the underlying systems of civil liability, civil procedure and civil law.

3.3 *Foreign insurance markets*

Whereas the above description has mainly concentrated on the situation in European markets, we should not lose sight of the fact that insurance may be quite different in insurance markets and legal cultures that are further away. Whereas this may not be true with respect to South American insurance markets, where the influence of European legal models is still strongly felt, it is not the case in two of the world's largest markets, the US and Japan.

The traditional Japanese insurance market is said to be closed and non-competitive, with a few big 'players', who compete less with innovation than with service to their clients (Lefas, 1998). Since 2001, supervision is exercised by an integrated Financial Services Agency (FSA). Substantive control law is laid down in the Insurance Business Law of 1995 and the insurance contract is governed by the Commercial Code 1899. Habitual insurance contract clauses play an important role, but only as trade usages (Kobayashi *et al.*, 2004).

Characteristic of the American insurance market is the juxtaposition of 50 different (state) markets, all of them subject to intensive insurance regulation. Among the questions that have given rise to dispute and subsequent legislation are the issue of the scope of insurance regulation (what is an insurance transaction?) and the question of regulatory responsibility (federal or state law). The latter question was decided upon by the well known McCarran–Ferguson Act, which holds that insurance is subject to the law of the several states, and that federal law (including antitrust law) only applies to the extent that the insurance business is not regulated by state law. Following the McCarran–Ferguson Act, all the states have enacted separate legislation and installed so-called 'insurance commissioners', charged, *inter alia*, with watching over the solvency of insurance undertakings over the adequacy and fairness (non-discrimination) of rating classifications and watching out for 'unfair and deceptive practices' (Abraham, 1995). Contrary to the framework of EU supervisory legislation, which is firmly based on the principle of 'home country control', American state legislation basically still adheres to a system of multiple licensing for cross-border inter-state operations.

4 **Converging orientations**

However slow and difficult the process may have been, the creation of a legal framework for a European internal market for insurance has given rise to a movement of convergence of insurance law, at the very least of the basic concepts and methods of public insurance law (cf. the principles of 'home country control', freedom of tariffication, abolition of 'contrôle matériel', deregulation). Even in the American federal structure the organization of

the insurance business and control on a state-by-state basis is derogated from in an increasing number of circumstances (Cousy, 1998).

Where it may be true that, under the EU internal market directives, harmonization of private law remained limited to the conflict of law rules, so as to leave the diversity of insurance contract law untouched, efforts are made, at least at the academic level, to strive for harmonization of substantive (insurance) contract law. A major effort is currently being made by an international Project Group for the Restatement of European Insurance Contract Law. In an Opinion on 'The European Insurance Contract' of 15 December 2004 (INT/202), the European Economic and Social Committee (EESC) has urged the Commission to begin examining comparative law and national practices in the area of insurance contracts and to prepare a Green Paper on the harmonization of mandatory rules of the general part of insurance contract law, taking into account what has been achieved by academic researchers.

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30 Interpretation of contracts

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1 What precisely is interpretation?

Like dreams and artistic creations, legal texts may need interpretation. Not for the same reasons, however, the difference being that a legal text, such as a statute or a will, by the use of words intends to express the will of the author of the text. The text may need clarification of its meaning. In this sense interpretation of a contract can be defined as the determination of the meaning that must be attached to the declarations made by the contracting parties and of the legal effects created by these declarations. One of the most important topics in the law of contract is indeed that concerned with how to establish the effects of the contract; in other words what, in case of dispute, is or is not an obligation according to the contract. The function of the contract is to be a legal form for autonomous regulation. What the parties have decided themselves in the contract is decisive within the frame of freedom of contract. But parties often make an unclear or incomplete contract, and they often have divergent opinions as to what it means. Contracts, like other linguistic expressions, suffer from the problem of unclear meaning. The term 'interpretation' – the term 'construction' is often used as a synonym – refers to the process by which a court gives meaning to contractual language when the parties attach materially different meanings to that language. The American Restatement (Second) of Contracts gives the following definition in s.200: 'Interpretation of a promise or agreement or a term thereof is the ascertainment of its meaning.' This aspect of interpretation will be dealt with next.

If the legal issue concerns the existence of a promise or agreement, one party pretending that she did not bind herself to the other party, the problem is not one of interpretation, but one of evidence. There is an analogy between contractual interpretation and statutory interpretation. Their aim is the same: to discover the intention of the rule creators; but of course the intention of Parliament is not the same as the intention of the members of parliament who voted, and the meaning of the contract is not the same as the subjective intentions of the contracting parties. In both cases, once the intention has been consigned to writing, it acquires a life of its own and the function of interpretation is to work out the objective intention of the statute or contract. It suffices here to say that the methods of interpretation of a statute in a common law jurisdiction are different from

the civil law methods. Likewise it will be seen further that for the interpretation of a contract the common law approach is different from the civil law one. In our days this difference is smoothing out.

The term 'interpretation' can have a broader meaning for which the term 'construction' is used by some scholars. That aspect of the doctrine of interpretation of contracts will be dealt with at the end of this chapter.

2 Suppletive rules and implied terms

The process of interpretation is distinct from completing the contract by the addition of terms implied by 'suppletive' statutory rules. Civil law inherited from Roman law a set of typical contracts, the so-called 'named' contracts, the standard incidents of which are laid down in the Code or other statutes in the form of 'suppletive' rules ('lois supplétives'). The first step for a court is therefore to 'qualify' or characterize the agreement before it. If it falls within the definition of one of the 'named' contracts, its content will be largely determined by the appropriate 'suppletive' (interpretative) rules. The starting point is that the incidents of a contract are fixed by law, subject to the parties' power to vary them. In the absence of contrary intention the contract contains the term the suppletive rule imposes.

Each 'implied' term is set out in a specific statutory provision. Thus, in a contract of sale, if the parties have not expressly fixed the time and place for the payment of the price, the relevant implied term is, for example, in article 1498, paragraph 2 Italian Civil Code or in article 1651, Belgian and French Civil Code: 'Payment is due at the time and place of delivery'. Besides the civil code, numerous other statutes contain suppletive rules. Oddly enough, at least in the Romanistic family, the statutory text does not always indicate clearly that the rule is only 'suppletive' (and not mandatory). Statutory imposed terms are indeed of two kinds in the civil law: terms imposed in a 'suppletive', i.e., interpretative way, based on the presumed intention of the parties in the absence of any express provision to the contrary; and terms imposed by law in a mandatory way, which are based on public policy and cannot be excluded by the parties. This can nourish hefty legal discussions.

2.1 Characterization/interpretation

In civil law systems it happens that the difficulty arises to classify a given agreement, i.e., to characterize it as one of the accepted, regulated 'named' contracts. To characterize a contract ('qualifier le contrat') in a civilian jurisdiction is to give it its name. This is not a problem of interpretation. But it is a related problem since the judge has to analyse the contents of the contract, by interpreting it, in order to characterize it correctly. The common law does not have that problem, not being based on a set of typified, 'named' contracts, such as lease, pledge etc.

2.2 *Implied terms*

In common law jurisdictions, though, many statutes prescribe that certain terms will be implied into various classes of contract. In England, for instance, certain terms are implied into a contract of sale of goods by some sections of the Sale of Goods Act and into contracts of hire-purchase by some sections of the Supply of Goods (Implied Terms) Act. Some of these are genuine implied terms in that the parties can exclude them by express argument, but others are more in the nature of mandatory rules of law in that they cannot be excluded. Those correspond to the mandatory rules (the ‘dispositions impératives’ or the ‘dispositions d’ordre public’) of the civil law.

Sometimes the courts imply a term as a matter of course into all contracts of a particular class. The problem of the implication of terms is one which frequently arises in the law of contract. In certain instances, the parties to a contract may have been content to express only the most important terms of their agreement, leaving the remaining details to be understood. The court will then be asked to imply a term or terms to remedy the deficiency. More often, however, a subsequent disagreement reveals that there are contingencies for which the parties have not provided in their express contract. So, if a person contracts to complete the building of a house, there is a standard implied term that the house when completed will be reasonably fit for habitation, and the work remaining to be done will be done in a proper and workmanlike manner. These terms are implied into all contracts of the relevant class unless they are inconsistent with the parties’ express contract. Most of these terms are well settled, and all the court needs to do is follow established precedent. But sometimes a court has to decide whether a new term of this kind should be created. In such a case the test applied is whether the nature of the contract itself implicitly requires such a term. A term will not be implied merely because the court thinks it would have been reasonable to have inserted it in the contract. A term can only be implied if it is necessary in the business sense to give efficacy to the contract (*The Moorcock case*, 1889). For example, a term has been implied into a contract for the use of a wharf that it was safe for a ship to lie at the wharf; and into a contract for a Turkish bath that the couches for reclining on were free from vermin. What the court does here is something different from what a civil court may do to fill a gap in a contract, as will be seen further.

By contrast to the ‘suppletive’ (interpretative) statutory rules, the starting-point for a common law court is the implied term. The primary question is, in principle, not ‘Into what type of contract did the parties enter?’, but ‘To what terms did the parties agree?’ It happens, as in the case of sale of goods for instance, that English law has codified the implied terms.

Elsewhere, as a technical device, the implied term is one of the differentiating characteristics of the common law. It is criticized as artificial (because not corresponding to the presumed intention of the parties), but the approach is ineradicable. It is retained even in the otherwise innovatory Uniform Commercial Code in the USA.

3 Statutory precepts relating to the interpretation

A contract may be interpreted by the parties themselves or by the court, in case of dispute. The rules of interpretation are the same for both. Most civil codes contain precepts relating to the interpretation of contracts. In the Anglo-American law it is of course not in statutory texts but in the case law that one has to find some guidelines.

The French Civil Code has nine brief articles relating to interpretation (Arts 1156–64), which hardly venture outside the commonplace. Analogous rules are to be found in other codes: the Belgian one (Arts 1156–64), the Italian one (Arts 1362–71), the Spanish one (Arts 1281–89), the Burundian one (Arts 55–62, Third Book), the Vietnamese one (Art.408), the Argentinean one (Art.1198 C.civ. and Art.218 C.com.), etc. Article 1162 French C.civ., for instance, provides for an interpretation in favour of the debtor and against the creditor, a rule of interpretation which is comparable to the ‘contra proferentem rule’ known by the Anglo-American legal systems. According to the French statute of 1 February 1995 on unfair clauses, provisions drafted by the professional party must be interpreted in favour of the consumer.

In the Romanistic family the general tendency seems to have moved towards a general recognition of all said provisions as binding legal rules under the control of the highest court. In the Germanic family, the Supreme Court of Lithuania does not control the interpretation given to a contract by a lower court, although it controls the application by the lower courts of the rules on interpretation contained in the (‘mixed’) civil code which came into force in 2001 (Arts 6.193–6.195). In Greece, too, apart from the factual issues as to which there is no control of the Areios Pagos, the rules on the basis of which the crucial meaning of the declaration of will is discovered are to some extent rules of logic, but also rules of law. Their implementation is consequently subject to the control of the Supreme Court.

In the German BGB one finds only the fundamental principles of interpretation (s.133 BGB, supplemented by s.157 BGB). The same is true, for example, for Austria, Greece, Bulgaria, Lithuania or China (ss.914 and 915, together with s.863 of the Austrian General Civil Code and s.346 of the Commercial Code; Arts 173 and 200 of the Greek Civil Code; Arts 6.193–6.195 of the Civil Code of Lithuania; Art. 20 of the Law of

Obligations and Contracts of Bulgaria; Art. 125 of the Chinese Law on Contracts.

In the Swedish Contracts Act, however, there are no legal rules concerning the interpretation of contracts. The same is true in the Netherlands. The rules of interpretation formulated by the old Dutch Civil Code (Arts 1378 *et seq.*) have not been incorporated in the new Civil Code because, it is said, they are self-evident, and therefore superfluous, and in part incorrect because of their generality. Several legal writers criticize this. This means that it is left entirely to the courts to develop rules and principles for the interpretation of contracts.

Until the incorporation of C.I.S.G. into Danish law (into force 1990) there were only a few scattered provisions on interpretation (for instance, s.38b of the Danish Contract Act providing that the interpretation most favourable to the consumer shall prevail; or if a declaration mentions that it is 'without obligo' the Contract Act treats this declaration not as an offer but as an invitation to make an offer). Danish case law is however much in line with the chapter on interpretation in the UNIDROIT Principles of international commercial contracts (1994).

4 Interpretation in the strict sense

In accordance with classical doctrine, all the legal systems take as their starting-point the common intention of the parties, but, as every lawyer knows, this is of little assistance. For the cases in which difficulties arise are precisely those in which the intention of the parties is not clear or in which they have simply failed to provide for the matter in issue at all.

The continental legal scholars have long been divided between supporters of a 'subjective' interpretation of contract, centred upon seeking the real understandings of the parties regardless of the literal meaning of the words, and 'objective' interpretation, whereby the written text was to be the only binding element regardless of what the parties believed to have agreed upon. In our days this different approach no longer gives rise to hefty academic discussions, but one continues to find the distinct accentuation in the various legal systems of the world.

4.1 The more subjective approach

As between the objective and subjective approaches to interpretation, the French or Spanish courts still incline to the latter. A decision of 1934 can illustrate this point. On the retirement of a director, Camille Blanc, a company undertook to pay him a life annuity and after his death to continue paying half of it to 'Mrs Camille Blanc'. Mrs Blanc died first and the widower remarried. After his death the second Mrs Blanc demanded the continuation of the payment of half of the life annuity, but her claim was

rejected despite the clear wording of the contract, because the court found that 'in the intention of the parties' only the first wife was to be entitled. One ventures to suggest that on analogous facts an English court would not have decided the case in the same 'subjective' way.

4.2 *The plain meaning doctrine*

In the common law the approach is indeed different. When there is no ambiguity in a written contract, it must be given its literal meaning. Words are to be construed according to their strict acceptance, unless from the context of the instrument, and the intention of the parties to be collected from it, they appear to be used in a different sense, or unless, in their strict sense, they are incapable of being carried into effect. The terms of the contract are to be understood in their plain, ordinary and popular sense, unless they have generally in respect to the subject-matter, as by the known usage of trade, or the like, acquired a peculiar sense distinct from the popular sense of the same words; or unless the context evidently points out that they must in the particular instance, and in order to effectuate the immediate intention of the parties to the contract, be understood in some other special and peculiar sense.

In the case *British Movietonews v. London and District Cinema* (1952) the plaintiffs were distributors of films and the defendants owned a chain of cinemas. In 1941, the plaintiffs agreed to furnish films to the defendants. An order of the government of 1943 limited the circulation of films, and in order to maintain their position the parties concluded a supplementary agreement according to which 'the principal agreement shall remain in force and effect until such time as the order is cancelled'. One could have thought that at the end of the war in 1945 the order would have been cancelled. This was, however, not the case and the order continued to be in force, although for other reasons than the national security. The defendants terminated the contract in 1948 with an advance notice of four weeks, as stipulated in the contract. The plaintiffs did not accept this termination while the government's order was still in force and claimed damages. The Court of Appeal reasoned in the way a French judge would reason and did not hesitate to understand the terms of the supplementary agreement in the light of the presumed intention of the parties that this agreement would not continue after the end of the war conditions. The House of Lords maintained the orthodox principle of interpretation. The cardinal presumption is that the parties have intended what they have in fact said, so that their words must be construed as they stand. That is to say, the meaning of the document or of a particular point of it is to be sought in the document itself: 'One must consider the meaning of the words used, not what one may guess to be the intention of the parties.'

4.3 Lord Hoffmann's rules

In a case of 1999, *Investors Compensation Scheme Ltd. v. West Bromwich Building Society*, the House of Lords gave a new signal. Interpretation is now seen as the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract. The background was famously referred to as the 'matrix of fact'. The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of the words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. In recent American cases too the interpretation according to plain meaning was rejected. The 'rule' that words should be given their 'natural and ordinary meaning' reflects the commonsense proposition that we do not easily accept that people have made linguistic mistakes, particularly in the formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Hoffmann's rules have been adopted in other common law jurisdictions, as for instance in New Zealand.

4.4 The objective German approach

In Germany, s.133 BGB provides that 'In interpreting a declaration of will one must seek out what was really intended and not adhere to the literal meaning of the words used.' This suggests, as was certainly the aim of the legislator, that in the process of interpretation the subjective intention should trump the objective expression (will theory). The modern interpreter, however, looks to the objective expression as the recipient would have understood it; the objective meaning is now determinative of the content of the declaration, in order to give stronger protection to the justified reliance of the addressee and of commerce generally (declaration theory). The content of the declaration is what the recipient would normally have understood by it, said the Bundesgerichtshof. In order to support this generally accepted view, s.157 BGB is invoked. This paragraph, which concerns the interpretation of contracts rather than of individual declarations of will, applies the standard of fair dealing and normal practice, which relates to the external aspect of the declaration. The result of ss.133 and 157 BGB, which have been taken over word for word into other Continental codes, is that the interpretation of all legal transactions in Germany is much less strictly bound by the letter of the transactions than in the case in Anglo-American

law (before the acceptance of Lord Hoffman's rules). On the other hand German law tends to follow a more objective, or normative, approach than the French one; the emphasis is not so much on what a party may have meant, but on how a reasonable man would have understood his declaration. There is no room for an inquiry into the 'true intention' of the parties if the justifiable reliance of the addressee deserves protection. French judges will seldom have recourse to 'reasonable' interpretation.

4.5 *The Dutch 'Haviltex' formula and the Israeli purposive interpretation*

In 1981, the Dutch Supreme Court stated in a fundamentally formulated decision that in interpreting terms of a contract the literal sense of the term is not decisive, but 'the sense the contracting parties could mutually reasonably attach to the stipulations in the present circumstances and that which they could reasonably expect from each other to that matter', to which was added that in this respect it could be important 'to which social circles the parties belong and which legal knowledge could be expected from such parties'. This formula, which became known as the 'Haviltex' formula, has been frequently repeated and the Supreme Court subjects decisions of lower court to this test. The 'Haviltex' criteria have kept their importance under the new Code.

The Israeli *Aprofim* case (1995) is a victory of purposive interpretation, namely the approach that emphasizes the purpose of the contract, and a blow to the literal approach. The case pertained to a standard form contract between the government and a construction company in which the government undertook to purchase a percentage of unsold apartments provided the construction company asked it to do so after a certain stage of the construction. The contract did not limit the time in which the contractor had to present his demand for the performance of the obligation to purchase, but any delay in presenting a demand, beyond the times mentioned, was to influence the contractor's right to receive the full price of the apartments. In this particular case, the contractor presented the government with the demand for the purchase of the apartments in the allotted timeframe, but was late in completing the construction of the apartments. The dispute of the parties centred on the interpretation of the clause stipulating the reduction of the price the government was required to pay for the apartments, in the case of a delay on the part of the contractor. While the state held the clause should be interpreted to include delays in construction, the contractor contended the wording of the contract was unequivocal and specifically addressed only delays in presenting the demand to purchase. The District Court ruled in favour of the contractors, holding the meaning of the contract to be self-evident from the clear language of the clause.

Justice Barak, hearing the appeal to the Supreme Court, overruled the District Court decision, holding that the contract cannot and should not be interpreted on the basis of its language alone. After finding that the language of the clause could not support the true purpose of the contract, Justice Barak held that a broad interpretation was needed. He held the purpose of the contract, providing incentives for the speedy construction of apartments in development areas, for the purpose of selling them to new immigrants and young couples in the open market, required the altering of the language of the contract to incorporate the meaning proposed by the state. Justice Barak wrote:

The meaning given to the contested provision by its language misses the true purpose on which the contract is based. It denies the state the main sanction which the contract wished to grant it and which was intended to guarantee its central purpose . . . How can this hole be filled? There is no proven practice in this matter. Filling in gaps can be done in accordance with the principle of good faith. The question is, what arrangement would reasonable parties to the development contract determine, according to the internal structure, the internal logic and the basic assumptions of the development contract. It seems to me that the answer would be that the natural arrangement required by the internal structure of the development contract would be that of [the contested provision], that is to say, a deduction in the asking price at the rate of 5% per month of late fulfillment [of the construction].

The joint intent of parties is to be deduced, not only from the language of the contract, but also from all the circumstances in which the contract was formed. The traditional theory, holding the circumstances to be relevant in contractual interpretation only when the parties' intent cannot be deduced from the language of the contract, was rejected by Barak, in accordance with his general philosophy of there never being a proper understanding of the text without a process of interpretation, and there never being a proper process of interpretation when relying on the language of the text alone. Barak holds the circumstances to be a necessary component in understanding the language, and thus the consideration of the circumstances to be made simultaneously with the interpretation of the language of the contract. The analysis is to swing, in a pendulum-like movement, from the language to the circumstances and back, with each source shedding light on the other, recognizing that neither is able to produce a valid subjective purpose on its own.

4.6 The better law

The principles, reconciling the subjective and the objective method of interpretation, are also to be found in the recent international texts on unification of the law of contracts. The principles set forth for C.I.S.G. contract

interpretation in Article 8 are as follows. Depending on the circumstances, the contract is to be interpreted pursuant to either a subjective or an objective test. One party's statements and conduct are to be interpreted subjectively according to his intent where the other party knew or could not have been unaware what that intent was. When, however, such other party neither knew nor could have been so aware, the first party statements made are to be interpreted objectively according to the understanding that a reasonable person would have had in the same circumstances. In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case. The same principles are to be found in the Principles of European Contract Law, Articles 5:101 and 5:102 (1998 version) and the UNIDROIT Principles of 1994, Articles 4.1 and 4.2.

As to the interpretation of contracts in the strict sense it can be stated by way of conclusion that, thanks to the efforts of comparative lawyers, the principles of interpretation which one can find in the cited international instruments for the unification of the law of contracts can be considered as being the better law. They are gaining ground everywhere.

As to cases where a contract is drawn up in two or more language versions and it is agreed that all the versions are equally authentic, and where there is a discrepancy between the versions, the UNIDROIT Principles indicate a preference for an interpretation according to the version in which the contract was originally drawn up, whereas the new Chinese Contract Law refers to an interpretation 'according to the purpose of the contract', thus leaving more room for assessment by the courts.

5 Control of the Supreme Court

In France and Belgium and other countries belonging to the Romanistic family the interpretation of a contract in the strict sense is a matter of fact which lies outside the control of the Cour de Cassation. One ultimate limit is, however, set to the sovereign power of the courts of first instance and the court of appeal whose interpretation prevail. They may not 'denature' a provision which is 'clear and precise'. The basis of the intervention by the Cour de Cassation in such a case is that a 'clause claire et précise' can need no interpretation and therefore any intervention by the court below must be a contravention to the agreement of the parties. This much is clear, but the instrument which is thus given to the Cour de Cassation is obviously very imprecise and unpredictable. All that can be said is that the court uses it sparingly. In Belgium the Cour de Cassation comes to the same result as in France, but by using another technique than the 'dénaturation', i.e., 'la violation de la foi due aux actes' (non-respect of the evidential power of a writing). In the Netherlands too, if the interpretation has been carried

out along the lines of the 'Haviltex' formula, the outcome of the interpretation is in procedural terms a matter of 'fact' (as opposed to 'law') which is not further examined by the Supreme Court. The outcome may only be subjected to the control which the court in all cases exercises as to the consistency of the motivation.

In Germany, the law is different. Notwithstanding the large part which the consideration of factual aspects plays in the interpretation of legal transactions, interpretation has in many cases been considered as a question of law, not as a question of fact, on the ground that Sections 133, 157, 242, BGB and other similar general rules of law contain legal provisions on interpretation. It is therefore frequently possible to appeal to the Bundesgerichtshof on the question of interpretation of a legal transaction. This is of special importance in the case of standardized contracts.

6 The link between the doctrine of interpretation and that on the admissibility of extrinsic evidence

In case there is a written document in which the contract is embedded, there is a clear link between the doctrine of interpretation of a contract and the admissibility of extrinsic evidence. But, first of all, should there be a writing to evidence the contract? Something has to be said first about the question of the necessity of a written document as evidence of the agreement. Then, in case there is a writing, the problem of the admissibility of extrinsic evidence against what is written appears. The common law has some difficulty in distinguishing between the law of evidence and the doctrine of interpretation.

6.1 The evidential requirement of a writing

The first rule contained in Article 1341 of the French and Belgian Civil Code requires a writing in a valid form in order to prove a contract of some importance. In Belgium this is actually a sum higher than 375 euros; in France, an act of 12 July 1980 left it to the legislator to fix this figure by 'décret'; it is now 5000 old French francs; in Italy, the extremely low sum of 5000 Lire (approximately 2.5 euros) was never adapted. Article 288 of the Turkish Procedural Code states that proof concerning obligations the value of which exceeds TL 20 000 at the time of the conclusion of the contract must be provided for by writing and not by witness testimony.

This rule goes back to the French royal edict of Moulins of 1566, and can be compared to the ancient English 'Statute of frauds' of 1677 requiring also a written form, but only for six types of contracts. The statutes of frauds make certain kinds of contracts unenforceable unless evidenced by a signed memorandum (in a sale of goods unless there is part payment or 'acceptance and receipts'). The Statute of frauds was abrogated in

England in great part in 1954, but the statutes of frauds are still in force in the USA, and in Ireland. Parts of it are still in force in some Australian jurisdictions.

6.2 Exceptions to the requirement of a writing in the Romanistic family

The evidential requirement of writing does not apply to contracts governed by commercial law. This article does not exist in Italian law, which makes no difference between commercial and non-commercial contracts. There is also an exception for cases where it was 'impossible' to obtain written evidence. A wider exception is provided by the rule which admits oral evidence whenever there exists 'a beginning of written proof' (*un commencement de preuve par écrit; un principio di prova per iscritto*), which is defined as any written act emanating from the defendant which makes it probable that the fact alleged is true. The interpretation of Articles 1347 and 1348 containing the said exceptions greatly weakens the prohibition of oral evidence of Article 1341, by giving a great discretion to the court.

6.3 The better law

In German or Dutch law there is no obligation to have a writing to evidence a contract. The same is true for the European Principles of contract law (Article 2:101), for the UNIDROIT Principles (Article 1.2) and for the C.I.S.G. (Article 11). A contract need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses. This is the better law.

7 The parol evidence rule and the Romanistic rule of no witnesses against and beyond the written contract

If there is a written document as may be required by the statutes of fraud, another rule will apply in the common law, the so-called 'parol evidence' rule. It is not a rule of procedure, but of substantive law, so that the problem can be mentioned for the first time in appeal. Where the parties have embodied the terms of their contract in a written document, the general rule is that extrinsic evidence is not allowed to be given so as to add to or subtract from, or in any manner to vary or qualify, the written contract. Evidence is not admissible of negotiations between the parties; nor is it permissible to adduce evidence to show that their subjective intentions were not in accord with the particular expressions used in the written instrument. The rule is to be found in all the (ex-) common law jurisdictions, such as Hong Kong, Israel, Ireland, New Zealand, Nigeria, Singapore and South Africa. In Singapore, the parol evidence rule and its exceptions are statutorily embodied within sections 93 and 94 of the Singapore Evidence Act (1997). A more supple version of the rule can be found in s.2-202 of the American U.C.C.

In French law Article 1341 contains a comparable rule: 'no evidence by witnesses against and outside of the content of instruments is allowed, nor as to what is alleged to have been said before, at the time of, or after the instruments'. Evidence 'outside of the content' ('prouver outre l'écrit') means evidence of errors or omissions made at the moment of the drafting of the instrument. Evidence 'against' ('prouver contre l'écrit') means evidence of modifications of the contract which were made by the parties since the signing of the instrument. For this evidence another writing is admissible (or an oath or an admission). The operation of the parol evidence rule on the contrary is not confined to oral evidence, but extends to extrinsic matter in writing (contrary to what is said in Article 1341 of the French Civil Code), such as drafts, preliminary agreements and letters of negotiation.

7.1 Integrated writing ('l'Acte')

If an instrument is not intended to be a contract or binding legal agreement, but is intended to be merely an informal memorandum of an agreement previously concluded, then extrinsic evidence may be admitted to show that this informal memorandum does not embody the terms contained in the previous agreement. In other words the parol evidence rule concerns only 'integrated writings', a writing which was adopted by the parties as the final and complete expression of their agreement. The question to ask is whether the document can appear to a reasonable person as a complete contractual document. In the law of Texas there is a presumption that written agreements are completely integrated. In commercial contracts it is common to find 'merger' or 'integration' clauses, such as 'The parties have negotiated this Agreement and shall enter into any Contract made subject hereto on the basis that the provisions of this Agreement and such Contract represent their entire agreement relating to the matters contained in this Agreement and such Contract.'

Although the term 'integrated writing' is not a term of art in the Romanistic family, the term 'acte' which is used in Article 1341 C.civ. implies a reasonable integrality and a fulfilment of the requirement of Article 1325 or Article 1326 C.civ. (requiring as many originals as there are parties having a separate interest for synallagmatic agreements, or requiring the mentioning by the debtor's own hand of a 'good' or an 'approved' writing out in full the sum or the quantity for unilateral agreements).

7.2 Exceptions to the parol evidence rule

There are, however, a number of exceptions to the parol evidence rule. One of the exceptions concerns the evidence as to supplementary or collateral terms. Although extrinsic evidence is not admissible to add to or vary the terms of a written instrument, evidence may be admitted to show that the

instrument was not intended to express the whole agreement between the parties. Extrinsic evidence may also be admitted to show a collateral agreement or warranty and it is sometimes said that these, too, must not contradict the express terms of the written contract. But it is sometimes possible to prove an overriding oral warranty or even a promise not to enforce an express term of the written agreement. Thus the draft of a new lease presented to a tenant contained a covenant that he would use the premises for business purposes only and not as sleeping quarters. The tenants objected to this covenant, and the landlords gave him an oral assurance that, if he signed the lease, they would not enforce it against him. The tenant signed the lease, but later the landlords sought to forfeit the lease for breach of this covenant. It was held that the oral assurance constituted a separate collateral agreement from which the landlords would not be permitted to resile.

Another exception is that extrinsic evidence may be admitted to explain a latent ambiguity, that is an ambiguity which does not appear from the face of the instrument, but which emerges when it is sought to apply the language of the contract to the circumstances under consideration. If some uncertainty still remains, whether because of some vagueness, generality or inaccuracy of words, or because the words themselves have some special or peculiar meaning or application, extrinsic evidence will be admitted to explain, but not to vary, the written agreement. An action in rectification whereby it is sought to rectify a document in case of a mistake, gives an example of yet another exception. One can list no fewer than 13 exceptions. No wonder that the parol evidence rule is a most complex one, of which it was said that 'few things are darker than this, or fuller of subtle difficulties'.

7.3 Differences and resemblances between the parol evidence rule and Article 1341 C.civ

One can compare the French Article 1341, 2 with the parol evidence rule. They both prohibit oral evidence for the purpose of varying or contradicting a written instrument. In both legal systems, the prohibition of oral evidence, however, does not apply to the proof of defects in the consent, or of *fraus legis*. The differences between the parol evidence rule and the Romanistic rule are as follows:

1. The parol evidence rule does not apply to agreements made after the signature of the contract. It would seem that Article 1341 C.civ. applies to those agreements.
2. Article 1341 forbids only oral evidence, but not evidence by another writing, oath or admission. The parol evidence rule, which would rather deserve the name of 'extrinsic evidence rule', prohibits all extrinsic evidence, writing included.

3. The exceptions to the parol evidence rule are different from the exceptions to Article 1341 C.civ. In the common law, if there is a written contract the parol evidence rule prohibits extrinsic evidence of surrounding elements, except in the case of rectification and in several other exceptional cases. In the Romanistic legal systems there has to be a writing to evidence the contract, except in the case of a 'beginning of a written proof' and in other exceptional cases (Arts. 1347 and 1348 C.civ.). These French exceptions concern the requirement of a writing in order to prove the existence of a contractual obligation. If no writing is required, oral evidence is of course admitted. In the case of an exception to the parol evidence rule which prohibits extrinsic evidence, by definition such evidence is allowed.
4. The scope of the parol evidence rule has been so greatly reduced by exceptions as to lead to uncertainty in the existing law. Those exceptions are ill-defined, so that the judges have in practice a great discretion to admit or reject extrinsic evidence. For other reasons (relating to the exceptions to the requirement of a written proof) the judges of the Romanistic family have in practice an analogous discretionary power. Article 2723 of the Italian Code gives a greater discretionary power to the judge to admit oral evidence than French law does, in the case of an agreement which has been made after the drawing up of the document.

7.4 The better law

There is no rule as the parol evidence rule in German or in Dutch law. There is, however, a presumption that the document accurately reflects the totality of the agreement, but the presumption is rebuttable, though only with difficulty. There is no parol evidence rule either in the C.I.S.G., the P.E.C.L. or the UNIDROIT principles.

8 Admittance of extrinsic evidence in respect of the parol evidence rule

In recent cases in America it is stressed that, even in cases wherein there is no exception to the parol evidence rule, extrinsic evidence can be admitted in order to interpret a promise, an agreement or a term of those. No oral evidence can be judged to contradict a written document before it was established by means of interpretation what the written document means to say. Only after the interpretation can the parol evidence rule be involved to refuse evidence which would contradict the meaning of the written document.

The French Cour de Cassation has always accepted that the rules of evidence, which are regulated, are independent of the rules of interpretation, which are free. As long as the existence of a contract is not contested, Article

1341 C.civ. does not prohibit evidence by witnesses or by presumptions in order to interpret the contract. Interpretation, however, is not allowed when the terms of the contract are clear and precise. This opinion can be criticized. It creates confusion.

8.1 Interpretatio cessat in claris

The opinion has been advocated, especially in the Romanistic family, that only unclear declarations need interpretation. Even the recent Civil Code of Vietnam refers to this rule. This opinion disregards the preliminary question when a declaration can be called unclear. Linguistic clarity is not enough; also, when the words of a contract seem clear, the intentions of the parties or other circumstances can be of importance to determine if the words are really clear and what is meant by them. The prevailing opinion nowadays is that a distinction between clear and unclear declarations cannot be drawn and that every declaration needs interpretation in order to determine its meaning.

8.2 The test of the reasonable man

In judgments in the Romanistic law family one finds sometimes a phrase which is often used in common law courts: 'One must consider the meaning of the words used, not what one may guess to be the intention of the parties.' Sometimes it is for instance said that Article 1341 C.civ. forbids clarification of the terms of a written contract. How to reconcile such decisions with the traditional rule in the case law according to which extrinsic evidence is admissible, not only to clarify ambiguous or vague expressions or to correct certain terms used in the writing, but also to put aside clear terms in the instrument (the plain and literal meaning of the words) as long as one does not infringe Article 1341 C.civ.? The better law is to admit extrinsic evidence on condition, however, that this evidence leads to an interpretation of the written contract which would be the interpretation that a reasonable man would have given at the moment of the making of the contract. This does not mean that the judge has the power to remake the contract in the manner that a reasonable and fair man (a better person than the parties perhaps) would have made it. It means only that the judge may have to find out against the relevant background the meaning which the writing would convey to a reasonable man.

So a judge can admit extrinsic evidence and at the same time respect the parole evidence rule, or respect Article 1341 C.civ. But the borderline is not clear-cut. It can be a delicate exercise to respect the said borderline. No wonder that French and Belgian judges and legal scholars express themselves on that subject in a prudent manner. No wonder either that the case law is not always crystal-clear and straightforward.

9 Procedure for oral evidence

Speaking about oral evidence the attention should be drawn to the difference between common law and civil law countries in the law of the procedure to hear witnesses. Civil procedure in common law systems traditionally requires a concentrated trial: the 'day in court'. In 'civil law' procedure relatively little emphasis is placed on pre-trial procedures, and the procedure is discontinuous. When it appears to the court that there are material contested issues of fact, it will order proof taking. Evidence will be taken at a future date. Although a witness will not be heard unless nominated by a party, only the court can call nominated witnesses and it exercises a discretion as to order and number. Interrogation at proof taking is conducted by the judge. At convenient stopping places in the witness's testimony the court dictates a summary to the clerk who takes it down for the minutes. We are far from the Anglo-American cross-examination.

10 The cardinal prohibition of the parol evidence rule: the negotiations and the subsequent conduct of the parties

Back to the parol evidence rule. The exceptions to that rule are so numerous as to suggest that the rule itself has become much less important than it was before. Some Anglo-American authors propose to abolish the parol evidence rule. In a mixed jurisdiction, the South African one, an analogous proposal has been made. So did the English Law Commission in 1976, although it decided in 1986 that no change was necessary. The Scottish Law Commission in fact did the same in the 'Report on interpretation in private law' of 1997: 'Evidence of any description relevant to the interpretation of a juridical act shall be admissible notwithstanding that it is extrinsic evidence.'

But even if the rule were emasculated as far as the interpretation of contracts is concerned, a court of a common law jurisdiction will never accept to consider as surrounding circumstances to which it could have regard either statements of intention of the parties or negotiations forming part of the process of preparation of the contract, or conduct subsequent to the contract. In the Hoffmann's rules cited above it is said that the law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The Scottish Law Commission leaves no doubt about it:

- (1) It should be provided that the general rule on the interpretation of an expression in a juridical act is that the expression is given the meaning which would reasonably be given to it in its context, having regard where appropriate to:
 - a. The surrounding circumstances; and
 - b. In so far as they can be objectively ascertained, the nature and purpose of the juridical act.

- (2) For the purpose of this rule the surrounding circumstances do not include:
- a. Statements of intention;
 - b. Instructions, communings or negotiations forming part of the process of preparation of the juridical act;
 - c. Conduct subsequent to the juridical act.

In contrast, in most continental systems, the elements mentioned above under (2) are included in the surrounding circumstances to which the court may have regard. The UNIDROIT Principles, the European principles and the C.I.S.G. also allow having regard to it. Article 8 (3) C.I.S.G. for instance states: 'In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.' (See also Article 4.3 UNIDROIT Principles of International Commercial Contracts and Article 5: 1.2 Principles of European Contract Law.) It is interesting to note that recent New Zealand and Australian cases suggest an increasing willingness to move from the old common law prohibition.

11 Interpretation in a wider sense of the word

It was said above that 'construction' and 'interpretation' are generally speaking used as synonyms. Some scholars, however, make a distinction between these terms. Interpretation would in their opinion refer mainly to simply finding out the meaning of words, whereas construction would be used when dealing with filling in the gaps of a (poorly drafted) agreement. Interpretation is then said to precede the construction of the contract. Where the interpretation stops, the 'filling in' of the missing terms can start. In this contribution until now the term 'interpretation' was taken in a strict sense, i.e., the finding out of the meaning which should be given to words which are used in a contract but are not clear. Interpretation clarifies the expression of a will which, although obscure, existed nevertheless at the moment the contract was made. The other sense of the term 'interpretation' consists in providing for words which were not expressed, i.e., for gaps. The existence of such lacunae appears when, after the making of the contract, an issue must be resolved which was not regulated in the contract, either because the parties preferred not to regulate it or simply because they did not think of it. One can find this broader definition of the term 'interpretation', for instance, in Dutch law where in interpreting a contract reasonableness and equity play a part. In Austria and Germany the distinction is made between 'simple interpretation' (*einfache Auslegung*) and 'supplementary interpretation' (*ergänzende Auslegung*).

In most jurisdictions it is permissible for the judge who has to interpret the contract to go further than to clarify the words of the contract by

supplementing in the contract terms of which the parties did not think (besides the 'suppletive statutory dispositions' mentioned above). But according to the approach in the different jurisdictions of the world, one can distinguish gradations in the said process of construing the contract.

11.1 'Equité' and customs

In the French tradition the judge could always find some help in Article 1135 C.civ.: 'Agreements obligate not only for what is expressed therein, but also for all the consequences which equity, usage or the law give to an obligation according to its nature.' (See also, e.g. Article 1135 Belgian Civil Code; Article 1374 Italian Civil Code; Article 1258 Spanish Civil Code.) This rule has become an instrument of active judicial intervention in contracts. Reference to 'équité', seldom used by the C.civ., allows the courts to include in a contract obligations which have not been provided for by the parties, but may be implied on the basis of an equitable view of the parties' relations. On the basis of that article, French courts 'discovered' for instance two important obligations in contracts: an obligation to protect the physical safety of the other party (e.g. in a transportation contract), and an obligation to inform the other party. The obligation to inform sometimes includes the duty to advise the non-professional party.

When interpreting a contract, the judge in countries like Burundi will certainly have regard to custom. Customs have in African countries a much more important role than in, let us say, Belgium, France, Italy (Articles 1340 and 1368 Italian Civil Code) or Greece (Article 200 Greek Civil Code). In the common law a custom or usage can only be incorporated into a contract if there is nothing in the express or necessarily implied terms of the contract to prevent such inclusion, and it can only be incorporated if it is not inconsistent with the terms of the contract as a whole. In New Zealand the criteria for implying a customary term are summarized in *Woods v. N.J. Ellingham & Co. Ltd* (1977). First, the custom must have acquired such notoriety that the parties must be taken to have known of it. Second, the term must be certain. Third, it must be reasonable. Fourth, until the courts take judicial notice of a custom, it must be proved by clear and convincing evidence.

11.2 Good faith as standard of interpretation

In Germany, s.242 BGB was used to construe the contract creatively and produce the new specific duties that were called for. Decided cases after World War I clearly overstep the borderline of contractual construction. Numerous duties have been created in this way and include duties of care, duties to supervise the manner and form of the principal performance, duties to assure performance, duties of cooperation and duties of information and

explanation. Nowadays in the judicial reasoning influenced by the Germanic system, for instance in Austria, the Netherlands or Belgium, one will have, rather than to an article like Article 1135 C.civ., resort to the 'suppletive' function of good faith (*Treu und Glauben*, *bonne foi*). The fundamental canon of interpretation became in several codes good faith (Article 1198 Argentinean Civil Code; Article 200 of the Greek Civil Code; Article 1366 of the Italian Civil Code; Article 20 Bulgarian Law on Contracts; Article 125 Chinese Law of Contracts). In Spain no provision within the Civil Code expressly states the necessity of taking into account the principle of good faith in interpreting a contract, but the principle of good faith has steadily increased its practical importance since its incorporation into the Preliminary Title of the Civil Code in 1974 (Article 71). Notwithstanding the absence of a general rule in the General Civil Code of Austria, the final resort in finding the true meaning of an agreement is the reference to the principle of good faith. The same is true in Denmark and Sweden.

Good faith, however, is not a term of art in the English law of contracts. This is the case in all the common law jurisdictions. In New Zealand, for instance, there is not a well-developed doctrine of good faith. In South Africa, too, the courts have not directly employed the concept of good faith in respect of the interpretation of contracts; the Supreme Court rejected its introduction under the guise of the 'exceptio doli' in the *Bank of Lisbon* case (1988).

According to Article 1134 al.3 of the French Civil Code all the contractual obligations must be performed in good faith. The French courts, however, have made little express use of Article 1134. It may be that, like the English courts, they are reluctant to set loose such a wide-ranging principle. A great number of decisions are nevertheless viewed by the legal writers as application of good faith in contracts. Decisions of the Cour de Cassation, where a landlord was denied the right to enforce the forfeiture clause in a lease because he waited before giving notice until the tenant was on vacation, can be given as an example.

When interpreting the C.I.S.G. treaty, 'regard is to be had' to the observance of good faith in international trade. Not by accident, the Article 7(1) mandate falls short of the national law analogues cited above which directly define the good faith obligations of the parties: the C.I.S.G. rule represents a compromise, designed to allay some convention drafters' fear that an obligation to act in good faith would lead to uncertainty. But the distinction between party obligation and Convention interpretation is likely to prove more apparent than real. The deduction of a general Convention principle requiring the parties to act in good faith seems no great leap, even if such a principle might seem inconsistent with certain views expressed in the C.I.S.G. travaux préparatoires.

11.3 Other functions of good faith

In Germany and the Netherlands the courts went a step further in the use of good faith by prohibiting a party on the basis of good faith to invoke existing contractual terms. In Belgium the courts prefer, in such cases, to deny a party that right on the basis of his tortious liability: it would be an 'abus de droit' (abuse of a right which a person has).

A last step consisted in the prohibition on a basis of good faith to invoke terms of the contract which became extremely burdensome. Quite apart from construing contracts creatively the courts were prepared, where necessary, to reconstruct them entirely. The famous 'general clause' of s.242 of the German Civil Code has been used by the German courts with remarkable freedom to adapt the law of contract to changed economic and social circumstances and attitudes, for example, by requiring the revision of agreements in the light of the inflation and revaluation of the currency after World War I and again after World War II. The courts were originally very reticent in dealing with disturbances created by the unforeseen collapse of the currency and the restriction of commerce in World War I which, quite beyond the control of the parties, affected the 'underlying basis of the transaction'. The breakthrough came in a judgment of 1920 on revaluation. Such cases provide a parallel to the coronation cases in English law. In Italian law such an adaptation of the contract in the light of supervening events is not done in the framework of the interpretation. There is a specific article on the 'excessiva onerosita'. The new Dutch Civil Code too has a separate basis to handle the problem of the adaptation of a contract to unforeseen hardship. In French and Belgian private law, on the contrary, until now the doctrine of 'imprévision' is not accepted by the Cour de Cassation.

11.4 Conclusion

The place of good faith in interpretation, which started in Germany after World War I, enjoys a constant rise in the world. Even if outside the German family and the legal systems influenced by the BGB the term 'good faith' is seldom used in the doctrine of interpretation of contracts, the sheer idea of a principle of interpretation in good faith is making progress, as is shown in recently drafted codes or contract laws. In Israel, for instance, the utilization of the good faith principle in the process of interpretation expands the court's power to intervene in contracts, while reducing the parties' power to control the apportionment of risks through their contract. Although the new Chinese Contract Law (the new Act has been in force since 1 October 1999) contains only one article relating to interpretation, this is nevertheless great progress compared to the three former Contract Laws, which were completely silent on the matter. Much in line with the UNIDROIT Principles, according to Article 125 of the new

Contract Law interpretation of a contract clause is to be based on its true meaning, which ‘shall be determined according to the terms and expressions used in the contract, the contents of the relevant clauses, the purpose of the contract, usages and the principle of good faith’.

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31 Israel

Gabriela Shalev

1 Introduction

The State of Israel was established on 14 May 1948 as a national homeland for the Jewish people. The Israeli legal system was initially based on the Ottoman and British law, as these were the last two rulers in Palestine, prior to the establishment of the state of Israel. At first, the new state of Israel, seeking to avoid disruption of the social fabric in the wake of political change, preserved most of the existing legal order by fixing the legal norms created by the former rulers.

The legal system in Israel cannot be categorized as part of one unified legal family, for example common law or civil law. Rather, it may be described as a system of ‘mixed jurisdiction’, though not in the traditional meaning, as the mixed jurisdiction in Israel is temporary and transitional. In the first years of statehood Israeli law comprised different layers, based on various legal sources, derived from different legal families (British law representing common law and Ottoman law representing civil law). Gradually, original Israeli legislation was enacted to replace the foreign law. Since this new legislation is not retroactive, two different systems of law coexisted simultaneously. This coexistence of different institutions, borrowed from different legal families, accords Israeli private law the title of a mixed jurisdiction.

Because of its heterogeneity and multiple influences, Israeli law has always attracted the attention of comparative scholars. Today, Israeli law deserves continued attention, since its new legislation – and mainly the draft of its new civil code (to be mentioned later) – still reflects an extensive comparative research and a variety of legal sources.

Israel has two official languages: Hebrew (mainly spoken by the Jewish inhabitants) and Arabic (mainly spoken by other minorities). However, all statutes, case law and court proceedings are in Hebrew. In a criminal proceeding, if the defendant does not understand Hebrew, the court is obliged to have a translator present in the courtroom to translate all the proceedings to the defendant. There is no such legal obligation in a civil trial, but judges have the jurisdiction to appoint a translator if it is deemed necessary to the proceedings.

Generally speaking, Israel does not adopt a pluralist system of law, with one exception. The fields of personal status and family law (in particular

the laws of marriage and divorce) are governed by 'personal law', namely Jewish law for Jews, Islamic law for Muslims and canon law for Catholics.

2 Constitutional law

Israel does not have a formal written constitution. Since the establishment of the state, the Israeli Parliament (the 'Knesset') decided to legislate basic laws as chapters that will form the future constitution. Thus basic laws in Israel define the different branches of government, for example, basic law: the Knesset (1958), basic law: the judiciary (1984) and basic law: the government (2001). In the past, the Supreme Court established constitutional principles, especially in the field of human rights, in several decisions. The Supreme Court was inspired by the Declaration of Independence, which gave expression to two fundamental principles: Israel was established as (1) a Jewish state and (2) a democratic state. In 1992, a 'constitutional revolution' occurred consisting of the legislation of two basic laws which acknowledged constitutional principles concerning human rights: (1) basic law: human dignity and freedom, and (2) basic law: freedom of occupation. The purpose of these laws, as defined in the laws, is 'to anchor in a basic law the values of the state of Israel as a Jewish and democratic state'. These two basic laws allow, for the first time, judicial review of the Knesset's legislation when it deems that human rights are violated by the legislation.

The basic laws can be found in Hebrew, Arabic and English on the Internet site of the Knesset (<http://www.knesset.gov.il>).

The Israeli constitutional system is a monist one: members of the government can serve concurrently as members of the Knesset. The state of Israel has a democratic-republican regime, which is based upon constitutional principles of the self-government of the people, the separation of powers, the rule of law and human rights. Members of the Knesset are elected for a four-year term, by a secret ballot in direct, equal and proportional elections, and the entire state is considered one electoral district. The Knesset consists of one chamber, which is the highest legislative authority in Israel. The Knesset also has a role as the body that will frame the future Israeli constitution.

The president of Israel is a figurehead and the representative of the state, whose role is mainly symbolic and ceremonial. The president is elected by the Knesset, and may serve for two five-year terms. The government is the executive authority and the Prime Minister, being the head of the government, is the highest executive authority.

Israel formally opened the doors for constitutional review when two basic laws were legislated in 1992. Prior to these basic laws, constitutional review was based on the principles established in the Declaration of Independence. Constitutional review is carried out by the Supreme Court

when it sits as the High Court of Justice. The High Court of Justice adjudicates administrative and constitutional issues involving petitions against the state's authorities.

Israel has had a penal code since 1977, which determines most, but not all, criminal offences. Many offences are determined by specific laws, such as those dealing with construction or taxation laws.

3 Civil and commercial law

Today Israeli civil law is embodied in statutes legislated by the Knesset. The courts, mainly the Supreme Court, play a major role in interpreting and applying these statutes.

Almost two decades ago, a codification committee was established in order to revise the private law of Israel and draft an Israeli version of a civil code, following the model of the great European codes (Code Civil, BGB, Codice Civile). The committee completed its task recently. The product of its work, a draft civil code, includes more than 800 sections covering the law of obligations (namely, contract law, tort law, unjust enrichment), property law and inheritance law. Consumer protection and labour law will not be included in the codification; neither will personal status and family law, which are governed by religious law.

The Companies Law of 1999 is a codification of the commercial law.

4 Court system and law faculties

The court system in Israel is composed of a hierarchy of three courts: Magistrates' Court, a court of first instance for minor civil and criminal cases; District Court, a court of first instance for major cases and an appellate tribunal over the Magistrates' Court; and the Supreme Court, an appellate tribunal over the District Court. As noted above, the Supreme Court also sits as the 'High Court of Justice', i.e., the court of exclusive jurisdiction, dealing with petitions of citizens. The Supreme Court is located in Jerusalem, which is the capital city of Israel.

In addition to the court system described above, there are two tribunals that are separate and independent of the general court system. The first is the Labour Courts. The Labour Courts deal with labour law and social security law as an independent instance. The second separate system is the system of religious courts dealing with matters of family law (especially marriage and divorce) and personal status. The jurisdiction of the tribunals varies according to personal religious affiliation of the parties: the Rabbinical Courts (for Jews), the Sharia Courts (for Muslims and Druze) and Ecclesial Courts (for the different Christian communities).

The Supreme Court of Israel has a significant role in creating law. The academic community plays a considerable role as well; law journal articles

and legal textbooks are frequently quoted in court decisions; professors are often nominated to committees that prepare draft laws. The committee that prepared the draft of the new civil code comprised professors of private law, and was headed by Aharon Barak, Israel's Chief Justice, who is a law professor as well.

There are ten law faculties in Israel, at universities and colleges. These are located in Jerusalem, Tel Aviv, Haifa, Ramat Gan (two universities), Kiryat Ono, Herzelia, Rishon Lezion, Netanya and Hod Hasharon. Israel's largest law faculty is at OAC (Ono Academic College) in Kiryat Ono.

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32 Italy

Barbara Pozzo

1 Introduction

Italy (Italia) is undoubtedly a civil law country. According to the categorization of René David it belongs to the Roman-Germanistic family, while in the Zweigert and Kötz exposition Italy is inserted in the Roman system. Both contributions, the French and the German, have been very influential in the legal development of the unified Italy after 1860. The first Italian codes after unification were modelled on the French Napoleonic Codes and for a time scholarship was also influenced by the French. By the end of the 19th century the German Pandectist school of legal thought began to dominate the legal process in Italy, where it affected above all the Italian doctrine. The effects of the German influence were not limited to private law, but extended to public law and law of procedure.

Laws are enacted by the state and by the regions according to the principle of decentralization stated in Article 5 of the Italian Constitution. Article 117 of the constitution declares that 'Legislative power belongs to the state and the regions in accordance with the constitution and within the limits set by European Union Law and international obligations.' Certain matters are in the exclusive legislative power of the state (Art. 117 (2)), some are subject to concurrent legislation of both state and regions (Art. 117(3)), while the regions have exclusive legislative power with respect to any matters not expressly reserved to state law (Art. 117 (4)). Five Regions, Friuli-Venezia Giulia, Sardinia, Sicily, Southern Tirol and the Aosta Valley, have particular forms of autonomy according to their special status adopted by constitutional law.

The only official language is Italian. Article 6 of the constitution states that 'the Republic protects linguistic minorities by special laws'. According to Law N. 482, of 15 December 1999, 'Norme in materia di tutela delle minoranze linguistiche storiche', and the Presidential Decree N. 345 of 2 May 2001, Regolamento di attuazione della legge n. 482, del 15 dicembre 1999 recante norme di tutela delle minoranze linguistiche storiche, was enacted, controlling the guardianship of the language and the culture of the 'Albanians, Catalans, Germanics, Greeks, Slovenians and Croatians and of those speaking French, French-Provencal, Friulan, Ladin, Occitan and Sardinian' populations. The dispositions of guardianship are applied in the territorial and submunicipal ambits on the basis of special delimitation,

approved by the Provincial Council and prior consultation with the municipalities concerned.

According to an eminent American comparative lawyer (Merryman, 1999, pp. 178ff.), for a common lawyer the Italian law is a peculiarly appropriate avenue of approach to study the civil law system, because of the way in which the Italians have managed to receive and rationalize the principal and quite different French and German contributions, and because Italy has a peculiar importance as the historic source of much of the law of western Europe.

2 Constitutional law

The Italian Constitution which introduced into Italy the republican form of state was adopted in 1948. The rapid and dramatic succession of events in the years 1943–5 – the landing in Sicily of Anglo-American troops, the German occupation of the centre and north, the fall of Fascism, the 8 September armistice and the flight of the king from the capital – left the Italian state at its most tragic moment. King Vittorio Emanuele III had conferred royal power on his son Umberto as *Luogotenente Generale del Regno*, who with a provisional decree of 25 July 1944 established the election by direct universal suffrage of an *Assemblea Costituente* to draw up a new constitution.

On 2 June 1946, the institutional referendum, by which the Italians had to choose between monarchy and republic, and the elections for the *Assemblea Costituente* were held together. The electorate voted in favour of a republic. In May 1946, Vittorio Emanuele III abdicated in favour of his son Umberto who, after the results of the referendum were proclaimed, went into permanent exile. The elections for the *Assemblea Costituente* saw the clear predominance of the three popular parties (*democrazia cristiana*, *partito socialista di unità proletaria* and *partito comunista*). The new Italian Constitution was definitively approved on 22 December 1947 and the ‘*Costituzione Italiana*’ became law on 1 January 1948. The constitution can be found in Italian on the site, <http://www.quirinale.it/costituzione/costituzione.htm>; in English on the site, http://www.oefre.unibe.ch/law/icl/it__indx.html; and in French on the site, http://cdpc.univtl.fr/constit_italie_2004.htm.

The Italian parliament (*Parlamento italiano*) is divided into two chambers: the Senate of the Republic (*Senato della Repubblica*) and the Chamber of Deputies (*Camera dei Deputati*). The legislative function in Italy is exercised by both chambers: bills must be approved in the same form by both chambers independently. Any modifications proposed by one assembly must be discussed and voted on by the other. According to the principles of ‘parliamentary government’ enshrined in the Italian constitutional model,

the government assumes the power of political decision with the consent of parliament. The head of the government (Presidente del Consiglio) and his ministers must be sworn in by the President of the Republic and must achieve the vote of 'confidence' by the two chambers. Carlo Azeglio Ciampi has been President of the Republic since 1999.

The Italian Constitution of 1948 states that the Republic is 'one and indivisible', though recognizing and promoting local autonomy: the administrative ordering consists of municipalities, provinces, metropolitan cities and regions, which are autonomous entities with their own statutes, powers and functions according to the principles defined in the constitution (Art. 114 Const.).

The constitution of 1948 is a 'rigid' constitution: it provides for a Constitutional Court with the power of judicial review of legislation (Arts.134–7 Const.). Only the Constitutional Court can pass judgment on the constitutionality of national laws regional laws and government acts having the force of law. It cannot pass judgment on administrative regulations, whose constitutional legitimacy is left to ordinary and administrative judges. Being a rigid constitution, for the amendments a particular procedure is foreseen by the constitution itself (Art. 138 Const.). Article 139 states that the republican form of the state may not be changed by way of constitutional amendment.

3 Civil and commercial law

The main source of private law is nowadays the Civil Code (Codice civile) enacted in 1942. The first Civil Code of the unified Italy was issued in 1865. In the same year a Commercial Code was enacted, afterwards reformed in 1882. The Civil Code of 1942 is subdivided into six books and includes in its fifth book, 'On Labour', also the discipline previously contained in the Commercial Code, which ceased to exist as a separate code.

Over the last 20 years a great number of laws outside the Civil Code, so-called 'Special legislation', have been enacted, either to expand provisions which the Code had already foreseen, or to regulate new matters not previously addressed. The 1993 Banking Law and 1998 Financial Intermediation Law are important examples of this legislation outside the code.

The main sources of inspiration of the Italian Civil Codes changed during the period from 1865 to 1942. The first Italian Civil Code (1865) corresponded to a transplant of French legal sources, while the second (1942) was strongly influenced by a shift towards German Pandectistic patterns, concerning legal discourse and methodology. A good translation of the Italian Civil Code into English was provided by Mario Beltramo, Giovanni Longo and John H. Merryman and is periodically updated.

In 1975, the Family Law Reform Act modified most family law norms contained in the Civil Code, introducing the principle of legal equality of the spouses. Divorce was introduced three years later by Law 898 of 1 December 1978. In 2003, an important Reform of the Law of corporations was enacted, which has profoundly modified the provisions of the fifth book of the code.

Though it cannot be said that the use of comparative law is usual and normal work for the Italian lawyer, there are few cases where also Italian judges have drawn inspiration from foreign case law, as in the field of privacy protection.

4 Court system and law faculties

The machinery of justice in Italy corresponds to the typical civil law pattern, being characterized by a plurality of court hierarchies. In Italy, the ordinary courts (*giustizia ordinaria*) deal with civil and criminal matters, while the administrative courts (*giustizia amministrativa*) deal – generally – with public law disputes. In the system of ordinary courts we find the justices of the peace (*giudici di pace*) at the bottom of the hierarchy; the *tribunale* is the court of first instance of general jurisdiction; the *corte d'appello* is the court of appeal at the intermediate level; the Italian Supreme Court in Rome (*Corte di Cassazione*) is the court of last instance for non-constitutional controversies. The Constitutional Court (*Corte Costituzionale*), located in Rome, rules on all questions concerning the constitutional legitimacy of a law or act having the force of law. In addition, the court has jurisdiction over conflicts among state powers; judgment in indictments against the Head of State, President of the Council and Ministers; and any decision over the admissibility of referendums repealing a law.

A first Penal Code of the unified Kingdom of Italy was enacted in 1889, replaced in 1931 by a new Penal Code which is still in force, though many times amended.

Legal doctrine has always been important in the Italian legal system. The ‘doctrine’ (*la dottrina*) is constituted by all works published by law professors in the form of textbooks, treatises, commentaries, monographs and articles. These works are not sources of law, but ‘doctrine’ pervades the whole Italian legal process, influencing judges and legislators.

There are many law faculties in Italy. Some of them have a very long history and tradition (e.g., Bologna, Pavia and Padua). In addition, major cities can count on the presence of a plurality of law schools, both private and public, as for example in Milan, Rome and Naples. Sicily and Sardinia have important universities in the major cities, such as Palermo, Messina, Catania, Cagliari and Sassari. Smaller towns like Macerata, Camerino,

Urbino, Siena, Pisa, have a long-established reputation for their hospitality to students coming from all over Italy and Europe.

The national association of comparative lawyers is called Associazione Italiana di Diritto Comparato (AIDC), which organizes biannual meetings on specific topics and conferences together with other national associations of comparative law. Specialized institutes in comparative law exist in many law schools, such as Turin, Milan, Rome, Florence and Trento, which generally organize also PhD. programmes in comparative law. Recently the Universities of Milan, Bologna and Insubria together created a Research Centre in Comparative Law, whose aim is to investigate the interconnections between law and language from a comparative law perspective and which organizes every year a Summer School in Comparative Law.

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33 Japanese law*

Masaki Abe and Luke Nottage

1 Introduction

Japan is a densely populated archipelago in North-East Asia, and remains the second largest economy in the world. Despite re-opening itself to the world in the mid-19th century, to modernize its economy, society and legal system, Japan has maintained ambiguous relationships towards modernity, 'the West', and law itself (Tanase, forthcoming).

Japanese law was formed in the crucible of comparative law, and continues to intrigue comparative lawyers. It borrowed early on from China, from continental Europe in the late 19th century, and from Anglo-American law particularly during Japan's Occupation following World War II. In the wake of economic stagnation and accelerating deregulation over the 1990s, some commentators now proclaim 'the Americanization of Japanese law' (Kelemen and Sibbitt, 2002). However, it has also been framed by international law, and law reformers remain attracted to broader 'global standards'. Accordingly, Japanese law can be expected to remain an archetypical 'hybrid' legal system, not readily characterized as belonging to any particular 'legal family' (cf. Merryman *et al.*, 1994).

The study of Japan's law has also led to new paradigms or theories being developed, particularly by foreign commentators writing in western languages, to explain phenomena seemingly showing that law remains quite unimportant in socioeconomic ordering. A central debate has concerned low per capita civil litigation rates, compared to other similar economies, especially in Europe and the United States. The 'culturalist' theory explains this on the basis that 'the Japanese don't like law' (Noda, 1976), owing primarily to the legacy of a Confucian tradition, emphasizing harmonious and hierarchical social relationships (see also writings in von Mehren, 1963). 'Institutional barriers' theory instead argues that 'the Japanese can't like law' (Haley, 1991). Access to justice is restricted by limited numbers of legal professionals, and problems in court proceedings, so claimants cannot afford to sue and thus do not obtain the outcomes nominally prescribed by the law. 'Social management' theory suggests that 'the Japanese are made

* Part of this contribution is based on Masaki Abe, 'Japan', in Herbert Kritzer (ed.), *Legal Systems of the World: A Political, Social, and Cultural Encyclopedia*, Santa Barbara, CA: ABC Clio.

not to like law'. Institutional barriers are maintained particularly by social elites, to resolve social problems outside the courts, which might lead society in unpredictable directions. Often, alternative dispute resolution procedures and resources are inaugurated to facilitate this approach. Some of the theorists adopting this perspective, especially in its earlier incarnations, have been sceptical about this management of social problems (Upham, 1987). But others suggest that it may be justified under more communitarian approaches to contemporary democracy (Tanase, forthcoming). By contrast, 'rationalist' theory asserts that 'the Japanese do like law', acting in its shadow (Ramseyer and Nakazato, 1998). Despite high barriers to bringing suit, Japanese law is predictable – at least in some areas, and compared to countries like the United States – so claimants do not even need to file suits to be able to obtain favourable settlements out of court. Much rationalist theory also relies on quantitative social science, particularly econometrics. However, more recent 'hybrid' theory combines more qualitative methodology, and takes a more eclectic and nuanced approach to show how 'the Japanese sometimes like law, but sometimes don't' (Milhaupt and West, 2004). Thus the Japanese legal system provides a rich testing ground for new theoretical approaches to comparative law more generally.

To better appreciate these implications for comparative law, as well as to provide basic information on the Japanese legal system, this chapter first outlines Japan's complex legal history, then sets out the foundational legal principles of its present constitution, and finally focuses on the structure and role of the courts and the legal profession.

2 History

A coalition of some powerful tribes, governed by customary norms, began to unify Japan as a state in the 5th century. A centralized regime was gradually organized, with the emperor at its apex, but the law was still unwritten and undifferentiated from custom. The first effort at codifying the law began in the latter half of the 7th century, when Chinese legal codes were transplanted. To strengthen its power, Japan's Imperial Court eagerly adopted the Chinese legal system, as well as the Chinese governmental system and tax system. However, to make the transplanted law conform to the Japanese reality, both ancient customs and emerging practices came to be incorporated into the legal codes.

The effort to develop a strong centralized regime soon collapsed, as a manorial system developed. Powerful nobles obtained a sort of extraterritorial jurisdiction, and made their own laws in their vast manors. This legal pluralism was further accelerated when the warriors who had been the guardians of the manors of nobles began to claim their own rule over manors and to make their own laws. While formal laws enacted by the Imperial Court were

still nominally valid all over the country, their effectiveness was considerably curtailed. After the warrior class established their own central government in the early 12th century, legal pluralism remained prevalent. While both the shogunate, the warriors' central government, and the Imperial Court enacted laws which had ostensibly national validity, the manors of nobles and the feudalities of warriors were governed by their own laws.

The country was only really unified in the late 16th century after a bloody civil war, by a powerful warrior, Hideyoshi Toyotomi. Laws with substantial national validity were enacted. Toyotomi's rule was short, however. After his death, Ieyasu Tokugawa came to power and founded a shogunate which lasted for 15 generations, and completed the unification of the law. Although the Tokugawa Shogunate granted warlords both legislative and judicial powers in their territories, it restricted warlords' legislative powers within demarcations set by its own laws and put lawsuits brought by a resident of one warlord's territory against a resident of another warlord's territory under its own jurisdiction. In addition, in the middle of the 17th century, the Tokugawa Shogunate closed the country, except for limited trade with China and the Netherlands, to block the influence of Christian religion over the Japanese people and to prevent warlords from accumulating wealth and weapons by foreign trade. This isolation policy continued until the mid-19th century, with Japanese law developing without foreign influence and acquiring some distinctive features. On the one hand, Tokugawa era law remained predominantly administrative law, used by the shogunate to help maintain national unity. On the other, largely in the form of precedents, detailed legal rules developed, dealing with secured loans, commercial notes etc. However, the ideological underpinning was that law was not available to citizens in the form of 'judiciable rights', but only through the benevolence of rulers (Henderson, 1965). More recent research, by contrast, suggests that functional equivalents to western rights consciousness, and greater variability and dissent, did exist in Tokugawa village practice (Ooms, 1996).

The isolation policy came to an end in 1853, with the arrival of American warships. Owing to related political turmoil, the Tokugawa Shogunate became weak and surrendered its power to the emperor in 1867. This 'Meiji Restoration' established a new regime, with the Emperor Meiji at its apex. The Meiji government urged the creation of a strong monarchy, and promoted the modernization of the legal system. The main reason for the latter was to revise disadvantageous treaties that the Tokugawa Shogunate had concluded with the United States and European countries, since Japan first had to be recognized as a modern sovereign state by those countries. The Meiji government sent officials around the world to study modern western law. It was first attracted primarily by French law, but ultimately enacted various codes, drawing more on German law towards the end of the 19th century. In

particular, the Constitution of Imperial Japan (the Meiji Constitution) was enacted in 1889, on the model of the Prussian Constitution. Japan became a modern constitutional monarchy, at least in appearance. Under the Meiji Constitution, sovereignty resided in the emperor and all governmental organs including the judiciary were regarded as mere assistants to the emperor. The constitution did include a bill of rights, but provided that those rights were guaranteed only within limits set by legislation. Thus the Imperial Diet could arbitrarily restrict the constitutional rights of the people.

After Japan's defeat in World War II, democratization of its polity and society began under the control of the Supreme Commander of the Allied Powers. The new Japanese Constitution was enacted in 1946, and came into effect the following year (Hook and McCormack, 2001). It declared that sovereignty resided in the people, and that the emperor was nothing more than the symbol of the state and the unity of the people. It also declared that constitutional rights were inviolable, and a system of judicial review was therefore institutionalized. This constitution has never been amended, and still lies at the very heart of the Japanese legal system. In 2000, the Diet resumed a detailed study of possible reforms, and surveys now suggest considerable public support for certain constitutional amendments. But it remains uncertain whether the Final Reports unveiled in 2005, will lead to major changes.

3 Foundational legal principles

The present constitution lays down three fundamental principles. The first is that sovereignty resides in the people, and no longer in the emperor (Art. 1). Although the emperor does play some indispensable roles in state affairs, such as the convocation of the Diet, those are mere rituals performed with the advice and approval of the Cabinet.

The second fundamental principle is respect for fundamental human rights. The constitution includes a bill of rights consisting of 30 articles, and prescribes that 'these fundamental human rights guaranteed to the people by this Constitution shall be conferred upon the people of this and future generations as eternal and inviolate rights' (Art. 11). These include not only the rights to such civil liberties as the freedom of speech, the free exercise of religion and several procedural rights of the accused. There is also a right to welfare: 'all people shall have the rights to maintain the minimum standards of wholesome and cultured living' (Art. 25, s.1). However, the concrete content of this right to welfare is thought to depend on the welfare policy of the government, so welfare recipients are not entitled to claim that a particular welfare policy is unconstitutional.

The third fundamental principle is pacifism. Article 9 of the constitution declares that 'the Japanese forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international

disputes' (s.1), and that 'land, sea, and air forces, as well as other war potential, will never be maintained' (s.2). Although there have been heated controversies on the compatibility between this Article and Japan's now very large Self Defence Force (SDF), the government has consistently asserted that the constitution never prohibited the maintenance of a minimum necessary force for self-defence. According to surveys dating back to the 1990s, a majority of the Japanese people thinks that Japan should make a due contribution to the maintenance of world peace, and that the SDF should be regarded as constitutional if necessary for this purpose. Encouraged by such sentiment, and pressured by the United States as its main military ally nowadays, the Japanese government has enacted various laws permitting the dispatch of SDF personnel abroad subject to certain conditions, and planning for potential military attack from abroad.

The constitution also adopts the separation of powers as a guiding principle for the governmental system. Legislative power is vested in the Diet. It consists of the House of Representatives and the House of Councillors, with the former more important than the latter in most respects. The members of both Houses are elected, and all citizens over the age of 20 have the right to vote. Executive power is vested in the Cabinet, comprising the Prime Minister and other ministers. The Prime Minister, the head of the Cabinet, is designated from among the members of the Diet by resolution. Then the Prime Minister appoints other ministers, the majority of whom must be selected from among the members of the Diet. Judicial power is vested in the Supreme Court and lower courts established by law. While the constitution provides that 'the Diet shall be the highest organ of state power' (Art. 41), it also adheres to the idea of checks and balances, which forms the foundation of the principle of the separation of powers, by granting the Cabinet the power to dissolve the Diet, and courts the power to determine the constitutionality of laws enacted by the Diet.

Each member of the Diet, but also the Cabinet, may submit a bill to the Diet. In reality, among those bills which finally become laws, the number of those submitted by the Cabinet far exceeds the number of those submitted by individual Diet members. This remains true, despite more private member bills submitted since the 1990s and some notable successes among them. Bills submitted by the Cabinet are still mainly drafted by officials in ministries or similar agencies, belonging to the executive branch. Therefore the real lawmaking power has lain in the hands of ministries. This differs from the US case but is consistent with the tradition of 'Westminster' parliamentary democracy still followed in parts of the Anglo-Commonwealth world. Japan's lawmaking processes have also become much more varied and complex, particularly since the

late 1990s. A new Cabinet Office has impinged on deliberative councils (*shingikai*) and other law-drafting processes hitherto jealously guarded by individual ministries; there is ever greater rivalry among the latter, and the entire system has become more transparent and politicized.

In addition to the constitution and statutory laws enacted by the Diet, formal sources of law include the following. The first is rules and regulations enacted by the Cabinet, ministries and agencies belonging to the executive branch. These rules and regulations are valid only insofar as they are enacted within the authorities specifically delegated to respective organs by statutes. The second source is rules enacted by the Supreme Court, concerning judicial procedures, matters related to lawyers, the internal discipline of the courts and the administration of the judiciary. But the Diet is also empowered to enact laws concerning those matters, and a law enacted by the Diet prevails over a rule enacted by the Supreme Court, if incompatible. The third source is international treaties. The Cabinet is empowered to conclude international treaties, but it has to obtain Diet approval beforehand or, depending on circumstances, subsequently. Although it is commonly thought that international treaties are superior to statutory laws, there are diverse opinions on the relationship between the constitution and international treaties. There is no judicial precedent, however, concerning the relationship between international treaties and domestic laws. A fourth source of laws is ordinances enacted by local governments. The constitution grants local governments the right to enact their own ordinances insofar as they are not incompatible with statutory laws enacted by the Diet. In some areas, such as protection of consumers and the environment, this has allowed quicker progress at the local level. But Japan's system of public finances, once again under review, has tended to constrain the exercise of this constitutional authority.

Formally, judicial precedents are not a source of law. Even a decision of the Supreme Court is no more than the final judgment of the particular case at issue, having no legal binding effect on future similar cases. (However, to overrule its own precedent, the Court must sit as a Grand Bench, comprising all 15 justices.) Lower courts can freely interpret laws without being bound by past decisions of the Supreme Court. However, lower courts are generally obedient to the precedents of the Supreme Court, and the Supreme Court itself is very cautious about overruling its own precedents. Thus its precedents are the most important clues for predicting how any given case will be decided, and thus constitute a *de facto* source of law. If there is no relevant precedent of the Supreme Court, the precedents of high courts occupy the same position. Japan's superior courts have established many important precedents by interpreting abstract provisions in statutes, especially in such areas as tort law (Nottage, 2004), and

hence it is impossible to understand the present condition of the Japanese law without sufficient knowledge of those precedents.

Another aspect of Japanese law that has long been of comparative interest is the practice of 'administrative guidance' (*gyosei shido*). One form involves directives from, for example, an organ of the national government to local governments. More controversial has been actions by public officials to persuade a private entity voluntarily to cooperate in a purpose they see as desirable, relying on broadly worded legislation (Haley, 1991). However, in 1985, the Supreme Court clarified that the essence of such administrative guidance was voluntary compliance, so that, if officials persisted in such actions despite clear refusal to comply, a private entity thus sustaining loss could claim compensation. Although claims and success rates remain low for claims against central government officials, they have been much higher versus local authorities. The Supreme Court's view was restated in the Administrative Procedures Act, which also for example allowed recipients of administrative guidance to request the guidance in writing. It was enacted in 1993, when the Liberal Democratic Party (LDP) lost power after almost half a century, combined also with a Public Comment process required since 1999 before promulgation of new regulations, and the Official Information Disclosure Act applicable since 2003 to most central government entities, the use of administrative guidance against businesses has become more circumspect than ever.

4 Court structure

The Supreme Court is the highest body of the judicial branch, dealing with appeals filed against judgments of high courts. It comprises the Chief Justice and 14 justices. Hearings and adjudications in the Supreme Court are made either by the Grand Bench, or by one of three Petty Benches each made up of five justices. Each case is first assigned to one Petty Bench. Only if the Petty Bench assigned a case finds it necessary to answer questions concerning the interpretation of the constitution, or to overrule a precedent of the Supreme Court, will the case be transferred to the Grand Bench. The vast majority of cases are decided by Petty Benches. The Court has a high caseload, despite reforms to the Code of Civil Procedure in effect since 1998 allowing discretion to hear civil appeals, at least compared to many Anglo-Commonwealth final courts of appeal.

In addition, the Supreme Court is vested with rule-making power and ultimate authority regarding judicial administration. This includes the power to assign lower court judges to particular positions in particular courts. Each lower court judge is assigned to a particular position in a particular court, transferred to another position in another court for every three to five years, and gradually promoted to better positions. While all

matters concerning judicial administration are formally determined by the Conference of Supreme Court Justices, most substantial decisions are made by the General Secretariat of the Supreme Court, with the Conference only approving the decisions of the General Secretariat. The latter's senior members are selected from among lower court judges, and they make up an elite class within the judiciary.

Until World War II, the Ministry of Justice had authority over judicial administration. During the Occupation, this authority was transferred to the Supreme Court to guarantee the independence of the judiciary from the executive branch. While the independence of the judiciary was certainly reinforced, the independence of individual judges was not. There is a risk that judges who have overruled the precedents of the Supreme Court or otherwise have been disobedient to the Supreme Court or its General Secretariat will be disadvantaged in their placement and promotion. The Court Organization Law does provide that a judge shall not be transferred against his or her will. But if a judge ever refuses the decision of the General Secretariat to transfer him or her to a particular position in a particular court, the judge will never be transferred to a better position in the future. So it is wise for a lower court judge not to reject the decisions of the General Secretariat, even if to do so is inconsistent with his or her own conscience. This situation has undermined the constitution's declaration that 'all judges shall be independent in the exercise of their conscience and shall be bound only by this Constitution and laws' (Art. 76, s.3).

As to the judiciary's structure, the constitution provides only that 'the whole judicial power is vested in a Supreme Court and in such inferior courts as are established by law' (Art. 76, s.1). The lower courts established by law are high courts, district courts, family courts and summary courts. High courts are intermediate appellate courts which have jurisdiction mainly over appeals against judgments rendered by district courts or family courts. In criminal cases originating in summary courts, however, appeals come directly to high courts. There are eight high courts and six branch offices. In high courts, all cases are handled by a collegiate body consisting of three judges, with no dissenting judgments.

District courts are courts of general jurisdiction which deal with most civil, criminal and administrative law cases in the first instance. In civil cases, district courts also have jurisdiction over appeals against judgments rendered by summary courts. They are situated in 50 locations, with branch offices in 203 locations. In district courts, most cases are disposed by a single judge. When a collegiate body consisting of three judges in a district court finds that a case brought to the court should be handled by a collegiate body, the case is handled by the collegiate body. In addition, the Court Organization Law requires that certain kinds of criminal cases and appeals

against judgments of summary courts should be handled by a collegiate body consisting of three judges.

Family courts are specialized courts dealing with family affairs and juvenile delinquency cases in the first instance. Family courts and their branch offices are established at the same places where district courts and their branch offices are located. In addition, there are 77 local offices of family courts, in which cases are handled by a single judge.

Summary courts are courts of limited jurisdiction which deal with civil cases involving claims not exceeding 1 400 000 yen and minor criminal cases designated by law in the first instance. There are 438 summary courts. In summary courts, all cases are handled by a single summary court judge.

In all of these courts, litigants are not required to be represented by qualified lawyers, except for very serious criminal cases, while representation by non-lawyers had been strictly prohibited until recently. In serious criminal cases, a court should appoint a lawyer for a defendant unable to afford one. In minor criminal cases, a defendant who cannot afford to hire a lawyer is entitled to a court-appointed lawyer if desired. The fees of court-appointed lawyers are paid from the public purse. As for civil and administrative law cases, legal aid is available to the poor, but the budget for legal aid remains very limited. Partly for this reason, civil cases in which both parties are represented by a lawyer are only about 40 per cent of all civil cases handled by district courts and a mere 1 per cent or so of all civil cases handled by summary courts.

District courts, family courts and summary courts not only adjudicate cases but also provide mediation services. In a mediation procedure, a mediation committee, comprising a judge and two or more mediators selected from among citizens who have broad knowledge and experience, mediates between the parties. In general, a mediation procedure is commenced on the request of a party, and is not obligatory. However, for certain types of cases involving family disputes, a party must first ask for family mediation provided by family courts before bringing a lawsuit. Generally, the proportions of court-annexed mediation cases have increased since the 1990s.

One of the notable characteristics of the Japanese legal system is that lay participation in the judicial procedure has been very limited. Lay citizens have really only participated in judicial procedures as mediators as mentioned above, or as councillors for family courts and summary courts. Councillors merely assist and give their opinions to judges or summary court judges. Neither mediators nor councillors are entitled to decide cases.

Juries were introduced for serious criminal cases in 1928, but the system fell into disuse. A variant has recently been revived, in the form of a lay assessor (*saiban'in*) system enacted in 2004, to begin in 2009. It draws more

on continental European models, involving laypersons sitting with judges to decide matters of both law and fact. Also, with effect from 2005, prosecution review boards including laypersons can force public prosecutors to bring criminal proceedings, if they refuse to do so following recommendations by two boards. In addition, another round of reforms to the Code of Civil Procedure, in effect from 2004, opens more avenues to the courts. The amendments allow parties opinions by expert advisors before formally lodging suit; encourage more use of expert witnesses (*kanteinin*) during proceedings; and introduce a system of 'expert commissioners' (*semmon i'in*) who can provide explanations in writing or orally before the parties and, with their consent, even attend settlement conferences to facilitate settlement or witness examinations to ask questions.

Likewise aimed at engaging more people in Japan's justice system, the 2004 Law to Promote the Use of Out-of-Court Dispute Resolution Procedures allows the Minister of Justice to establish a system for accrediting alternative dispute resolution (ADR) institutions operated by private organizations. Accredited institutions have to report on their activities, but achieve suspension of limitation periods while conducting their ADR procedures. Outside the formal court system, many ADR systems have been institutionalized in Japan, but most of them have been operated by or involve national or local government officials. Only some have been operated by private organizations. Most of them provide only mediation services, but some of them also provide arbitration services, and arbitration law was amended in 2003 to bring the century-old legislation into conformity with global standards.

The constitution provides that 'no extraordinary tribunal shall be established, nor shall any organ or agency of the Executive be given final judicial power' (Art. 76, s.2). Thus no judicial body can exist outside the hierarchy with the Supreme Court at its apex. While some quasi-judicial bodies which adjudicate particular types of dispute do exist as parts of the executive branch, their judgments are not final. Parties can sue to seek revocation of the judgments in either a district court or a high court, depending upon the organs which made the first decisions, and the Supreme Court has the final say. Those quasi-judicial bodies include the Fair Trade Commission, the Marine Accidents Inquiry Agency, the National Tax Tribunal and the Patent Office.

5 Legal professionals

To qualify as a lawyer (*bengoshi*) – a prerequisite also to being appointed as a judge or public prosecutor (Johnson, 2002) – one must pass the National Legal Examination and then be trained at the Legal Research and Training Institute. University legal education still takes place primarily at

the undergraduate level. Every year, about 45 000 students graduate with a Bachelor of Laws. However, most of them do not become lawyers, instead finding employment in governmental organs or private corporations, because it has been extremely difficult to pass the National Legal Examination. In 2004, while more than 40 000 people took the examination, fewer than 1500 examinees passed. The number of successful examinees is intentionally limited. The number was 500 in 1990, then gradually increased to 1000 in 2000, and to around 1500 in 2004. It will rise to around 3000 per annum in 2010, as part of a broader programme of judicial reforms under way since 2001. Another aspect of that programme was inauguration of 68 new postgraduate 'Law Schools' from April 2004. However, although it is easier for their (carefully selected) students to pass the examination, it remains one of the most difficult in Japan.

Those who pass the examination enter the Legal Research and Training Institute, where they get practical legal training as legal apprentices at public expense. The period of the training had been for two years, was shortened to one and a half years in 1998, and was further shortened to one year in 2006. Those who graduate from the Institute are regarded as qualified lawyers. However, only about 80 per cent go into private practice. Another 12 per cent decide to become judges, and 8 per cent become public prosecutors. While it is common that retired judges and public prosecutors move into private practice, it is rare for private practitioners later to become judges or public prosecutors. In 2004, there were about 2300 judges, 1500 public prosecutors and 21 000 lawyers.

A legal apprentice desiring to become a judge applies to the Supreme Court just before the end of apprenticeship at the Institute. The constitution prescribes that 'the judges of the inferior courts shall be appointed by the Cabinet from a list of persons nominated by the Supreme Court' (Art. 80, s. 1). In fact, the Cabinet has never refused to appoint a person put on the list submitted by the Supreme Court, and the Conference of Supreme Court Justices only approves a list made by the General Secretariat. Those who are admitted to the judiciary are first appointed as assistant judges for a term of ten years. After ten years, almost all assistant judges are promoted to full judges. Like the appointment of new assistant judges, promotion decisions are formally made by the Cabinet, based on the list submitted by the Supreme Court, but the real decisional power again rests with the General Secretariat. The term of a full judge is also ten years, and hence those who want to continue their judicial work have to apply for re-admission every ten years. The procedure of readmission is the same as the first admission. During their tenure as assistant and full judges, judges are frequently transferred among courts and gradually promoted to better positions. Decisions to transfer and promote judges are within the Supreme

Court's authority for judicial administration, and substantial decisions are made by the General Secretariat.

Exceptions to this judicial personnel management are Supreme Court justices and summary court judges. These, unlike ordinary judges, need not be qualified as lawyers (by completing the examination and the Institute apprenticeship). The Chief Justice of the Supreme Court is designated by the Cabinet and appointed by the emperor among those over the age of 40 and having sufficient legal knowledge. The appointment by the emperor is mere ritual. Other Supreme Court justices are appointed by the Cabinet. At the beginning of 2005, six Supreme Court justices were those selected from among lower court judges, four from among lawyers, and the remaining five were a former public prosecutor, a former diplomat, two former officials and a former professor of law. Most summary court judges are former court clerks whose careers award them qualification as summary court judges. There are about 800 summary court judges who are not qualified lawyers.

The total number of qualified lawyers – including judges, public prosecutors, and private practitioners – is about 25 000. The ratio of lawyers to the total population is about 1 to 5100, one of the lowest among developed countries. However, many quasi-lawyers must also be considered, especially when adopting a functionalist approach to comparative law. There are about 5700 patent attorneys (*benrishi*), who advise on certain intellectual property matters, and have been granted joint rights of representation (with *bengoshi*) in lawsuits concerning certain intellectual property cases since 2003. There are about 17 500 judicial scriveners (*shiho shoshi*), whose main functions are drafting legal documents and filing them with courts, public prosecutors and the Ministry of Justice's Legal Affairs Bureaus which manage the registration of persons' legal status and title to real estate on behalf of those who are not represented by lawyers. Since 2003, judicial scriveners also have been granted right to represent litigants in summary court proceedings. There are also about 37 000 administrative scriveners (*gyosei shoshi*), who draft legal documents to be submitted to organs belonging to the executive branch on behalf of their clients. There are about 68 000 tax attorneys (*zeirishi*), whose primary roles are the calculation of taxes and drafting of documents to be filed with the tax offices on behalf of their clients. Since 2002, tax attorneys may also assist their clients in lawsuits concerning tax matters provided their clients are represented by lawyers. About 550 public notaries (*koshonin*), appointed from retired public prosecutors and the like, authenticate and preserve certain legal documents, such as contracts, which may gain additional force in civil litigation. Some notaries are also involved in ADR.

In addition to these and other quasi-lawyers, many people who hold a Bachelor of Laws but are not qualified lawyers are employed by

governmental authorities and private corporations, where they are engaged in law-related jobs such as examining legal documents submitted by citizens or drafting contracts. Corporate legal department staff have steadily increased in numbers and sophistication since the 1970s.

6 The role, and rule, of law

It has long been said that Japan is a country where the law plays a very limited role. It is true that most disputes are settled either by negotiation between parties or through mediation services provided by courts or other ADR procedures, before developing into lawsuits. However, as mentioned at the outset, theories differ in explaining this behaviour, with varying implications.

As well as courts being infrequently utilized to resolve private disputes, the law plays a very limited role in another sense: the judiciary is very reluctant to exercise its constitutionally vested power to revoke the decisions of other branches of the government. Statutes enacted by the Diet are hardly ever found unconstitutional, and cases in which decisions of organs belonging to the executive branch are nullified are also rare. Almost all politically important decisions are virtually immune from judicial scrutiny, and hence the judiciary has been nearly a non-entity for most of Japan's political history. Again, explanations and appraisals differ concerning this phenomenon. A 'rationalist' theory argues that it results from the long reign of the LDP, which led not only bureaucrats within the executive branch but also the judiciary to comply with the party's clear policy preferences in politically important situations, even without direct interference by the party (Ramseyer and Rasmusen, 2003). Econometric evidence is presented to show that judges that go against such preferences in 'politically charged cases' (like the constitutionality of the SDF) tended to be assigned by the Supreme Court to less prestigious postings. However, some contest that conservatism is instead related primarily to Japan's civil law tradition regarding judicial administration (Haley, 1998). Further, data analysis has not been forthcoming regarding more common types of cases, also arguably politically charged, such as product liability claims against manufacturers. It can also be difficult to distinguish clear policy preferences for the LDP, since its various factions have tried to appeal to a broad array of voters. Anyway, this theory emphasizes that the Japanese judiciary got the (conservative) message around 1970, when the Supreme Court refused to promote a left-wing assistant judge and warned others that it would look unfavourably on a left-wing organization which many young judges had joined (including Chief Justice Akira Machida, incumbent in 2006). Accordingly, it should also concede that the judiciary would have received a different (more liberal) message from the LDP's fall from power in 1993,

and the related array of political, socioeconomic and legal changes. Hence, although the data analysis presented may support the more general proposition that actors engaged with Japan's legal system act in their rational self-interest, rather than just out of cultural conditioning, it seems risky to rely on this to predict what general attitudes and roles Japan's judiciary will adopt in the foreseeable future.

More generally, law has begun playing a more visible role in political and socioeconomic ordering in Japan. The globalization of the economy and the society weakens the influence of cultural traditions, and accelerating deregulation makes bureaucratic management of disputes difficult to maintain. In addition, there are pressures from foreign countries to make the Japanese legal system meet global standards, which have always held an attraction for law reformers in Japan anyway. Some Japanese corporations and their main peak associations are also demanding a more usable legal system, to protect themselves, develop new business and perhaps also to gain an edge over less legally sophisticated competitors. Citizens' groups and others have jumped on this bandwagon too.

In response to all these pressures, the Diet enacted the Law concerning the Establishment of the Judicial Reform Council in 1999, and the Council recommended major reforms in 2001. The Prime Minister then established an Office for the Promotion for Judicial Reform, within the new Cabinet Office, and the former generated many legislative reforms before its term expired in late 2004. Many outcomes have been noted above, centring on speeding up and improving court proceedings, expanding ADR and the legal profession, ameliorating legal education and promoting more citizen participation in the justice system. In addition, the Comprehensive Legal Support Act was enacted in 2004, creating a new independent agency (the Japan Judicial Support Centre) from 2006. This agency manages legal aid for civil cases and court-appointed lawyers for criminal cases. Instead of suspects only being entitled to request court-appointed lawyers after they are prosecuted, court-appointed lawyers are to be available promptly after arrest for those who are suspected of certain serious crimes. Legal aid for civil cases was also expanded.

If all these reforms find traction and the capacity of the legal system is really strengthened, people and corporations will become more willing to use the legal system. The more the legal system is utilized, the more the legal system will gain in prestige. (Already, there is evidence that graduates from elite law faculties are forsaking careers in the top ministries, to enter private practice: Milhaupt and West, 2004.) Ultimately, backed by more prestige, the judiciary should become more active in intervening in politics, even without frequent changes in ruling parties or coalitions, and private disputes should also be resolved more obviously in the light of the law.

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34 Legal culture*

David Nelken

The term 'legal culture' can be used in a variety of ways. Some of these are somewhat ill-defined, as when it is used as a rough equivalent to 'legal system' (Varga, 1992; Gessner, Hoeland and Varga, 1996; Bell, 2002); others are over-defined, as when it is limited to the techniques of exposition and interpretation employed by jurists and other legal actors (Rebuffa and Blankenburg, 1993). Those interested in the relationship between law and culture may wish to study law as a cultural artefact (Kahn, 1999), examine the way it becomes present in everyday life and experience, or through the media (Sarat and Kearns, 1993, 1998) or consider the role of law in accommodating cultural defences or protecting cultural treasures (Cotterrell, 2004).

Both 'law' and 'culture' are also words whose interpretation and definition have illocutionary effects ('this is the law', 'that behaviour is inconsistent with our culture'). The term 'legal culture' may itself be used by judges, or others, in the course of making claims about what is or is not consonant with a given body of law, practices or ideals. This use, as much prescriptive as descriptive, or prescriptive through being descriptive, can 'make' the facts it purports to describe or explain. Or scholars may use the term to capture what these legal actors are trying to do (Webber, 2004). Some uses of the term overlap with the notion of the 'culture of legality', the nearest, though not perfect equivalent, to which in English is 'the rule of law'. This meaning is particularly common in those jurisdictions, or parts of jurisdictions (e.g. in the former Soviet union, Latin America, or the south of Italy), where state rules are systematically avoided or evaded. The point of talking of 'legal culture' in such cases is to point to the normative goal of getting 'legality' into the culture of everyday social and political life and so reorienting the behaviour of such populations towards (state) law.

1 Legal culture in the sociology of law

Although these other meanings cannot be ignored, in this entry we shall be concerned mainly with legal culture as a 'term of art' developed by sociologists of law with an interest in explaining patterns of legally related behaviour. The legal sociologist Lawrence Friedman introduced the concept in

* See also: European Civil Code; Family law; Legal transplants.

the late 1960s, modelling it on the idea of political culture with its focus on inquiries into voting patterns and types of political system. For him legal culture is 'what people think about law, lawyers and the legal order, it means ideas, attitudes, opinions and expectations with regard to the legal system' (Friedman, 2006). Friedman distinguishes 'internal' legal culture, which refers to the role in the law of legal professionals, from 'external' legal culture which he uses to refer especially to those individuals or groups who bring pressure to bear on the law to produce social change. He sees legal culture as a cause of 'legal dynamics', though, somewhat confusingly, he also uses it to describe the results of such causes, writing for example, about the traits of a variety of large aggregates such as American culture, Latin American legal culture, modern legal culture and even global legal culture. More recently, other writers from the USA Law and Society movement, such as Susan Silbey, have taken up Friedman's interest in popular attitudes to law though they prefer to talk of legal consciousness rather than legal culture (Silbey, 2001, Silbey and Ewick, 1998).

Some authors draw a contrast, not unrelated to Friedman's distinction, between the factors conditioning the 'supply side' of law as embodied in the activities of legal and paralegal institutions, and the 'demand' side representing social patterns of use of legal institutions. In what he calls a sort of 'natural experiment', Erhard Blankenburg (1997) asks why Germany has one of the highest litigation rates in Europe and Holland one of the lowest when these countries are socially and culturally so similar and economically interdependent. His answer, carefully documented with respect to different types of legal controversy, is that in Holland there are a series of 'infrastructural' alternatives to litigation. This is said to demonstrate the determinant role played by the 'supply side' even where the 'demand' for law is assumed to be similar. But any clear-cut contrast between supply and demand is exaggerated. Are lawyers' strategies one or the other? Demand is shaped by supply, and vice versa. Assumptions of 'functional equivalence' across cultures are always questionable; what counts as an alternative or 'supplement' is itself culturally contingent. In another society (including Germany) the alternatives that Blankenburg uses to explain the low rate of litigation in Holland could easily lead to still greater litigation (Nelken, 1997).

2 Criticisms of legal culture

Legal culture is a much discussed term. Debates surrounding it can be of (at least) three types. The first contests the truth of a given claim about legal culture in general, or about a given legal culture. Is it 'structures' (courts, lawyers and alternative methods of dealing with disputes) or 'attitudes' (expectations and values) that are most important in explaining when

people turn to law? Is Japan really a good example of a society which makes little use of law (Feldman, 1997, 2001)? The second type of argument has more to do with how best to define legal culture. My own definition is broad. 'Legal culture, in its most general sense, is one way of describing relatively stable patterns of legally oriented social behaviour and attitudes. The identifying elements of legal culture range from facts about institutions such as the number and role of lawyers or the ways judges are appointed and controlled, to various forms of behaviour such as litigation or prison rates, and, at the other extreme, more nebulous aspects of ideas, values, aspirations and mentalities. Like culture itself, legal culture is about who we are not just what we do' (Nelken, 2004, p. 1). But if we include too much there is nothing left to do the explaining. So while some scholars include legal rules ('law in the books') in their definition, others do not, some limit legal culture to attitudes, others include behaviour; some counterpose structure to culture, others include both; some assume that only relatively 'enduring' attitudes or behaviour count as culture, others disagree, etc. Only if (more or less) the same meaning is ascribed to the term can it be possible to have empirically testable disagreements about features of the social world.

The third type of debate involves criticisms of the use of legal culture as such, however it be defined. Many scholars see the concept as so unsatisfactory that they propose to replace it with other terms, such as legal ideology (Cotterrell, 1997), law in action (Bruinsma, 2000) or legal tradition (Glenn, 2004). Those who are most interested in what shapes the internal culture of legal professionals tend to be attracted by notions such as legal mentalities, legal epistemes or legal formants. Those who want to emphasize the contrasts between the organization and the effects of legal institutions in different places prefer to talk of legal fields, legal style, regulatory style or even 'path dependency'. And, insofar as the underlying issue is what (if anything) holds a legal and social system together, a challenge to the whole 'law and society' paradigm comes from autopoiesis theory, which has its own approach to the reason why legal communications are connected to the larger social system and the other differentiated subsystems. These alternatives, however, have their own drawbacks, may not necessarily be in competition, and do not necessarily capture all that legal culture does (Nelken, 2006).

The most radical criticisms take aim at the word 'culture', citing contemporary anthropological understandings that envision

a far more fluid, contested, and changing set of values and practices than that provided by the idea of culture as tradition. Culture is the product of historical influences rather than evolutionary change. Its boundaries are fluid, meanings are contested, and meaning is produced by institutional arrangements and

political economy. Culture is marked by hybridity and creolization rather than uniformity or consistency. Local systems are analyzed in the context of national and transnational processes and are understood as the result of particular historical trajectories' (Merry, 2003).

Important as it is to avoid reifying culture or legal culture as something static, isolated and determining (Nelken, 1995), we should also note that the attack here is on a certain idea of culture, not on the idea of culture itself.

3 Using legal culture

The promise of the concept of legal culture is that it can help make comparisons of legal systems more sociologically meaningful by alerting us to the way aspects of law are themselves embedded in larger frameworks of social structure and culture that constitute and reveal the place of law in society. These may concern the extent to which law is party or state-directed (bottom up or top down), the role and importance of the judiciary, or the nature of legal education and legal training. They may concern ideas of what is meant by 'law' (and what law is 'for'), of where and how it is to be found (types of legal reasoning, the role of case law and precedent, of general clauses as compared to detailed drafting, of the place of law and fact). Legal culture can be discerned in different approaches to regulation, administration and dispute resolution. There may be important contrasts in the degree to which given controversies are subject to law, the role of other expertises, the part played by 'alternatives' to law, including not only arbitration and mediation but also the many 'infrastructural' ways of discouraging or resolving disputes (Blankenburg, 1997). Attention must also be given to the role of other religious or ethical norms and the ambit of the informal. Accompanying and concretizing such differences, explaining and attempting to justify them, there are likely to be contrasting attitudes to the role of law, formal and substantive ideas of legitimacy, or the need for public participation.

Care is needed in relating legal culture to larger aspects of culture and social structure. For different purposes, or in line with competing approaches to social theory, legal culture can be seen as manifested through institutional behaviour, or as a factor shaping and shaped by differences in individual legal consciousness, as a pattern of ideas which lie behind behaviour, or as another name for politico-legal discourse itself. Sometimes legal culture is examined independently from political culture, at other times it is identified as an inseparable aspect of political culture. It may be sought in 'high culture' and 'low culture'. When treated as constitutive of cultural consciousness generally this may be examined through structured interviews about the sense of justice (Hamilton and Sanders, 1992), contextualized as part of everyday narratives, as in the work of the

Amherst school of sociolegal scholars, or distilled from the ideology behind legal doctrine, as in the writings of American critical legal scholars.

Such diversity in ways of thinking about how to draw the line between legal culture and other phenomena is less likely to be unproductive once we recognize that it may also reflect differences on the ground. For example, in many societies there is a wide gulf between legal culture and general culture, as where the criminal law purports to maintain principles of impersonal equality before the law in societies where clientilistic and other particularistic practices are widespread. There is need for more attention to be given to the way writing about law assumes and mobilizes a (local) vision of legal culture even (or even especially) where the problem of legal culture is left unexplicated rather than being squarely addressed. It forces us to confront the problem of reflexivity – the way framing problems for discussion can reproduce rather than question taken-for-granted assumptions about our own legal (and academic) cultures and our local visions of the role and the rule of law.

4 Researching legal culture

A wide variety of data may be relevant to building up descriptions and explanations of legal culture. In line with the different methodologies that compete in the social sciences there is an important divide between those scholars who look for ‘indicators’ of legal culture in the activity of courts and other legal institutions, and those who insist instead on the need to interpret cultural meaning. The first approach uses culture (or deliberately simplified aspects of it) to explain variation in matters such as levels and types of litigation or social control. It often seeks a sort of sociolegal Esperanto which abstracts from the language used by members of different cultures, preferring for example to talk of ‘decision making’ rather than ‘discretion’. For those following the first approach an ever-present danger is that of tautology, using culture both as what is to be explained and as the variable which does the explaining (Cotterrell, 1997). It is therefore vital to specify when legal culture is cause or outcome even if the term may reasonably be used in both senses (Nelken, 2006).

The rival strategy seeks to use legally related behaviour by institutions or individuals as an ‘index’ of culture. Often its methodology aims at providing ‘thick’ descriptions of law as ‘local knowledge’ (Geertz, 1973) which are concerned precisely with grasping linguistic nuance and cultural packaging. It tries to grapple with the problems this poses of faithfully translating another system’s ideas of fairness and justice and making proper sense of its web of meanings. Thus legally relevant concepts are seen to both reflect and constitute culture; as in the changes undergone by the meaning of ‘contract’ in a society where the individual is seen as

necessarily embodied in wider relationships (Winn, 1994), or the way that the Japanese ideogram for the new concept of 'rights' came to settle on a sign associated with 'self-interest' rather than morality (Feldman, 1997). The interpretative approach is less suited for studying the relationships between legal culture and questions of power, conflict and social structure. So some combination of both approaches is needed (Nelken, 1994).

When it comes to carrying out research we should not confine this to sampling the views and behaviour of politicians, legal officials, legal and other professionals, and legal scholars. We should also be interested in the attitudes and actions of those outside legal institutions, both the powerful and the powerless. But though we will always want to know what the natives think it does not follow that we actually want to think like a native. The ability to look at a culture with new eyes is the great strength of the outside scholar. But, on the other hand, the observer's questions may often have more relevance to the country of origin than that under observation. Similarities and differences often come to life for an observer when they are exemplified by 'significant absences' (Lacey and Zedner, 1995). We should interrogate the way our own cultural assumptions shape the questions we ask and the answers we find convincing.

This question of 'starting points' (Nelken, 2000) is often left begging because of the implicit collusion between the writer and her audience which privileges what the audience wants to know as if it is what it should want to know. What therefore tends to be highlighted are those aspects of the society under investigation which seem especially relevant in confirming or disconfirming previous audience expectations. One result of this is that it can often be instructive to read comparative work, whatever its purported aims, not for what it says about the country or culture being observed, but for what it reveals about the cultural viewpoint of the observer and her home audience (as if we were looking through the other end of the telescope). It is easy for us to see that what an Italian scholar finds strange and problematic about legal culture in the USA is likely to tell us at least as much about Italian assumptions about the role and rule of law as it is does about how things are organized in the USA (Ferrarese, 1997). We are less quick to appreciate that the same is true in reverse. Much of the voluminous American research on the specificity of Japanese criminal and civil justice, for instance can be criticized for attempting to explain as distinctive features of Japanese legal culture matters which should rather be attributed to the continental European models which shaped and still shape legal institutions in Japan.

In practice, cultures, whether mediated by scholars or by others, often work reflexively, defining themselves in part through and against encounters with other legal cultures (or more specifically their 'idea' of other cultures). Faced with legal developments to protect copyright on the continent,

scholars in Britain in the 19th century reinvented its law so that it became possible to claim that a specific British approach had always existed (Sherman, 1997). In the 1980s the appearance of league tables of relative levels of incarceration may have induced Finland to move towards the norm by reducing its prison population and Holland to do the opposite. Whether East European cultures can come to resemble western legal cultures, assuming this to be desirable, depends on whether their citizens believe they can escape the patterns inherited from the past (Krygier, 1997). Conversely, for some scholars rooted in Chinese traditions, what others describe as the welcome spread of 'the rule of law' is criticized as the marginalization of the importance of 'qing', or the appeal to others' feelings, versus 'li' or reasonableness (Man and Wai, 1999).

5 National legal cultures and beyond

The search to understand and explain legal culture at the level of the nation state (as in the 'Japanese approach to law', 'Dutch legal culture', 'French criminal justice' etc.) continues to be an important ambition of comparative law and comparative sociology of law. It is undeniable that legal culture is tied in many ways to its own past, and that national authorities deliberately use law to impose institutional and procedural similarities. Differences between legal cultures may also mobilize or reflect wider social and cultural differences that roughly coincide with national political boundaries. But national legal cultures do not remain the same over time and they are affected by a variety of processes of borrowing, imitation and imposition, as well as their insertion in larger bilateral or multilateral structures and networks. On the one hand, we are told, recent developments in opening up the world to trade and communication means that many people increasingly have the sense of living in an interdependent global system marked by borrowing and lending across porous cultural boundaries which are saturated with inequality, power and domination. Thus the purported uniformity, coherence or stability of given national cultures will often be no more than an ideological projection or rhetorical device (Coombe, 1998). On the other hand, 'increasing homogenisation of social and cultural forms seems to be accompanied by a proliferation of claims to specific authenticities and identities' (Strathern, 1995, p. 3).

At the level below that of the nation state it may be fruitful to study the culture of the local courthouse, of different social and interest groups and professional associations, as well as the roles and relationships of individuals in engaging or avoiding disputes. Law will have a different, and changing, role and significance in different social arenas and settings, and for different groups and classes. Legal culture is not necessarily uniform (either organizationally and meaningfully) across different branches of law. The

boundaries between units of legal culture(s) are fluid and they intersect at the macro and micro level, in ways that are often far from harmonious. It is also increasingly important to explore so-called 'third cultures' of international trade, communication networks and other transnational processes (Dezalay and Garth, 1996; Snyder, 1999, Teubner, 1997, 1998). Thus, rather than limiting ourselves to national legal cultures, both a narrower and larger focus will often be more appropriate. But this untidiness, as well as the attempts to conceal or resolve it, are all part of the phenomenon of living legal cultures rather than evidence that the concept is otiose.

The current so-called 'globalization' of law is a complex process which is likely to produce increasing social and economic differentiation as much as harmony (Santos, 1995; Nelken, 2001; Heyderbrand, 2001). Assumptions of necessary convergence (Friedman, 1994) probably underestimate the continuing importance of culture and resistance. But one of the most important tasks of the student of legal culture at the present time is to try and capture how far globalization represents the attempted imposition of one particular legal culture on other societies. Importing countries are offered both the Anglo-American model whose prestige is spread by trade and the media, and national versions of the continental legal system embodied in ready-packaged codes.

The Anglo-American model is seen to be characterized by its emphasis on the care taken to link law and economics (rather than law and the state), procedures which rely on orality, party initiative, negotiation inside law or more broad cultural features such as individualism and the search for 'total justice'. Only some of these elements are actually on offer in legal transfers and much of this model does not accurately describe how the law operates at home (much of the American legal and regulatory system relies on inquisitorial methods). Much of what was represented by the 'rule of law' itself, as a way of providing certainty and keeping the state within bounds, seems increasingly outdated for the regulation of international commercial exchange by computer between multinationals more powerful than many of the governments of the countries in which they trade (Scheuerman, 2004). More than any particular feature of legal culture, however, what does seem to be spreading is the common law ideology of 'pragmatic legal instrumentalism', the very idea that law is something which does or should 'work', together with the claim that this is something which can or should be assessed in ways which are separable from wider political debates.

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35 Legal families*

Jaakko Husa

1 Classifying the legal systems of the world

Even though there is no clear-cut definition of ‘legal family’, it may be regarded as a conceptual and methodological device of the comparative lawyer, not sociologist of law or legal theoretician, but lawyer. It has been suggested that, as an academic field, comparative law may be divided into two main areas of research, albeit this division is flexible as to its nature. There is macro-comparative law and micro-comparative law. Customarily the micro-comparison deals with specific legal rules, cases and institutions that are conceived from a point of view of actual problems or particular legal conflicts of interests, whereas the macro-comparison normally focuses on larger-scale themes and questions. Systematization, grouping and classification of the legal systems of the world lie at the heart of macro-comparative law: it deals with comparison of entire legal systems, not specific small-scale problems of a legal nature (Zweigert and Kötz, 1998; Örüçü, 2004b).

Both main areas are seeking to place comparable elements of two or more legal systems up against each other in order to learn about the relevant differences and similarities between them. The legal families approach, specifically, and macro-comparative law, in general, are seeking to answer but one basic question: can the great number of legal systems of the world be divided into few large entities, i.e., families, groups, spheres or equivalent? In the context of comparative law, legal systems have earlier been understood mainly as formal legal systems of nation-states; however, today the term is used in a broader manner so that it contains not only rules, institutions, case law and doctrines but even some elements of social relations, historical factors, ideologies, culture and tradition. Even so, the study of comparative legal cultures differs from the study of comparative law because they focus on different things: on legal culture as a whole and specifically on law as a phenomenon embedded within the legal culture (Varga, 1992).

Comparative law specifically and comparative legal studies in general have sought for decades to reach a macro-level grasp of the world panorama of legal systems. Comparative law is and has always been fascinated by the idea of thinking and conceiving law as a representative of larger category of being. The epistemic need to draw a global map of law has been the

* See also: Common law; Methodology of comparative law; Mixed jurisdictions.

undeniable motivational force; there is even today an urge to rise above the micro-level complexities and a desire to try to conceive law as a global phenomenon. For some comparative lawyers to think globally equals to stress the commonalities, i.e. that what is similar (integrative comparison), whereas, to others this means to appreciate and to underline the differences (contrastive comparison) between legal systems (Schlesinger, 1995).

What appears clear is the fact that no specific classification or grouping attempt may be regarded as the correct one simply because all classifications and groupings are obliged, in a methodological sense, to look backwards and to build their system or taxonomy upon what was the situation when the data were gathered and what specific features were taken into account. So all groupings are of relative nature (Heiss, 2001). However, law is a living thing and it evolves and changes constantly, even while some culturally and traditionally deeply rooted basic features do change at a remarkably slow pace. In accord with the inescapable parameters of legal history, no specific systematization truly follows any logical pattern: they are bound to reflect the historically rooted law that is gradually taking new shapes and forms. Unfortunately, the standard way to structure the textbooks of comparative law does not follow this inevitable change very actively (Husa, 2004).

From the 1800s to the 21st century numerous deviating attempts have been made. However, at the same time, it has been admitted that it is virtually impossible to construct an ideal system of classification that would be even reasonably comparable to the taxonomies of those made by zoologists or botanists (Bogdan, 1994). The main difficulty for classification of legal families has been in finding a suitable criterion for division. Previously the classification attempts were by and large made on the basis of one or only a few criteria; however, the modern approach is to take into account several different criteria that contain many factors held to be relevant (Malmström, 1969). Even though there are some differences, the elements that are taken into account are very much of a similar type: history, ideology, legal style, legal argumentation and thinking, codification level of law, judicial reasoning, structural system of law, structure of court system, spirit and mentality of legal actors, training of lawyers, law's relation to religion and to politics, the economical basis of law, the background philosophy of legal thinking, the doctrine of sources of the law, the empirical effectiveness of formal legal rules, the role of tradition in law, paradigmatic societal beliefs about law, etc. (e.g., Sarfatti, 1933; Arminjon *et al.*, 1951; Martinez-Paz, 1960; Rheinstein, 1987; Eörsi, 1979; David, 1982; Merryman, 1985; de Cruz, 1995; Vanderlinden, 1995; Gambaro and Sacco, 1996).

In the 2000s, there are many competing concepts of 'legal family' within the field of comparative law and comparative legal studies. Especially the

concepts of legal culture and legal tradition are challenging the legal families approach (Glenn, 2000). However, there are some who say that we should speak of (legal) cultural families instead of mere legal families because it is said that the notion of legal family conceives law in isolation from the culture. Further, also the concept of sphere of law and the concept of legal formants have been proposed (Constantinesco, 1981; van Hoecke and Warrington, 1998).

Be that as it may, the notion of family as such has some advantages. It enables us to extend the metaphor to talk about family members, such as children and parents, cousins, distant relatives etc. We may even speak of immediate or distant relatives and, thus, we can talk about the legal genetics, the historical relations between different legal systems. The notion of legal family, in this sense, contains the idea of historical relationships between different systems of law. Some of the scholars have even gone so far as to explain that comparative law is but the study of historical relations between legal systems (Watson, 1993). Nonetheless, it is an utterly complex issue whether there are parent systems and whether these systems should be given an epistemic priority over others. The legal families approach has, indeed, been accused of being overtly western and in this sense basically biased. Also the very methodological capability of comparative law to genuinely understand culturally remote or culturally different systems has been questioned (Henry, 2004).

So the legal family approach is a historically determined macro-comparison, holding that there are some interrelations between systems; otherwise the whole attempt to compare entire systems would be futile. The legal families approach is also an innate part of the very language of law of today. For example, we are paradigmatically accustomed to speak of common law, Roman–German law, Asian law, mixed legal systems and religious law even without really thinking that we are using the conceptual devices constructed by comparative lawyers. It is right here that the actual strength of legal family tradition may be seen; even while there is justified and sound criticism it is hard to create better concepts that would fulfil the same function. On the bottom line there is a specific epistemic way to think about law: the legal systems or specific legal traditions grouped into families have something important in common even though there is undisputable diversity among them.

It should, however, be borne in mind that ‘legal family’ is not an exact empirical description of a group of legal systems, but an analytical structure which provides a rough first-step approach for more detailed comparative studies. As such, ‘legal family’ contains both empirical and analytical features. First and foremost, it is a broad epistemic matrix of macro-comparative law (Husa, 2001). In general, even those who regard

the legal family approach or the very concept of legal family with suspicion accept the general pedagogical value of it: it facilitates the study of foreign law and offers a general view on a system for a student who cannot learn the substantive contents of foreign system to a large extent and in depth (Bogdan, 1994).

2 Different classification attempts

As an outcome of the first international Congress of comparative law in Paris 1900, Esmein (1905) presented a classification based on multiple criteria. The division was based on history, geography and religion. However, he also took into account race as one dividing criterion. He came up with five different families of law, which were Roman, Germanic, Anglo-Saxon, Slavic and Islamic law. The laws of Asia and Africa were simply left out. This systematization does not strike us as completely outdated even today, more than 100 years later. It is easy to see that the basic elements of today's systems of legal families were already present by then. Even the passing of time has not really challenged the basic elements: Roman–German law, common law and the 'other' systems. However, the evolving EU law has caused some changes in classification attempts (e.g., de Cruz, 1995; Smits, 1998).

However, the earlier classifications were constructed in a very different kind of intellectual climate from those of today. Many of the classification criteria used then are sure to attract a very critical eye today. This does not concern only Esmein. As an example we may mention Sauser-Hall's (1913) infamous classification in which the grouping was based on the idea of dividing humanity into different races. From this parameter he came up with law of the Aryan or Indo-European people, Semitic, Mongolic (mainly China and Japan) and the law of barbarous people (i.e., mainly Africans and Melanesians). However, today this kind of classification based on obviously racist thinking is hardly regarded as valid macro-comparative law. As a criterion for classification the idea of a race is simply and irreversibly out of the question for modern comparative law as an academic exercise.

When we come closer to the world of modern comparative law we find the influential grouping attempt by Arminjon, Nolde and Wolff (1951). It was based firmly on private law. It took into account history, legal sources, legal technique, legal terms and concepts, and culture. Yet their attempt was perhaps further inspired by the criterion of language resulting in seven families. These were French, German, Scandinavian, English, Russian, Islamic and Hindu. Somewhat surprisingly, however, they left out the vast Sino-Tibetan language group. Their classification attempt does look quite modern in many ways. Most of their individual elements are taken into account even today, even while the change that has taken place in the world in general has quite obviously located their grouping in the history

of comparative law. Nonetheless, their grouping was the intellectual basis upon which the later widespread taxonomy by Zweigert and Kötz (1998) was constructed.

As a last representative of earlier classifications we may mention the one made by Schnitzer (1961) aiming to build a system that would reflect the legal history as well the previous classification attempts by others. He divided five basic groups of legal systems that were the law of the primitive people (in a broad meaning of the word), the law of the culture-people of the Mediterranean, Euro-American legal sphere, religious law containing Jewish, Christian and Islamic law, and the law of African-Asian people. He further refined this system so that the law of the Euro-American legal sphere was divided into a further four groups: Roman, German, Slavic and Anglo-American law. Within these subgroups he identified, for example, French, Italian, German, Nordic, Baltic, Soviet, Polish, Hungarian, US and English law. Schnitzer's tendency to stress culture has today many followers in comparative law, albeit in a different form. For example, the modern tendency to underline the importance of legal mentality and law-as-culture may be seen as an offspring of this sort of approach (Legrand, 1999).

There are two powerful and seemingly quite enduring modern groupings that have survived some changes and even challenge by the others. Their scholarly power has been multiplied by numerous editions and translations into other languages over the years. However, even these semi-paradigms were obliged to yield while facing the pressures of the 1990s. These are the classifications made by David and by Zweigert and Kötz. Even though their systems are the very base on which the comparative law has been built for the last 40 years, their position is anything but secure. In one sense, they are not considered to be accurate or satisfactory for present needs and yet their system and specific way of thinking is still with us. In this sense, they were and to some extent are even today of implicitly paradigmatic nature, even though they are contested by the critical theory of comparative law (Kennedy, 2003).

David (1982) is very famous for his influential *Grands Systèmes* approach, which is built upon the epistemic foundation of private law mainly of the western nation-states. He distinguished four great legal families: Roman-German, common law, Socialist law and philosophical or religious systems. In the last group he included Muslim law, Hindu law, law of the Far East and the law of Africa and Madagascar. However, David's last group was not actually a legal family because the systems allocated in it were quite independent of each other, in contrast to the systems within the other genuine legal families. The main criteria in classification were ideology and legal technique; nevertheless, the first criterion was of more importance. Also the Socialist law approach by Eörsi (1979) heavily stressed the importance of ideological factors, i.e., the basic economic

structure of a society, while classifying legal systems into different legal types according to their present state of development.

David gave a great role to the, now almost completely diminished, Socialist law. This is because in his thinking comparative law was a tool for finding certain common ground between the enemies of the Cold War; he wanted to find commonality on the area of law of the Socialist states and western states. David's system has been the most popular and its methodological effect is still evident even while Socialist law has collapsed. The taxonomy and approach of *Grands Systèmes* was long accepted as plausible by many, even though its main weaknesses were familiar (Esquirol, 2001). However, fresh editions and translations still keep coming.

After David, the place of orthodoxy in macro-comparative law has, in practice, been taken by the influential and widely spread system of legal families by Zweigert and Kötz (1998). The grouping made by them is not actually very different from that of Arminjon, Nolde and Wolff. They discern, now that Socialist law has collapsed, Romanist, Germanic, Nordic and common law families. Besides, they also recognize the law of the People's Republic of China, Japanese law, Islamic law and Hindu law. Their basic starting point is to commence from a group of criteria and not to lean on any single criterion. Their most important criterion is that of style: the comparatist must grasp the legal style of a system and use the distinctive features as a basis for classifying legal systems into groups. As with their immediate predecessors, the classification is made especially from the point of view of private law.

Within the style of a legal system there are multiple single factors to be taken into account. These are the historical development, distinctive mode of legal thinking, characteristic legal institutions, sources of law and ideology. In this sense their system is a combination of many of the features of earlier classification attempts. Their most important novelty was, already from the early German editions, the division between Roman and German law. Furthermore, Zweigert and Kötz even recognize the problem with hybrid systems that are difficult to place within any single family or group of law. Along lines similar to those of David they also said that their grouping served the function of introducing the great legal systems of the world. In a word, in a methodological and epistemological sense, they in fact coincide with David's *Grands Systèmes* approach. This applies also to the classification attempts made by Glendon, Gordon and Osakwe (1985) as well as to Gambaro and Sacco (1996).

3 Recent classifications and developments

Regardless of the critique by numerous scholars, there are even more novel attempts to classify and regroup the legal systems of the world. An

interesting attempt has been made by Mattei (1997). He saw that the ageing of the old classifications called for their replacement. He starts from legal theory and from the sociology of law by Max Weber. Mattei distinguishes three types of norms that affect the behaviour of mankind. The most important point is to look where the legal norms come from. He divides sources of law into three main groups: politics, law and philosophical or religious tradition. Mattei thinks that in each legal system there are many features; however, one of these may be seen as a dominating, i.e., hegemonic pattern of a single system.

The proposed classification or taxonomy consists of the rule of professional law, the rule of political law and the rule of traditional law. In the rule of professional law there are common law and Roman–German law, in which the fields of political and legal decision making are separated. Further, law is widely secularized. In the group of the rule of political law, law and legal processes are largely specified by political relationships. Here there are systems of the former Soviet Union and some Asian systems. In the rule of traditional law Mattei classifies those systems in which law and religion or some other philosophical–religious tradition is not separated from law. These are, for example, Islamic law countries, Hindu law, Asian and Confucian conceptions of law. The proposed taxonomy is developed in order to create a novel system that would have at least some explanatory and predictive function for comparative study of law.

Also the proposition by Vanderlinden (1995) is of interest. His private law-centred approach is quite similar to that of Mattei: it begins from straight criticism of old classifications, moves on to legal theory and finally stretches into a somewhat novel macro-classification attempt. He classifies the systems into five groups: customary law systems, doctrinal systems, jurisprudential systems, legislative systems and systems of revelation.

By customary law Vanderlinden does not mean an archaic or primitive system but refers to systems in which customs are determined by certain groups of society creating certain normative beliefs about what is legally obliged. Here there are, for example, the legal beliefs of Native Americans. Doctrinal systems are those rare systems that are derived from other legal systems, like Roman–Dutch in South-Africa and in Sri Lanka, in which the old doctrine of foreign origin is continued in some specific form. Jurisprudential systems are those that place the emphasis on the decision making of courts; those are the systems that have their historical origin in English law and legal thinking. Legislative systems are those that believe in the superiority of written codified law as the main source of law. Here we can find, basically, the Roman–German systems and their legal heritage which has foundations resting on the tradition of Roman law and *ius commune* culture. The systems of revelation are those systems that give a great role to

divine revelation, which then provides the general frame for law also. Here are to be found, for example, Islamic law, Hindu law and Biblical law.

4 Problems and prospects

The main problem of the legal families approach has been its cultural narrowness. This can be seen in the fact that the families are constructed from the point of view of western, i.e., Roman–German and common, law. The other systems, spheres or groups are positioned in a shallow class, shrinking them into mere appendices of comparative law. The whole project of grouping and classifying, as an academic venture, has been harshly criticized by some. This largely explains why the classifications have been so static, the parent systems are still here, with the exception that Socialist law has dropped out, and we have somehow returned intellectually to the era before the Soviet Union came into being. The current Europeanization process seems just to reinforce this development (Twining, 1999).

In accordance, macro-comparative law has been mostly intracultural, so that the compared systems have been quite close to each other, based on similar cultural–legal traditions operating under quite similar socio-economic and political conditions. The reality of culturally remote systems has remained vague and empirical knowledge has not been generated owing to the fact that comparative lawyers are not methodologically equipped to handle all that the venture of macro-comparative law would actually require. Cooperation with sociology of law, legal history, anthropology and cultural legal studies has not been forthcoming. This is one of the reasons why the legal families approach has not been able to respond fully to the challenge that legal culture, legal mentality and legal tradition approaches have presented to it (Gessner *et al.*, 1996).

The trademark focus on norms, institutions, cases and doctrines has left the actual legal practices of the other legal spheres or groups largely in the shadows when it concerns intercultural macro-comparisons. An example of this is the neglect of South East Asia by comparative law; to say that the law of that area is customary, authoritarian, Confucian or Islamic hardly captures the reality of law in that area (Harding, 2002). However, this criticism takes poorly into account the fact that comparative law has, besides study and research, an important pedagogical purpose. There is no doubt that even with their obvious shortcomings the legal families approach does add something to the schooling of new lawyers, so the criticism should not be too exaggerated. Besides, the mainstream is evidently aware of some of its inborn defects (Kötz, 1998).

The other clearly weak point of the legal families approach and its offspring is the concentration on private law. Comparative law in general and even specifically the macro-comparative law have for a long time

almost omitted such areas as constitutional law, administrative law and criminal law. It is quite telling that in the area of, now in growth around the globe, comparative public law even the very idea of constructing different large families or groups of law has been treated with some suspicion. Traditionally it was held that public law was so much political as to its nature so it really did not call rational comparative study of law. However, this situation is rapidly evolving and it will be of interest to see whether or not comparative study in this area will generate new kinds of public law legal families or are even these going to be conceived in the light of classical private law parenting paradigmatic families (Venter, 2000).

One of the latest developments within the legal families approaches has brought centre stage the so-called 'third legal family' thinking and idea of mixed legal systems. From the point of view of legal families, mixed legal systems or so-called 'hybrid systems' were long on the periphery (Örücü *et al.*, 1996). To maintain that legal systems are mixes of different elements may be a challenge to the legal families approach; however, it does not abandon it but instead continues the tradition. The idea of Palmer (2001) that the mixed jurisdictions of the world actually form a third major legal family alongside the common law and Roman–German law is an indication of this. To transfer the previously peripheral systems like South Africa, Quebec, Scotland, Puerto Rico, Philippines and Israel to the mainstream discussion is a novel epistemic move within the legal families approach.

It is likely that, even though the legal family approach continues to be a target of criticism, it is unlikely to be completely abandoned by comparative lawyers. There are even some fresh attempts to create a novel approach called the 'family trees' approach by Örücü (2004a). Within it, legal systems would be classified according to their parentage and constituent elements. The new grouping would also take into account the resulting blend in accordance with the mixed legal systems thinking. However, even the novel classification would lean on the idea of predominance. Whereas the old legal family classifications treated mixing of constituent elements of law with suspicion, the new approach regards all systems as mixed and overlapping. The idea is not to see any system as pure but to see some basic elements of law taking new shapes and forms. Örücü's main point is to try to deconstruct the conventionally labelled pattern of legal systems and to create reconstruction. Besides Örücü's, there are other attempts to renew the old tradition of legal families or legal spheres (e.g., Reyntjens, 1991; Heiss, 2001).

In conclusion, there are serious challenges and critiques to the legal families approach but also fresh attempts to reclassify and to regroup. Some change is to be expected. Nonetheless, in the macro-comparative law, only one thing remains: the constant need for further research and to attempt to

renew the old. Living law requires a living classification or, as Heraclitus once said, 'Everything flows, nothing stands still' (πάντα ρεῖ, οὐδέν μένει).

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36 Legal history and comparative law

Eltjo Schrage and Viola Heutger

‘Pour se disputer, il faut être d’accord.’ Already Plato was of the opinion that every discussion presupposes a mutual understanding of the main notions between the partners. Therefore it is stipulated that the concept of legal history be used in the sense of the Roman law tradition, which in itself is not only the local law of a small central Italian city-state of the early centuries of our era, but also the main source of medieval and later legal scholarship. The law school at Bologna became from the 12th century onwards the centre for the scholarly study of the Roman law texts. Those who wished to make progress in literate employment obtained their education there. The link between law and public administration which remained strong in the continental European tradition began there.

Although especially in the German tradition since the Historical School the curriculum has been divided into three parts, indigenous legal history, canon law and Roman law, it was specifically the latter branch of legal history which opened around the turn of the 19th and 20th century the gateway to the new discipline of comparative law.

Consequently we will discuss in this chapter firstly the notion of legal history in its narrow sense of the Roman law tradition. We will specifically devote attention to the relation between the educational pattern and legal practice, both on the continent and in Great Britain. We will see that the French Revolution, which entailed the codification movement of the 19th century, not only created the basis for comparative law, but also changed drastically the place of legal history in the law syllabus. Eventually the continuing changes in the position and place of the teaching of legal history gave rise to a quest for unification of the European legal systems.

We will discuss these three topics: the position of legal history (Roman law) at the universities, both on the continent and in Great Britain, firstly until the French Revolution; secondly its position after the French Revolution (and the continental codification movement) and the quest for comparative law (again: both on the continent and in Great Britain); and thirdly we will devote some attention to the new offspring of Roman law. We will then finish by giving an overview of useful websites on legal history.

1 The position of legal history on the continent and in Great Britain

A great many historians consider the Carolingian empire as the starting point for a common (European) civilization. It was then that the imperium occidentale separated itself from the (East-) Roman empire and went its own way. As Barraclough (1963, p. 25) remarks in a rather blunt way: 'it would be absurd to deny that civilization was essentially European. Feudal society thought and spoke in the same terms from the Atlantic coast of Donegal to the Pripet marshes'. In this connection he refers to a common code of chivalry, theology, philosophy and (Latin) language.

Barraclough could have mentioned another binding element: the study and application of Roman law. As a separate and principal discipline it started to be taught at the university of Bologna in the late 11th century, and from there it spread all over Europe in the next centuries. The *ius commune* in continental Europe is based on two great codifications. The first one was compiled, by order of the (East-)Roman emperor Justinian (527–65) from Roman law material. This codification of 533, which consists of three parts is called *Corpus Iuris Civilis* (Lokin and Zwolve, 1986, pp. 57–74). The other codification derives from the Roman Catholic Church, and is known by the title of *Corpus Iuris Canonici*. Its key part consists of the *Concordia discordantium canonum*, a compilation of canon (church) law which was accomplished by the monk Gratian in 1139.

The study of law taught as a separate discipline of learning at the universities in western Europe, to begin with Bologna, was modelled on the programme and method which had been developed by Irnerius (who died around 1125) and his successors. Important faculties of law were to be found at the universities founded from the 12th century onwards: in Italy, Bologna, Naples and Padua; in France, Orléans and Montpellier; in Spain, Salamanca and Valladolid; and in Portugal, Coïmbra; also in Cologne and Erfurt in Germany, and Louvain and Douai in the Southern Netherlands. It was self-evident that a lawyer in Europe had a European education, independent from his national background. Students moved from one country to another in order to listen to the most famous legal professors of their time. Until the 16th century, the faculties of law in Italy and France set the tone.

Law teaching resulted in summaries and commentaries on the *Corpus Iuris Civilis* and the *Corpus Iuris Canonici*, or parts of these. The high point in the secular part of the tradition is the *Glossa Ordinaria* (a 'gloss' meant originally an explanation of a word or term) by Accursius (died 1263). This continuous commentary on all parts of the *Corpus Iuris Civilis* was used by all law faculties in Europe. After 1250, the Accursian Gloss itself became subject to scholarly interpretation. Consequently, the learned lawyers directed themselves to a more systematic exposition of the

rules and opinions contained in the *Corpus Iuris Civilis*. The next step in this development was the monographic treaties. With this approach the so-called ‘commentators’ (1250–1500) developed a comprehensive system of concepts and methods, which could not only be used for the interpretation of Roman law texts, but also could be employed in legal practice, which, as we have seen, also had to apply local, customary law (Van den Bergh, 1980, p. 22).

This new approach left more room for other sources of law (statute law, customary law), was more selective in its use of the texts handed over in the *Corpus Iuris Civilis* and went hand in hand with a gradually changing concept of *ius commune*. In the view of the glossators Roman law had a universal, absolute application: Roman law was, since the days of Justinian’s *Corpus Iuris Civilis*, the emperor’s law and the German emperor was considered to be the genuine successor to Justinian. This last point needs some elucidation. The fact is, the German kings had themselves, from 982 onwards, crowned by the Roman pope as Roman emperor. In the same way as Charlemagne two centuries earlier had done, Otto III (996–1002) declared himself for a renovation of the Roman empire (*renovatio imperii Romani*) (Schramm, 1962, pp. 116–18). In particular, the emperors Frederick I (1152–90) and Frederick II (1215–50) of the house of Hohenstaufen demonstrated a very lofty, i.e., a sacral and missionary, conception of their rulership. They viewed themselves as successors to the Roman emperors, notably Constantine, Justinian and Valentinian, whose laws they venerated as divine oracles (as quoted by Koschaker, 1953, p. 40, n.3). As such they thought themselves fully qualified to incorporate their own laws as supplements to the *Corpus Iuris Civilis*.

As said, to the glossators Roman law was imperial law and therefore *ius commune*, whereas other sources of non-Roman law (mainly statute law) should be considered as *ius singulare*, i.e., should only be applied in those particular cases where Roman law did not provide a solution. However, this point of view did not work in practice; not only because Roman law was at that time ‘new’ law, but also because the emperor’s pretensions and power politics were not appreciated by other parties, such as the booming cities in Northern Italy, or the pope. For this reason the above-mentioned approach by the commentators to Roman law, based as it was on texts from the *Corpus Iuris Civilis* and from canon, feudal and statute law, fitted more easily in practice. From the 14th century on, the prevailing rule was, that Roman law, as *ius commune*, applied only as subsidiary law (*ibid.*, pp. 87–90).

Moulded by the same study material, from the 12th century onwards a ‘class’ of jurists grew up in Europe, first in the Mediterranean countries, later on also in the eastern and northern parts of Europe (in Poland and Hungary there existed as early as the 14th century a university). The fact

that the universities were founded at different times and that their standing differed greatly, led to a considerable academic wanderlust and thus to, what we should call today, an internationalization of education. Having read Roman or canon law, or both, the learned jurists put their knowledge into practice. Law, like theology and philosophy, had a market value. Academically trained jurists became overwhelmingly occupied in administrative work: in chancelleries, councils, courts of law, in the capacity of secretaries, judges etc. All this led to a gradual permeation of legislation and legal practice by a system of jurisprudence, developed by the (post-) glossators on the basis of the *Corpus Iuris Civilis*. This development has been called (not quite correctly) the reception of Roman law.

Based on the *Corpus Iuris Civilis* and the *Corpus Iuris Canonici*, the *ius commune* has been in force in present-day Italy, Spain, Portugal, France, Belgium, the Netherlands, Germany, Poland, Hungary, Scotland and – to a lesser degree – in Scandinavia. In Russia and England, the *ius commune* was applied less or even not at all. Russia was not influenced by the renaissance of the 12th century, the revival of ancient Roman culture. England, to begin with the Conquest, had already developed its own system of common law and legal education before Roman law started its advance over the continent. For that reason Roman law had a totally different meaning in Britain, where it was taught at the universities of Cambridge and Oxford. Roman law provided notably a technical vocabulary and a conceptual structure with which local customary law could be explicated. By so affecting the way in which law was conceived and expressed, Roman ideas profoundly influenced the writings of legal commentators and scholars in England. In Oxford and Cambridge, canon law and Roman law were taught, the latter only until Henry VIII abolished it as too closely linked to the Roman Catholic Church. The *Civilians*, as those scholars were called, the experts of Roman law, were never called to a more than marginal role in the English courts, at best in those rare courts which applied Roman law, such as the Court of Admiralty. They certainly were never called to hear cases concerning the property of land, the main assets of the ruling class in England and therefore fundamental to the common law. Initially common law was not taught at the universities. Only in the course of the 18th century were some thoughts devoted to its feasibility. When Charles Viner died in 1756, he bequeathed to the university of Oxford an important sum in order to found a chair in English law. The first one to occupy this chair was Sir William Blackstone, who made use of his lectures to write his famous *Commentaries on the Laws of England*, the first scholarly commentary to the Common Law. But the existence of the Vinerian chair was certainly not a warrant for a change in the curriculum. Several successors to Blackstone considered the chair as a sinecure, a negligible side-effect of their professorial dignity. In

1882 (more than 125 years after its foundation) Dicey was called to the Vinerian chair and he put the significance of his chair under scrutiny once more in his inaugural address, under the meaningful title: 'Can English law be taught at the Universities?' He answered the question affirmatively (who would bite the hand that feeds him?), but it was not until the end of World War II that (if we may borrow the words of Lord Goff) the more modern development of the academic stage of legal education took place. Today it is undeniable that the university occupies itself with the modern English law and the sense of the old-fashioned 'better read when dead' rule is now under discussion. If we may once more borrow the words of Lord Goff, who once made the remark that scholarly writings may, even when the judge is of another opinion, deliver valuable contributions to the discussion: 'For jurists are pilgrims with us on the endless road of unattainable perfection; and we have it on the excellent authority of Geoffrey Chaucer that conversation among pilgrims can be most rewarding.'

2 A natural law

The position and authority of Roman law has not been left unchanged. Humanists, who formed in the first place a critical–philological movement, also submitted, from the end of the 15th century onwards (Angelo Poliziano, the famous Italian humanist who lived from 14 July 1454 until his death in Florence on 29 September 1494), the authoritative Roman law texts to a textual criticism. As a result many interpretations had to be revised. Humanist criticism led to the rediscovery of classical Roman law, which in the eyes of the humanists had been misformed by the Justinianean codification. In general, Roman law was historicized (Van den Bergh, 1980, pp. 31–9; Koschaker, 1953, pp. 105–13).

At the same time a new discipline of law, that of the law of nations, developed. Hugo Grotius set the pace with *De iure belli ac pacis* (1625). It was in particular the need for this new law of nations which called for a reflection on the systematics and the fundamentals of law, because Roman law could not provide the answers to the questions posed. The law of nations did lend itself to a new doctrine of law, i.e., natural law, which formed part of the broader movement of Rationalism.

Science and mathematics were the source of inspiration for natural law. Against positive law, based on authoritative texts and commentaries, an ideal, universal natural law was posed. From axioms grounded in the natural state of all men and peoples, increasingly concrete principles and rules were deduced, in a strict, mathematical way. It will be clear that this very approach did not allow the natural law jurists to follow the order of the *Corpus Iuris Civilis*. Besides Grotius, the most famous representatives of this school were Leibniz (1646–1716), Pufendorf (1632–94), Wolff

(1679–1754) and Domat (1625–96). From 1660 onwards special chairs in natural law were established, notably in Germany and Holland.

3 The road towards the great codifications

It is, notwithstanding much research, still an open question to what extent this natural law thinking really changed the application of positive law, *ius commune*, in concrete cases (Coing, 1985, pp. 74–5). Law had become a public affair, a subject for debate in the salons and coffee houses. Basic human rights were formulated in a variety of social contract theories (Van den Bergh, 1980, p. 45.). No longer were books about law merely published in Latin, but in the native languages too.

The manifold criticisms of the administration of justice and its sources of law led to enhanced appreciation of the legislation, or even codification. Codes were considered the panacea for all the evils which stuck to the old system of law. It was not only Roman law which was challenged. The most ferocious propagandist of legislation, Jeremy Bentham, rejected customary law as much as Roman law (and for that matter natural law too). So did Voltaire in France, or Schorer in the northern Netherlands. Consequently the position and prestige of Roman law had changed since the second half of the 17th century. Many people, jurists included, considered Roman law as a *corpus alienum*, a foreign transplant of remote origin. At the same time the significance of indigenous law (*ius patrium*) increased. In the Netherlands Frederik van der Marck (1719–1800) was still a rare bird as promotor of native law. In France, however, something like a national law, the *Droit commun de la France*, came into being, developed from the royal legislation, the customary law of Paris and Roman law jurisprudence. Special chairs in French law, founded by Colbert in 1679, stimulated the development of a national doctrine of law. In other European countries a similar favouring of native law could be discerned. In Spain, Roman law was even banished by royal order from the law courts and universities in 1713–1741 (Coing, 1985, pp. 80–82).

4 The great codifications themselves

The French example especially may serve as an illustration. Scholten, following the analysis by J. van Kan of the French efforts to codify, has made an important point. He said that, at least in France, the quest for codification was part of a political programme, since this endeavour played a part in the struggle for one state created by unification of the various provinces, which struggle initially took place between the king (later the central government of the revolution) and the provincial powers that tried to maintain their autonomy. Royal power and the increasing national consciousness of the French people were opposed to the particularistic law system of any

part of France and against the hopeless fragmentation of local customs. Codification implied the quest for unity. Of course, there were several other factors which played a part in this struggle. Within the framework of the quest for centralization of power the arrows of the revolution aimed at independent judicial decisions, which could not be considered to depend on the desires of the central authority. Such decisions were estimated to be arbitrary. A quotation of Mirabeau is striking:

Les nouveaux codes doivent être tels, que chaque citoyen puisse connaître les lois de son pays sans être obligé d'avoir recours à la funeste érudition des gens du palais qui . . . citent pour détruire la loi positive des actes de notoriété, des usages, des maximes, des jurisprudences, des règlements, des arrêts, l'opinion d'un commentateur, d'un Grec, d'un Romain, d'un Chinois, et qui de cette manière égarent et ruinent les clients.

Inherent to the quest for codification is the endeavour to create a complete, unitarian, well ordered law book that is easily accessible to the citizen. This endeavour goes hand in hand with an absolutistic and centralistic concept of the state. It was the Enlightenment which offered the theoretical framework, within which a new view about what the law should be could be developed. The primacy of the law given by the central authority was in this way confirmed.

More or less the same should be said about the codifications which, in the period we are dealing with, saw the light in the German countries, such as the *Codex Maximilianeus bavaricus civilis* (1756) (Gagner, 1974, pp. 40ff.), the *Allgemeines Landrecht für die Preußischen Staaten* (1794) (Wagner, 1974, p. 119) and the *Allgemeines Bürgerliches Gesetzbuch für die gesamten Deutschen Erbländer der Österreichischen Monarchie*, which was published in 1811 and came into force in 1812. It is, however, specifically a striking feature of the French Civil Code, which came into existence in 1803. This codification has become by far the most influential of all. The Iberian peninsula, Italy, Poland, Belgium and the Netherlands alike derived their own codification mainly from the French. From the time of this codification movement it was mainly the national statutes and the given law which ruled the judiciary, jurisprudence and juridical education. The primacy of the Roman law (in its form of the *ius commune*) seemed to have come to an end. Typical of this view is an often used quotation, ascribed to the French king of the Netherlands, Lodewijk Napoléon, who remarked when the *Wetboek Napoléon* ingerigt voor het Koninkrijk Holland came into force: 'The Roman law is and remains abolished.' It should be noted however, that the various national codifications contained much Roman law and even derived their systematic order from the Institutes. Only as late as 1900 did the German BGB follow a different pattern. A second

remark to be made in this context is that England escaped codification for the very simple reason that it never underwent the influence of the French Revolution and therefore never felt the need to depress its national legislation, as other nations did.

5 Comparative law

Although any of the above-mentioned codifications served in the first place nations' own interests, it remains true that they arranged and categorized the law as it was in force in that very country during that very period. A notable feature of the phenomenon of codification is that every codification in a way reorganizes the local variety of the widely spread *ius commune*. However, under the national codification a layer of common historically grown concepts, notions and regulations remained noticeable. Consequently, that scholars went to inquire what had remained the common core of the different, national codifications. In this way, as early as the 19th century, a new discipline came into being: comparative law. In 1900, the year of the World Exhibition, the first world congress on comparative law was held in Paris. At around that time Levi started in England to compare English commercial law with the trade laws of almost every country in the world (Zweigert and Kötz, 1998, p. 56).

It was not only scholarly curiosity about what had remained a constant factor in the different legal systems that founded this new branch of the law. A political motive came next. The different national lawgivers in western Europe in the 19th century saw themselves confronted by comparable challenges. The industrial revolution forced the legislative powers to reconsider the ordering of social economic life. This was the time when labour law came into existence; child protection measurements were introduced, the freedom of contract was rethought, commercial law, law of competition, of bills of exchange, of expropriation, of land lease, of mortgages, etc., were to be re-examined.

No national lawgiver could afford to encounter these problems without throwing a glance at the other side of the national frontiers. To their surprise the lawyers who did so discovered a great many similarities, parallel developments and problems they had in common with their neighbours. The *ius commune* turned out to contain a treasure of conceptual knowledge shared by the majority of lawyers, founded as it was in a common history. Roman law again rendered good services, since it offered to the legislator well tested tools to create new law. Labour law finds (at least partly) its original concepts in the Roman *locatio conductio operarum* and the *locatio conductio operis*; the concept of corporate businesses with limited liability (*Gesellschaft mit beschränkter Haftung*) goes back to the Roman *societas*; the concept of freedom of contract finds its origin in the

medieval interpretation of the titles of the *Corpus iuris civilis* on the stipulatio; etc.

Although there are certainly a great many divergences between the different national law systems, there remains a hard core of fundamental similarities in western Europe, as shown by the new discipline of comparative law in the 19th and early 20th century. In 1951, the European Coal and Steel Community (ECSC) was set up, with six members: Belgium, West Germany, Luxembourg, France, Italy and the Netherlands. The ECSC was such an achievement that these same six countries decided to go further and integrate other sectors of their economies. In 1957, they signed the Treaties of Rome, creating the European Atomic Energy Community (EURATOM) and the European Economic Community (EEC). The member states set about removing trade barriers between them and forming a 'common market'. Additionally, the Court of Justice of the European Communities was set up in 1952 and later on new legal instruments were introduced, called directives and regulations. Furthermore, new methods of integrating stakeholders and interested parties into the law-making process were launched. All lawyers of the member states are now asked on a regular basis to react to communications and research programmes of the European Commission. This consultation and discussion process also again raises the question of where to place legal history in the law-making process and whether there is a need for a European Civil Code.

6 Unification of community law: the swing of the pendulum?

Does this evolution imply a return to the European *ius commune* from before the French Revolution? Asking the question immediately prompts a negative answer. Before the French Revolution England had its own common law, which developed in many respects distinct from the continental *ius commune*. Nowadays the United Kingdom is a member of the EU. This question, however, deserves more attention. It might be true that, in a great many respects, local and national courts throughout the European Community will have to face the same common law of European origin as the courts in other member states, but the main source of this law is no longer the authority of the Roman emperor (and his successors) or the *auctoritas suadendi* of the *Corpus Iuris Civilis*. It might be considered to be typical of the modern European Community that the participating nations have transferred part of their sovereignty to the institutions of the Common Market, the Executive Commission, the Council of Ministers, the Council of Europe and the Court of the European Community. This entails problems of implementation of supranational rulings.

Coing and Zimmermann have suggested that there might be a sort of continuity between the *ius commune* that governed Europe before the

French Revolution and the 19th-century codification movement on the one hand and the common European law of today on the other. Although the sources of either are of a different origin, there is some truth in this suggestion.

Identity of concrete rules, however, cannot be the ultimate goal of the growing European collaboration. The concept of Europe used to have the connotation of a cultural entity: Kantorowicz spoke of the cultural Rome idea and the political background of many discussions concerning the extension of the EU with new member states lies exactly behind the question as to whether these states adhere to this cultural concept of Europe. Law is more than just detailed ruling. What is growing in Europe is a common core of concepts of law and justice. The Treaty of Rome concerning human rights provides a good example. The European community has to face a great many challenges. Of course detailed ruling is one of them; but there is more than an increasing resemblance in different branches of the law (e.g., the law of restitution, product liability, consumer protection or the liability in tort without fault). In the past the different European countries had the same fundamental principles in common as they will have to face for the future. Who else than the Roman lawyers will have formulated these principles? We quote Ulpian (Dig. 1,1,10):

Iustitia est constans et perpetua voluntas
ius suum cuique tribuendi. Iuris praecepta
sunt haec: honeste vivere, alterum non laedere,
suum cuique tribuere. (Justice is the constant and perpetual desire to attribute to
everybody his fair share. The fundamental rules of the law are these: live hon-
estly, do not harm others, and give everybody his fair share.)

7 Legal history as a teaching subject

Legal history is a very broad term for many different subjects. First of all there is a legal history behind all legal subjects taught at universities. Furthermore, it covers some thousands of years, from antiquity up to modern legal history in the post-codification environment, so it is quite difficult to determine a permanent definition of what is to be called legal history, because of its interdisciplinary character. Therefore it is understandable that each university formulates its own requisites as to what students have to know as legal history. This can be quite different throughout Europe. But it has to be said that legal history is not very Europeanized and normally is only taught as a course for first-year students or as an optional course. At an increasing number of universities legal history is integrated into the courses on private law and public law (Heutger, 2003). Nonetheless, there are many legal scholars against the approach of integrating legal history into subjects of law in force (Honsell, 2003).

8 European legal learning in history

Legal history as it is studied and taught at universities nowadays all over the world is inspired by the tradition of schools of legal scholars. Some hundreds of years ago, legal teachers, one can say, were historians as well as practising lawyers. They applied Roman legal texts as a *ius commune* (Schrage, 1996, p. 285). Nowadays we expect from our legal historians a knowledge of history of law as well as of modern law, only without the objective of applying ancient legal texts to modern legal problems.

9 The re-Europeanization of legal scholarship: from individual to collective movements

Nowadays, the Europeanization of legal scholarship has gained new impetus thanks to organized student exchanges. Today it is still an individual initiative to study abroad, but the whole organization and many of the necessary arrangements which are to be made in order to enable study abroad are organized by the respective universities all over Europe through programmes like Erasmus and Socrates (http://europa.eu.int/comm/education/index_en.html). So it is no longer a matter of depending on welfare and contacts to take the decision to study abroad.

10 Summer schools

Over recent decades it has become quite popular to give summer schools on various legal subjects. An increasing number of summer schools are dedicated to comparative law issues. This trend is slowly reaching the legal historian community. Some courses, held in Lüneburg, Salzburg and Vienna and at the Max Planck Institute for European Legal History, are a starting point for this global development. Looking at the programme of these summer schools it is obvious that, when the courses are not held at specific institutions dedicated to history of law, all other courses have opted for an integration of history of law into a comparative perspective.

11 The language of legal history and the language of comparative law

When students travelled throughout Europe in the 16th and 17th centuries the common language of students and professors was Latin. Latin has been the *lingua franca* of academic scholarship for centuries, including written dissertations. Recent decades have brought a decline in knowledge of the Latin knowledge. In Northern Europe almost no university requires its students to know Latin. That is different from Southern Europe, where Latin is still a basic requirement for studying law. The whole approach of the Erasmus/Socrates exchange programmes was based on the consent of teaching English classes besides the national language for incoming students. After some years of experience in student exchange a new trend

towards teaching in the national language can be ascertained. This tendency is especially to be noticed in courses on Roman Law held at Italian universities. On the other hand it is now more and more common to allow more than one language in international activities. Some summer schools are conducted in two or more languages.

12 The purists

As mentioned above, it is quite hard to determine exactly the whole spectrum of the discipline of legal history. Legal history is composed of different elements: Roman law, Antique law, national legal history and history of codifications. Additionally, canon law is partly a component of legal history as well as some common sources of the work of the glossators. In any case, Roman law has a strong position within the composition of legal history and is taught all over the world. It is also the part of legal history where we can find the greatest exchange of scholars. Roman lawyers do understand each other irrespective of different national backgrounds. They investigate the same Latin and Greek sources and they all deal with linguistic as well as legal interpretation.

In Southern Europe we can still find a more traditional way of teaching Roman law. Here it is absolutely not done to integrate Roman law into classes on private or public law, as happens in some northern countries. The pure deep research of the Roman law sources is in the south the starting point of every course on Roman law. Italy is also the only country where, in previous years, new teaching methods on Roman law were introduced in order to train young professionals. One is the *Corso di alta formazione in diritto romano* at the University La Sapienza in Rome and the other is the *Collegio di diritto romano* at the Institute for Advanced Study (IUSS) at the University of Pavia. Different from the trend in other countries where English is seen as the *lingua franca* or where more than one language is welcomed, both Italian universities have chosen to teach their internationally composed courses in Italian only. The interaction of law and language is very intensive in the field of Roman law. Therefore, in many of the recent translation projects of the *Corpus Iuris Civilis*, lawyers and philologists are working together.

13 Legal history as reflected in reviews and on the web

Nowadays, all main sources are readily available on the world wide web, and research institutions and reviews are easily accessible on the Internet. The links that follow may change in the future, but in general, by searching with www.google.com they can be traced as well. A selection of these sources is added to the list of references.

14 Legal history and comparative law: different or complementary?

We can state that legal history and comparative law have a lot in common. They both add knowledge to legal understanding and both ask for studies in depth and the knowledge of at least one foreign language. It is not always easy to draw the borderline between the two disciplines. Let us take as an example the developments of the law of contracts of sale and let us, therefore, compare Dutch law to the consecutive amendments to the German Civil Code in the versions of 2000 and 2004, before the so-called 'Schuldrechtsmodernisierungsreform' had taken place. Does this comparison belong to the realm of legal history? Or should legal history restrict itself to a comparison of the Dutch civil code with the equivalent provisions in the much older French Civil Code?

Legal history is much more than knowing Roman law, ancient Greek law, canon law or legal developments of the Middle Ages. Knowledge of the preparatory works of each national civil code is also part of history and they still have an outstanding influence on how to interpret the intention of the legislator. This understanding of legal history as a complementary topic to comparative law and even to national law is reflected in the curricula of many universities. Legal history is going to be increasingly integrated into topics like Private law and Public law. Therefore it can be said that legal history and comparative law are matching subjects, providing all lawyers with deeper insight into legal solutions in time or in geographical settings.

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Decretum Gratiani (Friedberg): <http://mdz.bib-bvb.de/digbib/gratian/>. From a scholarly point of view, the way the Decretum Gratiani by Friedberg is done can be seen as a perfect model of the way legal sources can be accessible on the world wide web. This edition is offering the reader a fixed pdf-file from the original book, making it possible to verify the digitalization.

<http://www.iuscivile.com> on this website (edited by Ernest Metzger, University of Aberdeen) useful links to sources, legal historians, reviews, list of abbreviations, conferences and teaching material can be found.

Max-Planck-Institut für europäische Rechtsgeschichte, Frankfurt am Main: <http://www.mpi-erf.uni-frankfurt.de>. At this website useful links to legal history journals, libraries and institutions are provided.

<http://home.hetnet.nl/~otto.vervaart/>: this webpage contains useful links and information on legal history.

Recent decades have generated many new reviews. These include Forum Historiae Juris (<http://www.rewi.hu-berlin.de/online/fhi/>) and Diritto e storia (<http://www.dirittoestoria.it>).

37 Legal reasoning*

Jaap Hage

1 Preliminaries

Legal reasoning can be studied from several points of view. It is for instance possible to look at the brain processes of somebody engaged in legal reasoning. This approach may be interesting for neurologists, but has as yet little relevance for lawyers. Another approach would be to investigate which mental processes are involved in the process of reaching a decision in a legal case (Hogarth, 1971; Crombag *et al.*, 1977; Koppen and de Keijser, 2002). A third way to look at legal reasoning is to study the argumentation by means of which a legal conclusion is supported. It is not necessarily so that the arguments adduced for a legal conclusion reflect the mental process through which this conclusion was reached. In this connection it is customary to distinguish between the context of discovery and the context of justification. The context of discovery deals with the psychological side of legal reasoning, while the context of justification concerns the justification of legal conclusions. Often the context of justification is identified with the arguments produced for a conclusion, but these arguments can also have a function other than to justify their conclusions, namely to make a legal decision acceptable for the parties involved (Witteveen, 1988). This is the rhetorical aspect of legal reasoning. In this chapter, I will focus on legal argumentation in the context of justification and disregard its psychological and rhetorical aspects. This means, amongst other things, that the issue whether lawyers in the common law tradition reason in a different way than lawyers in the civil law tradition (e.g., 'inductive' instead of 'deductive'; cf. Legrand, 1997; Smits, 2004) falls outside the scope of this contribution, because the notion of reasoning in this connection concerns the mental processes of the reasoner, rather than the kinds of reasons that can legitimately be adduced for a particular conclusion.

The study of legal justification itself can be conducted in a descriptive way and in a normative way. One can study how legal justification actually takes place, but also how it should be done ideally. Since this contribution is part of an encyclopedia of comparative law, its emphasis is on the description of methods of legal justification in different countries.

* See also: American law; Common law; German law; Statutory interpretation.

Because this is an encyclopedia entry, the size of this entry must remain limited. The following books may be useful for those who are interested in detailed studies of the methods of legal reasoning in western countries:

Atiyah and Summers (1987), *Form and Substance in Anglo-American Law*, is a comparative study of legal reasoning in England and the United States. The authors aim to show that, despite the similarities, American legal reasoning is more substantive than English legal reasoning, which is more formal. (The distinction between formal and substantive legal reasoning is discussed in section 3.)

MacCormick and Summers (eds) (1991), *Interpreting Statutes*, is one of the two results of the so-called 'Bielefelder Kreis', a group of legal theorists that aimed at giving comparative descriptions of legal reasoning in a number of western countries. This book contains a description of statutory interpretation in Argentina, Germany, Finland, France, Italy, Poland, Sweden, the United Kingdom and the United States. All studies about individual countries were written by researchers from these countries. In addition there are chapters about the methodological issues and chapters in which the results are synthesized. It turns out, according to MacCormick and Summers, that, despite obvious differences, the similarities between the different systems dominate.

MacCormick and Summers (eds) (1997), *Interpreting Precedents*, is the second result of the Bielefelder Kreis, this time devoted to the reasoning with and interpretation of precedents. The detailed studies deal with Germany, Finland, France, Italy, Norway, Poland, Spain, Sweden, the United Kingdom, the United States (New York State) and European Community law.

Vogenauer (2001), *Die Auslegung von Gesetzen in England und auf dem Kontinent*, is a detailed study of the techniques of statutory interpretation in Germany, France, European Community law and England. The author argues that, behind superficial differences, legal reasoning in these systems exhibits large similarities. More particularly, legal reasoning in England would be much more substantive than is traditionally assumed.

The comparative study of legal reasoning is a 'mer à boire' and instead of even trying to undertake this study, I will provide a number of analytical tools that may be useful for conducting it (sections 2 to 6) and apply some of these tools to legal reasoning in France, Germany, the United Kingdom and the United States (sections 7 to 10) in order to illuminate the differences between statute-based and case-based legal reasoning and between formal and substantive legal reasoning. The countries mentioned were chosen because they represent the common law and the civil law

tradition, and because legal reasoning in France and England is often taken to be relatively formal, while legal reasoning in Germany and the United States is often considered to be relatively substantive.

2 Of reasons

A discussion of legal reasoning can benefit from a distinction between different kinds of reasons. Contributive reasons are reasons which plead for or against a conclusion, but which do not determine by themselves whether this conclusion follows. The contributive reasons for a conclusion must be weighed against the contributive reasons against this conclusion, and whether the conclusion follows depends on the balance of all contributive reasons for and against it. For instance, whether a conflict of duties leads to force majeure depends on the balance of the duties, where each duty is a contributive reason for or against the behaviour at stake. Another example would be the balance that must be struck between colliding human rights (Alexy, 1994, pp. 71ff.).

In contrast to contributive reasons, decisive reasons determine their conclusions by themselves. A legal example of a decisive reason is that, if a rule is applied to a case, the legal consequence of this rule is attached to the case. When a rule applies (which is a different matter than the applicability of the rule; see section 5), there is no need for balancing any more; the consequence of the rule holds in this case without exception. In other words, if a rule applies in a case, this is a decisive reason for the legal consequence of the rule in this case. From the definition of a decisive reason it follows that there is no need to balance decisive reasons. It is just impossible that there can be both a decisive reason for and against a conclusion. It also follows that a contributive reason always gives way to a colliding decisive reason.

Exclusionary reasons (Raz, 1975, pp. 35ff.) are reasons that deal with other reasons. They make facts which normally would count as reasons not to count so because of the exclusionary reason. For instance, if a legal rule is applicable in a case, this is not only a reason to apply this rule but also a reason to ignore the values and policies that underlie this rule. Normally these values and policies would be contributive reasons to decide a case in a particular way, but if they are 'summarized' in a rule, this rule comes in the place of the values and policies that went into it (Raz, 1975, pp. 73ff.; Schauer, 1991, pp. 42ff.; Hage, 1997, pp. 110ff.). Using both the rule and its underlying values and policies would take these underlying policies and values into account twice.

3 Substantive and formal reasoning

Legal rules are made for a purpose. They can express moral rules, aim to realize values or reflect government policies. Legal reasoning is formal to

the extent that it is based on these rules and ignores their underlying moral rules, values and policies. Legal rules and precedents provide us with formal reasons for legal decisions. Legal reasoning is substantive to the extent that it takes recourse to these moral rules, values and policies, which are said to provide us with substantive reasons for legal decisions (Atiyah and Summers, 1987, pp. 5ff.).

Formal reasons usually have underlying substantive reasons, but, where legal reasoning is formal, it takes the rules and cases on which it is based as exclusionary reasons, meaning that the formal reasons are used instead of the substantive reasons that went into them. For instance, a judge uses a statutory rule to decide a case and does not pay attention to the values and policies underlying this rule. The statutory rule is treated both as a decisive reason for its conclusion and as an exclusionary reason for the values and policies underlying this rule (*ibid.*, pp. 8–9) and, if legal reasoning is very formal, even for those values and policies that were not taken into account when the rule was made.

Factors that make for the formality of legal reasoning are the use of rules, both statutory rules and rules based on precedent, the existence of judgments and verdicts and particular kinds of procedural law, such as statutes of limitation and jurisdictional rules (*ibid.*, pp. 10–11). Methods of interpretation differ in their degree of formality. Where they follow the literal meaning of words in the texts of statutes or seek the intentions of the historical legislator, they are relatively formal. Where they seek for and use the purposes or rationales of rules, or generate interpretations with an eye to the desirability of the outcome, they are relatively substantive (*ibid.*, p. 15).

The formality of formal reasons comes in degrees. We have already seen that the applicability of a rule may set aside more or less contributive reasons that deal with the same issue. Some rules refer to substantive standards, such as the rule to attend goods received in custody as a good housekeeper. This rule requires substantive reasoning where it asks for the determination of what a good housekeeper would do, but is formal to the extent that it excludes all other possibly relevant contributive reasons. The same goes for the binding force of precedents. In the common law countries many precedents have full binding force, meaning that, if a precedent applies, all potential other reasons are excluded. In civil law countries precedents of high courts tend to have persuasive force, meaning that they are contributive reasons for the conclusions which they support. Their weight depends on how ‘persuasive’ they are. They are not exclusionary reasons, however. A very persuasive precedent may outweigh many contributive reasons that plead the other way, but it does not exclude them as reasons, as a binding precedent would.

4 Two kinds of 'rules'

Legal reasoning is very often seen as a form of rule-based reasoning. This is even so when the rules derive from precedents. To obtain a good picture of the role of rules in legal reasoning, it is important to distinguish between different kinds of 'rules'.

Legal conclusions can always be presented as the outcome of a deductively valid argument. If a legal case should be solved in a particular way, another case which is similar in all relevant aspects should be solved in the same way. This means that a legal solution for a particular case can be generalized into a solution for all similar cases. For instance, if John is not entitled to half of the marital estate because he murdered his wife, this can be generalized into the 'rule' that those who murdered their spouses are not entitled to their normal share of the marital estate (see, e.g., the Dutch Supreme Court: HR 7 December 1990, NJ 1991, 593). This generalization can in turn be used in arguments that justify the conclusion that somebody is not entitled to part of the marital estate. Such arguments are usually construed in the form of a syllogism: persons who murdered their spouses are not entitled to their normal share of the marital estate. John murdered his spouse. Therefore, John is not entitled to his normal share of the marital estate.

According to this type of legal justification, a conclusion for a particular case is drawn by subsuming the facts of the case under a general 'rule' stating that such cases have the legal consequence that is derived for this particular case (MacCormick, 1978, pp. 101ff.; Alexy, 1978, p. 273). This possibility of justification by means of a deductive argument exists in all legal systems in which legal judgments are assumed to be universalizable. In practice this will hold for every legal system.

The 'rule' on which this kind of justification is based is not necessarily explicitly made by a legislator or immediately based on a precedent. It may be the outcome of legal reasoning in which one or more sources of law are interpreted and possibly combined. The above-mentioned rule about persons who murdered their spouses, for instance, was the outcome of applying the unwritten principle that nobody should profit from his own wrongs to a particular case. This principle was in turn extracted from a rule in which it was embodied. I propose to call such rules, which describe the legal consequences for a particular type of case, a Case Legal Consequence Pair (CLCP). A CLCP is not a rule that brings about the legal consequence for a particular kind of case (not a constitutive rule), but rather a description of the consequences attached by a legal system to a particular kind of case. As such it is true or false, not valid or invalid. The 'logic' of these rules is deductive. If a case belongs to the type mentioned in the rule's antecedent, it must have the legal consequence of the rule's conclusion, because otherwise the CLCP would be false.

CLCPs must be distinguished from constitutive rules which cause (in a legal, not in a physical, sense) that particular kinds of cases have particular legal consequences. These constitutive rules are often made by a legislator, or are extracted from precedents. If they are the result of legislation or based on a binding (as opposed to a merely persuasive) precedent, they result from authoritative decision making and as a consequence they lead not only to reasons for their legal consequences, but also to exclusionary reasons that block the relevance of other potentially relevant reasons. The 'logic' of these constitutive reasons is not deductive, because it is possible to make exceptions to them, or to apply them analogously. I will say a little bit more about the logic of constitutive rules, because a good picture of this logic is necessary to understand how rule-based reasoning can be more or less formal and how different legal systems can vary with respect to their formality in dealing with rules.

5 Rule-based reasoning

Reasoning with constitutive rules has two main phases, which are not necessarily separated in time. The phase which comes logically first is the determination whether a rule is applicable in a concrete case. The second phase is the decision whether the rule should be applied to this case.

A rule may be said to be applicable in a case if the facts of the case satisfy the conditions of the rule. To determine whether a rule is applicable in a case, two steps must be taken. The first step is the identification of the rule conditions. The second step is the classification of the case facts to make them satisfy the established rule conditions. Both of these steps are usually called 'interpretation', but they are different steps and they are better distinguished. I will call them rule interpretation and fact classification, respectively.

If a rule was made through legislation, it will normally be easy to identify the rule conditions. Rule interpretation is more difficult if the rule is based on case law, because then it involves the determination of the *ratio decendi* of a case. The so-called 'canons of interpretation' (e.g., take the rule literally, or look for the purpose of the rule) play a role in this connection if the rule is based on legislation. To my knowledge, the idea of canons of interpretation has hardly been elaborated yet in connection with case law, although there has been considerable discussion about how to establish the *ratio decendi* of a case (see section 6).

Fact classification and determination of the scope of rule conditions are two sides of the same medal. Both involve the determination whether the facts of a case satisfy the conditions of a rule. Because this step is often approached from the rule side of the argument, it is also dealt with by means of the so-called 'canons of interpretation'. This time the canons are

not used to determine what the conditions of a rule are, but rather what their individual scope is.

The canons of interpretation can be divided into two main types. Canons of the first type are hermeneutic. They aim to establish the meaning of statutory rules, and include (a) the Literal Rule, also called grammatical interpretation, which follows the literal or, if applicable, the technical meaning of the statutory text; and (b) the Mischief Rule, also called interpretation according to legislative intent, which follows the legislator's intent in making the rule.

These hermeneutic canons lead to relatively formal reasoning, because they abstract from the substantive reasons for having the rule. Canons of the second type are substantive ones, because they interpret rules with an eye to the values and policies served by them. They include (a) the Golden Rule, also called teleological or purposive interpretation, which aims to establish the meaning of a rule from its purpose (the expression 'Golden Rule' is also used as a synonym for the Literal Rule, or for the refusal to give a rule an interpretation that leads to inconsistency or otherwise absurd results; cf. Bell and Engle, 1987, p. 15); and (b) the use of economic analysis (Posner, 2003; Cooter and Ulen, 2004) to prefer the interpretation which has the best cost–benefit ratio.

When different canons of interpretation lead to different outcomes for a particular case, it is possible to use (implicitly) substantive reasoning in order to choose between competing canons, for instance between grammatical interpretation and following legislative intent. Even if the preferred interpretation is officially justified by formal reasons (such as legislative intent), this would assign a crucial role to substantive legal reasoning.

If it turns out to be possible to classify the facts of a case such that they satisfy the conditions of a rule, the rule is applicable in this case. This does not automatically mean that the rule's consequences are attached to the case, however. In fact, a rule's applicability is neither a sufficient, nor a necessary, condition for the rule's application. If a rule is applicable, this is a contributive reason to apply the rule. This reason must be weighed against contributive reasons that plead against application, if there are any. Such a contributive reason against application would, for instance, be that application is against the rule's purpose. If the contributive reasons against application of a rule outweigh the contributive reasons for application, including the rule's applicability, the rule does not apply although it is applicable, and then we say that there is an exception to the rule. In general, it depends on the legal system at issue: (a) whether it recognizes contributive reasons against application of an applicable rule; (b) what these reasons are; and (c) what their weight is, in particular in comparison to the weight of a rule's applicability.

This allows for variation in the degree of formality of a legal system. If a legal system easily allows exceptions to rules for substantive reasons (e.g., the undesirability of the rule's application in a concrete case), it is relatively substantive. If a system allows few or no exceptions, or only exceptions for formal reasons such as legislative intent, it is relatively formal.

If a rule is not applicable, this is a contributive reason against application of the rule. Because it is 'only' a contributive reason, it is in theory possible that a rule which is not applicable is nevertheless applied because the non-applicability is outweighed by the contributive reasons pleading for application. This will occasionally happen in cases that are sufficiently similar to the cases in which the rule is applicable and in which application is in accordance with the rule's purpose. We then speak of analogous application of the rule. Again, it depends on the legal system in question: (a) whether it recognizes contributive reasons for application of a non-applicable rule at all; (b) what, if any, these reasons are; and (c) what their weight is, in particular in comparison to the weight of a rule's non-applicability as a reason against applying the rule.

6 Precedents

The role of precedents is different in legal systems from the common law tradition and systems from the civil law tradition. The former systems employ the rule of *stare decisis*, which implies that some precedents are binding, while the latter do not, with as a consequence that precedents have at best persuasive force. I will start the discussion of precedent-based reasoning with the role of merely persuasive precedents.

Persuasive precedents are cases that provide contributive reasons to decide a new case in accordance with the decision of the old case. As such they are formal reasons. There were probably substantive reasons to decide the old case as it was actually decided and, if a new case is similar to that old case (more or less), the same substantive reasons will be present in it too. If the new case is merely decided on these substantive reasons, the precedent did not play a role as such, not even a persuasive one. A precedent only plays a role as such if it adds to the force of the substantive reasons contained in it (Bronaugh, 1987). What is added is the force of precedent, and this is a formal reason. It depends on the legal system in question: (a) whether it recognizes persuasive precedents; (b) under which circumstances a precedent has persuasive force; and (c) what is the weight of a persuasive precedent as a contributive reason for a particular decision.

A legal system is the more formal, the more easily it recognizes persuasive precedents and the more weight it attaches to them. In fact (almost) all legal systems recognize persuasive precedents, which may be explained by

the fact that treating similar cases in similar ways is seen as a principle of fairness (Dworkin, 1978, p. 113).

Binding precedents are not only reasons to decide new cases in a particular way, but also (exclusionary) reasons to disregard other potentially relevant reasons. Because of their exclusionary force binding precedents need normally not to be balanced against competing contributive reasons. If they are applicable, they normally determine the outcome of the cases in which they are applicable. This strong force of binding precedents means that their operation is guided by a number of rules which determine which precedents (if any) have binding force for whom, and which parts of the precedents have this binding force.

The notion of binding precedent goes hand in hand with the rule of *stare decisis* which assigns binding force to a number of precedents. In this connection it is customary to distinguish between horizontal and vertical bindingness (McLeod, 2002, pp. 148ff.). The horizontal dimension concerns the issue whether a court is bound by its own former decisions; the vertical dimension concerns whether a court is bound by decisions of higher courts, and if so, which higher courts. It depends on the legal system in question whether and to what extent (for which courts) it accepts horizontal and vertical bindingness. Because binding precedents provide reasons which are even more formal than persuasive precedents (because they exclude the relevance of other potential reasons), a legal system is the more formal, the more binding precedents are recognized.

Even if a precedent is binding, not every part of it is binding. The binding part of a precedent is called the *ratio decendi* (or, in American law, holding) of the case, the non-binding part an (*obiter*) *dictum*. There exists no unequivocal test to determine which part of a precedent is *ratio decendi* and which part *obiter dictum*. One test, proposed by Wambaugh, runs that those parts of an argument are part of the *ratio decendi* that are necessary conditions for the conclusion (Cross, 1991, pp. 53ff.). Another test, popularized by Goodhart, runs that those case facts that were seen by the judge as material constitute the *ratio decendi* (*ibid.*, pp. 66ff.). It has also been argued that it is impossible to devise a test to distinguish between *ratio decendi* and *obiter dictum* (Stone, 1985, pp. 123ff.).

The necessity to distinguish between *ratio decendi* and *obiter dicta* provides a legal decision maker with some leeway that can be used for substantive legal reasoning. Another way to achieve some leeway is to adopt the so-called ‘declaratory theory of precedent’, which holds that case law is evidence of independently existing law (Cross, 1991, pp. 26ff.). By declaring a case to be misguided evidence, it is possible to discard it. The prevalent theory, however, is that precedents are not so much evidence of pre-existing law, but constitutive for the law (McLeod, 2002, p. 131; for an

argument that in Australia the situation is different, see Wesley-Smith, 1987, p. 75). On this prevalent view, the possibility to replace formal reasoning by means of precedents, by substantive reasoning is lacking.

Again other techniques to limit the effects of binding precedents are to distinguish cases by pointing out relevant differences between the precedent and the new case, applying the so-called ‘per incuriam doctrine’, which holds that a precedent based on disregard of a relevant precedent or statute needs not be followed, or application of the doctrine of changed circumstances (see McLeod, 2002, pp. 141ff. for details).

7 France

The ideological background of legal reasoning in France was set at the time of the French Revolution. According to art. 10 of the Law of 16–24 August 1790, which is still in force, courts are not permitted to take part, directly or indirectly, in the exercise of legislative power. This law was a reaction to the pre-revolutionary practice according to which the royal courts made kinds of rules in the form of so-called ‘arrêts de règlements’ (Steiner, 2002, p. 77). The strong emphasis on the separation between the legislative and the judicial power expressed by this law still influences the ideology of French legal reasoning. This means that in France case law is, barring a few exceptions, officially not binding and that individual cases are not an official source of law (Vogenauer, 2001, p. 338). Reference to case law is not allowed as the foundation of a legal decision (Steiner, 2002, pp. 80–81). In practice, however, decisions of, in particular, the higher courts play an important role (Vogenauer, 2001, p. 339) and case law as a whole (as opposed to individual cases) is considered as a source of law, albeit officially one of low ranking (Troper and Grzegorzczak, 1997, p. 112). Because precedents cannot function as an independent source of law, their use lies in the interpretation of statutory law (*ibid.*, p. 126).

The same ideological background which makes the role of case law problematic in France assigns a central role to statutory law (Troper *et al.*, 1991, p. 211). It also influences the ‘official’ canons for statutory interpretation. Traditionally (Portalis’ *Discours Préliminaire for the Code Civil* in 1799), these canons are taken to be as follows: (a) the law should be followed where it is clear; (b) the law should be interpreted according to legislative intent where it is unclear; and (c) in case of a gap, recourse should be taken to customary law and equity (Steiner, 2002, pp. 57–8).

The relative importance of the third guideline is small, and the first two guidelines together suggest a rather formal approach to statutory law. However, these traditional hermeneutically oriented canons have been supplemented by ‘modern’ ones (Troper *et al.*, 1991, p. 179; Steiner, 2002, pp. 64ff.). One of these modern methods is the ‘libre recherche scientifique’

proposed by Gény (1899), according to which the role of the judge is taken to be similar to that of the legislator in that the judge must pay attention to private autonomy, the public order and the balance of private interests (Vogenaer, 2001, p. 332). Another modern method is the evolutive (or historic) method propagated by Saleilles, which pays attention to the developments in society to which the law must be adapted. The intention of the original legislator therefore becomes less important.

The overall picture is that legal reasoning in France is far less formal than its ideology would have it (Vogenaer, 2001, p. 338). One reason is that the canons for statutory interpretation have shifted towards more substantive methods. Another reason is that precedents are not formally binding, with the consequence that judges have leeway to adapt the use of case law to the needs of new cases as determined by substantive reasons.

8 Germany

According to Alexy and Dreier (1991, p. 117), the German legal culture is to a significant degree substantive and value-oriented. They mention three reasons for the existence of interpretational issues and doubts, namely the openness of statutory law, the uncertainty of legal methodology and – most important in the present context – the divergence of ideas about rightness or justice (*ibid.*, pp. 74ff.). Apparently these ideas play an important role in German law.

That the German law is relatively open also becomes clear from the recognition that gap filling is often possible. The following (translated) quotation from the German Federal Constitutional Court is telling:

The law is not identical with the whole of the written statutes. Over and above the positive enactments of the state power there can be a surplus of law which has its source in the constitutional legal order as a holistic unity of meaning, and which can operate as a corrective to the written law. (BVerfGE 34, 269 (287))

Another factor which makes German law relatively open is that the interpretation of statutes is not only a matter of determining legislative intent (although this is important), but also a matter of establishing the right decision. In this connection ethical arguments can play a role.

In Germany, it is possible (for the Constitutional Court) to review statutes against the constitution and to review ordinary statutes against EC law and treaties. Moreover, statutes should be interpreted in accordance with the constitution. Since the constitution protects a number of human rights, interpretation in accordance with the constitution and review of statutory rules against the constitution often amount to substantive legal reasoning.

Another factor which makes German legal reasoning relatively substantive is that in Germany precedents are not binding, with the exception of judgments of the Federal Constitutional Court (Alexy and Dreier, 1997, p. 26). Nevertheless, they play a crucial role in statutory interpretation (Vogenauer, 2001, pp. 224ff.) and, as a consequence, they have a considerable impact on legal argumentation (Alexy and Dreier, 1991, p. 90). Precedents in Germany have a high *de facto* authority, which even goes so far that deviation from precedents may constitute a legal error (*ibid.*; Vogenauer, 2001, p. 225). In this sense, the role of precedent in German law makes German legal reasoning more formal than the officially non-binding nature of precedent may suggest.

Another factor which increases the formal nature of German legal reasoning is the important role of legal doctrine. Germany has a longstanding tradition of legal doctrine in which the law is systematized (Zweigert and Kötz, 1998, pp. 135ff.). This doctrine has a considerable influence on German judges (Alexy and Dreier, 1997, p. 118), thereby making legal reasoning more formal.

In summary, it may be said that the German legal culture has both a tendency towards substantive legal reasoning and a countervailing tendency towards formalism. Of these two tendencies, the one towards substantive reasoning seems to prevail (Vogenauer, 2001, pp. 224, 227).

9 The United Kingdom

Legal reasoning in the UK differs fundamentally, at least in theory, from legal reasoning in France or Germany, because the UK (with to a certain extent an exception for Scotland) belongs to the common law family. This means that the general background of legal reasoning is precedent-based, with the rule of *stare decisis* with regard to precedents and with an attitude towards statutory rules that is at least *prima facie* different from that in the civil law tradition. Part of this attitude stems from the fact that statutory rules are traditionally meant as exceptions to the common law. Where statutory law is available, it has precedence over the common law, but there is a tendency to give this exception a limited scope. There are diverging opinions with regard to the question whether the influence of a statutory rule extends beyond its proper scope of application and, more particularly, whether it should be used for analogical reasoning in a vein similar to precedents. The prevailing opinion seems to be that the influence of statutory law remains confined to what is the proper topic of the statute and that the common law remains unaltered except where it is expressly altered (Bell and Engle, 1987, pp. 41ff.).

There are several traditional canons for statutory interpretation (*ibid.*, p. 47; see also Holland and Webb, 2003, p. 209). First, if possible, a

statutory provision should be interpreted according to its ordinary meaning (the Literal Rule), or its technical meaning where appropriate. In this connection, the context of general words can play a role. Second, if the first prescript would lead to an interpretation against the purpose of the statute, a secondary meaning of the words may be chosen. The purpose of a statute should in this connection be taken to be the purpose of the legislator (the Mischief Rule, so called because the interpreter considers the mischief which the rule was intended to remedy). Finally, in order to avoid absurd consequences, there are limited possibilities to make small amendments (additions, alterations, implied meanings) to the literal text (the Golden Rule).

The general picture is that statutory interpretation is mainly aimed at establishing legislative intent, where the text of the statute is the main indication of what this intent was. In this respect legal reasoning in the UK is mainly formal. This view is confirmed by Atiyah and Summers (1987, pp. 100ff.). However, since the mid-20th century, according to Vogenauer (2001, pp. 1235ff.), there has been a tendency in English legal culture towards substantive reasoning. As one of the causes of this development, Vogenauer mentions the decreasing importance of the Literal Rule, brought about by a change in legislative technique that puts less emphasis on precise formulation (see also the entry 'Common law' in this encyclopedia).

The rule of *stare decisis* gives case-based reasoning in the UK a formal flavour, because adherence to previous decisions stands in the way of substantive legal reasoning. Although judges have a number of techniques available that allow them to disregard unwanted precedents (some of them mentioned in section 6), the general tendency is nevertheless that adherence to precedent prevails in the UK over substantive reasoning (Bankowski and McCormick, 1997, pp. 348ff.; Atiyah and Summers, 1987, pp. 118ff.). Vogenauer (2001, p. 1243) argues, however, that the formal approach with regard to case law loses importance because of increasing judicial activism, which is in turn evoked by the failure of the legislature to remedy defects in the common law.

10 The United States

Although the UK and the US are both common law countries, the mode of legal reasoning in the US is more substantive than in the UK, at least if we follow an extensive analysis of Atiyah and Summers (1987). They list, amongst others, the following differences between the two systems.

With regard to statutory interpretation, English judges would, far more than American ones, emphasize the ordinary meaning of words. American judges would pay relatively more attention to the purpose of rules and their underlying policies. Moreover, where purpose is looked for, English judges

would limit themselves to the text of the statute itself, or other statutes, while American judges would more often look for evidence in legislative history. It would even be the case that American judges see rules as encompassing values, purposes and rationales, even where they are not explicitly mentioned in them, while English judges do not. These differences are, amongst others, explained by the more precise drafting of English statutes, the greater importance attached in England to legal certainty, and a greater willingness on the part of American judges to engage in politically loaded issues.

With regard to case law, Atiyah and Summers argue that American legal reasoning is less formal because the doctrine of *stare decisis*, which is in force in the US too, is applied there less rigorously. Part of this is brought about because American courts are less bound to follow their own earlier decisions, in particular if the court feels that the earlier decisions were wrong. Moreover, in most branches of the American common law, a case is only considered as a binding precedent if it has passed a period of evaluative trial in which also lower courts participate. A judgment that is found wanting during this process will wither away. Such a period of 'testing' is absent from English legal practice. Still another relevant factor is that there are cases without a clear *ratio decendi* because the judges were not unanimous. American judges feel more free to disregard such cases with 'plurality opinion'. Finally, the power of judges to overrule wrongly decided cases would be more extensive in the US.

These findings of Atiyah and Summers seem to be contradicted by those of Vogenauer, who mentions empirical research that seems to show that, in the 1990s (after the publication of the study by Atiyah and Summers), English judges more often invoke the purpose of statutory rules than in the decennia before. However, Vogenauer immediately points out that these statistics are not decisive, and that the interpretation of what goes on in English law depends on the interpreter (Vogenauer, 1991, pp. 1148ff.).

11 Conclusion

Although it is difficult to offer hard conclusions about the differences in legal reasoning between different countries, it seems nevertheless possible to draw some more tentative conclusions. There are historical and (as a consequence thereof) institutional differences between the various legal systems, that *prima facie* result in differences in the style of legal reasoning. Obvious differences are found in the common law or civil law background of a system, the amount of emphasis a system places on the separation of powers and (as a consequence) the possibility of review of rules against (constitutional) values and human rights. Pro tanto, a system that belongs to the civil law tradition will be more formal than a system that belongs to the common

law tradition, and a system that strongly emphasizes the separation of powers will be more formal than a system that does so to a lesser degree. These differences suggest, amongst others, that the American system makes more use of substantive reasoning than the English system, and the German system more than the French system.

Whether these *prima facie* differences hold in practice is subject to debate. It seems that the more theoretical accounts of legal reasoning stress the differences that should obtain given the institutional differences, while the legal practices of the different systems, in particular in recent years, tend towards a substantive style of legal reasoning, whether this is explicitly recognized or not.

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38 Legal translation

Gerard-René de Groot

1 Introductory remarks

The issue of the translation of legal information is one of the core questions of comparative law. On the one hand, comparative lawyers frequently have to provide information on rules in force in a certain legal system in a language which is not (one of) the legal language(s) of the legal system involved. In such a case comparative lawyers are directly confronted with the difficulty of the translation of legal terminology. On the other hand, there is a second relationship between comparative law and the translation of legal terminology: if translators have to translate the content of legal documents (contracts, statutory provisions, books and articles on legal topics etc.) they are constantly confronted with comparative law, because the comparison of the content of the legal terminology of the source legal system and of concepts behind the legal terminology of a legal system which uses the target language as legal language should be their core activity during the translating process.

The specific problems of the translation of legal terminology are caused by the system-specificity of the legal language. This system-specificity has as a consequence that within a single language there is not only one legal language, as, for instance, there is a single chemical, economic or medical language within a certain language. A language has as many legal languages as there are systems using this language as a legal language (de Groot, 1999a, pp. 12–14; Sandrini, 1994, p. 12; Wiesmann, 2004, pp. 19, 20).

As a consequence, it is of primary importance to establish that one legal language must be translated into another legal language. One should not translate from a legal language into the ordinary words of the target language, but into the legal terminology of the target language. If the target language is used in several legal systems as the language of the law, a conscious choice must be made for the terminology of one of the possible target legal languages. One target language legal system must be chosen, that is to say, a single legal system which uses the target language as its legal language. The choice of a particular target language legal system should depend on the potential users of the translation (de Groot, 1996, pp. 11–13, 1999a, pp. 17–19; Sandrini, 1994, pp. 12, 13). Subsequently, the information contained in the terminology of the source language legal system must be represented by the terminology of the target language legal system.

Once one has opted, where necessary, for a particular target language legal system, one can get to work. The meaning in the source language legal system of the terms to be translated must be studied, after which a term with the same content must be sought in the target language legal system. Translators of legal terminology are obliged to practise comparative law.

2 Equivalentents

Through comparative law, the translator of legal terminology needs to find an equivalent in the target language legal system for the term of the source language legal system. Because of the system-specificity of legal terms, logically, full equivalence only occurs where the source language and the target language relate to the same legal system. In principle, this is only the case when translating within a bilingual or multilingual legal system, such as that of Belgium, Finland, Switzerland and, to some degree, Canada (Gémar, 1988; de Groot, 1996, pp. 13, 14, 1999a, p. 20; Herbots, 1987).

Where the source and target language relate to different legal systems, equivalence is rare (Sandrini, 1994, pp. 109–12). Apart from the diverse embedding of a term in a legal system as a whole, near full equivalence occurs if (a) there is a partial unification of legal areas, relevant to the translation, of the legal systems related to the source language and the target language (de Groot, 1996, p. 14, 1999a, p. 21); and (b) in the past, a concept of the one legal system has been adopted by the other and still functions in that system in the same way, not influenced by the remainder of that legal system (de Groot, 1996, p. 14, 1999a, p. 21). Numerous examples can be found among legal systems, in which the one is a reception (whether imposed or not) of the other. In private law, examples are Indonesia/the Netherlands; Turkey/Switzerland; Japan/Germany; Taiwan/Germany (see, for Indonesia, Temorshuizen-Arts, 2003, pp. 30, 31; compare, for Japan, Kitamura, 1986).

Where the source language and the target language relate to different legal systems and the above exceptions are not at issue, virtual full equivalence proves to be a problem, however. Nevertheless, certain terms relating to different legal systems will be readily seen by translators as equivalentents (see Kisch, 1973, on the terms marriage/mariage/Ehe/matrimonio/huwelijk). Kisch concludes for translatability if the terms correspond in essence ('quant à la substance'). But when do they? 'C'est une question d'ordre pragmatique' (This is a question of pragmatic order), Kisch writes. What purpose needs to be taken into account when making such a pragmatic decision?

Of fundamental importance is the context and purpose of the translation: these are the factors that determine whether the differences between source term and target term are of such relevance that the possible target term may not be used as a translation of the source term (compare

de Groot, 1996, pp. 15, 16, 1999a, pp. 22, 23; Kielar, 1986; Sandrini, 1994, p. 16; Sarcevic, 1997, p. 236; Temorshuizen-Arts, 2003, pp. 38, 39). It is possible that in a particular context certain words are acceptable equivalents, where they are not in a different context. Relevant also is whether a translation needs to be prepared to give persons who do not master the source language a summary impression of the contents of the text, or whether the translation will receive the status of authentic text in addition to the source text (compare also the 'skopoi' theory of Vlachopoulos, 1998). In the latter case, it is important that the terms in the target text are not narrower or broader than those in the source text. Looking from this angle, we may already establish that the conclusion that terms are acceptable equivalents is not absolute. Acceptable equivalence depends on the above factors.

Furthermore, one has to realize, that different types of partial equivalents may exist. For instance, in the one legal system there may be a distinction which does not exist in the other (de Groot, 1996, pp. 16, 17, 1999a, pp. 22–4).

In the literature, it is frequently stated that a source language term should be expressed by a 'functional' equivalent of the target language. Weston (1990, p. 21) states, for instance: 'The first method is that of functional equivalence: using a term or expression in the target language (TL) which embodies the nearest situationally equivalent concept' (cf. Pigeon, in Gémard, 1982, pp. 271–81; Sarcevic, 1988b, pp. 970–75, 1997, p. 236; Temorshuizen-Arts, 2003, pp. 32–4).

Serious doubts as regards this statement are justified (de Groot, 1999a, pp. 24, 25). For a target language term to be identified as an equivalent to a source language term, not only must there be functional equivalence, but also a similar systematic and structural embedding: some cases which under French law are resolved with the institute of 'erreur' (error, mistake, involuntary misrepresentation), are resolved under German law through the theory of 'Wegfall der Geschäftsgrundlage', which is based on 'Treu und Glauben' (s. 242 BGB). In no case, however, should one translate 'erreur' by 'Wegfall der Geschäftsgrundlage'. The systematic and structural embedding of the two concepts is too diverse.

3 Subsidiary solutions

If no acceptable equivalents in the target language legal system can be uncovered, subsidiary solutions must be sought. Basically, three subsidiary solutions may be distinguished (cf. Sarcevic, 1997, pp. 250–64; Wiesmann, 2004, pp. 79–82). The first of these is preserving the source term: there will be no translation and the source term or its transcribed version is used. If needed, the term may be explained by adding information in parentheses

or in a footnote in the form of a literal translation or a remark such as ‘comparable to . . .’. Generally speaking, one should not too often preserve source language terms in the translation. The primary purpose of a translation is to make the source text (more) accessible to persons who do not master the language of the source text. This purpose is frequently neglected if certain terms are not translated (Weston, 1990, p. 19).

If many untranslated source language terms are introduced into the target language, there is also the danger of making the translation into a collection of foreign-language words glued together by prepositions, adverbs and verbs from the target language. Furthermore, if the reader has no or little affinity with the morphology of the source language, he or she is faced with a combination of letters which is incomprehensible, hard to pronounce or retain. As a result of the above, it may be concluded that using an untranslated term from the source language in the target language must be avoided in particular where there is little or no etymological correspondence between the two languages. The purpose of every translation is, after all, the transfer of the information contained in the term and this does not happen if terms are left untranslated, unless the translator knows that the source language expression is somewhat transparent to the reader of the target text (Temorshuizen-Arts, 2003, p. 35). Furthermore, expectations about transparency should not be set too high.

There are additional disadvantages which plead against preserving the source language term in the target language if the source language has a different alphabet or employs characters based on pictograms. For the average reader of the target text, employing the original term in unfamiliar characters is devoid of meaning. In such a case, transcription will be necessary, although even the transcription, if not accompanied by an explanation, will not or will hardly provide information to the readers of the target text.

A short step beyond ‘simple’ transcription is what Sarcevic (1988b, p. 971) qualifies as ‘naturalisation’: the linguistic adaptation of a source language term to the rules of the target language. In such cases, Pasternak (1993, p. 293) refers to ‘bedeutungsverlustlose phonetische Einverleibung fremdsprachiger Termini’ (phonetic annexation of foreign language terms without loss of their meaning) in the target language. However, it is preferable to qualify such a linguistically adapted term as a neologism (de Groot, 1996, p. 21, 1999a, p. 29).

Earlier the possibility was mentioned of clarifying the original term by adding a ‘literal’ translation in parentheses. By such a literal translation is meant a translation of elements, focusing on the ordinary usage of the source and target language, which form the building blocks of the source language legal term to be translated. Some authors list such a ‘literal’ or

'word-for-word' translation as a separate alternative in the event of the absence of an equivalent concept (Sarcevic, 1997, pp. 259–61). This is not very useful. Such a word-for-word translation may be sensible in making the untranslated source language term a little more accessible, but, independent of the original term, such a literal translation only makes sense if it yields an equivalent, a paraphrase which is comprehensible to lawyers from the target language legal system, or forms a useful neologism (cf. Temorshuizen-Arts, 2003, p. 35).

The possibility of putting in parentheses or in a footnote remarks to the effect of 'comparable with . . .' after the source term preserved in the target language text should be briefly dealt with. Such a remark approximates a paraphrase (see the next paragraph) without setting out the similarities and differences.

The second subsidiary solution is paraphrasing. A paraphrase is used to describe the source language term. If the paraphrase in the target language is a virtually perfect definition of the source language concept, such a paraphrase approximates an equivalent consisting of several words. Sarcevic (1988b, p. 973; cf. Sarcevic, 1997, pp. 250–54; Sandrini, 1994, p. 113) qualifies this as a descriptive equivalent. The legal entity thus described does not exist as such in the target language legal system, but the combination of its elements makes the term accessible to a lawyer trained in that system. Where the circumlocution is defective, this subsidiary solution resembles a neologism. The desirability and the usefulness of paraphrasing as a subsidiary solution is contingent on the length and complexity of the paraphrase, and the purpose of the translation.

Neologism is the third subsidiary solution. This is where a term is used in the target language that does not form part of the terminology of the target language legal system, if necessary in combination with an explanatory footnote. It must be emphasized, however, that the term 'neologism' is used here in a very broad sense. In the context of legal translation, each term not belonging to the target language legal system has to be considered a neologism. Often the expression 'neologism' is used in a more narrow sense, meaning each term that does not exist in the target language. The broader definition of 'neologism', however, is a logical result of the premise discussed earlier, that legal information must not be translated from source language into target language, but from the terminology of the source language, legal system into the terminology of the target language legal system selected by the translator. From this it follows that all terms that do not belong to the target language legal system opted for must be qualified as neologisms.

An essential question is that of the norms according to which a neologism should be chosen (de Groot, 1996, pp. 22–6, 1999a, pp. 30–5). This

must not happen in an arbitrary way. No one will find it acceptable if, after not finding an acceptable French equivalent as a translation for a term in a German statute, this term is rendered in French by the neologism 'blubs'. Such a decision would be absurd. The neologism must be chosen in such a way that the content of the source term is shown to some extent, without using a term which is already used in the target language legal system.

From the latter, it can be concluded, first, that the translator must make sure that the target term does not exist in the target language legal system. All terms even remotely connected with that legal system must be counted out. For instance, the use of the French 'droit commun' as a translation for the term 'common law' must be rejected, because the former is already in use in a sense very different from that of 'common law'.

A neologism must be chosen in such a way that a lawyer from the target language legal system can get an idea of its meaning: the term must possess some transparency. Very useful for this purpose are terms which used to have an equivalent meaning. If, for instance, the German term 'Sicherungseigentum' must be represented by the terminology of the legal system of the Netherlands, it is wise to use as a translation 'fiduciaire eigendom' or 'eigendom tot zekerheid' by way of a neologism. Since 1992, these concepts no longer form part of the legal system of the Netherlands. However, because of the recent legal history, such a translation does offer unambiguous information to a lawyer familiar with the legal system of the Netherlands.

Often Roman law terms are attractive as neologisms, if one can assume that lawyers from the target language legal system (still) have some knowledge of Roman law. A fine example of the use of Roman law terms as neologisms, for want of acceptable equivalents in the target language legal system, is the English text of Article 22 (1) of the European Regulation on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters:

The following courts shall have exclusive jurisdiction, regardless of domicile: 1. in proceedings which have as their object rights in rem, or tenancies of, immovable property, the courts of the Contracting State in which the property is situated.

The expression 'right in rem' was chosen to render the continental-European terms 'droit réel', 'diritto reale', 'derecho reale', 'dingliches Recht', 'zakelijk recht' in English.

Often terms can be used which, although they do not function in the target language legal system as legal terms, do function in another legal system which uses the same language as its legal language. This proposition deserves

further explanation. Earlier it was expressly stated that the translation process is from the legal language of a specific legal system into the legal language of a particular other legal system. If the target language serves as a legal language in several legal systems, a choice must be made for one particular national legal terminology. Translators should not use the terminology of system A at one point and the terminology of system B at another. Once a fundamental choice has been made for the terminology of system A, but some acceptable equivalents are lacking, it is allowed to employ as neologisms acceptable equivalents from another legal system. In that case, it is necessary to mark such terms as neologisms, for instance by expressly referring to the legal system from which the neologisms in question were borrowed. But also, when using this 'escape', it is important to keep in mind that the main purpose of the translation is to convey the meaning of source terms. If the translator suspects that the substance of the legal system from which he or she wishes to borrow a term to serve as a neologism – and consequently also its legal terminology – is unknown to the users of the target text, a reassessment is in order or an explanatory footnote must be added to the neologism. The following example may illustrate this: suppose it is thought that the Spanish term 'hipoteca' cannot be translated as the English term 'mortgage' and consequently a term from the English terminology used in Quebec is chosen, namely 'hypotheq'. Would this term not look very odd to an English reader of the target text if no explanation were provided? Conceivably, this is the case, so that an explanation is in order.

In respect of choosing neologisms, attention has to be paid briefly to the 'status' of neologisms already chosen by others for certain terms from the source language legal system in need of translation. If it can be assumed that some users of the target text already encountered at some point or another these neologisms chosen by others in publications to express the terms in question from the source language legal system, it is advisable seriously to consider adopting the choice of earlier translators. One should be aware that choosing one's own neologisms could lead to confusion. Naturally, the likelihood of confusion is dependent on the notoriety of the earlier publication, in which a particular neologism was introduced.

4 Consequences for bilingual legal dictionaries

It is obvious that the previously described approach of legal translation should, of course, have consequences for tools for translating legal terminology, in particular for bilingual legal dictionaries. The following desiderata for reliable legal dictionaries can be formulated, based on the previous considerations (de Groot, 1990, 1996, pp. 45–7, 1999b; de Groot and Rayar, 1995; de Groot and van Laer, 2000; cf. Duintjer Tebbens, 1982; Hesseling, 1975; Reynolds, 1986; Sarcevic, 1988a; Sarcevic, 1989).

- a. Bilingual legal dictionaries should be restricted to offering suggestions for translations based on legal areas, tying both source language terms and target language terms to a particular legal system. If this is not adhered to, the make-up of the dictionary becomes unclear and precludes easy and reliable consultation.
- b. The relation of the entries and their proposed translations to their respective legal system must be made explicit by offering references to relevant legal sources, linguistic context and sometimes encyclopedic and bibliographic references, thus ensuring verifiability.
- c. Compilers of bilingual dictionaries should not present their proposed translations as 'standard' equivalents. Alternatives should be identified according to area of law, system and use.
- d. The dictionary should indicate the degree of equivalence: whether the translation suggestion is a full equivalent, the closest approximate equivalent (acceptable equivalent) or a partial equivalent.
- e. The absence of an equivalent term in the legal system(s) related to the target language should be mentioned expressly. In that case subsidiary solutions should be offered.
- f. Neologisms must be identified as such, so as to avoid these being used by those consulting the dictionary as terms belonging to the legal system related to the target language. Ideally, the suggestion for a particular neologism should be reasoned.
- g. The proposed translations must be reconsidered in the event of changes in either the legal system related to the source language or that related to the target language. In other words: legal dictionaries must be frequently reassessed and updated.

The compilation of a bilingual legal dictionary that makes a serious effort to comply with these desiderata is a great accomplishment, which deserves the qualification of academic work. Regrettably, very few legal dictionaries published so far have attempted to meet these requirements. A list of examples of good legal dictionaries is given below. The majority of the other dictionaries fail to offer much more than glossaries containing unsubstantiated translations. They only contain non-motivated translation suggestions and frequently do not distinguish between the different legal languages within the source, respectively target language.

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39 Legal transplants*

Jörg Fedtke

Dating back to antiquity, ‘free trade in legal ideas’ (Kahn-Freund, 1974, p. 10) has increased dramatically over the past decades; borrowing from another system is today certainly ‘the most common form of legal change’ (Watson, 1991, p. 73). Many factors have contributed to this development. Prominent among them is the demise of Socialism in Eastern Europe towards the end of the 1980s and its various knock-on effects across the globe: the desire of many countries to join the European Union and to develop commercial relationships with the United States; the democratization of societies in parts of Africa and South America; the quest for free trade and internationally harmonized rules for the protection of intellectual property; or the trend towards a stronger recognition of human rights. All of this has favoured a spread of legal ideas regardless of political borders or cultural differences; it has also blurred the seemingly neat theoretical distinctions drawn between various ‘legal families’ by comparatists in the second half of the 20th century.

Technically, transplants can take place on different levels of a legal system and for a variety of reasons. Though far more often a result of decisions made by national legislators, legal borrowing can also come in the guise of judicial activity or, more gradually, through the backdoor of commercial practice. The decision to draw on ideas found in other legal systems is thereby often justified by the quality of a given foreign solution. It is, moreover, easier and cheaper to copy an existing rule than to reinvent the wheel. In addition to saving part of the time and cost of drafting legislation, practical experience with the foreign model will often be available at no extra expense. Other (at times overlapping) reasons for using legal transplants include the harmonization of law within the framework of international agreements; the influence of attractive political ideas and concepts; special economical, judicial or cultural ties between societies; the general influence that many ‘parent’ legal systems continue to exert on their former colonies; and demands of donor countries calling for the observance of democratic standards and respect for human rights by governments on the receiving end of development aid programmes. Economical pressures

* See also: Aims of comparative law; Legal culture; Legal translation; Methodology of comparative law.

create further incentives for the introduction of changes based on foreign commercial law, and military intervention (followed by the reconstruction of societies on the basis of 'imported' legal principles) has re-emerged, it seems, as yet another scenario favouring legal transplants. Finally, the global spread of increasingly similar working and living conditions has raised equally similar legal problems in societies all over the world, and – in their wake – a trend towards similar and often even identical legislative and judicial responses.

Borrowing legal ideas is a dynamic process which can take several years. The initial phase involves the identification of an appropriate model and (in most cases) more or less comprehensive adjustments of the chosen material in order to merge it successfully with the existing rules of the borrowing system. Even mere translation will thereby often increase the differences between the original and the 'imitated' provision. Once they have found their way into a new environment, foreign legal ideas are then likely to be subject to substantial further change. The borrowing system is not in any way bound by the interpretation of the model provision in its country of origin, and legal practice is thus free to take into account or ignore the case law and academic literature available abroad. Conceptual differences in the law, linguistic barriers and different political, socio-economical or cultural parameters will thereby often inhibit a fruitful comparative dialogue between the systems involved in the exchange. Good reasons exist, however, to give due regard to this foreign material wherever possible. A comparison will thus not only help to show why a particular foreign model was initially chosen; by highlighting differences between that model and the own national variant, the meaning of one's own law may also become clearer. More importantly, foreign case law and academic literature dealing with a very similar (or even identical) provision will be likely to display a range of different interpretations and thus provide the borrowing system with a range of solutions for legal disputes with a similar or even identical factual background. This does not absolve judges applying the transplanted idea from forming their own opinion; it may, however, expand the 'argumentative horizon' for the solution of the case at hand and thus save precious court time.

There is, in principle, no limit as far as the subject matter of a legal transplant is concerned; foreign ideas have been copied in most areas of private, administrative, constitutional, social security and even criminal law. The process can involve both single provisions and large portions of a statute. In exceptional cases (such as the French Code civil of 1804) even entire codifications have been taken as a model by other countries. Both the type of law concerned and the extent to which ideas are transplanted can thereby lead to specific difficulties. It would seem that borrowing is easier in areas

of the law which could be described as more 'technical' in nature (i.e., data protection, road traffic law, rules governing the powers and functions of state officials, or election laws), whereas the outcome of a legal transplant becomes far less predictable when policy considerations and fundamental values such as human rights come into play. Further difficulties include the translation of foreign legal language, the technical incorporation of a new rule into the existing corpus of law (which can necessitate cross-referencing the transplanted provision with other parts of the system not immediately affected by the borrowed rule), the harmonization of substantive rules with the underlying law of procedure, and the subsequent interpretation of the transplanted rule in a different legal and cultural context. Legal tradition and a preference for 'national' solutions are equally powerful obstacles to a successful transplantation. Finally, a legal transplant is most likely to succeed in its new environment if it was chosen and introduced without external pressure. As indicated above, foreign political and commercial interests will frequently seek to promote specific legal approaches to a given problem. The most obvious external influence is the implementation of certain legal ideas with the help of military force. It is submitted that external pressure of any kind is likely to reduce the chances of a legal transplant succeeding in its new environment; indeed much can be said in favour of distinguishing between the voluntary introduction of foreign law and its forced imposition, an idea already developed by Rheinstein (1987, pp. 125–7) many years ago.

Two final aspects are worth mentioning. Legal transplants are more often than not difficult to identify. There is, of course, no obligation for legislators or judges who use foreign law to disclose the intellectual ownership of a legal idea, and the origin of a rule (or indeed the fact that it was borrowed at all) will usually remain more or less obscure. In many cases, borrowing will not result in the copying of a specific text but rather in the transplantation of an idea; in others, the translation of a foreign provision or subsequent modifications to the text will make it difficult to identify the original. More importantly, 'undercover' transplants avoid criticism in the borrowing system based on prejudice against what is often perceived as an imposition of foreign views. It is thus likely that this method of developing national law is in practice even more important than the established cases of legal borrowing would suggest.

This last consideration leads to a related aspect concerning the use of comparative methodology by judges. Legal transplants can occur through case law, and some courts such as the Supreme Court of Israel or the Constitutional Court of South Africa have openly used foreign legal ideas to develop their respective legal systems. When it comes to the interpretation of the South African Bill of Rights, consideration of foreign case law

is even expressly authorized by section 39(1)(c) of the South African Constitution. Judges in other legal systems such as the United States are less open to comparative arguments, especially with respect to constitutional issues. In an increasingly globalized environment, legal transplants through judicial activity can, however, be expected to become more common despite concerns raised especially with a view to practical problems (lack of judicial time and expertise in foreign law) and the possibly weaker democratic legitimacy of the judiciary as compared to the national legislator.

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40 Lithuania

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1 Introduction

The Republic of Lithuania (Lietuvos Respublika) is one of the three Baltic States (the other two are Estonia and Latvia) that joined the European Union in May 2004. The Lithuanian legal system rightly may be qualified as a civil law system considering that a significant portion of its civil, public and criminal law is codified. In 2001, the new Civil Code (Civilinis Kodeksas) entered into force and in 2003, the new Penal Code (Baudžiamasis Kodeksas) took effect. Procedural law is also codified. Thus Lithuanians have a Code of Civil Procedure (Civilinio Proceso Kodeksas) and Code of Criminal Procedure (Baudžiamojo Proceso Kodeksas).

In terms of legal families, the Lithuanian legal system may be described as a hybrid of the French and German legal families. The new Lithuanian Civil Code supports this thesis: its strict structure and abstract wording is reminiscent of the German Bürgerliches Gesetzbuch. However, the influence of the French Code Civil may also be perceived.

The official language of Lithuania is Lithuanian: all statute law and cases are drafted in Lithuanian. Court proceedings are also conducted in Lithuanian.

2 Constitutional law

The new Constitution of Lithuania (Lietuvos Respublikos Konstitucija) entered into force in 1992, two years after the end of the occupation by the Soviet Union. The constitution contains chapters on fundamental rights, Parliament, the President of the Republic, Government, Judiciary, Administrative division, State budget, Control of the State, Foreign policy, Defence and the revision of the constitution. Lithuanian native speakers may find the electronic version of the constitution at <http://www3.lrs.lt/cgi-bin/preps2?Condition1=237975&Condition2>, whereas an English version of the constitution is available at <http://www3.lrs.lt/cgi-bin/preps2?Condition1=239805&Condition2>.

The present constitution was preceded by three other constitutions introduced in 1922, 1928 and 1938 subsequently to attempt to declare the independence of the Lithuanian state. The 1922 constitution consolidated democratic principles and a doctrine of separation of powers. The 1928 constitution, although very similar to the first Lithuanian Constitution,

significantly expanded the rights of the President, to the detriment of rights of the Parliament. The 1938 constitution legitimized the authoritarian power: the doctrine of separation of powers was officially rejected. After the declaration of independence on 11 March 1990, the 1938 constitution retained its validity until the new Constitution was drafted.

The Constitutional Court of Lithuania (*Konstitucinis Teismas*) is given an exclusive power to review the constitutionality of laws and other acts of legal importance. An act infringing any of the rights or procedures established in the constitution gives rise to constitutional review.

The powers of the state are exercised by Parliament (*Seimas*), the President (*Prezidentas*), the government (*Vyriausybė*), and the judiciary (*Teismai*). The parliament consists of one chamber which comprises 141 parliamentarians elected directly by the people for a term of four years. A member of parliament may not be at the same time a member of the government; in that sense, the Lithuanian parliamentary system may be qualified as a dualist parliamentary system. The Head of State is the President (at present *Valdas Adamkus*).

The Republic of Lithuania is a unitary state. However, the territory of Lithuania is divided into ten counties (*Apskritis*) which include nine towns (*Miestai*) and 51 municipalities (*Savivaldybės*); municipalities subsequently fall into subdistricts (*Seniūnijos*). The main task of the county administration is to execute the constitution and other statute law. It may also be regarded as a coordinator between municipalities that fall under its territory. The municipality administration, on the other hand, is not a mere executor of statutory law: it may itself enact laws on education, health care, culture, waste management, public transport, public procurement and traffic applicable within its territory.

3 Civil and commercial law

The Civil Code of Lithuania (*Civilinis Kodeksas*) entered into force in 2001. Its new structure and phrasing distinguish it from its predecessor, the Civil Code of 1964. The new Civil Code consists of six books (*Knygos*): General Provisions, Persons, Family Law, Material Law, Patrimonial Law and Law of Obligations respectively. Books comprise parts (*daly*s) which are subsequently divided into chapters (*skyriai*) and sections (*skirsniai*). The idea of making a clear structure and abstract phrasing of the Civil Code was borrowed from the German Civil Code. Traces of French civil tradition may also be found. However, the new Civil Code discards all the relics of Soviet Union civil law. The legislator informally agreed not to revise the Civil Code for at least four years after its entry into force. The official English translation of the Civil Code may be found at <http://www3.lrs.lt/cgi-bin/preps?Condition1=245495&Condition2>.

Lithuania belongs to the monist continental countries which do not distinguish between commercial law and civil law. It rather considers commercial law as part of the civil law.

The influence of foreign case law and doctrine cannot be easily perceived in the judgments of Lithuanian courts. Usually they do not refer to it. However, the situation is different with regard to the law of European Communities and the decisions of the European Court of Justice. Even before the accession of Lithuania to the European Union, the Supreme Court occasionally drew inspiration from the jurisprudence of the ECJ and gave effect to EC law. The number of references will inevitably increase now that Lithuania has become a member of the EU. Nevertheless, the question whether the judiciary of Lithuania will at the same time become more open to foreign case law and legislation remains open.

4 Court system and law faculties

Justice in Lithuania is administered by the Constitutional Court, Courts of General Jurisdiction and courts of special jurisdiction.

Courts of General Jurisdiction include district courts (*Apylinkės Teismai*), regional courts (*Apygardos Teismai*), Court of Appeals (*Apeliacinis Teismas*) and Supreme Court (*Aukščiausiasis Teismas*). There are 54 district courts which are the first instance for criminal and civil cases, cases of administrative offences and other private matters, as well as cases involving the enforcement of decisions and sentences. Judgments, decisions, rulings and orders of district courts may be appealed to one of the five regional courts, which may also act as the first instance court for criminal and civil cases assigned to its jurisdiction by law. The appeal to the Court of Appeals located in Vilnius is allowed for cases heard by regional court as first instance. In addition, the Court of Appeals hears the requests for recognition and enforcement of foreign or international courts and foreign or international arbitration awards. It has some other functions assigned to its jurisdiction by law. The Supreme Court is the court of cassation established in Vilnius to review effective judgments, decisions, rulings and orders of the courts of general jurisdiction. The Supreme Court, in addition, develops a uniform court practice in the interpretation and applications of laws and other legal acts.

Administrative courts are courts of special jurisdiction established in 1999 to hear cases relating to administrative acts and acts of commission by entities of public administration. They include regional administrative courts (*Apygardos Administracinis Teismai*) and the Supreme Administrative Court (*Vyriausiasis Administracinis Teismas*). There are five regional administrative courts that hear cases relating to public administration, lawfulness of regulatory administrative acts and taxes. It is noteworthy that,

before going to regional administrative court, the case may be disputed in the pre-trial procedure. Accordingly, the dispute is investigated by municipal public administrative commissions, regional administrative disputes commissions and the Chief Administrative Disputes Commission. The appeal from regional administrative courts, as well as from district courts for cases relating to administrative offences, is allowed to the Supreme Administrative Court. The Supreme Administrative Court may be first and final instance for administrative cases assigned to its jurisdiction by law. It is also the instance for requests to reopen completed administrative cases, including cases of administrative offences.

There are three law faculties in Lithuania. The Faculty of Law of Vilnius University is the oldest and one of the biggest educational institutions in Lithuania, which provides over 500 qualified lawyers each year. The other two law faculties are under the auspices of Mykolas Romeris University in Vilnius and Vytautas Magnus University in Kaunas.

5 References

Lithuanian statute law is published in Valstybės Žinios. The official website on which one can find all Lithuanian statute law is <http://www3.lrs.lt/DPaieska.html>.

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41 Methodology of comparative law*

A. Esin Örüçü

The fact that any one thing can be compared with any other thing has not prevented wide discussion of the concepts ‘comparability’ and ‘methodology’ by comparative lawyers. The discussion starts with the claim that ‘things to be compared must be comparable’, and revolves around words ‘like’ and ‘similar’. ‘Like must be compared with like’ and ‘*similia similibus*’, these being well-established maxims of comparative law. What is ‘like’ in law? Even if what ‘like’ means can be determined, how much ‘like’ do things have to be to be ‘comparable’? What is meant by ‘only comparables can be meaningfully compared’ and by concepts such as ‘sufficiently comparable’, ‘reasonably comparable’ or ‘fruitfully comparable’?

It is also claimed that ‘comparability’ carries the requirement that ‘there be a variable common to each instance and that the variable have the same meaning for each instance’ (Merryman, 1974, p.92; Zelditch, 1971) and that ‘comparisons can be useful only if the legal institutions under investigation are naturally or functionally comparable’ (Zweigert and Kötz, 1998, p. 34).

In 1900, the assumption underlying the Paris Congress, presented as the starting point of methodological and scientific comparative law proper, might have been that only ‘similar’ things could be compared, but is this the approach we take today? For example, would comparing diverse legal systems, legal institutions or legal rules and coming to the conclusion that they are not ‘like’, not be ‘meaningful’ or ‘fruitful’?

Comparative law scholars use the term ‘*tertium comparationis*’, a common comparative denominator that could be the third unit besides the two legal comparanda, i.e., the elements to be compared, the comparatum and the comparandum. Here, comparability is seen to be closely related to *tertium comparationis* and to depend on the presence of common elements which render judicial phenomena ‘meaningfully comparable’: thus comparability is equated with *tertium comparationis*. Hence it is said that the objects of comparison must have common characteristics which serve as the common denominator, the *tertium comparationis*. What must the comparative lawyer consider as *tertium comparationis*? Should this be the ‘common function’ between institutions and rules, or the ‘common goal’

* See also: Aims of comparative law; European Civil Code; Legal culture.

they are meant to achieve, or the ‘problem’, or the ‘factual situation’ they are created to solve or the ‘solutions’ offered?

At the level of macro comparison, the issue of ‘comparability’ has been resolved by many comparative lawyers with the argument that the comparison must extend to the same evolutionary stage of different legal systems under comparison and that they should be at the same stage of development, whether, economic, social or legal.

However, there is nothing in the logic of comparative inquiry dictating that comparison be limited to any specific level or unit. Hence, at the macro level, ‘comparability’ may be relative to the interests of the comparative lawyer. It is the aims of the specific comparative study that should determine the choice of legal systems to be compared. Nor need one carry out comparative research only in groups of legal systems with broadly shared attributes.

At the level of micro comparison, it has been widely argued that the true basis of comparative law is ‘functional equivalence’. Two distinct currents of functionalism are on offer: the ‘functionalist method’, one of the best-known working tools in comparative law, and ‘functionalism’ in the sense that law responds to human needs and therefore all rules and institutions have the purpose of answering these needs. The functional–institutional approach answers the question ‘Which institution in system B performs an equivalent function to the one under survey in system A?’ From the answer to this question the concept of ‘functional equivalence’ emerges. Comparative lawyers seek out institutions having the same role, i.e., having ‘functional comparability’, or solving the same problem, ‘similarity of solutions’. What is undertaken here can also be the ‘functional juxtaposition’ of comparable solutions.

The problem-solving approach – the other side of the same coin – asks the question, ‘How is a specific social or legal problem, encountered both in society A and society B, resolved?’; i.e., ‘Which legal or other institutions cope with this problem?’ This approach, similar to the ‘functionalist’ approach, springs from the belief that similar problems have similar solutions across legal systems, though reached by different routes. It is said that ‘the fact that the problem is one and the same warrants the comparability’ (Schmitthoff, 1939). According to the functional–institutional approach the above questions, once answered, are immediately translated into functional questions. Functional inquiry also suits the utilitarian approach to comparative law.

Thus one either starts with a social problem or need in one society, discovers the institution that deals with it and then looks to other societies for institutions, legal or otherwise, which deal with the same problem or need, i.e., functional equivalents, or one starts with an institution in one society, asks ‘What is the purpose or function of this institution in this society?’

and, having ascertained it, looks for a functionally equivalent institution in the second and then, if so wished, in a third society. The underlying assumptions are that there are shared problems or needs in all the societies under comparison, that they are met somewhere in the society and that the means of solving these problems may be different but comparable, their functions being equivalent.

Another way of putting the issue is that 'the approach should be factual'. Here, similarity of factual needs met by different legal systems makes those legal systems comparable. Institutions can only be meaningfully compared if they solve the same factual problem (Zweigert and Kötz, 1998). This approach can also be called the universalist approach to human needs which hails from the belief that social problems are universal, the laws respond to these needs in various ways, but that the end results are comparable. Hence, here, the starting point is a 'concrete problem'. As noted, even the incomparable can be compared provided that the focus is on the same facts.

In the 'factual approach', if facts are not the same there is no comparability. In the 'universalist approach' the similarity of solutions is paramount. If this were not so there would be no place for comparisons. That is why certain areas such as family law, where moral and religious values are prominent, have been neglected for a long time. Comparability benefits from the findings of similarity as it can then develop further on 'praesumptio similitudinis'.

However, would this approach be satisfactory when institutional facts encountered in one legal system have no comparable counterpart in the other legal system? The answer must lie in comparisons being carried out between legal systems of some similarity. If the countries under comparison have social orders that are different to one another, then legal rules that regulate situations specific to only one of the societies must be separated from the legal rules that regulate shared situations. According to this approach, those in the first category are not comparable, whereas those in the second are; thus comparative lawyers can only work in systems that are in some way related. This allocates rather a limited role to the comparative law researcher. However, the 'functionalist method' in any of its forms is not the sole approach in comparative law research, though it has recently gained a special place in common core studies in Europe.

If by 'law' is meant a body of rules only and comparison at the micro level is directed at these rules, then the functional approach would be useful, since a body of rules is created for the purpose of solving human problems, most of which are shared. Thus, in the context of the European Union, for example, where comparative law is a driving force and has a decisive role in the harmonization process, the 'functional comparative analysis method' shifts the focus from the 'vertical' to the 'horizontal' and provides the

potential for convergence of both the legal systems and the legal methods of the member states, leading to gradual and eventual legal integration. In this, to build on similarities may be desirable and decisive. However, the comparison of differences and contexts and therefore the extension of comparison beyond functionally equivalent rules require other approaches. The functional–institutional approach does not solve the issue of comparability as between a western legal system and a religious system or a developing legal system. In addition, if there is a problem in one legal system that has no counterpart in another, this approach faces another dilemma, and yet this is when comparative law research becomes most effective. There are fundamental criticisms of this approach such as the limitation of subject areas that can be compared and the fact that many areas of law are beyond the scope of comparison since they are regarded as ‘not lending themselves to comparison’, being determined by specific histories, mores, ethical values, political ideologies, cultural differences or religious beliefs. There is also the problem of ‘one institution or rule with many functions’.

To say that ‘comparison’ itself is the method would be reductivist since a number of methodological options exist. Most of these are contextual approaches such as analysis of existing rules and institutions in ‘historical’, ‘economic’, ‘political’ or in ‘cultural’ contexts. Some of these approaches are now dubbed ‘post-modernist’, intermingled with legal realism. The functional method was adopted to do away with ‘the local dimensions’ of rules and to reduce the rules to their operative description ‘freed from the context’ of their own systems; whereas the contextual approaches specifically stress the ‘local dimension’.

It has recently been suggested that ‘the post-modern critique of functionalism, coined as “better-solution-comparativism” is primarily directed against its implied or outspoken universalism, its “agenda of sameness”’, in order to yield results of similarity and avoid ‘challenging questions about the role of law in society’ (Peters and Schwenke, 2000, p. 827). Claims that the functional approach underestimates differences are seen to be related to cultural ‘framework-relativist’ thinking, ‘according to which legal thought, language and judgments are determined by greatly differing and ultimately irreconcilable frameworks’ (ibid., p. 828).

Today nets can be cast as wide as may be wished to include the comparison of the ‘ordinary’, the ‘extraordinary’, the ‘similar’ and the ‘different’, the basis being the assumption that ‘everything is comparable’. Thus, at the macro level, fruitful comparisons can be carried out between systems that do not share the same degree of economic, political and social development and are not within groups of legal systems broadly sharing similar attributes.

As there is no one single method to be followed, which methods can and should be used by comparative lawyers? When and with what expectations?

The problems of comparative legal methodology are many and various and, as seen, have been considered in different ways by different comparative lawyers, and the methodology of comparative law has been referred to in a number of ways. 'Functional equivalence' and the 'problem-oriented' approach (Zweigert, 1972), 'model-building', 'common core' studies and 'factual' approach (Schlesinger, 1968), the 'multi-axial method' made up of the historical, functional and dogmatic axes and the law as a system of rules in a national context (Schmidt, 1981) and 'method in action' (Ancel, 1971) are just some of the approaches to 'How to compare?' put forward in the last century. Today, we see a plurality of methods being practised, and the availability of a multiplicity of approaches can only enrich research possibilities. Comparative law research is moving towards the exploration of backgrounds, contexts and interrelationships by employing a 'system dynamics' approach.

It is a fact that 'comparison' involving juxtaposing and contrasting is used in all fields of study, be they social sciences or natural sciences. Comparison is a way of looking; it is a mode of approaching material, a method in the process of cognition (Örücü, 1986). Thus, used alone, the 'comparative method' can be employed in various fields of discourse. In this sense it is an empirical, descriptive research design using 'comparison' as a technique of cognizance. However, when the term 'comparative' is included in the name of a subdivision of a field such as comparative architecture or comparative linguistics, it denotes an area of study and in that context, the word 'comparative' in the title no longer depicts a method, but indicates an independent branch of that science, in our case, legal science. This subject, then, develops its own methods. Comparative lawyers have not 'invented' their methods or the 'process' of the methods and techniques used. They have borrowed methods such as the historical, structural, functional, empirical, statistical, thematic and evolutionary and have creatively applied them to the problems of comparative law research.

What then is a method? A method is a means of obtaining data – information classified into usable conceptual units – and a means of ordering and measuring data. Observation, documentary research, sample surveys, statistical operations, context analysis and in-depth interviews are all methods (Roberts, 1972, p. 51). In comparative law research, the obvious method is comparison; i.e., juxtaposing, contrasting and comparing. But how this comparison is to be carried out has no standard answer.

Although comparative law research is open-ended and the methodology is determined by the strategy of the comparative lawyer, the possibility of comparison is dependent upon the existence and availability of data. Data can best be obtained by employing social science methodology. Direct investigation, understanding and analysis of data recorded for a specific

purpose are essential and healthy starting points for comparative inquiry. The inquiry stage is also related to concept building where concepts that are neither so broad as to be meaningless nor so narrow as to cover one single instance have to be devised. Umbrella concepts may have to be created.

The comparative lawyer must collect and describe data on the basis of carefully constructed classificatory schemes, discover and describe uniformities and differences on the basis of such data, formulate interrelationships between component elements of the process and other social phenomena as tentative hypotheses, subsequently verify the tentative hypotheses by rigorous empirical observation and construct the cumulative 'acceptance' of various basic propositions.

In any comparative analysis the first issue to determine is 'What to compare?' Since the essence of comparison is the recognition and explanation of significant regularities, similarities and differences, it is essential that the phenomena to be compared be identified unambiguously. The answer to what to compare amounts to a choice between macro-level, meso-level and micro-level comparison. When the approach is macro-comparative, the 'normal' unit of comparison could be the 'system'. But choice can lie between this macro focus and the 'structure' which involves a meso or micro-legal focus. This choice is strategic, not dogmatic.

As a blueprint, it can be suggested that the following steps be followed in most comparative law research. Having decided on the scope of the comparison, the first step is the choosing of the concepts and identifying them. In essence these are the units of inquiry and the containers of data. Concepts, which are to be the units of a comparison, should be identified and defined. There should be extensive information sufficiently precise to be meaningfully compared. Here there may be problems such as concept construction and definition; level of abstraction and classification; languages of comparison and measurement; and problems of translation and cross-cultural terminology.

Logically, conceptualization precedes description and comparison, identification, explanation, measurement and confirmation (theorizing or theory testing), which are the other steps in a simple process of comparison. Conceptualization is the recognition of the need for a level of abstraction of concepts. Choice of systems necessitates choice between an intracultural comparison (of legal systems rooted in similar cultural traditions and operating in similar socioeconomic conditions) and cross-cultural comparison. The classification of legal systems therefore constitutes an important aspect of comparative law and should be treated at the stage of conceptualization. If the choice lies with meso or micro comparison then the various characteristics of a legal system (the structure, the sources of law, judicial systems and the judiciary, the legal profession, etc.; the various branches of national

laws; institutions and concepts including general principles of law; the historical development of legal systems) could be selected as topics.

Here we may see one type of methodology: the comparison of equivalent institutions and concepts. This approach assumes parallelism of social problems. The search for equivalents (*similia similibus*) cannot be confined to institutions with similar or identical names since terminology may offer no assistance. In such circumstances functional equivalence is particularly useful. The conceptualization process requires that a choice also be made between whether one wants to undertake a structural comparison, an institutional comparison or a functional comparison involving differential explanation in the later stages of the process. These are all strategies of comparative inquiry and can include the structural, functional or psychological approach, behaviour-oriented focus, area study approach, configuration approach, problem-based orientation, 'most similar' or 'most different' approach, or multi-approach strategy.

Having chosen what to compare, established, defined and classified the concepts – paying attention to translation and cross-culture problems – and chosen the relevant strategy and approach, the comparatist moves to the second phase in the process. This is the descriptive phase, which may take the form of a description of the norm, concepts and institutions of the systems concerned, or it may consist of the examination of the socio-economic problems and the solutions provided by the systems in question. This is the stage of collection of data on the basis of carefully constructed classificatory schemes.

The first tool in this phase is observation, the earliest type of 'comparative method'. There are, however, problems of observer effect, difficulties of language and access and appreciation of cultural differences here. The second tool is sample survey. This standard tool for acquisition of cross-cultural data is flexible; it can be used for interviewing, for intensive or extensive samples.

The identification phase comes next. This phase is concerned with the identification or discernment of differences and similarities between the phenomena under comparison. It is the discovery and description of uniformities and differences on the basis of the collected and classified data. It can also be called the classification phase. In this phase content analysis is made which is the result of the inferential form of measurement.

As comparable concepts and rules are first to be described and then juxtaposed, it can be said that contrasting is the first task of comparing. The empirical school suggests that the appropriate method begins with the facts, 'the problem', rather than with hypotheses, and ends in description. Similarities and differences brought to light by this juxtaposing, contrasting and comparing are then identified. This is a down-to-earth approach,

which the present-day lawyer is well equipped to handle. Yet comparative inquiry should not end at description, but move on into explanation where the real comparison starts, and then, on into confirmation of findings. Hence the need for hypotheses.

The directly comparative phase of the methodology is the fourth, the explanatory phase. In the explanatory phase the divergences and resemblances are accounted for. Here the comparatist's own outlook is important. It could be a jurisprudential outlook that is sociologically or historically oriented or textually concentrated. For the explanation to be accurate a sociocultural overview is essential. Comparison concentrated on textual or formal rules can give an incomplete or distorted picture. Also, when one is engaged in meso or micro comparison, the topic under comparison must be placed in the context of the entire legal system in the explanatory phase. In this phase simulation can also be used. The main purpose of simulation is to understand the interactions of the components of a system under different conditions or constraints, or of various systems under the same conditions and constraints. It is used especially in macro-level comparisons. This phase consists of the formulation of interrelationships involving political, economic, cultural and other social phenomena as tentative hypotheses. It is at this stage that context becomes indispensable for understanding. Here the help of economists, historians, anthropologists or cognitive psychologists may be needed. Yet the imagination and creativity of the comparative lawyer herself cannot be replaced by any of those specialists.

For the verification of such hypotheses and the cumulative 'acceptance' of various basic propositions, one moves to the final stage, i.e., confirmation. This is the theory testing, the arrival at a set of final statements. The purpose of specific comparative analysis may be to test or suggest propositions which can be used by extension to explain all cases (if only on a probability basis) of the level of generality of the cases compared. Here, the presumption of similarity can be used as a means of testing the result, in evaluation of the problems and the practical solutions in more than one legal system.

Traditional black-letter law-oriented (rule-based) comparative law research is normative, structural, institutional and positivistic, and would not use any approach other than the reading of statutes, cases, parliamentary debates and doctrinal works, and would regard description and identification to be the final stages of the inquiry. Even the conceptualization stage might be suspect. For those concerned with law in action and law in interaction with social and cultural systems, rule-based research is not satisfactory since it may lead to only partial truth and a misleading picture. Creative comparative law research may be interested in suggesting 'core concepts' and point the way to 'ideal systems', or at least to the 'better law'

approach. Some complain that on the whole comparative lawyers are concerned with description, analysis and explanation and not with evaluation and prescription (Twining, 2000, p. 34). However, in relation to the search for 'better law', there is scope for evaluation and prescription, but the legitimacy of this activity will always remain questionable.

What then are the limits of comparativism? The first category of limits is related to the comparative lawyer herself and the second arises from extrinsic factors. In each category there are a number of issues to look at, some more serious than others (Örücü, 2004, pp. 161–70). For example, the limits of comparativism related to the comparative lawyer herself can be the possible lack of a deep level of knowledge of languages, pitfalls related to translation, especially translation of culture-specific concepts, and 'cultural deficit'.

The so-called 'contrarian challenge' advocates that the comparative lawyer be only interested in difference. In its extreme form, assuming an epistemological pessimism, there could even be denial of comparativism as each culture is unique. Cultural differences in this extreme position would bar comparative law research. The 'other', the 'untranslatable', would always remain a mystery, since any attempt at understanding the 'other' would only lead to misconceptions and misleading results. In its more flexible form, however, comparative law works, but must be involved only with differences between systems. There is a natural link between the 'contrarian challenge' and the 'difference theory'. One solution is 'cultural immersion' (Curran, 1998). Another is the suggestion that an 'organic method' be developed to contextualize objects of comparison (Palmer, 2004, pp. 5, 11).

Comparative research is carried out for a number of purposes and the methodology and techniques used can differ according to these purposes. For example, in law reform by legislators or the courts, comparative law acts as a provider of a pool of models, using foreign law to modernize and improve the law at home. The aim will dictate the choice of models. Looking for legal systems, preferably in sociocultural and legal cultural affinity, systems which share the same problem but deal with the problem in different ways, better ways and more efficient ways will lead the comparatist to a specific kind of methodology.

In unification with prior harmonization, or solely for harmonization purposes, the choice of systems will be predetermined by political choices. The comparative lawyer here presents the necessary changes to the legal systems or institutions to be harmonized to smooth the process. A thorough knowledge of both systems is required before an approximation is suggested. More problems will be encountered if the two or more systems are socio-culturally and/or legal-culturally diverse. This activity will involve another kind of comparative law methodology.

In tracing relationships, usually carried out by legal historians/comparatists, historically related systems, borrowers, colonies, recipients and systems related in any other way are studied vis-à-vis the institutions that have moved, in order to understand the changes that took place in the moving institution. Explanations for the movement and the change will be sought. Both vertical and horizontal comparisons will be needed. The specific problems are anachronism and a lack of appreciation of social history. Sometimes the model (mother) can learn from the offspring. Here, the choice of systems is predetermined by history and the methodology to be used will be different to the other activities above.

For pure theoretical research, to enhance understanding of legal phenomena and create legal knowledge, choice is open and extreme positions should be sought, as the more diverse the systems, the more valuable the findings. Here the methodology used will again differ from the above.

Obviously we can talk, not of a 'comparative law methodology' and not even a 'methodology of comparative law', but of methods employed in comparative law research, since there is no one single method or a single perspective exclusive to comparative law. Legislative (reform) comparatists, law-applying comparatists and academic comparatists have different goals and therefore a single methodology for all would be unworkable. Yet, whether one regards comparative law as a method and technique or as a social science, the very act of comparison itself is obviously a method, a method of analysing data for purposes of understanding and explaining. However, as demonstrated, methodology is more than a simple decision 'to compare'.

The application of a proper method suitable for a particular piece of research is generally a prerequisite for success in any area of study. In comparative law it is of paramount importance as on it will depend whether the specific comparative inquiry effectively serves the function or functions which the comparatist has decided to emphasize, the accuracy and value of the results secured and the validity of conclusions drawn.

The ultimate test in evaluating any method used is this: do the techniques employed adequately or effectively fulfil the object or objects that the comparatist has decided on? Do they, for example, promote the better understanding of one's own law, the formulation of reliable theories of law, the promotion of law reform or unification? Can the results obtained be safely depended on as accurate? If the answer is negative then the method used was inadequate or unsystematic.

Recent changes in theoretical and methodological outlook and ways in which methodological questions are posed have brought practical orientation, dogmatic orientation, law and society orientation and creative comparative law to the foreground. It is important to think of the methodological consequences of these different approaches.

Some problems, however, will always remain, whichever approach is used: typology of legal families versus legal culture/social culture; the limits of functional equivalence; language and translation; the extent of knowledge needed to appreciate legal, political, social and cultural contexts; transplants and the use and misuse of foreign models; appreciation of cross-cultural concepts; the traditional narrow approach to legal matters; concept construction and level of abstraction; cross-cultural terminology; appreciating differences; assurance of access and observer effect.

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42 Mistake*

Gerhard Lubbe

1 Introduction

A mistake is ‘a belief that is not in accord with the facts’ (Restatement, Contracts 2d, s.151; Kramer and Probst, 2000, p. 6). In a contractual setting the question is whether a party whose expectations of a contract have been frustrated by a mistake should be permitted to disappoint the expectation of the other party that a contract has come about. In respect of a given transaction, there is a myriad of circumstances about which mistakes might be made. In addition, one or both of the parties might be mistaken about the same or different aspects, and a party (or both of them) might at the same time be labouring under a number of mistakes about different issues. As a result of this complexity and the interplay of basic principles of contract law (Kramer and Probst, 2000, p. 1), national legal systems offer a ‘perplexing abundance of different viewpoints’ on when a mistake is operative (Zweigert and Kötz, 1998, p. 423).

The treatment of mistake in the civilian tradition reflects the development of the casuistic notions of Roman law by the authors of the *jus commune* (Kötz and Flessner, 1997, pp.172–3, 179; Kramer and Probst, 2000, pp. 8–9). This influence is not absent from English law. Decisions of the 19th century, which under the sway of Pothier inclined towards a subjective view of contract, sit uneasily with an objective theory of contract espoused in more recent precedents (Beatson, 2002, p. 308). Difficulties regarding the English law of mistake are exacerbated by a doctrine of equitable mistake that coexists uneasily with the rules of the common law (Beatson, 2002, p. 309; Treitel, 2003, p. 312). In the United States of America the case law, which reveals patterns similar to those of English law, has been described as ‘not marked by consistency in either reasoning or result’ (Farnsworth, 1998: p. 569). In consequence, the approach of the Restatement, Contracts 2d has become established as a framework for future development (*ibid.*; Bernstein, 2002, pp. 173–4; Zweigert and Kötz, 1998, p. 422). Criticism of the treatment in the classic civilian codifications also suggests a need for reform (Kramer and Probst, 2000, p. 12; Drexelius, 1964, p. 7; Ferid and Sonnenberger, 1994, p. 483).

* See also: Supervening events.

2 The classification of mistake

The tripartite distinction of English law between unilateral, common and mutual mistake is characterized by terminological uncertainty (Beatson, 2002, p. 311; Furmston, 2001, pp. 252–3), is of little utility in respect of a typology of mistake and not recognized in civilian legal systems (Markesinis, Lorenz and Dannemann, 1997, p. 198). That a party who wishes to enforce a contract was aware of the other's mistake or in fact shared it may be relevant in deciding whether the mistake is operative, however.

Of greater significance is a distinction recognized by Lord Atkin in *Bell v. Lever Brothers Ltd* [1932] 161 at 172, where it was said, 'If mistake operates at all, it operates so as to negative or in some cases nullify consent.' The latter category comprises cases where, although the parties are in full agreement about the contract and its terms, the mistaken party would not have contracted but for the mistake (Beatson, 2002, p. 311; Treitel, 2003, p. 286; Furmston, 2001, p. 253; Kramer and Probst, 2000, p. 7). In contrast to such cases where the mistake relates to the motive of a contracting party, are those where, as a result of 'some mistake or misunderstanding in the communications between the parties', they are at cross-purposes to such an extent that their minds do not meet as regards the subject matter and terms of the contract (Guest, 1994, p. 293; Treitel, 2003, p. 286; Beatson, 2002, pp. 310–311, 321).

The civilian tradition reveals a similar approach, deriving from Savigny's distinction between mistakes that influence the formation of a party's intention and those in the expression of the will which result in disagreement between the parties (Zweigert and Kötz, 1998, p. 413; Kramer and Probst, 2000, p. 6). Paragraph 119 of the German BGB, for instance, regulates mistakes in the transaction and mistakes concerning essential characteristics (Markesinis, Lorenz and Dannemann, 1997, pp. 198–201). The former may take the form of either a declaration mistake (Erklärungsirrtum) or a mistake in content (Inhaltsirrtum). A declaration mistake occurs where a party expresses him or herself inaccurately, by a slip of the tongue or the pen (see also s. 120 BGB on the so-called 'mistake in transmission', where a mistake occurs in the transmission of the declaration of will by a third party (Übermittlungsirrtum)). Where a party does intend to use the words in a declaration, but is mistaken about their objective significance, there is a mistake in content (Markesinis, Lorenz and Dannemann, 1997, p. 199).

In all of these cases there is a discrepancy between what is said and what is actually intended, which, when taken at face value by the other party, results in disagreement. The same does not hold in respect of mistakes concerning essential characteristics (Eigenschaftsirrtum), regulated by s. 119(2), the recognition of which amounts to an exception to the general

rule that a mistake in motive is legally irrelevant (*ibid.*, p. 200; Kramer and Probst, 2000, p. 11). For a similar approach in Dutch law see respectively articles 3:33, 3:35 and article 6:228 of the BW (Chao-Duivis, 1996, pp. 168–311; van Rossum, 1992, pp. 304–8; and see Zweigert and Kötz, 1998, pp. 414–16 on Swiss and Austrian law). The distinction in French law between *erreur* as a vice of consent (articles 1109, 1110 and 1117 Code Civil) which provides a ground for rescinding a contract and the notion of ‘*erreur obstacle*’, developed by legal commentators, brings French law into line with the distinction in *Bell v. Lever Brothers Ltd*. *Erreur obstacle* encompasses cases of disagreement as regards the subject matter of the transaction or its cause and excludes article 1108’s requirement of consent (Ferid and Sonnenberger, 1994, pp. 415, 478, 485; Nicholas, 1992, p. 98; Ryan, 1962, pp. 54–5; Kramer and Probst, 2000, p. 14–15; Drexelius, 1964, pp. 43–4). In the case of a vice of consent, there is agreement, but because the party in question would not have contracted but for the mistake, the consent does not amount to a free exercise of individual autonomy and the contract is voidable (Ferid and Sonnenberger, 1994, p. 484; Nicholas, 1992, pp. 76, 78, 98; Cartwright, 2002b, pp. 154, 159).

3 Mistake and the basis of contractual liability

The treatment of mistake reflects the weighing up of the relative interests of the parties to a contract encapsulated in a legal system’s theoretical understanding of contract.

The German BGB deals with mistake by means of a general theory of the legal act: a contract consists of coinciding declarations of will expressing the intention of the parties regarding its essential and incidental terms. A contract may in principle be rescinded under s. 119(1) BGB if a party mistakenly thought a declaration reflected his or her actual intention whereas in fact it objectively did not. From the perspective of a generally objective theory of contract, the treatment in s. 119 of mistakes in the transaction in the same breath as mistakes as to essential qualities is understandable (cf. Kramer and Probst, 2000, p. 13 on Austrian law). The question in each instance is whether the contract that has come about is defeasible at the instance of the mistaken party. English law also adopts an objective test of agreement. In spite of disagreement there is a contract where one party has induced in the other a reasonable belief that agreement has been reached (*Smith v. Hughes* (1871) LR 6 QB 597; *OT Africa Line Ltd v. Vickers plc* [1996] 1 Lloyds’ Rep 700). The implications of the objective theory for the distinction between mistakes that nullify and those that negative consent are not clearly understood, however, resulting in the separate treatment of disagreement and mistakes which nullify consent. In American law, by contrast, there is a tendency, as in German law, to subject both classes of case

to the same rules (Calamari and Perillo, 1998, p. 347; Farnsworth, 1998, pp. 569–84; Bernstein, 2002, pp. 173, 174).

Article 1101 of the Code Civil defines a contract as an agreement which under art. 1108 depends, *inter alia*, on the consent of the person who obliges himself. The ‘internal, subjective intentions of the parties and in particular of the party whose obligation is in issue’ determine whether there is agreement or not (Cartwright, 2002b, p. 156; Ferid and Sonnenberger, 1994, pp. 415, 484). Although the will must be outwardly declared in order to have legal relevance it is of evidential significance only (Cartwright, 2002b, p. 156). In the case of a discrepancy between the subjective and the declared will or in the case where the will underlying the declaration is vitiated, the contract is voidable (Ferid and Sonnenberger, 1994, p. 414). French law is nevertheless sensitive to the need to correct the operation of the subjective theory and it is of interest to note that there is a tendency to treat some instances of *erreur obstacle* on the same basis as *erreur*.

4 Mistakes that negative consent

As a general rule the objective test of English law precludes a reliance on a mistake that negatives consent (Beatson, 2002, p. 321; Treitel, 2003, p. 307; Cartwright, 2002b, pp. 156–7). A declaration unaccompanied by a subjective intention which bears an objective sense operates as a representation that agreement has been reached and priority is given to interests of the party who relies thereon (Cartwright, 2002b, p. 159). The position may be different where the mistake concerns the elements and consequences of the contract, *i.e.*, relates to the identity of a party (and not merely his or her attributes) or the subject matter of the contract (and not merely its qualities) or the terms of the contract (Treitel, 2003, pp. 298ff.; Beatson, 2002, pp. 321–6, 333). If in such a case the party seeking to avoid the contract would not have contracted had he or she known the truth, the absence of agreement will be operative provided the circumstances exclude the application of the objective theory (Treitel, 2003, pp. 304–6). This will be the case in the first place where ambiguity in the contractual declarations precludes a reasonable inference that the resiling party was assenting to the contract as understood by the enforcer (*Raffles v. Wichelhaus* (1864) 2 H&C 906; Beatson, 2002, pp. 322–3; Treitel, 2003, p. 307). Knowledge on the part of the enforcer of the mistake of the other, secondly, excludes any belief in the existence of agreement. There is no contract because there is no reliance that merits protection (*Hartog v. Colin and Shields* [1939] 3 All ER 566; *Webster v. Cecil* [1861] 30 Beav 62; *Cundy v. Lindsay* [1878] 3 App Cas 459). In principle, the same result should follow where the enforcer ought to have been aware of the mistake, and there are indications of an inclination in this direction by the courts (Beatson, 2002, pp. 323–4). Finally, a mistake of this

kind is operative where it has been negligently induced in the resiler by the party seeking to enforce the agreement (Treitel, 2003, p. 309; *Scriven Bros v. Hindley & Co* [1913] KB 564).

In German law, a mistake in transaction renders the contract voidable at the instance of the mistaken party (s. 119(1) BGB). It must be established not only that there was a mistake, but also that it was causally relevant in the sense that the party would, with full knowledge and upon an objectively reasonable evaluation of the circumstances, not have made the declaration (s. 119(1); Kramer and Probst, 2000, pp. 11–12). Rescission must be made without culpable delay and in any event within ten years (s. 121 BGB). The right to rescind may be excluded where its exercise would be contrary to good faith (*Treu und Glauben*). Where, for instance, the other party is prepared to give effect to the contract as understood by the mistaken party, a reliance on mistake will be excluded as a *venire contra factum proprium*.

An important corrective on the general right to rescind is s. 122, which requires the rescinding party to compensate the other for loss suffered in consequence of having relied on the validity of the declaration. The claim is restricted to the amount that will place the injured party in the position he would have been in had the contract not been concluded. Irrespective of fault, the resiler is held bound because the mistake originates within his or her sphere of responsibility (*Veranlassungsprinzip*) and because of the need to protect the reliance of the addressee (Kramer and Probst, 2000, pp. 22–3). Accordingly, there is no duty to compensate where the other party was aware of the mistake or was negligently ignorant thereof (s. 122 (2) BGB). The same applies to the case where the other party was responsible for the resiler's mistake (Kötz and Flessner, 1997, p. 187, n. 72). There is furthermore no duty to compensate in the case of a shared or common mistake regarding the falling away of the subjective *Geschäftsgrundlage*, i.e., the factual basis of the contract.

From this it is apparent that the circumstances under which s. 122 BGB corrects the reliance on mistake in cases of disagreement and English law permits it are to a large extent similar (see Zweigert and Kötz, 1998, pp. 414–15 for parallels in other systems). The systems differ regarding the weight accorded the interest of the party who wishes to enforce the contract. The uniquely German approach seeks to balance a general right to rescind against a general right to be compensated for reliance losses, whereas under English law the enforcer is in principle entitled to the benefit of the bargain.

In respect of *erreur obstacle*, French law adopts the implications of the conclusion that agreement has not been reached only in some instances (Nicholas, 1992, pp. 98–100). This would seem to be the approach in cases of error in corpore and error in negotio characterized by ambiguity,

which rarely occur in practice, however (Kramer and Probst, 2000, p. 14, Drexelius, 1964, p. 43). In the case law, cases of *erreur obstacle* where a party is mistaken as to the objective tenor of a declaration are dealt with under the rubric *erreur*. In consequence, the agreement is regarded as relatively null only and the reliance on the mistake tempered by the application of objective corrective principles referred to below (Nicholas, 1992, p. 98; Ferid and Sonnenberger, 1994, p. 486; Drexelius, 1964, p. 44). A party, who rescinds either on the basis of *erreur obstacle* or *erreur*, may in any event be obliged to compensate the other on a delictual basis under art. 1382 of the Code Civil for loss suffered as a result of relying on the appearance of agreement flowing from the conduct of the former (Nicholas, 1992, pp. 93, 110; Ferid and Sonnenberger, 1994, pp. 442, 452, 478, 492). German commentators also are of the view that s. 119 BGB does not exclude a claim for damages on the basis of *culpa in contrahendo*, for example where the mistaken party acted negligently in making the declaration. In such a case the limitations of s. 122 do not apply.

5 Mistakes that nullify consent

Only two kinds of mistake, those as to substance and person (*erreur sur la substance* and *erreur sur la personne*), are recognized by the French Civil Code. The former relates to ‘the very substance of the thing which is the object of the contract’. A mistake as to a contracting party is not a cause for nullity ‘unless the consideration of this person is the principal cause of the agreement’ (art. 1110; Nicholas, 1992, p. 95). This encompasses not only a mistake about identity but also one as to the characteristics of a party (Ferid and Sonnenberger, 1994, pp. 489, 490; Nicholas, 1992, p. 96). In other respects, the treatment of mistake as to person parallels that of *erreur sur la substance*.

By limiting the scope of operative mistakes to those as to substance of the object and the person with whom one contracts, the Code purports to render irrelevant mistakes as to mere *accidentia* (Ferid and Sonnenberger, 1994, p. 484; Cartwright, 2002b, p. 159). Under the influence of Pothier (1813, p. 113), the test is subjective. The question is whether the mistake relates to a quality of the object of substantial importance for the transaction in view of the purposes, circumstances and expectations of the party whose obligation is in question. The modern notion of *erreur sur la substance* encompasses mistakes in respect of performances and counter-performances of whatever nature, corporeal or otherwise, irrespective of the nature of the contract (Ferid and Sonnenberger, 1994, p. 487; Nicholas, 1992, pp. 88–9; Cartwright, 2002b, p. 160). Although an operative mistake amounts to a mistake in motive, not all such mistakes are relevant (Nicholas, 1992, p. 91). Relief is restricted to mistakes regarding qualities of the object of the

contract (Ferid and Sonnenberger, 1994, p. 492; Nicholas, 1992, p. 92). A mere mistaken assumption as to the value of the object is irrelevant as well unless it results from an underlying mistake as to the substance of the object. The Code makes provision, albeit within narrow limits, for a remedy in cases of inadequacy of value (arts 1674, 1188 CC).

French law does not apply the will theory without qualification. Additional constraints have been developed to safeguard the security of transactions and the interests of the other party (Nicholas, 1992, pp. 92, 94). Although some commentators require that the parties should have agreed that the putative aspect was the determining consideration for the agreement (*qualité convenue*), this view has not found general acceptance (Cartwright, 2002b, p. 160; Nicholas, 1992, p. 92). Instead, the party who wishes to enforce the agreement should have known or ought to have been aware that a particular assumption was the decisive consideration for the other (Nicholas, 1992, pp. 92, 93; Cartwright, 2002b, pp. 160–61). A further limitation relates to the conduct of the mistaken party: the mistake should not have been inexcusable. This requires a consideration of the circumstances of the case in order to decide whether, in view of the general criteria pertaining to *faute*, a party is entitled to rely on a mistake. Negligence renders a mistake inexcusable (Ferid and Sonnenberger, 1994, pp. 490–91; Nicholas, 1992, p. 94).

The conduct of the contract enforcer may be of evidential significance to establish that the mistake of the other determined his or her consent or was excusable (Nicholas, 1992, pp. 94–5). More significantly, the limitations on *erreur sur la substance* do not apply where the enforcer is guilty of fraud in relation to the mistake of the other (Cartwright, 2002b, p. 161). Any mistake may be relied upon in such a case irrespective of whether it is inexcusable or not. This is so irrespective of whether the enforcer knowingly caused the mistake by an active misrepresentation or, being aware of it, took advantage thereof in contravention of a duty to inform the other party (*ibid.*, p. 162). The possibility of a delictual claim for damages for loss suffered as a result of a reliance on mistake serves as a further corrective for the subjective theory (Nicholas, 1992, pp. 93, 110; Ferid and Sonnenberger, 1994, pp. 442, 452, 478).

Under s. 119(2) BGB, a mistake as to essential qualities of a person or thing provides the basis for rescission provided that the mistake was decisive for the decision to enter into the contract. Although the mistake is one in motive only, the disappointed expectation of the mistaken party is regarded as worthy of protection provided that the mistake related to an objectively important inherent, factual or legal characteristic attributed to the other party or the subject matter (Markesinis, Lorenz and Dannemann, 1997, pp. 200–201). Depending on the nature of the contract, a mistake as

to the qualifications or previous behaviour of a contracting party may be relevant. As regards the subject matter of the contract, the focus is on mistaken assumptions regarding its attributes that affect its value. A mistake merely as to the value of the thing or future expectations is irrelevant, however. The right to rescind a declaration of will under s. 119(2) is subject to the restrictions referred to above in respect of s. 119(1).

The English law regarding mistakes that nullify consent covers only misapprehensions not induced by the party seeking to enforce the contract (Zweigert and Kötz, 1998, p. 421; Cartwright, 2002b, p. 160). The enquiry is furthermore restricted to the question whether a shared misapprehension – a so-called ‘mutual mistake’ – which motivated both parties to conclude a contract can be relied upon. Although, in consequence, the English approach appears to be much narrower than that of civilian systems, the position is distorted by the rigid distinction between mistake and misrepresentation as a ground for rescission. Apart from the resort to a claim for damages in tort under the Misrepresentation Act 1967, the latter ground permits rescission on account of mistakes in motive – including mistakes merely as to the qualities of the subject matter of a contract – even if induced by the wholly honest and innocent misrepresentation of a contracting party (Cartwright, 2002a, pp. 66–75; Rothoef, 1968, pp. 288–9). As a result, the circumstances under which relief can be obtained are extended beyond the confines of French law and the doctrine of error in substantia rendered redundant. A shared mistake is relevant where it concerns the existence of subject matter of the contract, the possibility of performing the contract or the identity or quantity of its subject matter (Beatson, 2002, p. 314; Treitel, 2003, pp. 286–7). In an echo of the flirtation with the roman doctrine of error in substantia in *Kennedy v. Panama, New Zealand, and Australian Royal Mail Co Ltd* (1867) LR 2 QB 580, it has been suggested that a mistake of both parties regarding ‘the existence of some quality which makes the thing without the quality essentially different from the thing as it was believed to be’ will also be operative (*Bell v. Lever Brothers Ltd* [1932] AC 161 at 218; *Associated Japanese Bank (International) Ltd v. Crédit du Nord SA* [1989] 1 WLR 255).

The approach is nevertheless stricter than that of French and German law. Whereas the latter systems afford relief where, for example a party is mistaken about the authenticity of a painting or the age of a second-hand motor vehicle (see, respectively, Cartwright, 2002b, p. 160; Markesinis, Lorenz and Dannemann, 1997, pp. 200–201), there is English authority to the contrary (*Leaf v. International Galleries* [1950] 2 KB 86; *Oscar Chess Ltd v. Williams* [1957] 1 WLR 370). In *Nicholson & Venn v. Smith Marriott* (1947) 177 LT 189 a shared assumption that Georgian linen was ‘the authentic property of Charles I’ was held to nullify the contract. The suggestion has been made that

what has to be established is whether the quality attributed to the subject matter is so decisively important that the parties ‘actually use it to identify the thing’ (Treitel, 2003, p. 292; Beatson, 2002, p. 319). The impression is that a mistake will be operative if, according to an objective commercial evaluation, the subject matter of the contract as it is conceived to be by the parties is different in kind from what it in fact is. This perhaps reflects the relatively more objective solution to the criterion for mistake regarding essential qualities of German law rather than the subjective test of French law. The proposition that it is ‘no longer useful to invoke the civilian distinction’ (*Associated Japanese Bank (International) Ltd v. Crédit du Nord SA* [1989] 1 WLR 255 at 268) is accordingly not wholly persuasive.

Even where a contract is upheld according to the rules of the common law, a court will entertain a prayer for equitable relief. Although equity deals only to a limited extent with the operation of the objective principle in respect of a mistake which negatives consent, it intervenes to correct hardship that might result from the narrow notion of mutual mistake. This it does by affording relief for mistakes of law, inoperative at common law and by giving some recognition to mistakes as to value (Treitel, 2003, pp. 310–14). Statements to the effect that the English doctrine regarding mistake as to the qualities of the subject matter is ‘markedly narrower in scope than the civilian doctrine’ (Beatson, 2002, p. 319; Treitel, 2003, pp. 286, 290) must also be approached with caution.

Under American law a contract is voidable for a shared mistake where it concerns a basic assumption of the contract and materially affects the agreed exchange of performances under it. Avoidance is furthermore excluded where the party seeking to avoid bears the risk of the mistake as a result of the terms of the agreement or because the contract was concluded with a limited knowledge of the facts. Absent any of these grounds, the risk of a mistake may be allocated to a party by a court provided ‘that it is reasonable in the circumstances to do so’ (Restatement, Contracts 2d ss. 152(1), 154; Farnsworth, 1998, pp. 569–84; Bernstein, 2002, p. 173). The requirements for a reliance on a shared mistake apply also to a mistake of one party provided further that enforcement of the contract would be unconscionable, or the other party had reason to know of the mistake or his fault caused the mistake (s. 153). The ambit of unilateral mistake is not wholly clear, but seems to encompass not only a case of a unilateral mistake in motive (Farnsworth, 1998, pp. 588–92; Calamari and Perillo, 1998, p. 355), but also classic cases of mistakes which negative consent (Farnsworth, 1998, pp. 593–4; Bernstein, 2002, pp. 173–4). Although traditional criteria such as the existence, identity and quality of the subject matter are still regarded as relevant to determining whether an assumption was a basic one (Farnsworth, 1998, p. 570; Calamari and Perillo, 1998,

pp. 347–54), the approach of the Restatement breaks new ground. The requirement that the mistake should have a material effect on the agreed exchange of performance goes beyond that of inducement (Calamari and Perillo, 1998, p. 348; Farnsworth, 1998, p. 575). The Restatement s. 152 comment c suggests that what is required is that ‘the resulting imbalance . . . is so severe that he can not fairly be required to carry it out’. The fact that the mistaken party is not merely adversely affected by the mistake, but that the other will be enriched in the event that the contract is enforced, seems to carry weight with courts in this regard (Farnsworth, 1998, p. 575). Although an assumption of risk is relevant in English law (Beatson, 2002, p. 319; Treitel, 2003, pp. 293–4), the notion that a court may allocate the risk of a mistake to a party on the basis of reasonableness goes beyond what is acceptable to English law. That the American law was ‘shaped largely in Equity’ (Farnsworth, 1998, p. 568) may go some way to explaining the greater flexibility of the American law of mistake.

6 Convergent tendencies

The distinction between mistakes which nullify and those that negate agreement is not wholly satisfactory or universally supported. Even within legal systems there are differences of opinion as to whether disagreement comes within the ambit of mistake at all, or should be dealt with simply as ‘disagreement’ or a problem of contract formation (Ferid and Sonnenberger, 1994, p. 486; Beatson, 2002, p. 310; Farnsworth, 1998, p. 563). The term ‘mistake’ is certainly used in a different sense in respect of each category (Guest, 1994, p. 293), hence the tendency to regard an antecedent mistake of fact which informs the formation of the will as a ‘mistake properly so-called’ and disagreement as a ‘mistake improperly so-called’ only (Hartkamp and Tillema, 1995, pp. 75, 77).

Disagreement has traditionally been distinguished from mistakes in motive on the basis that the issue is not whether a contract should be nullified on account of a mistake, but whether a contract can come about in the absence of agreement. This reasoning tends to be undermined by an objective theory of contract, which telescopes the enquiries. Accordingly, some systems, for instance German and American law, tend to subject instances of disagreement where there is an objective appearance of agreement to the same rules that apply to mistakes that nullify agreement. Other systems separate these two categories. The Dutch BW, for instance, deals separately with disagreement and mistake and in this sense is akin to English law. Articles 3:33 and 35, furthermore, parallel the English approach encapsulated in *Smith v. Hughes* (1871) LR 6 QB 597 in providing for a contract based on a reasonable belief of agreement induced by one party in the mind of the other (Hartkamp and Tillema, 1995, pp. 76–7).

Divergences of approach do not, therefore, follow the division between civil and common law. The tendency to apply the approach to mistakes properly so-called to instances of disagreement resulting from inaccuracy in communication as well is apparent also in influential restatements of a uniform international contract law such as the Principles of European Contract Law and the UNIDROIT Principles of International Commercial Contracts (see art. 4:104 PECL and art. 3.6 PICC).

Irrespective also of the approach to the classification of mistake, there is an increasing recognition that a mistake should be regarded as operative where it is shared by the parties to the contract, or where it has been brought about by the party who endeavours to enforce the contract or where that party was aware of the other's mistake or ought to have been aware of it (Kramer and Probst, 2000, pp. 16–22, 25–7). Although not all systems attach the same significance to them and although there are differences in the detail of the arrangements, a variety of legal systems recognize these factors as delineating the point at which the interests of a party wishing to enforce a contract must yield to that of a party seeking to rely on a mistake. These considerations, which suggest that any reliance of the enforcer on a contract is either non-existent or otherwise not worthy of protection, in conjunction with other considerations, such as that the mistake should be recognizable to the party wishing to enforce the contract, not inexcusable in so far as the mistaken party is concerned and not have been allocated to one or other of the parties (*ibid.*, pp. 23–5, 29–31), are also at the heart of the treatment of mistake in the PECL (art. 4:103) and PICC (art. 3.5, read with art. 2.1.20).

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43 Mixed jurisdictions*

Vernon Valentine Palmer

Generally

'Mixed jurisdictions' as they are classically called, make up roughly 15 political entities, of which 11 are independent countries. Most (excluding Scotland and Israel) of these are the former colonial possessions of France, the Netherlands or Spain which were subsequently transferred to Great Britain or the United States. Their inelegant name is basically an accident of history. Legal cartographers during the height of the British empire were unable to fit these entities into the civil law or common law mould which dominated their thinking, and hence they simply called them mixed or hybrid to indicate their otherness (Reid, 2003–4, pp. 8–9). Though comparative law classification schemes have long since been improved and expanded, the group continues to be referred to by this name, in part because of tradition and convenience, and in part owing to the unique traits (see below, characteristic features) which distinguish them from other systems.

The sources of law in the mixed jurisdictions are far from uniform and the differences shape the styles of individual systems. The French group (e.g., Quebec, Louisiana, Mauritius) is characterized by the influence of the Code Napoléon and thus possesses civil law in a codified form which is thought to be more highly resistant to common law penetration than the uncodified mixed systems. The Dutch group (e.g., South Africa, Sri Lanka) consists of uncodified Roman–Dutch law that stems from institutional writers such as Grotius and Voet and necessitates a stronger system of *stare decisis*. The Spanish group (Puerto Rico, the Philippines) is somewhat like the French group because the 1889 civil code of Spain was crafted in the mould of the French Code Civil. On the common law side of the coin, whether the jurisdiction's common law footing stems from Great Britain or the United States of America also makes an important difference to the development of the system (Palmer, 2001b, pp. 4–6).

Characteristic features

While there has never been an accepted definition of a mixed jurisdiction, there are three characteristics that clearly identify them (Palmer, 2001b,

* See also: Common law; Legal translation; Legal families; Legal transplants; Scots law; South Africa.

pp. 7–8). The first is that common law and civil law constitute the basic building blocks of the legal order. The second is quantitative and psychological. There must be a substantial quantity of both common law and civil law to constitute a mixed jurisdiction. Some common law systems, even the English, contain elements of civil law here and there. Only those systems, however, which contain a large enough quantity of these elements, to the point that the mixture is obvious and openly acknowledged, are generally considered mixed jurisdictions. The third characteristic is structural. In all the mixed jurisdictions the two laws were originally placed in private law and public law compartments. This results in a private civil law and a public common law. This is not to imply that the private law ever comprises solely civil law; usually it will have inherited some common law concepts (Glenn *et al.*, 1996, p. 6). Moreover, such systems will seldom maintain a strict divide between the laws. The common law will penetrate into the private sphere over the course of time, creating some areas of private common law.

The founding of the system

The system usually acquires the characteristic features of a mixed system long after the country was founded. Keeping this delay in mind, each of the mixed jurisdictions can point to one of three historical situations as the foundation of their system: (1) an intercolonial transfer; (2) a merger of sovereignties; and (3) a cultural shift by influential jurists (Palmer, 2001b, p. 17).

The first situation arose when France, Spain and Holland ceded, transferred or lost their colonies to either Great Britain or the United States. Most of the mixed systems (e.g., Quebec, South Africa, Louisiana, the Philippines and Puerto Rico) were founded in this way. Following the transfer of a colony, common law was imported to the public sphere, judicial institutions and possibly criminal law, while the civil law was retained in the private law sector. The decision in favour of retaining the existing civil law was usually the strongest in circumstances where there was a large, non-Anglophonic population of continental European extraction already ensconced upon the land and already in a position of numerical superiority and socioeconomic dominance (*ibid.*, p. 21).

The second historical situation explains the development of the legal system in Scotland. After the Act of Union of 1707 (but some historians think the system was mixed well before that date), public law was based upon English common law, and the private law, criminal law and legal institutions were based upon the native Scots law (*ibid.*, p. 29).

The third situation explains post-independence development in Israel (*ibid.*, p. 30). Israel was originally a common law nation in both the private and public spheres. However, from the time of its founding in 1948, the nation, in a gradual and piecemeal fashion, has passed codificatory statutes

importing civil law into the private law sphere. This occurred because of the legal culture of a relatively small group of jurists composed of the leading figures of Israeli law during the first generation of that law's independent development. These 'fathers' of the mixed system trained in continental Europe and retained a strong affinity for continental private law (Goldstein, 2001, pp. 452–4). This was a complete reversal as to the means and order by which mixed jurisdictions have normally been founded and is considered the only instance in which civil law transplants have ousted and replaced the pre-existing common law (Tedeschi and Zemach, 1972, p. 295).

The divisions among jurists: purists, pragmatists and pollutionists

Historically three different groups of jurists have dominated legal thought in the mixed jurisdictions. The purists are partisans of the civil law, who wish to keep the private law pure and deplore common law encroachment. Purists normally have civilian legal training and speak a continental language (Palmer, 2001b, p. 32). In general they perceive common law assimilation as a sign of decay and degeneration, a loss of cultural integrity that should be halted and restored. Pollutionists are usually of Anglo-American ancestry (or English-speaking nationals) who may believe in the superiority of the common law. They may have common law training and speak no continental language, and favour reception of common law rules or even the overthrow of civil law. Pragmatists normally have a wider legal training and take a more detached view of the law. For them the interaction of common and civil law allows the judge or legislator to mix the rules of each tradition and create superior rules than either system could produce on its own (Garcia-Padilla, 1991, p. 5).

The three groups seem to be different than ordinary schools of legal thought. They are indigenous to the mixed jurisdiction environment and have no identity in other kinds of systems. Today their differences may be more historical than topical, for the vast majority of lawyers today may be uncritical of the system (Palmer, 2001b, p. 34).

Judicial institutions

As compared to civil law countries, courts in the mixed jurisdictions are generally more powerful and centralized institutions. They closely resemble the courts of the common law. They possess inherent powers including the contempt power and the authority to issue procedural and evidentiary rules. Because of a lack of hierarchy and specialization, the mixed jurisdiction judge likewise becomes a legal generalist. His or her career path resembles that of a common law judge. They tend to be selected from senior practitioners, as opposed to young recruits from a judicial college. For example, in Scotland, judges appointed to the Court of Sessions are

selected from the ranks of senior advocates. The mixed jurisdiction judges are known as law builders who possess life experience, political contacts and professional achievement. Because of their different recruitment, these judges tend to have well-developed egos and independence of mind, qualities that might almost be regarded as deficiencies in civil law judges (Palmer, 2001b, pp. 37–8).

These courts, however, are not exact replicas of those found in common law jurisdictions. They are unitary institutions which do not have an institutional or subject matter separation between law and equity. Though English equity jurisprudence has in fact been imported into the civil law of the mixed jurisdictions, this is an equity unchannelled by a separate court (*ibid.*, pp. 35–7).

The linguistic factor

The relationship between law and language is particularly intertwined in the mixed jurisdictions. A basic distinction lies between the ‘living languages of the society and the source languages of the two laws’ (Palmer, 2001b, pp. 41–2). The living languages are those spoken by sizable portions of the population. A source language, on the other hand, is the language in which the original legal tradition developed before the system became mixed. For example, English is a living language in all the mixed jurisdictions but it is the source language of only the common law and never the original civil law. The source language of the civil law was Latin which was reformulated into national languages such as Dutch, French and Spanish, and, in the case of Israel, perhaps into German and Italian (*ibid.*, p. 42). These languages, however, may be no longer spoken or understood in jurisdictions which have become purely Anglophone and accordingly the typical jurist may find herself cut off from the sources, unless by way of translation.

The impact of language has been apparent in five ways. First, when the mixed jurisdiction was founded, linguistic identification played a crucial role in favour of retaining the civil law. Arguably it was the only law written in a language the population understood and could obey. Second, the mother tongue of the individual jurists has been a key factor influencing their basic orientation and perspective toward the two laws. Third, the presence of multiple language groups makes the publication of laws and the operation of government, courts and schools far more complex and problematic. Steps must be taken to ensure that citizens are able to understand the law and procedure in their own language. Fourth, mixed jurisdiction jurists would be largely unable to communicate with each other and the outside world without the use of English, which serves as their international *lingua franca*. Fifth, disappearing literacy in the source language(s) of the civil law (a widespread phenomenon in Louisiana and the Philippines) has

hindered understanding of that tradition. It is thus open to doubt whether such countries have sufficient linguistic infrastructure to sustain the mixed character of their laws.

Legal precedent and reasoning

Generally speaking, the force of precedent in the mixed jurisdictions now falls somewhere in the middle, between the original civilian heritage which attributed little or no value to judicial decisions as legal sources and the incoming Anglo-American view which treats decisions as the law itself (Palmer, 2001b, p. 47). However the reliance on jurisprudence varies greatly in both theory and practice. While codified systems theoretically deny that jurisprudence is a source of law, in practice great weight may be given to it in both creating and interpreting the law (*ibid.*, p. 45). The uncoded systems tend openly to regard jurisprudence as an important source of law. Here jurisprudence ranks second to legislation, creating a system of sources close to the common law approach.

The binding effect of decisions, or *stare decisis*, may be measured in two ways. Horizontally, the form of *stare decisis* determines the degree to which the highest court in the system regards itself bound by previously rendered, factually relevant decisions (*ibid.*, p. 51). Once again there is a split between the codified and uncoded systems. The codified systems tend to have a more liberal view of *stare decisis* and the highest courts have no problem overruling their own prior holdings (*ibid.*). For example, from 1922 to 1926, the Supreme Court of Louisiana was said to have ‘overruled itself more times than the United States Supreme Court in all its history’. Contrast the uncoded systems, which tend to follow more closely the stricter Anglo-American view of *stare decisis* (*ibid.*, p. 52).

The vertical effect of precedent, the degree to which lower courts are bound by a ruling of a higher court, is uniformly strict (*ibid.*). The lower courts have ‘a quasi-absolute duty’ to abide by the decisions rendered by a higher court (*ibid.*). Contrary to the implications of *jurisprudence constante*, even a single decision of a higher court, as opposed to a series, will bind the lower courts (*ibid.*, p. 52). While lower court judges do not appear to be statutorily bound to accept higher rulings (except in Israel), notions of hierarchy, shared tradition, concern for equality of justice and fear of reversal effectively keep them from deviating from the higher court’s decisions (Palmer, 2001b, p. 52).

Common law penetration

The reception of the common law into the private law sphere has been labelled the ‘second reception’ of the common law by the mixed jurisdictions (Palmer, 2001b, p. 53). This second reception could not occur without

judicial activism because the judges are continually in the forefront of legal development. Mixed jurisdiction judges tend to justify their acceptance of common law ideas in two ways. The first justification is the familiar argument of silence: when the civil law does not have rules to solve a particular case, and thus is silent in a particular area, the judge can utilize common law rules to find a reasonable answer (*ibid.*, p. 55). Anglo-American law is thus viewed as a universal law which helps to fill gaps in the civil law (*ibid.*). The second justification proffered by mixed jurisdiction judges is the argument from similarity. When the civil law and common law have similar or identical rules, the judge may feel there is no obstacle in the way of equating the two (*ibid.*, p. 56).

These justifications help explain why certain areas of the private civil law have been more susceptible to common law penetration. The field of obligations (tort, contract and quasi-contract) has been the most susceptible to common law penetration. Tort (delict) has been more prone to common law displacement than the fields of contract and quasi-contract, which have absorbed some common law ideas as well. In contrast the field of property has been described as ‘the most unassailable stronghold of civilian jurisprudence’ (Zimmerman and Visser, 1996, p. 28). The reason for this disproportionate effect on different areas of the private civil law base is possibly threefold. One, the civil law regulation of the fields of property, successions and family law is far more specific than the regulation of delict, thus leaving fewer gaps to be filled by common law (Palmer, 2001b, p. 59). Two, civil law and common law often have diametrically opposed rules in the areas of property law, successions and family law, thus restricting the argument from similarity to a minimum (*ibid.*). Three, attachment to laws regulating property and the family is more deep-seated than the rules governing delictual liability (*ibid.*).

The creation of original law

It is a debatable subject whether the mixed jurisdictions have ever produced ‘original’ or *sui generis* law. According to Reid, there may be a new arrangement of components, but never a new law which is neither civil law nor common law. In his view these systems have never created a ‘legal third way’ (Reid, 2003–4, pp. 24–7). On the other hand, another view holds that original creations have resulted from the creative amalgamation of common law and civil law elements. According to this view, the Scottish trust, the Quebec floating charge and Louisiana-style detrimental reliance are examples of novel concepts and principles (Palmer, 2001b, p. 60).

On this view, ‘Original law’ usually occurs over the course of time, often through judicial activism. It does not result from the common law uprooting of a civil law concept, or vice versa. In a typical situation the imported

common law concept will be similar to a civil law analogue and in the course of time differences between the two concepts become apparent. Instead of one displacing the other, a synthesis of the two occurs. In some rare situations this can occur through statute, which tends to speed up the process (*ibid.*, pp. 59–62). Whether original law is created through statute or judicial development, close interaction between the imported rule and its civilian analogue engender a third concept never beheld before.

The reception of Anglo-American procedure and evidence

The mixed jurisdictions have adopted many of the rules of procedure and evidence of the common law. For example, trials are conducted as oral adversarial hearings, with direct examination and cross-examination of witnesses and active participation of attorneys in the trial process (as opposed to the more passive role that attorneys take in the civilian system). This followed easily from the common law nature of the courts themselves which possessed inherent power to promulgate internal rules. However, one can observe differences between those countries with procedural systems which were once civilian and have been thoroughly anglicized, those only partly anglicized, and those which have never known civil law procedure in the first place (Palmer, 2001b, p. 63).

The mixed jurisdictions of South Africa, Puerto Rico and the Philippines fall into the first category. In these systems the original civil law procedural system almost immediately disappeared, being replaced by common law procedure. Quebec and Louisiana fall into the second category. The procedural and evidentiary rules in these countries are made up of both civil law and common law components. These rules are truly mixed because they are not dominated by either the civil or the common law (Brisson, 1989; Valcke, 1996; Tucker, 1932). Scotland and Israel fall into the third category. Scotland has never known the civilian procedural system, nor has it adopted the English system. Its system is 'of indigenous stock', although this may be similar to English procedure. On the other hand, since its founding, Israel has been subject to the English procedural and evidentiary systems and remains staunchly entrenched in the common law tradition (Palmer, 2001b, pp. 64–5).

The reason why most mixed jurisdictions have turned to common law rules of evidence and procedure is that the courts were modelled along Anglo-American lines. The judges had the power to promulgate their own rules without legislative oversight, and thus were able to import and implant more English institutions than otherwise might have been accepted. The assimilation of these rules, however, was not without effect upon the substantive civil law. For example, in Louisiana, the remedy of specific performance of a contract is available only to the extent that the procedural

requirement that irreparable loss can be proved, a limitation clearly due to procedural hurdles established around the common law injunction. Therefore the old maxim that civil law subordinates the remedy to the right is thus turned on its head in jurisdictions where common law procedure controls the right (*ibid.*, pp. 65–6).

Commercial law

At their founding, the mixed jurisdictions, Israel excepted, had a civilian-based commercial law. However over time common law commercial rules were fully assimilated. The reasons for this were based upon the requirements of commerce, perceptions of economic self-interest and the belief that civil law differences would be a hindrance to trade and should be eliminated (Palmer, 2001b, pp. 66–7). The resistance to common law penetration that is found in other areas of the private law was not vitally felt in the commercial sector. The business world is more culture-neutral than other areas of the law and therefore its wholesale adoption of common law principles has been more acceptable. Commercial law follows the dominant economy, not the dominant culture. Furthermore, the abandonment of the civil law was based upon its inadequacy as well as self-interested economic reasons. The common law in the commercial area was not imposed upon the mixed jurisdictions by external interests, but was voluntarily sought after by local business interests (*ibid.*, p. 80).

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44 Nationality law*

Gerard-René de Groot

1 Function and definition

Nationality is both in international and in national law an important connecting factor for the attribution of rights and duties to individual persons and states. Under international law states have, for example, the right to grant diplomatic protection to persons who possess their nationality (Donner, 1983). Under national law the obligation to fulfil military service and the rights to become a member of parliament or to have high political functions are frequently linked to the possession of the nationality of the country involved. However, there is no standard list of duties and rights which normally are linked to the nationality of a state under national and international law (de Groot, 1989, pp. 13–15; Makarov, 1962, pp. 30, 31; Wiessner, 1989). National states are in principle autonomous in their decision on which rights and duties will be connected to the possession of nationality, whereas under international law the consequences of the possession of a nationality are also subject to discussion (van Panhuys, 1959).

Nationality can be defined as ‘the legal bond between a person and a state’. This definition is, *inter alia*, given in Art. 2 (a) European Convention on Nationality (Strasbourg, 1997). Art. 2 (a) immediately adds the words ‘and does not indicate the person’s ethnic origin’. In other words, nationality is a legal concept and not a sociological or ethnical concept. The nationality of a country in this legal sense is acquired or lost on the basis of a nationality statute (de Groot, 1989, pp. 10–12; Makarov, 1962, pp. 12–19). For example, a person possesses Netherlands nationality if he or she possesses this nationality by virtue of the general Netherlands nationality statute, i.e., the 1984 Rijkswet op het Nederlanderschap and other relevant legislation, rules of implementation, case law and legal practice.

2 The term ‘nationality’

The word ‘nationality’ is etymologically derived from the Latin word ‘natio’ (nation). A difficulty is that ‘nation’ can nowadays be used as a synonym for ‘state’, but also in order to refer to a ‘people’ in a sociological or ethnical sense. In the context of international and national law the word refers to the legal bond with the ‘nation’ as state, but in many languages words

* See also: Private international law.

etymologically related to nationality are (or can be) used for the indication of the ethnicity of persons (e.g., 'Nationalität' in the German language) (de Groot, 2003b, pp. 6–10).

A second difficulty is the relationship between the concepts 'nationality' and 'citizenship'. 'Nationality' expresses a person's legal bond with a particular state; 'citizenship' implies, *inter alia*, enabling an individual to participate actively in the constitutional life of that state. Often the entitlement to citizenship rights and nationality coincide in practice. However, not everyone who possesses the nationality of a particular state also enjoys full citizenship rights of that state; small children may possess the nationality of a state, but they are not yet entitled to exercise citizenship rights. The opposite occurs as well: persons who are not nationals of a particular state may nevertheless be granted specific rights to participate in the constitutional life of that state. In some countries, for example, subject to certain conditions, non-'nationals' are entitled to vote and be elected in local (municipality) elections.

In the English language, the relationship between the two terms 'nationality' and 'citizenship' is even complicated in the context of nationality law itself. In the United Kingdom, the term 'nationality' is used to indicate the formal link between a person and the state. The statute that regulates this status is the British Nationality Act 1981. The most privileged status to be acquired under this Act, however, is the status of 'British citizen'. Other statuses are British Overseas Territories Citizen, British Overseas Citizen, British Subject without Citizenship and British Protected Persons. In Ireland, it is the Irish Nationality and Citizenship Act, 1956 that regulates who precisely possess Irish citizenship. In the United States, the Immigration and Nationality Act, 1952 regulates who is an American citizen, but the Act also provides that the inhabitants of American Samoa and Swains Island have the status of American national without citizenship (Section 308; 8 U.S.C. 1408).

Also within several other languages a complicated relationship between terms for nationality (in the sense of a bond with the state) and citizenship can be observed. Compare, for example, Dutch: *nationaliteit*–*burgerschap*; French: *nationalité*–*citoyenneté* (see on these terms Guiguet, 1997); German: *Staatsangehörigkeit*–*Bürgerschaft* (see Grawert, 1973, pp. 164–74); Portuguese: *nacionalidade*–*cidadania*; Spanish: *nacionalidad*–*ciudadania*. But again, in several other languages, only one term is used for both 'nationality' and 'citizenship' (e.g., Polish: *obywatelstwo*; Italian: *cittadinanza*; Swedish: *medborgarskap*), but frequently in those languages another word exists which indicates the nationality in an ethnical sense (Italian: *nazionalità*; Polish: *narodowość*; Swedish: *nationalitet*).

3 **Autonomy of states in nationality matters**

Article 1 of the Hague Convention on certain questions relating to the conflict of nationality laws (1930) states: 'It is for each State to determine under its own law who are its nationals. This law shall be recognised by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality.'

This principal autonomy in nationality matters was recognized earlier by the Permanent Court of International Justice in 1923 in the decision on the nationality decrees in Tunis and Morocco. The Court concluded that nationality questions 'belong according to the current status of international law' to the 'domaine réservé' of national states.

The principle of autonomy in nationality matters is repeated in Art. 3 of the European Convention on Nationality (1997) and is also recognized by the European Court of Justice in the decision *in re Micheletti* (7-7-1992; ECR 1992, I-4258) (compare de Groot, 2003b, pp. 18–20). A consequence of the autonomy of states in matters of nationality is the possibility of statelessness or dual/multiple nationality. It may happen that no state attributes a nationality to a certain person, whereas another person may possess simultaneously the nationality of two or more states (Makarov, 1962, pp. 291–322). How states react on statelessness, respectively multiple nationality will be described below.

Another consequence of the autonomy in nationality matters is that questions as to whether a person possesses the nationality of a particular state shall always be determined in accordance with the law of that state (Art. 2 Hague Convention on Nationality 1930). That principle implies also the necessity of a dependent connection of preliminary questions in nationality law (de Groot and Tratnik, 2002, pp. 45–51; Makarov, 1962, pp. 239–90). If, for example, the acquisition of a nationality depends on the answer to the question whether a certain child born out of wedlock is the child of a particular man, this question has to be answered under the application of the law of the country of the nationality in question. The only exception to that rule is that the private international law of that country may refer to the applicability of the law of another country. Such a transmission (or remission) has to be followed.

4 **Treaties**

The national autonomy in nationality matters is nowadays restricted by several bilateral and multilateral treaties. Bilateral nationality treaties are frequently concluded after the transfer of territory from one state to another and in cases of state succession (Makarov, 1962, pp. 128–40). An example is the Agreement concerning the assignment of citizens between

the Kingdom of the Netherlands and the Republic of Surinam (1975) (*Overeenkomst betreffende de toescheiding van staatsburgers tussen het Koninkrijk der Nederlanden en de Republiek Suriname*).

Over the past 75 years numerous multilateral treaties were concluded with relevance for nationality law (de Groot and Doeswijk, 2004, pp. 58–84). In chronological order the following treaties can be mentioned:

1. The Hague Convention on certain questions relating to the conflict of nationality laws (1930), with a Protocol relating to a certain case of statelessness (1930). This treaty contains general rules on nationality matters and some provisions on the nationality of married women.
2. The Montevideo Convention on the nationality of women (1933), which forbids distinctions based on sex in nationality law.
3. The Montevideo Convention on nationality (1933), which provides, *inter alia*, the loss of nationality in case of naturalization in another Contracting State.
4. Art. 32 Geneva Convention relating to the status of refugees (1951) and Art. 34 of the New York Convention relating to the status of stateless persons (1954). According to these treaties states shall ‘as far as possible’ facilitate the naturalization of refugees and stateless persons.
5. The New York Convention on the nationality of married women (1957). This treaty stipulates that a marriage or the dissolution of a marriage shall not *ex lege* affect the nationality of women. The convention also prescribes the facilitation of the acquisition of the nationality of the husband by his wife. In particular, the fact that a woman should easily obtain the nationality of her husband by operation of the rules of this treaty, whereas a man could not obtain the nationality of his wife in the same way, can, when carefully observed, lead to discrimination against women. Spouses often think it practical for all kinds of reasons to have the same nationality. Under the rules of the 1957 Treaty it is usually the woman who has to renounce her nationality, since it is a lot harder for the man to change his nationality. In this the 1957 Treaty conflicts with the International Convention on the Elimination of All Forms of Discrimination of Women (1979).
6. The Optional protocol concerning acquisition of nationality, belonging to the Vienna Convention on diplomatic relations (1961) and the Optional protocol concerning acquisition of nationality, belonging to the Vienna Convention on consular relations (1963). Article II of both protocols provides that members of the mission not being nationals of the receiving state, and members of their families forming part of their household, shall not, solely by operation of the law of the receiving state, acquire the nationality of that state.

7. The New York Convention on the reduction of statelessness (1961), which obliges states to facilitate the acquisition of nationality by persons born stateless on their territory. Furthermore, this treaty gives an exhaustive list of grounds for loss of nationality which may cause statelessness.
8. The Strasbourg Convention on reduction of cases of multiple nationality and military obligations in cases of multiple nationality (1963) with a Protocol (1977) and an Additional Protocol (1977). This treaty provides for the loss of nationality in case of voluntary acquisition of the nationality of another Contracting State. A Second Protocol amending the convention on the reduction of cases of multiple nationality (1993) allows Contracting States to provide for exceptions to this rule if (a) a person acquires the nationality of her/his spouse; (b) a person acquires the nationality of the country where he/she was born or was living as a minor; (c) a child acquires the nationality of a parent.
9. The Paris Convention on the exchange of information regarding acquisition of nationality (1964) (*Convention concernant l'échange d'information en matière d'acquisition de nationalité*), which obliges states to inform other Contracting States in case of voluntary acquisition of nationality.
10. Art. 5 (d) (iii) International Convention on the elimination of all forms of racial discrimination (New York, 1966) forbids expressly racial discrimination in respect of the acquisition or loss of nationality. Compare also Art. II International Convention on the suppression and punishment of the crime of apartheid (1973).
11. Art. 24 (3) International Convention on civil and political rights (New York, 1966) underlines that every person has the right to acquire a nationality. Regrettably, the convention fails to indicate to which nationality the child should be entitled.
12. Art. 11 European Convention on the adoption of children (1967) prescribes the facilitation of the acquisition of the nationality of the adoptive parents by the adopted child.
13. Art. 20 American Convention on human rights (San José, 1969) guarantees – differently from the European Convention on Human Rights – that every person has the right to a nationality and that no one shall arbitrarily be deprived of his nationality. Most important is that this treaty states that every person is entitled to the nationality of the state in whose territory he was born if he does not have the right to any other nationality.
14. The Berne Convention to reduce the number of cases of statelessness (1973) (*Convention tendant à réduire le nombre des cas d'apatridie*)

- prescribes the acquisition of the nationality of the mother by a child which otherwise would be stateless.
15. Art. 9 (1) International Convention on the elimination of all forms of discrimination of women (New York, 1979) grants women equal rights with men to acquire, change or retain their nationality. Moreover, art. 9 (2) prescribes granting women equal rights with men with respect to the nationality of their children.
 16. Art. 7 (1) International Convention on the rights of the child (New York, 1989) guarantees again the right of a child to acquire a nationality (but again without indicating which nationality), whereas art. 8 obliges states to preserve the identity of a child, including nationality.
 17. The European convention on nationality (Strasbourg, 1997). This treaty contains, inter alia, general principles regarding nationality, gives provisions with respect to desirable grounds for acquisition of nationality and contains an exhaustive list of acceptable grounds for loss of nationality.
 18. The Convention on a certificate of nationality (Lissabon, 1999) provides for a certificate of possession of a nationality which must be accepted by other Contracting States.
 19. Within the United Nations a Convention on nationality of natural persons in relation to the succession of states is under preparation, whereas the Council of Europe published a draft Protocol to the European Convention on nationality dealing with the nationality of persons in case of state succession.

5 General principles of international law with regard to nationality

The autonomy of states in nationality matters is also limited by general principles of international law. However, it is not easy to identify the content of those principles. In the 1997 European Convention on nationality an attempt is made to codify the state of the art in respect of these general principles of international law which limit the autonomy of states in nationality matters. Article 4 states:

The rules on nationality of each State Party shall be based on the following principles:

- a. everyone has the right to a nationality;
- b. statelessness shall be avoided;
- c. no one shall be arbitrarily deprived of his or her nationality;
- d. neither marriage nor the dissolution of a marriage between a national of a State Party and an alien, nor the change of nationality by one of the spouses during marriage, shall automatically affect the nationality of the other spouse.

However, these general principles are rather vague. Article 4 (a) does not indicate to which nationality a person should have a right; Art. 4 (b) lacks to mention in which ways statelessness should be avoided; and Art. 4 (c) does not provide criteria in order to establish that a deprivation of nationality was arbitrary. Exclusively Art. 4 (d) is concrete enough to apply directly (de Groot, 2000, pp. 123–8).

Article 5 European Convention on nationality (1997) gives two additional rules which could develop into general principles of international law regarding nationality. Article 5 (1) prescribes that the rules of a state on nationality shall not contain distinctions or include any practice which amount to discrimination on the grounds of sex, religion, race, colour or national or ethnic origin. However, in practice it is extremely difficult to establish when, for example, a preferential access to the nationality of a state based on ethnic origin constitutes a discrimination in the sense of this provision (see, e.g., para. 7 German nationality Act and Art. 116 (1) German constitution; Art. 5 Greek nationality Act; Art. 22 (1) Spanish civil code (Sephardic Jews)) (de Groot and Doeswijk, 2004, pp. 89, 90).

Article 5 (2) obliges states to ‘be guided by the principle of non-discrimination between its nationals, whether they are nationals at birth or have acquired its nationality subsequently’. This obligation is also extremely vague. Furthermore, in comparative perspective, one can observe that many states do not observe this rule.

No concrete limitation of the autonomy can be concluded from the ruling of the International Court of Justice *in re Nottebohm* (ICJ Reports 1955, 4 (23)). The Court said:

a State cannot claim that the rules it has thus laid down are entitled to recognition by another State unless it has acted in conformity with this general aim of making the legal bond of nationality accord with the individual’s genuine connection with the State which assumes the defence of its citizens by means of protection as against other States.

However, this decision does not deal with the conferment of nationality in general, or with the acquisition of nationality by naturalization, but exclusively with the right of a state to grant diplomatic protection to a national against another state (Randelshofer, 1985, p. 421).

6 European community law

In spite of the fact that, since the Maastricht Treaty came into force in 1993, the possession of the nationality of a member state of the European Union is linked to European citizenship, the European Union did not take measures in order to influence the grounds for acquisition and loss of the nationality of the member states. Nevertheless, the law of the European Union

does perhaps restrict the autonomy of the member states in the field of nationality. This could be the case in particular if a ground for acquisition or loss would hinder the right of free movement of persons within the territory of the European Union (de Groot, 2003b, pp. 18–32).

7 Nationality as human right

Article 15 (1) Universal Declaration of Human Rights (1948) stresses that everyone has the right to a nationality. Article 15 (2) forbids arbitrary deprivation of nationality and a denial of the right to change nationality. However, these rights are vague: it is unclear to which nationality a person should be entitled. Of all international conventions, exclusively the American convention of human rights gives a concrete entitlement to the nationality of the country of birth. Furthermore, it is difficult to establish criteria regarding circumstances under which a deprivation of nationality should be qualified as arbitrary.

Moreover, the guarantee of the possession of nationality is less essential than the other human rights listed in the Universal Declaration (de Groot, 1989, pp. 14–17; de Groot and Doeswijk, 2004, pp. 51–5).

8 Multiple nationality

For almost the whole of the 20th century dual or multiple nationality of persons was considered undesirable. The 1933 Montevideo Convention on nationality and 1963 Strasbourg Convention are manifestations of that opinion. Many countries had also in their national law provisions which aimed to reduce cases of multiple nationality (Bar-Yaacov, 1961; Ko Swan Sik, 1957; Kammann, 1984). Some countries, however, accepted multiple nationality in relation to some specific other countries. Spain, for example, concluded treaties allowing dual nationality with 12 Latin-American countries, and Italy concluded a similar treaty with Argentina (Aznar Sanchez, 1977; de Groot, 2002b).

During the second half of the 20th century several countries gradually changed their attitude in respect of the issue of multiple nationality (de Groot, 2003c). They recognized that persons can maintain such close links with more than one state, that they should be able to possess simultaneously the nationalities of more states. This new attitude was in particular manifested by the abolition of voluntary acquisition of a foreign nationality as a general ground for loss of nationality (e.g.: United Kingdom, 1949; United States, 1967; France, 1973; Canada, 1977; Italy, 1992; Mexico, 1998; Sweden, 2001; Finland, 2003) or by increasingly allowing exceptions to this ground for loss (Germany, 2000; Netherlands, 2003). Nevertheless, the (un)desirability of multiple nationality is still the subject of discussion in many countries.

On the international level, the changed attitude towards multiple nationality is manifested by the Second Protocol to the 1963 Strasbourg Convention, which allows Contracting States to make some exceptions to the main rule of the convention, such as that voluntary acquisition of another nationality causes the loss of the old nationality. The 1997 European Convention on nationality is neutral in respect of the issue of multiple nationality.

9 Statelessness

Statelessness is considered undesirable. This is, *inter alia*, manifested by the 1961 Convention on the reduction of statelessness, the 1973 Berne Convention, Art. 24(3) International Convention on civil and political rights (1966), Art. 7 International Convention on the Rights of the child and Art. 4, 6–8 European Convention on Nationality. Many countries provide for the acquisition of their nationality *ex lege* by persons born on their territory who otherwise would be stateless. Again other countries facilitate the acquisition of their nationality by stateless persons born on their territory or even by all stateless persons residing legally on their territory.

10 Grounds for the acquisition of nationality *ex lege*

Although international treaties aim to harmonize some grounds for acquisition of nationality, one can still observe a huge variety of grounds for acquisition *ex lege*. The most current ways of acquisition of nationality by birth are acquisition *iure sanguinis* (by birth as a child of a national) and acquisition *iure soli* (by birth on the territory of a state).

Originally, all states which provided for an acquisition of nationality *iure sanguinis* almost exclusively applied *ius sanguinis a patre* (in the paternal line); only in exceptional circumstances was *ius sanguinis a matre* (the maternal line) relevant (e.g., in the case of a child born out of wedlock and not recognized by a man) (Gonset, 1977). In practice, however, most children had the same nationality as father and mother, because women lost their own nationality at the moment of their marriage and at that moment acquired the nationality of their husband. This system was labelled by Dutoit (1973–80) as *système unitaire*. During the 20th century this system was gradually replaced by the so-called '*système dualiste*' which allowed married women to possess their own independent nationality (Dutoit, 1973–80; Dutoit and Masmejan, 1991; Dutoit and Blackie, 1993; Dutoit and Affolter, 1998; de Groot, 1977).

Most countries now apply a *ius sanguinis a matre et a patre*: a child acquires the nationality if father or mother possesses this nationality (de Groot, 2002a, p. 124). However, some countries provide for exceptions. In the first place, some countries exclude children born out of wedlock as

a child of a foreign mother and a father who is a national (de Groot, 2002a, pp. 131–5) (see Art. 6 (1) (a) (2) European Convention on nationality 1997). Secondly, several countries restrict acquisition of nationality if neither parent possesses the nationality of the country involved (de Groot, 2002a, p. 128). Thirdly, many countries restrict the transmission of the nationality of a parent to a child born abroad to the first or second generation born outside the country involved (*ibid.*, pp. 125–9) (see Art. 6 (1) (a) (1) European Convention on nationality 1997).

The United Kingdom and Ireland traditionally applied *ius soli*; so did traditional immigration countries like the United States, most countries of Latin America (see Moosmayer, 1963), Australia, New Zealand and South Africa. Increasingly, these countries do not apply a strict *ius soli* (birth on territory entitles to nationality), but prescribe additionally that at least one parent meets certain residence requirements (UK since 1983; Ireland since 2005).

Nowadays, most countries do not apply either *ius sanguinis* or *ius soli*, but a combination of both principles. Classical *ius soli* countries provide, in the case of birth abroad of a child of a national, for an acquisition *iure sanguinis*, but often limit the transmission of nationality in this way to the first or second generation. On the other hand, classical *ius sanguinis* countries have in the recent past introduced some elements of *ius soli* in order to reduce cases of statelessness or to stimulate the integration of the descendants of foreign families residing permanently on their territory (de Groot, 2002a, pp. 137–9).

Children born in wedlock have in principle at the moment of birth a family relationship with both father and mother: this family relationship is frequently the legal basis for the acquisition of nationality *iure sanguinis*. If a child is born out of wedlock, the family relationship with the father can be established later on, for example, by recognition, legitimation or judicial establishment of paternity. Many legal systems provide that, in this case, the child acquires the nationality of the father, although several countries provide for additional requirements (*ibid.*, pp. 131–3).

Many countries mention adoption as a ground for acquisition of nationality *ex lege*. Most of these countries require that the adoption involved be realized during the minority of the child. However, in some countries, the age limit is lower (*ibid.*, pp. 135, 136; Hecker, 1985). Some countries only provide for nationality consequences of adoption when the adoption order was made by a court, or by authorities of the country involved. However, an increasing number of nationality codes provide for the possibility that a foreign adoption order has nationality consequences if this foreign adoption order is recognized because of rules of private international law. In some countries, a special reference is made to the Hague Adoption Convention

of 29 May 1993. In respect of adoption, one has to realize that many countries only know full adoption, which replaces completely the pre-existing legal family ties of the child with the original parents by a family relationship with the adoptive parents. Some countries provide (in most cases as an alternative, as in France and Portugal) for a weak adoption (also called 'simple adoption'), which creates a family relationship with the adoptive parents, but does not disrupt all legal ties with the original parents. This so-called 'weak' adoption often lacks nationality consequences, whereas the full adoption has these consequences.

Most countries provide that, under certain conditions, children of a person who acquires the nationality of the country also acquire this nationality if they are still minors. A large variety of conditions for an extension of acquisition can be observed (de Groot and Vrinds, 2004).

Next to these frequently occurring grounds for acquisition of nationality *ex lege* some states provide for other grounds for automatic acquisition of nationality. Some examples:

- a. Children born in France to foreign parents born abroad acquire French nationality *ex lege* when they reach the age of majority.
- b. According to Austrian nationality law, an alien may acquire *ex lege* Austrian nationality by accepting an appointment as an ordinary professor at an Austrian university. Compare also in this context the legislation of the Vatican.
- c. French nationality can, if certain conditions are fulfilled, be acquired by a person born in France who enters the French army.
- d. In Spain, the possession and continuous use of Spanish nationality for ten years in good faith and based on a title registered in the civil register is cause for consolidation of the nationality if the title for the acquisition involved is annulled. In other words, continuous treatment as a national is, in the case of good faith of the person involved, a ground for acquisition of nationality.

11 Option rights

In several countries certain persons can acquire, under certain conditions, the nationality of the country involved by lodging a declaration of option (de Groot, 2002a, pp. 144–54; Meessen, 1966). The details of the conditions cannot be elaborated here, nor will the precise option procedure be described. However, it is important to stress that there are at least two distinct types of options. According to the law of some countries, a declaration of option can be made orally without any formality. Of course the declaration has to reach the competent authorities. Normally these authorities will make an official document, which will be signed in order to prove

the declaration, but if such a document does not exist, the declaration can be proved by any other means. If a declaration was made, but not all the conditions giving a right to opt were fulfilled, the nationality is not acquired. If all conditions were fulfilled and the declaration can be proved, although no document exists, the nationality is nevertheless acquired. The authorities do not have the possibility to avoid the acquisition of nationality because of, for example, reasons of public policy or state security.

In some other countries, a person who uses his right of option must make a written declaration. The authorities check whether all the conditions are fulfilled, but they are also able to reject the option for reasons of public security or lack of integration. It is obvious that this kind of option is much weaker than the first category mentioned. It is therefore not surprising that, generally speaking, countries which have this second type of option rights often grant this right to considerably more persons than countries where the first type of option rights exists. One could also describe the second type of option rights as a quick naturalization procedure where the discretion of the authorities to refuse the acquisition of nationality is limited.

Some countries do not use the term 'option rights', but provide for the possibility to register as a citizen if certain requirements are met. If the authorities do not have any discretion in respect of the registration, such a right to register as a citizen is in fact an option right of the first mentioned category. If there is discretion of the authorities, it can be classified as an option right of the second category.

In this context it also has to be mentioned that a couple of countries use the construction of a legal entitlement to naturalization: if certain conditions are fulfilled, naturalization has to be granted on the application of the person involved. The authorities' discretion is reduced to zero. Such an entitlement comes close to the option rights of the first mentioned category. If the naturalization can still be refused for reasons of public policy or similar general reasons, the entitlement can be compared with the option rights of the second category.

12 Naturalization

All countries provide for the possibility of acquisition of nationality by naturalization, i.e., by a discretionary decision of competent authorities. In some countries a naturalization has to be granted by act of parliament (e.g., Belgium, Denmark). In most other countries the power to grant naturalization is given to the head of state, to the government or to a particular minister. Treaty provisions which aim to harmonize the conditions of naturalization are rare. Some treaties prescribe the facilitation of some categories of persons (like stateless persons or refugees), but only the European Convention on nationality (1997) tries to influence one

particular requirement for naturalization: the length of residence, which should not, according to this convention, exceed ten years (although, on the occasion of the ratification of this convention, Macedonia stipulated the right to require a residence of 15 years).

Comparative studies (de Groot, 1989, pp. 237–70; Walmsley, 2001; Weil, 2001, pp. 17–35) learn that the variety of requirements for naturalization is huge. Walmsley (2001) concluded, correctly, that ‘few countries have the same requirements for naturalization or refer to them in the same terms as other States’. The following requirements are frequent:

- a. Full age: in most countries, this implies having reached the age of 18 years. Nearly all countries provide for the possibility of a waiver of this condition.
- b. Residence: the required length varies considerably. Moreover, many countries do not require simple residence, but legal residence or even entitlement to reside permanently. In several countries the required period of residence must be uninterrupted. Therefore, the means of calculation of this condition for naturalization varies considerably from country to country.
- c. Immigration status: nearly all countries require that the applicant reside legally in the country at the moment of application for naturalization. However, several countries prescribe that the whole required period of residence must be legal. Moreover, some countries require that the applicant possess an entitlement to reside permanently in the country.
- d. Integration or even assimilation: in several countries the applicant has to take an integration examination successfully.
- e. Command of (one of) the national language(s): the degree of knowledge of a state’s language which is required varies again. In some states a basic oral command is enough, some other states also require the ability to write the language.
- f. No danger for the security of the state. The concrete application of this requirement varies again from country to country. Several states, influenced by the United Kingdom, refer to this requirement under the condition that the applicant must be of ‘good character’.
- g. Ability to support oneself: although this condition is frequently ‘hidden’ behind the condition in respect to the immigration status.
- h. Renunciation of a previous nationality: whether this condition is required depends on the general attitude of a state regarding cases of dual or multiple nationality.
- i. Oath of fidelity.
- j. Payment of a naturalization fee. In some countries naturalization is free of charge (Belgium, Luxembourg); other countries provide for

a fee in order to cover the cost of the naturalization authorities; again other countries require really high fees (some cantons in Switzerland).

Less frequent are, for example, the following requirements: (a) health certificate (France); (b) no intensive relation to another state (Austria); (c) benefit to the country. All countries reduce the requirements for naturalization for some specific groups of applicants, such as spouses of nationals, former nationals, refugees, stateless persons.

Walmsley (2001) stresses that, because of the fact that naturalization is the principal way for a foreign immigrant to acquire the nationality of the state in which he is permanently resident, the requirements for naturalization are some of the most important elements of a state's nationality laws and reflect their general attitude towards non-ethnic residents in their state.

13 Grounds for loss of nationality in comparative perspective

There is an enormous variety of grounds for loss of nationality. The 1961 Convention on the reduction of statelessness forbids some grounds for loss of nationality if this would cause statelessness for the person involved, but the convention also provides for many exceptions to this rule. A very important development is manifested by Arts 7 and 8 European Convention on Nationality (1997) which give an exhaustive list of acceptable grounds for loss of nationality. The grounds mentioned in these articles are as follows:

- a. Voluntary acquisition of another nationality;
- b. Acquisition of the nationality of the state party by means of fraudulent conduct, false information or concealment of any relevant fact attributable to the applicant;
- c. Voluntary service in a foreign military force;
- d. Conduct seriously prejudicial to the vital interests of the state party;
- e. Lack of a genuine link between the state party and a national habitually residing abroad;
- f. Where it is established during the minority of a child that the preconditions laid down by internal law which led to the *ex lege* acquisition of the nationality of the state party are no longer fulfilled;
- g. Adoption of a child if the child acquires or possesses the foreign nationality of one or both of the adopting parents;
- h. The renunciation of its nationality by the person concerned, under the condition that this person does not thereby become stateless.

Furthermore, Art. 7 (2) allows that a state provides for the loss of nationality by children whose parents lose that nationality except in the case of loss because of foreign military service or because of conduct seriously prejudicial to the vital interests of the state. However, children shall not lose

their nationality if one of their parents retains it. According to Art. 7 (3), loss of nationality may not cause statelessness with the exception of deprivation of nationality because of fraud.

Many countries provide for the loss of nationality on several of these grounds (de Groot, 2003a). Some countries only provide for the loss of nationality by renunciation on initiative of the person involved (e.g., Poland, Portugal). On the other hand, not all countries recognize the right that a person may renounce his nationality provided that no statelessness is caused (e.g., Morocco).

In a comparative perspective, numerous other grounds for loss can be observed, which are not covered by the list of Arts 7 and 8 European convention on nationality: Some examples:

- a. Foreign public service (e.g. France, Italy);
- b. General criminal behaviour (e.g. Spain, United Kingdom);
- c. Refusal to fulfil military service (e.g. Turkey);
- d. Using a foreign passport (e.g. Indonesia, Mexico);
- e. Accepting a foreign title of nobility (Mexico).

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45 The Netherlands

Jan M. Smits

1 Introduction

The Netherlands (*Nederland*) is one of the three countries within the Kingdom of the Netherlands (the other two are Aruba and the Dutch Antilles). There is no doubt that its legal system can be qualified as a civil law system as it has codified its major parts of private law and criminal law in codes and meets all other requirements usually attributed to civil law systems (cf. Zweigert and Kötz, 1998, pp. 63ff.). Usually, Dutch law is located somewhere in between the French and German legal family, although in practice it seems to approach the German legal family much more. This is for example apparent from the new Dutch Civil Code of 1992, this code has a general part and a (rather abstract) way of drafting that reminds the reader much more of the German than of the French code.

The only official national language is Dutch: all statutes and case law are in this language. The language to be used in all court proceedings is Dutch as well. Only in the (northern) province of *Friesland* is it allowed to make use of Frisian in the courts and in administrative matters, although this happens only rarely in practice.

In so far as Dutch law plays a special role in the debate on comparative law, this is usually associated with its position as a small country. The idea then is that smaller countries do not have to play the politics of power and can therefore try to transplant their law more easily to other countries. This would especially be apparent with the ‘export’ of the new Dutch Civil Code to countries like Russia and China. Its original drafter, E.M. Meijers (1880–1954), once stated that, in making codes of high quality, a small country could show its greatness. However, the question remains open to what extent this ambition has really come true.

2 Constitutional law

In 1983, the Netherlands adopted a new constitution. This new *Grondwet voor het Koninkrijk der Nederlanden* did not contain major changes in comparison with the previous one but was merely a technical adaptation and a restructuring of the old provisions. It contains chapters on fundamental rights, government, parliament, the high advisory bodies, legislature, administration, judiciary, decentralization and revision of the constitution.

Many constitutional practices are based on customary law outside of the constitution. Thus the constitution does not, for example, mention the existence of political parties, nor does it list the rule that, if government no longer has the confidence of parliament, it has to go. The constitution can be found in Dutch on the site http://www.minbzk.nl/grondwet_en/grondwet; an English translation is available through <http://www.minbuza.nl>.

The Dutch constitutional system is a dualist one: members of the government cannot at the same time be a member of parliament. Parliament (the *Staten-Generaal*) consists of two chambers, of which the more important one is the Second Chamber (directly elected by the people). The members of the First Chamber are elected by the provincial parliaments and, although all statutes have to go through both chambers, the practice is that the true political debate takes place in the Second Chamber. H.M. Queen Beatrix has been head of state since 1980.

The Netherlands is a unitary state. At the regional level, the 12 provinces have competences in the fields, *inter alia*, of the environment, water management, traffic and control of municipalities.

The Dutch constitution does not allow constitutional review: art. 120 of the constitution explicitly states that the courts are not allowed the constitutionality of statutes and treaties. On the other hand, courts are obliged not to apply statute law in so far as it is contrary to international treaties accepted in the Netherlands. Currently, there is a debate on whether constitutional review should not be accepted after all; if it should come to this, this competence will probably be entrusted to the ordinary courts, not to a separate constitutional court.

3 Civil and commercial law

The present Dutch Civil Code (*Burgerlijk Wetboek*) is the result of a recodification project that started in 1947, when E.M. Meijers was entrusted with this project. In 1970, the first book of the new code (on the law of persons and family) was enacted, followed by a second book, on company law, in 1976. In 1991, Book 8, on transport law, came into force. The core of private law was finally adopted in 1992, when Books 3 (General Part of Patrimonial Law), Book 5 (Law of Property), Book 6 (General Part of the Law of Obligations) and parts of Book 7 (Specific Contracts) were enacted. In 2003, Book 4, on the law of succession, was adopted. Some parts of Book 7 are still to follow: the contracts envisaged by it are at present still governed by the old civil code. Next to the Civil Code, there still is a Commercial Code of 1826, but on completion of the Civil Code project it will be abandoned as all its provisions will then have become part of the Civil Code. This does not preclude the courts from treating, for example, commercial contracts in a different way than consumer contracts.

If one has to characterize the new Dutch Civil Code in terms of legal families, one should say that many of its provisions still show their origin in the French tradition, but in structure and level of abstraction the German approach is apparent as well. The Code was based on extensive comparative research. Another characteristic of the Code is that it contains several open-ended norms that allow the courts considerable freedom in deciding concrete cases. But it is not only for this reason that case law is an important source of Dutch private law: even in the case of rather specific statutory rules, the Dutch Supreme Court is sometimes willing to deviate from these rules if justice requires it.

The present Civil Code was preceded by the Civil Code of 1838. Most of its provisions were translations of the French *Code Napoléon* although there were some typically Dutch provisions in it as well. Transfer of ownership, for example, required (and still requires under the new Code) delivery, unlike the French Code where transfer takes place *solo consensu*. Before the 1838 Code, the French Civil Code had effect in the Netherlands (in the southern part since 1804 and in the northern provinces since 1812). The Dutch Civil Code was translated into English and French by Haanappel and Mackaay (1990) and into German by Nieper and Westerdijk (1995–8).

Foreign case law and doctrine do not play a big role in Dutch court practice. The Dutch Supreme Court and lower courts do not explicitly refer to it. Foreign case law and doctrine are, however, often taken into account in the influential opinions of the Advocate-Generals before the Supreme Court. These opinions contain an advice to the Supreme Court to decide a case in a particular way; especially in controversial cases, these opinions often contain an extensive overview of comparative materials.

4 Court system and law faculties

The *Rechtbank* is usually the Dutch court of first instance in both civil, commercial, criminal and administrative matters. In civil, commercial and criminal cases, appeal is allowed to one of the five Courts of Appeal (located in The Hague, Amsterdam, Arnhem, Leeuwarden and Den Bosch) and finally to the *Hoge Raad der Nederlanden* in The Hague. The *Hoge Raad* is a court of cassation: it does not judge on the basis of the facts of the case, but looks at whether the court of appeal has applied the law in a correct way. In administrative cases, the appeal is not with the Supreme Court but with a separate department of the Council of State.

Legal doctrine plays an important role in Dutch law: there is a permanent interaction between the judiciary, the legislator and legal academia. Often, draft statutes are amended as a result of criticism in the literature. Every important decision of the Supreme Court is usually commented upon by legal academics. Often law professors are appointed as members

of the Supreme Court or as Advocate-Generals. It was this interaction that, for example, led the Supreme Court to refer to the draft of the new Dutch Civil Code long before the Code was adopted. This ‘anticipatory interpretation’ seems even to have become (at least in private law) a specific feature of the Dutch legal system.

There are ten Law Faculties in the Netherlands. These are located in Leiden, Utrecht, Groningen, Amsterdam (where there are two), Nijmegen, Tilburg, Rotterdam, Maastricht and Heerlen. Organized discussion among legal scholars (and practitioners) takes place in several societies, of which the Dutch Lawyers Association (*Nederlandse Juristenvereniging*) is the biggest. The Netherlands Comparative Law Association is the society specializing in comparative law. Both societies publish annual reports on specific topics.

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Statute law is published in Dutch in the *Staatsblad* (usually abbreviated as *Stb.*). All recent statute law can also be found at the government site (<http://www.overheid.nl/op>).

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46 Offer and acceptance inter absentes*

Franco Ferrari

1 Introduction

The notion of 'contract' has been adopted by both the common law and the civil law; nevertheless, the apparent prominence of a concept 'in two legal systems should not mislead one into seeing similarity where there is significant difference' (Zysow, 1985). The most obvious difference relates to the different 'indicia of seriousness', i.e., the 'general requirements to distinguish those promises which are legally significant from those which are not, to distinguish serious from unserious promises and thus to determine which promises are actionable and which are not' (Zweigert and Kötz, 1992, p. 419). In civil law, at least in the so-called 'romanistic' area, this function is generally performed by the so-called *causa* (see art.1325 s.2 of the Italian Civil Code) or *cause*, i.e., a generalized reasonable motive for making a contractual promise. By contrast, in the common law, consideration 'stands, doctrinally speaking, at the very center of the . . . approach to contract law' (von Mehren, 1959). Although these concepts perform basically the same functions (see Markesinis, 1978) (it has even been argued that they are the same. In the colony of the Cape of Good Hope, for instance, the Supreme Court pointed out that *causa* and consideration were the same; see, e.g., *Alexander v. Perry*, 4 Buch. 59 (1874); *Malan & Van der Merwe v. Secretan, Boon & Co.*, Foord 94 (1880); for further citations, see Lorenzen, 1919; Markesinis, 1978, p. 53). In the early 1920s, however, this opinion came under severe attack (see Kotzé, 1922): they do not correspond; neither do the corresponding concepts of contracts which are in most, albeit not all, countries based upon one of these 'indicia of seriousness'. However, this does not exclude the possible correspondence of other elements of contract in the different legal systems, such as the consent of parties and its elements: offer and acceptance.

2 Agreement of the parties

2.1 *Consensual and real contracts*

As has been pointed out by several authors, 'the first requirement of a "contract", in the core meaning of the word, is the existence of an agreement' (Schlesinger, 1968, p. 71) or consent. This type of consent, i.e., the

* See also: Consideration.

manifested accord (in order to lead to the conclusion of a contract, the consent must be manifested, see e.g. Mazeaud *et al.*, 1991, p. 118; Larroumet, 1986, p. 210) of the parties' will relating to the projected contract must be held distinguished (as for this distinction see, e.g., Mazeaud, 1991, p. 118; Larroumet, 1986, p. 208) from the consent as a 'party's acquiescence to the terms and conditions of a projected contract' (Litvinoff, 1987). The former is sometimes expressly required by law, as in France (see art. 1108 of the French Civil code (hereinafter: Fr. C. c.): 'four conditions are essential to the validity of an agreement: The consent of the party who binds himself; his capacity to contract; a certain object forming the matter of the contract; a lawful cause in the bond'). These are also the *essentialia negotii* required in other countries, such as Italy (see art. 1325 s.1 of the Italian Civil code (hereinafter: Ital. C.c.)); Spain (see art. 1261 of the Spanish Civil Code, hereinafter: Sp. C.c.: 'No hay contrato sino cuando concurren los requisitos siguientes: 1. Consentimiento de los contratantes. 2. Objeto cierto que sea materia del contrato. 3. Causa de la obligacion que se establezca'), and Switzerland (See art. 1 OR: 'a contract requires the mutual agreement of the parties. This agreement may be either express or implied'). Thus 'the consent is very important, because without it, there cannot be a contract' (Ghestin, 1988, p. 217).

However, this does not mean that the accord of the parties, i.e., the 'meeting of the manifestations or the declarations of each party' (Galgano, 1988, p. 61; for a similar definition, see also Larroumet, 1986, p. 210, where the author states that the conclusion of a contract presupposes that 'the wills of the parties must have met'), is always sufficient to lead to the conclusion of a contract (see, e.g., Messineo, 1968, p. 393, where the author states that 'the consensual contract is not only the one which requires consent (in fact, consent is required for all contracts), but the one for which the consent is also sufficient'). Indeed, while there are some contracts which merely require consent, in other contracts 'the obligation arises not just from the agreement of the parties but from the delivery [of the goods which are the objects of the contract]' (Lorenzen, 1919, p. 623), as expressly stated for instance in art. 1443 of the Chilean Civil Code. The latter ('real') contracts, also known in Roman law (in Roman law 'real' contracts, i.e., contracts *re contrahuntur*, could be nominated 'real' contracts, like *mutuum*, *comodatum*, *depositum*, *pignus*, or innominate 'real' contracts, which, however, became actionable at a later period; see also, Lorenzen, 1919, p. 623), protect just the interests of one party, while the consensual contracts protect the interests of both parties.

A typical example of a 'real' contract is represented by the deposit contract which is a 'real' contract not only in some western European legal systems, such as France (see art. 1919(1) Fr. C.c., where it is stated that the

contract 'is only perfected by the real or supposed delivery of the thing deposited'); Italy (see art. 1766 Ital. C.c.: 'the deposit is the contract in which one party receives a movable good from another with the commitment to preserve and return it in the same nature'); and Luxembourg, but also in some Eastern European systems as well as in some South American ones. However, some other legal systems do not consider the contract of deposit as being a 'real' contract. This can be evinced, for instance, from the Swiss definition of *Hinterlegung*: 'the deposit is a contract which obliges the depository to receive from the depositor a movable good that the latter entrusts to him and to preserve it in a secure place' (see art. 427 OR). Also the German legal system considers the deposit contract (*Verwahrung*) as being a *Konsensualkontrakt* and not a *Realkontrakt*.

The deposit contract is not the only 'real' contract; the French Civil code, for instance, considers also the *prêt à usage*, the loan for use (see art. 1875 Fr. C.c.: 'the loan for use, or gratuitous lending, is a contract by which one of the parties gives up a thing to another for its employment, on condition by the borrower to restore it after having so employed it'), the *prêt de consommation*, the correspondent of the Roman *mutuum* (see art. 1892 Fr. C.c.: 'the loan for consumption is a contract by which one of the parties delivers to the other a certain quantity of things which perish in using, on condition by the latter to return to him as much of the same kind of goods and of the same quality'), and the *gage* (see art. 2071 Fr. C.c.: 'pledging is a contract by which a debtor places a thing in the hands of the creditor as security for his debt') to be 'real' contracts. To this list of 'real' contracts referred to in the French civil code, the French courts added the *don manuel* and the *contrat de transport de marchandises*.

The Italian legal system recognizes even more contracts for which the delivery is required *quoad constitutionem* (or *ad essentiam*) (as to 'real' contracts in Italian law, see, e.g., Dalmartello, 1955; Di Gravio, 1989; Forchielli, 1952; Manzini, 1989), though there is a dispute among Italian scholars about the qualification of some of them. Such contracts are (for a list of the contracts which are considered as being 'real' contracts, see, e.g., Messineo, 1968, pp. 395ff.) the *contratto estimatorio* (see art. 1556 Ital. C.c.; in this type of contract one party may deliver personal property to another at a fixed price which must be paid unless the goods are returned at a predetermined time), *comodato* (see art. 1803 Ital. C.c.; this contract corresponds to the French *prêt à usage*; in fact, it is a contract whereby a party gratuitously delivers personal or real property to another party to be used for a time or for a specific use, with the obligation of returning the identical property), *deposito* (see art. 1766, 1783 Ital. C.c.; the *deposito* corresponds to the French *dépot*, i.e., it is a bailment contract whereby a party receives personal property from another party and undertakes to keep it in his custody and to return

it in the same condition), *donazione modale* (see art. 783 Ital. C.c.; the *donazione modale* can be defined as a gift by contract or legal instrument made in a spirit of liberality and having goods of moderate value as its object and which requires no formality), *pegno* (see art. 2786(1) Ital. C.c.: 'a pledge is established by delivering to the creditor the thing concerned, or the document conferring exclusive power to dispose of such thing'), *riporto* (see art. 1549 Ital. C.c.: 'the contract is completed by delivery of the securities'), *sequestro convenzionale* (see art. 1798 Ital. C.c.: 'contractual sequestration is a contract by which two or more persons engaged in a controversy over one or more things entrust them to a third person to keep in his custody and deliver to the person to whom they will belong when the controversy is settled') as well as the contract of carriage of goods by rail (see art. 38(3) Law on Railroad Transportation of 13 May 1940), which is considered a 'real' contract (a *Realkontrakt*) in Switzerland as well. The Italian system knows two types of *mutui*: the contract whereby one party delivers a determined quantity of money or other fungible goods to another party who undertakes to return a like number of goods of the same kind and quality: one is considered a 'real' contract (art. 1813 Ital. C.c.), while the other is considered a 'consensual' contract (*promessa di mutuo*, art. 1822 Ital. C.c.).

This category of contracts, the contracts *qui re contrahuntur*, is not, however, accepted in all countries. In fact, in the German legal system (though the Austrian legal system belongs to the German legal family, it does acknowledge the category of 'real' contracts; for this conclusion, see, Koziol and Welser, 1987, p. 114, where the authors, e.g., list as being 'real' contracts deposit and loan), as well as in the Danish legal system (see, e.g., Vaisse, 1976, p. 126, who points out that 'all contracts are consensual'), this category does not exist any more, despite some recent attempts to consider the contract of transport of goods by rail as being a 'real' contract (*contra*, in the sense that even the contract of transport of goods is not considered as being a 'real' contract under German law, see, e.g., Basedow, 1987, p. 232).

2.2 *The definitions of agreement of the parties*

Having pointed out that the agreement of the parties is not always sufficient for a valid contract, the concept of agreement of the parties itself has to be analysed. This concept has been defined in different ways: under Austrian law, for instance, it is defined as the *wahre Einwilligung*, the 'free, serious, precise and intelligible' accord of the parties (see s. 869 Austrian Civil Code; hereinafter: ABGB; Koziol and Welser, 1987, p. 103). Swiss scholars, by contrast, consider the consent as existing when 'the parties have manifested their corresponding will' (see art. 1(1) OR; Bucher, 1988, pp. 110ff.; Keller and Schöbi, 1988, p. 53). In common law the agreement has been defined as 'a manifestation of mutual assent on the part of two or more persons'

(Restatement (Second) of Contracts s. 3) 'the terms of which are sufficiently definite and certain to be legally enforceable' (Rohwer and Schaber, 1990, p. 8). The partial agreement generally does not bind the parties, as in the case in which the parties agree to determine some elements of the contracts in a future negotiation. In common law it is often repeated that the agreement to agree in the future does not correspond to a present contract.

Although these definitions can help us to understand the importance and the essence of the agreement of the parties, they are not sufficient to solve all the problems which can arise upon the occasion of the conclusion of a contract. A more useful definition considers the agreement as coming into existence only when 'a complete coincidence between the declarations of the will of the different parties is reached' (Galgano, 1988, p. 61). And this is, indeed, the most common definition (see, for a very similar definition, Calamari and Perillo, 1987, p. 25) upon which most legal systems draw in order to answer one of the most controversial problems, namely, the role of the acceptance which does not conform to the offer. This problem is generally solved by stating that 'an acceptance under amplifications, limitations or other alterations is deemed a refusal . . .' (see s. 150 BGB). And this principle, known (in several variations) in most civil law systems, such as in Italy (art. 1326(4) Ital. C.c.) and France (see, e.g., Flour and Aubert, 1988, pp. 109ff.), and in principle accepted by the 1980 United Nations Convention on Contracts for the International Sale of Goods as well, supposes the aforementioned definition, and thus constitutes one of the most important principles regarding the formation of contracts.

2.3 Express and implied consent

Having defined the agreement of the parties, it has to be mentioned that the parties' consent can be both express or implied (see, e.g., Bucher, 1988, p. 113). In Switzerland, an express statement to this effect is to be found in art. 1(2) of the Code of Obligations (hereinafter: OR), that states that 'the manifestation can be express or tacit'. In other countries as well, similar statements can be found; in this respect it may suffice to refer to s. 863(1) of the Austrian General Civil Code (hereinafter: AGBGB) ('Intention is manifested not only expressly by words and generally adopted signs but also tacitly by acts which in regard to their circumstances reveal an intention beyond substantial doubt'), as well as to art. 1386 of the Quebec Civil Code ('The exchange of consents is accomplished by the express or tacit manifestation of the will of a person to accept an offer to contract made to him by another person').

By contrast, it is not possible to find any specific definition of the different types of agreement (express and implied) in the mentioned systems. Very few legal systems offer such a definition, but one can be found for example in the

Civil Code of Argentina (see, e.g., art. 1146: 'el consentimiento tacito se presume si una de las partes entregare, y la otra recibiere la cosa ofrecida o pedida; o si una de las partes hiciere lo que no hubiera hecho, o no hiciere lo que hubiera hecho si su intencion fuese no aceptar la propuesta u oferta'). In fact, in order to be able to define the aforementioned kinds of consent, it is necessary to examine the single manifestations or declarations (in Germany, the only expression used in the BGB is *Willenserklärung*, i.e., declaration of will. Indeed, section III title 2 of book I of the BGB is entitled *Willenserklärungen*) of will which compose the consent. That is why an 'express' agreement can be defined as the agreement consisting of two express declarations of will, i.e., of manifestations of will made by using signs of language (for definition of 'express' manifestation of will, which 'generally does not cause any problem' (Kramer and Schmidlin, 1973, p. 91), see also von Büren, 1964, pp. 135ff.; Engel, 1973, p. 101; Galgano, 1988, p. 63). These signs are not limited only to words, both written and oral, but encompass all kinds of communicative instruments which are deemed signs of language by society (e.g. raising one's hand during an auction; see Galgano, 1988, p. 63; Larroumet, 1986, p. 226) or which are especially so defined by the parties (see Kramer and Schmidlin, 1973, p. 92).

On the other hand, an agreement is deemed to be implied when the contracting parties manifest their will by using instruments (other than signs of language) which make it possible with certainty to deduce the existence of a contractual intent. This definition is common to many legal systems (see Galgano, 1988, pp. 63ff.; Litvinoff, 1987, pp. 699, 703 ff.).

The agreement can be tacitly manifested by both parties or by only one of the parties. For example, s. 151 of the BGB admits that the contract can be concluded 'without the necessity that the offeror be notified of the acceptance, if such notification is not to be expected according to common usage'. According to most scholars, this is the case with acceptance which is implied by execution (or the beginning of the execution) of the obligation (acceptance by execution, or performance, of the contract is regulated, e.g., by art. 1327(1) Ital. C.c., where it is stated that 'when, at the request of the offeror or by the nature of the transaction or according to usage, the performance should take place without prior reply, the contract is concluded at the time and place in which performance begins'. See also Diez-Picazo and Gullon, 1988, p. 75; Galgano, 1988, pp. 71ff.).

The concepts being examined are also known in common law jurisdictions where a distinction is made between acceptance by declaration and acceptance by conduct. The latter can be further divided into acceptance by performance ('under the common law a unilateral contract arises upon performance': see Calamari and Perillo, 1987, p. 81, ss.2-17; see also *Becker v. Missouri Dep't of Social Services*, 689 F.2d 763 (8th Cir. 1982)) and

acceptance by other conduct. The acceptance by performance corresponds to the aforementioned principle set out in s. 151 of the BGB as well as by other provisions, such as art. 1327(1) of the Italian Civil Code.

2.4 *Silent consent*

Another problem in the area of implied agreement relates to the value of silence as acceptance (as for this problem, see, e.g. Goretti, 1982). Within this area it is possible to develop a general rule, valid for most legal systems, according to which silence as such does not constitute acceptance of an offer. Though this rule has been adopted in many countries as well as by the drafters of the 1980 United Nations Convention on Contracts for the International Sale of Goods (art.18(1) CISG), there are several qualifications to this rule in the different legal systems.

One such qualification concerns the contracts which create obligations for one party only. An example of such qualification can be found in art. 1333(2) of the Italian Civil Code, where it is stated that, with regard to contracts that create obligations only for the offeror, 'the offeree can reject the offer within the time required by the nature of the transaction or by usage. In the absence of such rejection the contract is concluded'. A similar principle is also valid in France, where it has not been introduced by statute but rather by courts (see, as regards this affirmation, Larroumet, 1986, p. 229; Mazeaud, 1991, p. 126).

As for common law, it is necessary to point out that the requirement of consideration makes it very difficult to conceive a contract for the sole benefit of the offeree within which silence can be regarded as acceptance (see Schlesinger, 1968, p. 1073, where it is stated that, 'where the offer is for the sole benefit of the offeree, *i.e.*, where he would incur neither in liability nor risks by its "acceptance", even an express acceptance would not ordinarily form a contract (under common law rules) because of the absence of consideration').

Another qualification of the general rule pursuant to which silence by itself cannot amount to acceptance relates to cases where a duty to speak arising from law or usage or practices established between the parties exists (see art. 1394 Quebec Civil Code; art. 370(3) Civil Code of the Republic of Uzbekistan). In some countries, the law expressly provides that the lack of a rejection of the offer amounts to an acceptance. Illustrative of this type of exception is the rule concerning the tacit extension of a lease contract, as can be found for example in France (e.g. art. 1759 Fr. C.c.: 'If the party hiring a house or an apartment continues his enjoyment after expiration of the lease in writing, without opposition on the part of the lessor, he shall be taken to occupy them on the same conditions, for the term fixed by usage of the places . . .'), Germany (e.g. s. 645 BGB: 'If, after the expiration of

the term of the lease, the use of the thing is continued by the lessee, the lease is deemed to have been extended for an indeterminate time, unless the lessor or the lessee declares a contrary intention to the other party within a period of two weeks . . .'); and also in Louisiana (see, e.g., Litvinoff, 1987, pp. 699, 704). In Italy the aforementioned rule is also applicable.

2.5 *Silence to an offer under Swiss law*

In this chapter silence will be examined within the Swiss legal system. This particular interest in the Swiss legal system is due to its apparently different treatment of this issue: according to art. 6 OR, 'when one does not expect an express acceptance because of the particular nature of the transaction or the circumstances, the contract is considered to be formed if the offer is not rejected within a reasonable period of time' (see e.g. Betz, 1984; Kramer, 1984, p. 235; Yung, 1964, pp. 339ff.). This principle, which corresponds partly to the one found in art. 234 of the Portuguese Civil Code, appears quite similar to the canon law principle *qui tacet consentire videtur*, as laid down in *Liber Sextus Decret. 5, 12 regula XLII* (see, e.g., Kramer and Schmidlin, 1973, p. 273). However, these principles cannot be equated with one another, even though it has been so argued (see e.g. Schläpfer, 1937, p. 34). This is because generally an express acceptance is expected (see, e.g., Schönenberger and Jäggi, 1973, pp. 459 ff.). However, the Swiss consider express acceptance to include all types of acceptance except for silence, and therefore it even encompasses acceptance by conduct.

The principal exception, that of silence as acceptance, is valid only when certain conditions exist: when both express acceptance is not expected and the silence lasts at least for a reasonable period of time.

As for the first requirement, under Swiss law, its existence must be inferred from the 'particular nature' or circumstances of the contract. There is a dispute among scholars over the first element ('particular nature'). Most commentators, however, consider it only an element creating particular circumstances in which acceptance may be presumed (see, e.g., Schönenberger and Jäggi, 1973, pp. 460ff.; Yung, 1964, pp. 339, 346). Independently from the value the various Swiss scholars attribute to the aforementioned element, they agree on the types of contracts that allow silence to amount to acceptance, namely the *einseitig begünstigenden Geschäfte*, that is to say the contracts which benefit only one party and oblige solely the other (see, for this exception to the rule, Kramer and Schmidlin, 1973, pp. 281ff.). It has even been argued that only these contracts fulfil the condition which allows the application of the cited provision (see, e.g., Schläpfer, 1937, p. 63; Engel, 1973, p. 147).

The second requirement is linked to the 'particular circumstances' of the contract, an expression which some scholars consider a general clause

enabling judges to evaluate whether or not silence will result in acceptance (see, e.g., Kramer and Schmidlin, 1973, p. 284). Among these circumstances (which must be evaluated at the time of the remittance of the offer – see Schläpfer, 1937, pp. 39ff.; Yung, 1964, pp. 346ff.), are above all the *vorausgehende Abrede*, *i.e.*, those cases in which silence becomes acceptance because of a prior agreement stating so (see, as for this ‘circumstance’, Bucher, 1988, p. 136; Kramer and Schmidlin, 1973, pp. 284ff.; Schönenberger and Jäggi, 1973, p. 461). Where there is a prior course of dealing between the parties, silence can also amount to acceptance (see Kramer and Schmidlin, 1973, pp. 285ff.). Therefore silence may amount to acceptance when the parties continuously deal with one another in contracts of the same nature, a principle upon which many legal systems are based (see, e.g., Schönenberger and Jäggi, 1973, p. 462).

In those instances where silence amounts to acceptance, the ‘reasonable period of time’ referred to in art. 6 OR fixes the minimum duration during which the offeree must be silent (see Kramer and Schmidlin, 1973, p. 288). If within this period of time the offeree does not reject the offer, the contract is deemed concluded. Whether or not a period of time is ‘reasonable’ is determined by the court on a case-by-case basis; in doing so, the court may well take into account the period of time fixed by the offeror.

3 Offer

3.1 *Agreement inter praesentes*

The agreement, a prerequisite of contract in every legal system, can be formed both *inter praesentes* and, thus instantaneously, or *inter absentes*. Even though only the formation of a contract between absent parties will be examined, this cannot be done without a brief overview of the contract’s conclusion *inter praesentes*. This is necessary to establish who can be considered a present party as opposed to an absent one.

The agreement *inter praesentes* is generally formed without the expiration of a time period different from that strictly necessary for the (present) parties’ exchange of their declarations of will. This concept, which derives from the Roman *sponsio-stipulatio*, can be found in most civil law systems (see, e.g., Switzerland, art. 4(1) OR, and Austria, s. 862 ABGB). Common law also is based on the aforementioned principle which was invoked by the House of Lords in, for example, *Entores Ltd. v. Miles Far East Corp* (2 All.E.R. 493, 495 (1955)).

At this point one must determine who can be considered a present party. *Nulla queastio* as for face-to-face conversations, that is to say when persons are physically present. A problem with this qualification arises, above all, when parties use means of communication such as the telephone, *i.e.*, when a face-to-face conversation is not possible. In this case, however, the rules

that govern the formation of contract *inter praesentes* are applicable, at least in most civil law countries. Some of them have even expressly provided for this situation by law: for example, Austria (s. 862 AGBGB), Germany (s. 147(1) BGB) and Switzerland (art. 4(2) OR).

As for common law countries, one must be aware that in England parties contracting over the telephone are considered present parties, but not those contracting via telex. US law relies on this rule as well, at least regarding the conclusion of contracts by telephone.

3.2 *The offer to the public*

When the parties are not present, the agreement is formed in successive phases. In this case one traditionally distinguishes the parties' declarations of will as manifested in offer and acceptance. The offer can be (and in some countries, as in the Republic Belarus (art. 405(1) Civil Code), actually is) defined as a declaration of a party addressed to one or more specific persons (for an example of a provision which expressly considers the offer made to more specific persons, see art. 14(1) CISG) through which the offeror manifests its intent to be bound by a contract and the acceptance of which leads to the conclusion of the contract (see von Büren, 1964, p. 124; Engel, 1973, p. 141; Larroumet, 1986, p. 220). This declaration must be sufficiently definite (Diez-Picazo and Gullon, 1988, p. 75; Engel, 1973, pp. 155ff.; Kramer and Schmidlin, 1973, p. 170; Larroumet, 1986, pp. 220ff.), *i.e.*, it must contain the essential elements of a contract which are determined by the type of contract to be concluded (lease, sale). As for contracts for the international sale of goods, this requirement is laid down in art. 14(1) CISG, which considers the goods, the quantity and the price to be essential elements.

It must be pointed out, however, that even a proposal not directed to one or more specific persons can at times be deemed an offer: this is the case of the offer made to the public, that is to say, the offer made to an indefinite number of persons (see, e.g., art. 14(2) CISG, which provides that a proposal directed to the public may be an offer, if it is clearly the offeror's intention to be bound by his proposal). Even this type of offer must, however, contain the essential elements of the contract to be concluded, as expressly stated, for instance, by the French Cour de Cassation (28 November 1968, J.C.P. 15797 (1969)): 'the offer made to the public binds the offeror with regard to the first who accepts under the same conditions as the offer made to a specific person' (see also Vialard, 1971). Not only do legal scholars and courts of different countries analogize offers to the public to offers to specific persons, but this analogy has been explicitly recognized in various countries, among others, Italy (art. 1336(1) Ital. C.c.).

Some common law countries also consider this type of offer as an 'offer'. This is true not only as far as the US is concerned, where there has been

much discussion over the question whether this type of offer can be revoked (for more on this issue, see, e.g., Schlesinger, 1968, p. 113), but also in respect to England, where the possibility to analogize offers to the public to 'offers' was introduced by the leading case *Carlill v. Carbolic Smoke Ball Co.* (1 Q.B. 256, 268 (1893)): 'an offer can be made to an individual, to a class of persons, or to the whole world'.

3.3 *Offer and invitation to make an offer*

Different from the offer made to one or more specific persons (as well as from the offer to the public) is the invitation to make an offer, which can be defined as a 'declaration which does not contain all the essential elements of the contract to be concluded' (Galgano, 1988, p. 73; see also Diez-Picazo and Gullon, 1988, p. 75). This distinction is relevant because, in the case of an offer, the acceptance of the offer creates a contract which binds both parties, while in the case of an invitation to make an offer, there is not even a power of acceptance (see, as for the distinction at issue, Schlesinger, 1968, p. 77; Larroumet, 1986, pp. 221ff.; Mazeaud *et al.*, 1991, p. 120). Most legal systems recognize this distinction, especially regarding the problems presented by the display of merchandise in shop windows and by self-service businesses. However, legal scholars are not in agreement as to the treatment of these two situations; they disagree over whether they constitute offers or *invitationes ad offerendum*.

In fact, in some civil law systems, the display of articles in shop windows is deemed an offer as long as a price is indicated. This is true, for example, in France as well as in Switzerland, where art. 7(3) OR expressly states that 'the display of merchandise with an indication of price is deemed an offer'. In other legal systems, however, the display of articles in shop windows constitutes only an invitation to negotiate, as for example in Germany and Italy. This is also the preferred solution in common law countries (England, India, United States), as well as in formerly Socialist countries.

In relation to the treatment of self-service sales as well, there is no uniformity among the legal systems. In fact, in England and in Germany the shopper's taking the merchandise off the shelves does not constitute acceptance (and the presentation of the merchandise to the cashier is no more than an offer). In contrast, in France and in Italy the taking of the goods leads to the conclusion of the contract, because the display of the merchandise constitutes a true offer to the public.

3.4 *Revocable and irrevocable offer*

Various legal systems offer distinct solutions to the problem of the revocability/irrevocability of an offer. In several civil law countries (such as

Belgium, Italy, France, Luxembourg, Spain) an offer made without reference to its revocability is deemed revocable until its acceptance (see, e.g., Schlesinger, 1968, p. 109). The CISG as well is based upon the aforementioned principle; however, according to art. 16(1) CISG, the revocation of an offer is effective only 'if the revocation reaches the offeree before he has dispatched an acceptance'. It should be noted that the aforementioned systems, as well as the CISG, allow for the offeror to make an offer irrevocable. Consequently, if the offeror has bound himself to keep the offer firm for a certain time, the revocation is without effect.

Different from revocation is the withdrawal of an offer, which is permissible even for the irrevocable offer. The offeror can in fact withdraw his offer, *i.e.*, he can tell the offeree to ignore the offer *in itinere*. Withdrawal, as differentiated from revocation, precedes, indeed, the receipt of the offer.

In other civil law countries, such as Austria, Germany, the Republic of Belarus, the Republic of Uzbekistan, Portugal and Switzerland, where the offeror is silent regarding the revocability of an offer, the offer is considered irrevocable. In Germany, s.145 of the BGB states that 'whoever offers to another to enter into a contract is bound by the offer, unless he has excluded being so bound' (see also art. 7(1) OR). Even here one must distinguish between revocation and withdrawal of an offer. To be effective, in some systems, such as Austria, Germany, the Republic of Belarus and the Republic of Uzbekistan, the withdrawal cannot reach the offeree after the latter has received the offer. In contrast, in other systems, such as Portugal and Switzerland, it is irrelevant whether the offeree receives the offer or the withdrawal first; knowledge is the determinative factor. That is why a withdrawal of which the offeree has knowledge first will be effective even though the offer had reached the offeree first.

In some cases, the offer will be considered irrevocable where the parties are silent as to its revocability, but only for a fixed period of time determined by the applicable laws and therefore independent from determinations based on usage or the nature of the transaction. This is the case of Mexican law, or more precisely of the *distrito federal*, which provides for a period of three days during which the offer is irrevocable (art. 1806 of the *Codigo civil para el distrito federal*).

As for common law countries, one can say that generally all offers are revocable, even those which the offeror states are irrevocable (see, e.g., Schlesinger, 1968, pp. 748, 766; Nussbaum, 1936, who states that in England 'the consideration doctrine stood in the way of holding irrevocable an offer made neither for value nor under seal, even when the offeror had waived his right to revoke'), except in those cases where the offer 'is under seal, or is supported by consideration, or where a special statute makes it irrevocable' (Schlesinger, 1968, p. 766).

It is not easy to explain these diverse solutions. Perhaps the German solution was influenced by cultural factors as expressed by the motto *ein Mann, ein Wort* (see von Gierke, 1889, p. 164), or by the suspicion that an offer followed by a revocation conceals a malicious intent, or by the legislature's favouring the conclusion of contracts, even where the price is the sacrifice of contractual autonomy. The offer must constitute for the offeree a fixed point of reference around which to shape his own conduct. By contrast, by considering all offers revocable, the common law systems as well as some civil law systems safeguard contractual autonomy.

4 Acceptance

4.1 Acceptance and counter-offer

The agreement of the parties is formed, as has already been mentioned, at the time when offer and acceptance come together. Having examined the offer, one's attention must now focus on the acceptance, which can be defined as the (express or implied) manifestation of will by which the offeree responds positively to the offeror and by which the contract is concluded. However, in order to lead to the conclusion of a contract, the acceptance must comply with certain prerequisites. In effect, generally it is required that the terms of the acceptance entirely correspond to those of the offer; where the acceptance does not correspond to the offer, it is simply considered a counter-offer, it being impossible that there be any accord. Most legal systems, as well as the CISG (art. 19(1)), have expressly adopted some form of this principle (known as the 'mirror image rule'): art. 1326(5) Ital. C.c., for instance, states that 'an acceptance that does not conform to the offer corresponds to a counter-offer'.

Over the years, this rigid 'mirror image rule' has been weakened, as evidenced for instance by s. 2-207(1) UCC, which provides that 'a definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms', and art. 19(2) CISG, which, in contrast to art. 19(1) (which contains the mirror image rule), provides that 'a reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects orally to the discrepancy or dispatches a notice to that effect'. Thus, in some countries, the reply to an offer that contains modifications or additions may be considered an 'acceptance', provided that the modifications and alterations do not materially alter the offer.

4.2 *Acceptance and its time limit*

It is superfluous to state that an offer cannot remain effective for an indeterminate period of time, otherwise the offeror would forever be bound, thus having a negative influence upon the exchange of goods especially in those legal systems where an offer is generally considered irrevocable. Therefore, in the case of agreement *inter absentes*, every legal system provides either the possibility for the offeror to set a time limit upon the expiration of which the offeree loses his power of acceptance, or a time period which has the same effect and is not set by the offeror, but is fixed by law or by the court on the basis, for instance, of the nature or other circumstances of the contract.

If no time limit is set for acceptance, then the acceptance may only be declared within a period of time that is 'ordinarily' or 'reasonably' necessary according to the nature of the transaction or usage. A question relating to the aforementioned rule concerns the identification of the criteria used for the determination of the implicit time limit for acceptance. As for this question, most legal systems take into account the lapse of time strictly necessary for the offeree's acceptance to reach the offeror (see, e.g., Kramer and Schmidlin, 1973, p. 261 for this general rule); of course, other criteria also have to be taken into account, such as prior conduct of the parties, fluctuating value or the perishable nature of the object, etc.

4.3 *Late acceptance*

A further problem is related to the effects of a late acceptance. Generally, 'the late acceptance of an offer is considered a new offer' (s. 150(1) BGB). This rule can be found in most legal systems. However, one must distinguish various types of 'late acceptance'. Where the acceptance was made after the expiration of the time for acceptance, there can be no doubt that the aforementioned rule applies. Where, however, the acceptance has been made before the expiration of the time limit and in time for it to reach the offeror before its expiration, some legal systems (such as the German, the Swiss and the Uzbek ones) as well as the CISG (art. 21(2)) apply a more elaborate rule: if an acceptance that has reached the offeror late shows that, if its transmission had been normal, it would have arrived in due time, the acceptance is effective as an acceptance, unless the offeror immediately notifies the offeree that he considers his offer as having lapsed. In other words, there are instances where a late acceptance still can lead to the conclusion of the contract.

There are other legal systems, however, such as the US and the Italian systems, which provide a contrary rule: 'the offeror can treat late acceptance as effective, provided that he immediately so informs the other party' (art.1326(3) Ital. C.c.). This means that in these legal systems one proceeds

from the consideration that a late acceptance does not constitute acceptance, but rather a new offer with the same contents, which has to be accepted in order to lead to the conclusion of the contract.

5 The moment the contract is concluded

5.1 In general

Having examined the various elements required for an agreement, one must focus one's attention on the moment at which the contract *inter absentes* is formed, that is to say, when the acceptance becomes effective (see, e.g., Schlesinger, 1968, p. 156).

As for this problem, the various legal systems are based upon differing principles: the principles of 'information', 'reception', 'expedition' (or 'mailbox rule') or that of 'declaration' (for this distinction, see, e.g., Mazeaud *et al.*, 1991, pp. 130ff.; see also Schlesinger, 1968, pp. 158–60 for a tripartition including only the theory of 'information', 'expedition' and 'reception'). The application of these principles results in differing consequences. For example, under the legal systems in which property (tangible movables) passes at the moment the contract is concluded (as for the different principles which govern the transfer of property of movable goods, see, e.g., von Caemmerer, 1938; Ferrari, 1993; Galgano, 1999, pp. 103ff.; Kruse, 1958), this moment differs according to which principle is applied (as for the influence of the different theories upon the various rules governing the passage of property in movable goods, see, e.g., Larroumet, 1986, p. 243; Mazeaud *et al.*, 1991, p. 131).

The choice of one principle *versus* the other influences the possibility for the offeree to revoke the acceptance as well as the risk related to its transmission. The choice of one principle or the other also determines where the contract is concluded, which may in some countries be relevant for the purposes of determining the law applicable to an international contractual relationship.

5.2 The theory of 'information'

According to the principle of 'information', the contract *inter absentes* is concluded the moment that the offeror learns of the acceptance (for an identical definition of the theory of 'information', see, e.g., Diez-Picazo and Gullon, 1988, p. 76; Galgano, 1988, p. 70; Larroumet, 1986, p. 248). The premise upon which this principle is based has been well clarified in Italy: the *Relazione al Re*, the official introduction accompanying the entry into force of the Italian Civil Code, states (at n.70) that 'it is not admissible that a subject is voluntarily bound without having knowledge of the commitment which is acquired upon notice of the other party's will of full adhesion to the offer. What is more, this corresponds to the exigencies of

commerce which requires security and clarity.' On the basis of this principle, the risk of the transmission of the acceptance is placed upon the offeree (Nussbaum, 1936, p. 927: 'at least he (the offeree) knows that it was dispatched and it seems natural to have him bear the risk of delay or loss of his own letter rather than to put this burden upon the addressee who is uninformed even as to the act of dispatch'); thus, the contract cannot be considered as being formed where the acceptance does not reach its destination or reaches it late. Moreover, the delay of the conclusion of the contract caused by the principle of 'information' gives to the offeror more time to revoke the offer.

Another disadvantage relates to the difficulties in proving that the offeror has obtained knowledge of the acceptance. However, this principle gives the offeree more time to revoke the acceptance, since the revocation of the acceptance, where at all admissible, can generally occur up to the moment at which the acceptance becomes effective, *i.e.*, up to the time the offeror has knowledge of it.

This rule, which has been codified in various countries, such as Egypt, the Philippines and Italy, is generally mitigated by a presumption of knowledge, pursuant to which 'acceptance, its revocation and any other declaration directed to a specific person, are considered to be known at the moment they reach the address of the person to whom they are directed' (see art. 1335(1) Ital. C.c.). However, this presumption generally is not a presumption *iuris et de iure*, *i.e.*, it is not conclusive. In fact, the Italian Civil code, for example, provides that an offeror may prove that 'without his fault, it was impossible for him to have notice of [the acceptance]' that has reached him at his address. Where the offeror succeeds in proving so, the contract cannot be considered as being formed at the time when the acceptance reached the offeror.

Another exception to the theory of 'information' occurs in cases where it is permissible for contracts to be concluded by the beginning of performance. In those cases the contract is concluded at the time and place where performance is begun.

5.3 *The theory of 'reception'*

Pursuant to the theory of 'reception', contracts are concluded when the offeree's acceptance reaches the address of the offeror in a manner that allows the offeror to become aware of the acceptance. Thus, the contract is concluded even though the offeror does not have actual knowledge of the acceptance. In Europe, this principle, which resembles the aforementioned 'mitigated' information principle (for this expression, see Bucher, 1988, p. 139), is expressly provided for in Austria, Germany, Hungary and Switzerland, as well as in other countries. In Belgium, Denmark and

Luxembourg, this principle has been introduced by the courts (see Vaisse, 1976, pp. 11, 24).

This principle differs from the 'mitigated' principle of 'information' in that the offeror is not permitted to prove that he was unable, for no fault of his own, to have knowledge of the acceptance which arrived at his address. In some of the aforementioned legal systems, however, the offeror can prove that the acceptance arrived at his address at an 'anomalous' time. Thus, if the reception of a written acceptance occurs at night, the contract is deemed concluded only the next day, either at the start of business hours or at the time mail is normally delivered.

In this author's opinion, this principle seems to better allocate the inherent risk in concluding contracts *inter absentes*. In the first phase, the risk of transmitting the acceptance is incumbent upon the offeree (as with the principle of 'information'): if the acceptance never arrives or arrives late, the contract will not be concluded, even though the acceptance occurred. But, at the moment the acceptance arrives within the so-called *Machtbereich des Antragenden* (control of the offeror), the offeror risks finding himself contractually bound, even if he has no knowledge of the acceptance of his offer.

Another aspect which distinguishes the principle of 'reception' from the principle of 'information' relates to the burden of proof: under the principle of 'reception', contracts being concluded by the delivery of the acceptance to the offeror's address, the offeree does not find himself in the situation of having to prove that the offeror had actual knowledge of the acceptance. However, under this rule the offeree has generally (this is not true as far as the CISG is concerned, see art. 16(1)) less time to avoid the conclusion of the contract once the acceptance has been dispatched.

5.4 *The theory of 'expedition' or 'mailbox rule'*

Another principle which is widespread (and upon which most of the common law countries are based), is that of 'expedition' or the 'mailbox rule'. Occasionally, this principle is erroneously referred to as the theory of 'declaration'. On the basis of this mistaken appellation, the contract is concluded with solely a declaration, that is to say, it is not even necessary to direct the declaration to the offeror which, of course, causes problems relating to the proof of the conclusion of the contract (for a definition of the 'declaration' theory, see, e.g. Diez-Picazo and Gullon, 1988, p. 76; Larroumet, 1986, p. 247; as regards the difficulty of proof of contract, see, e.g., Larroumet, 1986: p. 247).

By contrast, the theory of 'expedition' bases the conclusion of a contract upon the transmission of an affirmative declaration of will addressed to the offeror (as for the motives which lead to this rule, see Nussbaum, 1936,

pp. 925ff.; for a definition of 'expedition', see, e.g., Diez-Picazo and Gullon, 1988, p. 76). An illustration of this principle which relates to the conclusion of a contract by mail, can be found in the English case *Dunlop v. Higgins* (1 HL Cas. 381, 1848), where it is stated that 'a contract is accepted by the posting of a letter declaring its acceptance; the acceptor has done all that is necessary for him to do, and is not answerable for casualties occurring at the post office'.

One consequence of this rule (the rule of *Adams v. Lindsell*, 1 B. & Ald. 681 [K.B. 1818]), which, despite much criticism very early on (see, e.g., Langdell, 1880, pp. 15ff.; Pollock, 1921, pp. 38ff.) has also been adopted in the US, is that the acceptor cannot revoke the acceptance after it has been expedited not can he withdraw it. Furthermore, even the offeror is not allowed to revoke his declaration of will after the acceptance has been put into the course of transmission, 'the theory of "expedition" thus curtails the period of time during which the offeror may revoke his offer' (see Schlesinger, 1968, p. 159; Macneil, 1964; also under the CISG, even though it adopted the theory of 'reception', the offeror's possibility to revoke is limited; see art. 16(1) CISG). However, as a result of this rule, the risk of the transmission of the acceptance is not on the offeree, but on the offeror, who will be contractually bound even though he is unaware of the acceptance.

Even though the theory at issue characterizes the area of common law, it can also be found in a few civil law systems, such as in France, where, since the Code civil does not expressly provide for any solution as to the way to determine the moment of the conclusion of the contract, it is the courts that have stated that the theory of 'expedition' is the one to be followed (see Cour de Cassation, 7 January 1981 in Rev. trim. dr. civ. 849 et seq. (1981)).

5.5 *Conclusion*

Even though the theories of contract in civil law and common law systems cannot easily be compared, both sets of systems have similar concerns regarding the formation of contracts through offer and acceptance. The various legal systems approach the concepts of offer and acceptance differently, but, as has been shown, these approaches inevitably lead to similar results. For example, the various legal systems require that an offer be definite and express an intent to bind the offeror. Furthermore, in the systems where the offer is considered irrevocable by law, the parties can agree upon its revocability. *Vice versa*, where the offer is considered revocable by law, the parties may agree upon its irrevocability. As for the acceptance, one must note that all legal systems (at least as a general rule) base their rules upon the principle that the acceptance must be a mirror image of the offer. What is even more remarkable is that various legal systems have responded

to the emerging trend to modify the aforementioned mirror image rule: the acceptance which differs from the offer regarding additional and non-essential elements is more and more considered a valid acceptance.

The only real difference one can find relates to the theories upon which one determines the moment at which the contract is concluded, even though uniformity is necessary, especially to facilitate commercial transactions. In response to this need, for example, the CISG chose the theory of 'reception' as the theory that governs contracts that fall within its sphere of application. *De iure condendo*, the principle of 'reception' should be adopted in more legal systems, as it best allocates the risks of offer and acceptance between the parties.

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47 Personal and real security*

J.H.M. (Sjef) van Erp

1 Introduction

No credit without security and, to add what Goode has written in his manual on commercial law (2003b, p. 577), 'Enterprises live (and sometimes die) by credit.' In other words: security is vital for getting financing, which in its turn is essential for economic life. Whether a buyer of goods is given time to pay the purchase price after delivery of the goods or a consumer needs a loan to buy a new car, irrespective of the formal legal framework, from an economic point of view in each case credit will be given by a lender to a borrower. Of course, the lender will demand repayment and, realizing that repayment is not a priori certain, the lender will want some form of reassurance that any given credit will be paid back.

The bare promise of the borrower provides some certainty. If the borrower, for example, no longer is paying any agreed-upon instalments, this is a breach of contract with ensuing consequences. Such a claim, however, is strictly personal. In the case of the borrower's insolvency the lender will have to accept that other creditors also have claims and that he will rank *pari passu* among them. For most, not to say all, lenders this will not be enough. They will want more certainty. In legal terms: they will demand security, which can be given in several ways. These will be discussed below. It should be realized, however, that even when security is given, absolute certainty that a debt will be paid never can be created.

Security can be established in various ways. Frequently, a distinction is made between 'personal' and 'real' as well as between 'consensual' and 'legal' security. These distinctions will hereafter be briefly discussed, but first a few remarks on terminology are in order. Especially in property law, the use of the English language for describing civil law concepts is often problematic. English concepts, such as 'estate' and 'interest' are difficult to translate in, for example, French or German, whereas civil law concepts such as 'propriété/Eigentum', 'droits réels' or 'beschränkte dingliche Rechte' do not really have an English equivalent. Ownership is sometimes a good translation for 'propriété/Eigentum' and 'droits réels' or 'beschränkte dingliche Rechte' can only inadequately be translated by 'real rights' or 'limited real rights', respectively. With regard to the latter concept it should be realized

* See also: Assignment; Commercial regulation; Property and real rights.

that this is the English translation of a civil law concept, unknown to English law. In the following paragraphs I will explicitly describe each term to avoid or, better, attempt to avoid, misunderstanding.

First of all, the term 'security right' will be used and only occasionally the term 'security interest'. The latter is a term more frequently used in the common law; the former is more often used in the civil law. With both terms it is intended to express a preferential right, which the creditor has with regard to the proceeds of sale of a particular asset or class of assets that belongs to his debtor. Sometimes this right is accompanied by a power to sell such assets. Having described what is meant by 'security right', the question can now be asked what is meant by a 'personal', distinguished from a 'real', security right. The difference lies in the nature of the ensuing liability. Next to the principal debtor another person can be made liable for the debt. The result is joint liability. The creditor then has the choice as to whom he will approach to pay back the loan: the originally sole (first) debtor, the new second debtor or perhaps even both. If another person is only liable in the case of the main debtor defaulting (subsidiary liability), the result is a 'surety agreement'. In the case where this other person's liability is not of a subsidiary, but of a primary nature, the agreement is often called a 'guarantee', although the terms 'suretyship' and 'guarantee' are frequently used interchangeably. Suretyship and guarantee are both a type of personal security, as it is the person of the debtor (surety or guarantor) who is made liable. Of course, this means that such a person is liable in his patrimony (all of that person's assets). From this perspective also a personal security is 'real', because it affects the surety's or guarantor's property. However, the creditor is not entitled to seize certain specific assets, demand that these are sold and that the proceeds of the sale are only paid to him, limited to the amount of his claim, in preference to all other creditors. That can only happen if the creditor has strengthened his claim with 'real' security. Real in this sense means that the creditor can take, for example, certain agreed-upon immovable property (of course he could also take, if agreed upon, certain movable property or claims) which will then as such be the security for the repayment of the debt. The security right is then considered to be 'real', in contradiction to 'personal', because it rests directly on specific assets. In the case of personal security, as we have seen, it will also be the surety's or guarantor's property, which, at the end of the day, will be held liable. This liability however is considered to be of a general nature and not specific, as in the case of real security. It is the promise by the surety or guarantor which is seen as the prime source of (personal) security, not any property that may be sold.

Another frequently made distinction is between consensual and legal security (see Goode, 2004a, pp. 583ff., pp. 619ff.). Consensual security is based upon a mutual agreement between the parties; legal security arises by

operation of the law. An example of the first category is pledge, an example of the latter are statutory liens or, in French, *privèleges* (in the following called 'privileges'). These privileges can be general or specific. General privileges give a creditor a right of preference with regard to the proceeds of sale concerning all or a certain type of property belonging to the debtor. Special privileges give the creditor such a right with regard to specific property. Privileges, however, do not confer upon the holder a right to sell any property, unlike the power of sale given to a mortgagee or pledgee.

Certain legal devices may in practice have the effect of a security right. An example is the right of a creditor to detain property belonging to the debtor until the debt is fully paid (e.g., a repairman's lien). If a creditor is entitled to detain the property, he has a very strong position vis-à-vis the debtor and the debtor's creditors. Under Dutch law, the right to detain property is also given to a contractor with regard to immovable property and the right implies a specific privilege with regard to the property detained (cf. article 3:292 Dutch C.C. and H.R. 15 February 1991, N.J. 1991, 628 (*Agema v. Westland Utrecht*)). Another example is the right of set-off. By allowing a creditor to set off a claim against a debt that he owes to his debtor, his claim will be fully paid irrespective of claims held by other creditors. Although in such a situation creditors may rank *pari passu*, by invoking the right of set-off the creditor *de facto* has priority over other creditors. Both the right to detain property and the possibility of set-off are therefore sometimes called 'de facto' security rights.

In the following paragraphs, after a few introductory remarks about personal security, the focus will be on consensual real security rights with regard to movable (personal) property and claims. Recurring questions in this legal area concern (1) in which objects ('assets') a security interest can be created: only present assets or also future assets ('after acquired property'), (2) which obligations can be secured: only existing obligations or also future (fluctuating) obligations, (3) whether proceeds can be covered by a security right, (4) which consequences should be attached to accession and commingling of goods, and (5) whether publication (registration) of security rights is necessary. (See United Nations Commission on International Trade Law Working Group VI (Security Interests), Seventh session, New York, 24–8 January 2005, Security Interests, Recommendations of the draft Legislative Guide on Secured Transactions, Report of the Secretary General (Document A/CN.9/WG.VI/WP.16), to be found at <http://www.uncitral.org/en-index.htm> (Working Group VI)). Each question is answered differently from country to country. At a legal technical level diversity here is enormous. Nevertheless, attempts are made, at a national, regional and global level to streamline the law in this area, using a unitary and functional approach. Both diversity and convergence will be discussed.

2 Personal security

The two major examples of personal security are, as already mentioned, the surety agreement and the guarantee. Other examples are standby letters of credit and comfort letters. Guarantees can be divided into dependent and independent guarantees. A surety agreement and a dependent guarantee both depend upon the existence of a debt owed by the principal debtor to the principal creditor. They are, therefore, accessory in nature. This accessory nature does not exist in the case of an independent guarantee. Here the prevailing thought is ‘pay first, argue later’, meaning that any questions concerning the underlying relationship should not and cannot affect the performance of the guarantee (Drobnig, Sagel-Grande and Snijders, 2003, pp. 91ff.). Only afterwards can such problems be solved.

Various harmonization attempts are made in this area. The draft new EU Consumer Credit Directive contains special provisions protecting sureties who are not acting in any professional capacity (more information can be found on the website of the European Commission, Consumer Affairs: http://europa.eu.int/comm/consumers/cons_int/fina_serv/cons_directive/index_en.htm). Examples are parents acting as surety for their children. Also the Study Group on a European Civil Code has drafted provisions which are aimed at protecting consumers when they assume a guarantee (see the proposals concerning personal security: http://www.sgecc.net/media/download/personal_securities.pdf). With regard to business guarantees the International Chamber of Commerce (ICC) has published various, widely used, sets of uniform rules.

This is also an area where fundamental human rights enter the sphere of private law. According to a ruling by the German Bundesverfassungsgericht, the respect for a person’s private autonomy implies that, in situations where there is a structural inequality of bargaining power, resulting in a strong disadvantage for one of the parties, the court must apply general clauses in the German Civil Code in such a way as to have due regard to the imbalance and resulting disadvantage (Bundesverfassungsgericht 19 October 1993, BVerfGE 89, 214 NJW 1994, 36 ZIP 1993, 1775).

3 Real security

3.1 *Ownership as security: retention of title and transfer of ownership for security purposes*

It is possible to use the right of ownership as security. ‘Ownership’ is used here in the civil law sense as the most complete right a person can have with regard to an object. The right of ownership can be used as security in several ways. First of all, ownership can be reserved or, as it is also called, retained. A seller who sells goods on credit may retain ownership of the goods sold and delivered until full payment of the purchase price. The

buyer will be in control of the goods, but will not be the owner until he has completely paid the purchase price. The question then arises whether the buyer does not have any property entitlement at all. Here legal systems give different answers. The position of the buyer under the new Dutch Civil Code is the same as that of any buyer: he is entitled to transfer of the goods bought. However, for this transfer less strict rules apply as the buyer is already in control of the goods (cf. article 3:91 Dutch C.C.). Under German law, the buyer is given an 'expectation right' ('Anwartschaftsrecht'), which in many respects is considered to be a real right. Examples where retention of title is used as a security device are conditional sale, hire purchase and finance lease. If a sale is said to be conditional, it is meant that the sale is final, but the transfer of ownership is conditional upon payment of the full purchase price. In essence, this is the same in the case of hire purchase, although here the periodic instalments are seen as at the same time rental payments and instalment payments. In the case of finance lease, the rental aspect prevails, but often the lessee is given an option to buy at a nominal price the good leased at the end of the lease period (cf. Goode, 2004a, pp. 700 ff.).

In the case of retention of title, the transfer of ownership is postponed by the creditor to conserve his rights against a defaulting debtor, allowing, for example, the seller to claim the goods in the case of insolvency of the buyer. It could be said that ownership in such a case is used as a shield to protect oneself against the consequences of a defaulting debtor. Ownership can also be used as a sword, by demanding from the debtor the transfer of ownership to the creditor, which will be returned to the debtor after full payment. This is the so-called transfer of ownership for security purposes, sometimes also called (based upon the Latin term for this type of transfer) 'fiduciary transfer'. The use of the word 'fiduciary' does not have any connection whatsoever with English equity law. It only means that the ownership transferred to the creditor is for purposes of security. This means that the rule of the English Court of Appeal in the famous *Romalpa* case, allowing the fiduciary owner the right of tracing in equity, was based upon a misapprehension of the applicable civil (Dutch) law (*Aluminium Industrie Vaassen BV v. Romalpa Aluminium Ltd.* [1976] 1 WLR 676). Transfer of ownership for security purposes was and still is widely used in Germany. The new Dutch Civil Code banned this type of transfer, but gradually more and more exceptions have to be made under the pressure of European legal developments, such as the financial collateral directive (see article 3:84 (3) Dutch C.C. and Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements, Official Journal L 168, 27/06/2002, pp. 43ff.). In English law ownership can also be used as a security device by making use of the trust, resulting in a split between legal

and equitable ownership. Such a relationship is not unlike what can be found in German law with regard to retention of title, leading to legal 'ownership' (in the civil law, absolute, sense) in the hands of the creditor and what might be called 'economic ownership' (the 'Anwartschaftsrecht') in the hands of the debtor.

3.2 *Limited real rights*

Various forms exist in both civil and common law to give creditors certain preferential rights with regard to specific – or sometimes a specific class of or even all – assets belonging to the debtor. Assets can be pledged or mortgaged to the creditor. The terms 'pledge', 'mortgage' and 'hypothech' have meanings which vary from one legal system to another. Generally, a distinction is made between creating a limited interest in movable property, claims and immovable property, respectively. In the new Dutch Civil Code, for example, the term 'pledge' is limited to movable property and claims; the term 'hypothech' is limited to 'registered' (mostly immovable) property. In all these cases the creditor is given the power to sell the property which is pledged or mortgaged and to be paid from the proceeds of this sale before, in general, all other creditors. English law also knows the concept of the pledge and the concept of the (equitable) charge comes quite close to what civil lawyers would call a limited real right.

4 **Towards a uniform real security right**

When looking at the various attempts to unify the law of personal property security rights, it becomes clear that the model chosen by the drafters of the American Uniform Commercial Code (UCC) has proved to be very influential. The model has been followed in countries such as Canada and New Zealand; it is the basis of the model law on secured transactions drafted by the European Bank for Reconstruction and Development, the model Inter-American law on secured transactions as proposed by the Organization of American States, the UNIDROIT Cape Town convention on international interests in mobile equipment and the (draft) legislative guide on secured transactions proposed by UNCITRAL, and it has inspired several law reform initiatives in England to streamline the law in this area. For an overview of legal developments, see the website of the World Legal Information Institute: <http://www.worldlii.org/catalog/3079.html>; for the model law of the EBRD, see <http://www.ebrd.com> and, for the model proposed by the Organization of American States, see <http://www.oas.org>; the UNIDROIT convention can be found at <http://www.unidroit.org/english/workprogramme/study072/main.htm> and the UNCITRAL draft legislative guide on <http://www.uncitral.org>. The proposals by the Study Group on a European Civil Code can be found at <http://www.sgecc.net>. For the English

proposals, see the report by the Law Commission for England and Wales on registration of security interests: company charges and property other than land (Consultation Paper 164) to be found at <http://www.lawcom.gov.uk>. Also, in France, reform proposals are made. Cf. the Livre Blanc by the Comité de Droit Financier Paris Europlace: http://www.paris-europlace.net/files/livre_blanc_comite_droit_paris_europlace.pdf and the Avant-projet de texte issu du rapport Grimaldi, Ministère de la Justice, Paris, published 31 March 2005: <http://www.justice.gouv.fr/publicat/rapport/rapportGrimaldi.htm>. See also the Acte uniforme portant organisation des sûretés, drafted under the auspices of the Organisation pour l'Harmonisation en Afrique du Droit des Affaires: <http://www.jurisint.org/pub/ohada/pres/pres.04.fr.html>. Article 9 UCC may also influence developments within the European Union towards harmonization of the law in this area. Recently, the European Commission proposed a Common Frame of Reference (CFR) in order to create a coherent framework of both existing and future European private law (the private law 'acquis communautaire'). The CFR is based upon the existing *acquis communautaire* and on the common core of European private law systems. The CFR may also provide the framework for a possible European law on personal property security interests (more information can be found on the website of the European Commission http://europa.eu.int/comm/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/index_en.htm).

The approach that is chosen in Article 9 UCC is of a highly pragmatic nature and directly rooted in the economic reality of securing credit (cf. Sigman, in Kieninger, 2004, pp. 54ff.). See for the most recent version of Article 9 the website of the Legal Information Institute of Cornell University: <http://www.law.cornell.edu/ucc/index.htm> (revised Article 9, which became effective 1 July 2001). Article 9 gives a very broad definition of 'security interests', the purpose of which is to cover any type of personal property security right. According to Section 9-102 (73) a security agreement means an agreement which creates or provides for a security interest. A security interest is defined in section 1-201 (35) as an interest in personal property or fixtures, which secures payment or performance of an obligation. This is a very broad definition. To give an example: the retention or reservation of title by a seller of goods notwithstanding shipment or delivery to the buyer is limited in effect to a reservation of a security interest. How broad the definition is can also be seen when reading section 9-109, which describes the scope of Article 9. This section states under (a)(1) that Article 9 UCC applies to any transaction (regardless of its form), which is intended to create a security interest in personal property or fixtures by contract. The article also covers accounts, chattel paper, payment intangibles, promissory notes and consignments. Section 9-202 stresses that title to the

collateral is immaterial. This broad definition of security rights is aimed at extinguishing the pre-code legal diversity, which is not unlike the diversity that can still be found in Europe. Irrespective of form, Article 9 looks at the substance of the security transaction. In essence Article 9 provides that, if (1) a person gives credit to another person and (2) this other person gives the lender a clear grip on assets that belong to the borrower aimed at reaching the status of preferential creditor, then (3) their legal relationship results in an Article 9 security interest to which all the rules in Article 9 apply, irrespective of the legal technicalities of the security arrangement.

If Article 9 applies, a distinction is made between (1) the legal effect of the security agreement between the parties ('attachment'); and (2) the legal effect of the security agreement against third parties ('perfection'). Perfection requires, generally speaking, public notice through registration. According to section 9-203 (b) a security interest is enforceable against the debtor and third parties with respect to the collateral only if (1) value has been given; (2) the debtor has rights in the collateral or the power to transfer rights in the collateral to a secured party; and (3) the debtor has authenticated a security agreement that provides a description of the collateral or the collateral is not a certificated security and is in the possession of the secured party pursuant to the debtor's security agreement. According to section 9-308 (a) a security interest is perfected if it has attached and if all of the applicable requirements for perfection (generally this requires registration of a notice) have been taken.

5 Summary and final remarks

The legal area of personal and real security with regard to movable property and claims is characterized by an enormous diversity. Nevertheless, when the various legal regimes are examined in greater depth a few underlying basic principles of property law can be found. Relevant for the area of personal property security rights are the principle of specificity of (a) assets and (b) debts (the object on which a property right rests and the obligation to be secured must be clearly defined or at least be identifiable), the principle of publicity (rights against the world, such as security rights, can only be enforced if they are known to the third party against whom enforcement is sought) and the principle of accessory (a security right depends for its existence upon the existence of an underlying debt). Of course, these principles do not apply everywhere with the same strength. Their application is influenced by the nature of the transaction and the status of the parties. Business transactions, for example, are governed by more liberal rules than consumer transactions. The following paragraphs will summarize what has been said above and make some comments from the perspective of the above-mentioned principles of property law.

First, however, some remarks should be made about the use of ownership as security. Considering the definition of a real security right that was given above, according to which a security right is defined as a right creating a preferential status for a creditor with regard to the proceeds of sale of a particular asset, combined with the power to provoke and execute such a sale, the use of ownership as security does not create a security right. As remarked above, ownership is, however, frequently used as a form of security, either by retaining it or by demanding its transfer. Because ownership is stronger than any other limited real right, it creates, certainly from the perspective of other creditors, a form of what might be called 'super security'. One effect of such a super security sometimes is that the creditor is allowed to retain the property (cf. the rights of the creditor under a retention of title clause and under article 4 of the financial collateral directive). Retaining assets by holders of a security right is generally seen as unacceptable, because it may result in enrichment by the creditor that is unjustified given the amount of the debt owed by the debtor. It also raises questions of valuation of the assets. How can the debtor and, for that matter other creditors, be certain that the market value which the creditor attaches to the object is correct? Clear external standards are a condition *sine qua non* here. A further problem concerns publication. Because a right of ownership with regard to personal property and claims is, generally speaking, nowhere registered, the consequence which is frequently drawn from this is that also the use of ownership for security purposes does not have to be made public through, for example, registration. (Of course, also here exceptions exist: cf. articles 395ff. of the English Companies Act, 1985.) Looking at ownership as security, it is a security right that violates the principle of publicity. The result is an undisclosed security, which may create an impression of 'false wealth'. (See, e.g., the famous American case of *Benedict v. Ratner*, 268 U.S. 353 (1925).)

Next to the use of the right of ownership as a (super) security, various limited real rights in various alternative formats are used to secure a debt. Whatever the type of security right involved, some general remarks can be made. In some legal systems the debt to be secured must be specified or at least be identifiable, either *ex ante* or *ex post* (i.e., from the moment the security comes into existence or only at the moment the security right has to be enforced). In other legal systems, such as England, the claim only needs to be described in very general terms. As to the assets that can be seized and sold by the creditor, the same differences in approach can be mentioned as we have just seen with regard to the obligation to be secured. The assets must, as a matter of principle, be described specifically or at least in an identifiable way. Nevertheless, also here developments can be seen that go in a different direction. A general description of assets is sometimes

sufficient, as in England (floating charge), the U.S. (Article 9 UCC: 'floating lien', cf. section 9-504), and France ('fonds de commerce' and claims under the Dailly Law of 1981) (cf. articles L313.23ff. French Financial and Monetary Code; Loi n° 81-1 of 2 January 1981). As to the principle of publicity, it can be said that, from an overall viewpoint, security rights have to be made known to third parties, mostly through registration, but also here various exceptions exist. The prime example of transparency is, again, Article 9 UCC, with its general registration requirement. The Netherlands (non-possessory pledge, which replaces the transfer of ownership for security purposes under the old Civil Code) and Germany (transfer of ownership for security purposes), however, recognize (to use the American expression) perfection without public notice. These two countries accept undisclosed security rights. Also in England a tendency exists towards attempting to shield security arrangements from scrutiny by other creditors (see Goode, 2004a, pp. 605ff.). The same tendency can be seen in the EU financial collateral directive (cf. recital 10 and article 3 of the directive).

It is also a general principle of personal and real security law that the security right is extinguished when the credit to be secured is paid off. This is the so-called 'accessory principle'. Of course, by formulating the underlying obligation in an abstract (open-ended) way, the impact of this principle will already diminish. In Germany, Austria and Switzerland (and see also the proposals to introduce a so-called 'euro-mortgage') it is even possible with regard to mortgages resting on immovable property that the accessory principle is not applied at all. The mortgage is in such a case severed from the underlying debt and, as such, has become abstract. The same can be seen in the law concerning personal security. If a guarantee is independent of the underlying obligation that is to be secured, this consequently means that the security is now abstract.

This tendency towards abstraction is in my view related to a more general trend in the direction of generalization and non-transparency. This trend can be observed at various levels. The debt to be secured can be formulated in open-ended terms. Creating an abstract security right is then only one step further, as already mentioned above. The assets upon which the security right rests are also more and more often described in general terms, allowing the creditor to seize property as if he had a general security right. Furthermore, various legal systems, as pointed out above, show a tendency towards acceptance of undisclosed security rights. The outcome of this trend towards abstraction and generalization as well as the tendency in the direction of non-disclosure is that the protection of the debtor, but also of other creditors, is minimized. If the assets, for example, are to be described narrowly, certain assets will not be covered by the security right, which can then be used to secure other credit. This is to the advantage of both debtors

and creditors. German law shows that courts are willing to limit the impact of abstraction and generalization by setting what may be called 'replacement standards': through developing case law giving debtors the right to demand a release of assets from their creditors, the principle of specificity is restored by making use of general principles of contract law (the requirements of good faith and public morals) (cf. Bundesgerichtshof 27 November 1997, BGHZ 137, 212 and paragraph 237 German C.C. It could also be said, in other words, that the principle of accessory is restored here, as the amount of the underlying claim is reconnected with the number and value of the secured assets.

This development towards contractualization can also be seen with respect to accessory as such. If the accessory principle is not applied, accessory-like clauses are sometimes inserted in contracts between debtors and creditors. To put it differently, through contract law fundamental property and security law principles are restored. As to publicity, it is quite interesting to note that, in the absence of a public register, private registers take over the information market. In the Netherlands, credit is registered at the Bureau Kredietregistratie; in Germany a comparable institution is the 'Schutzgemeinschaft für allgemeine Kreditsicherung' (Schufa); and in other countries various credit registration agencies (such as Equifax and Experian in the US and England) exist (see A. San José Riestra, 'Credit bureaus in today's credit markets', European Credit Research Institute (ECRI) research report no. 4, September 2002, to be found at http://www.ecri.be/media/research_report/Credit_Bureaus.pdf). Private registers, to a greater or a lesser degree controlled by leading parties in the market, thus take over the role of government registries. In other words, registration is being privatized.

The result of the movement away from the application of property law principles as a consequence of abstraction, generalization and non-disclosure and the counter-movement to restore the effect of these principles through contractualization and privatization is that more than ever personal and real security law increasingly is becoming an area at the intersection of property law and the law of obligations. Remarkably enough, the consequence of this development seems to be growing support for standardization, simplification and public registration of personal property security rights to limit this growing conceptual fragmentation and complexity.

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Note

1. The list of references was prepared by Ton Roseboom.

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48 Personality rights*

Johann Neethling

1 Recognition and basis of protection of personality rights

Personality rights recognize a person as a physical and spiritual–moral being (Joubert, 1953, pp. 139 ff.) and guarantee his enjoyment of his own sense of existence (Von Bar, 2000, p. 61). The modern concept of personality rights is firmly established in many legal systems but they do not have the same views on the protection of these rights (*ibid.*).

In Europe some systems, such as German law, recognize a general right to personality, from which all concrete rights of personality flow, as a general clause for comprehensive personality protection (Neumann-Duesberg, 1991, pp. 957–8; Larenz and Canaris, 1994, pp. 491, 518–19; Van Gerven *et al.*, 2000, pp. 163 ff., 142 ff., 165–6; Von Bar, 1996, pp. 583–4; Helle, 1991, pp. 6–7, 11). Others, for example France and Belgium, have and see no need for the recognition of a general right to personality because they developed a wide-ranging protection of personality rights on the basis of general delictual principles (Kerpen, 2003, pp. 44 ff.; Van Gerven *et al.*, 2000, pp. 57 ff.; Rogers *et al.*, 2001, pp. 87–9; Schmitz, 1967, pp. 4–6; Guldix and Wylleman, 1999, pp. 1589–94; Von Bar, 2000, p. 94). This is also the position in South Africa (Neethling, Potgieter and Visser, 2005, pp. 39–59; Burchell, 1996, pp. 639 ff.). A third group, such as Austria, Holland and Liechtenstein, recognize a general right to personality notwithstanding the fact they have another basis for comprehensive personality protection (Karner and Koziol, 2003, pp. 17–22; Frick, 1991, pp. 44–8, 56, 59–61, 253 ff., 286–7; Von Bar, 2000, p. 94, fn 508; Lindenbergh, 1999, pp. 1672–3, 1692–3; Rogers *et al.*, 2001, p. 155; Nehmelman, 2002, pp. 215–6, 268; Smits, 2003, p. 124; Lemmens, 2003, pp. 387–8). Switzerland, where the acceptance of a general right to personality is controversial, hinges between the French and Austrian models (Rogers *et al.*, 2001, pp. 301–4; Frick, 1991, *passim*; Bucher, 1995, pp. 148 ff.; Guldix and Wylleman, 1999, p. 162). Notwithstanding the divergent approaches to the recognition of a general right of personality, in all of the above systems particular personality rights are recognized by either statute or the courts. They include *inter alia* the rights to life, physical integrity, bodily freedom, reputation, dignity, privacy, identity (including name and image) and feelings (*sentiments d'affection*) (Helle, 1991, *passim*;

* See also: Damages (in tort); Privacy; Tort law in general

Von Bar, 1996, pp. 42–3; Markesinis and Unberath, 2002, pp. 26–7, 43, 74–5; Son, 1996, pp. 32–5, 52ff.; Hubmann, 1967, *passim*; 1990, pp. 4–5; Van Gamm, 1969, pp. 28, 39–42; Kerpen, 2003, *passim*; Van Gerven, *et al.*, 2000, pp. 110, 152–3, 156–7, 166; Schmitz, 1967, p. 30 ff., 39 ff.; Guldix and Wylleman, 1999, pp. 1620–21, 1624ff.; Neethling, Potgieter and Visser, 2005, pp. 39–59; Walter, 1996, pp. 42 ff., 64 ff., 144–8; Burchell, 1996, pp. 639 ff.; Karner and Koziol, 2003, pp. 48 ff.; Lindenbergh, 1999, pp. 1667–9, 1673–5, 1692–3; Rogers *et al.*, 2001, p. 155; Smits, 2003, p. 124; Frick, 1991, pp. 214 ff.; Bucher, 1995, pp. 149 ff.; Lemmens, 2003, p. 399).

In contradistinction to the previous systems, in English law, as with most common law countries, the concept and recognition of personality rights are virtually non-existent. Protection of personality is based on tort law (Hueston and Buckley, 1996, pp. 120 ff., 138 ff.; Rogers, 2002, pp. 68 ff., 81 ff., 403 ff.; Van Gerven *et al.*, 2000, pp. 44 ff., 90 ff., 159 ff.; Kerpen, 2003, pp. 82 ff.; Walter, 1996, pp. 115 ff.; Fleming, 1998, pp. 21 ff., 580 ff.). As such, England lacks a basis for comprehensive personality protection and in any case seems reluctant to expand personality protection by recognizing, for example, the right to privacy (Milmo and Rogers, 2004, pp. 606–9; Rogers, 2002, pp. 479 ff.; Van Gerven *et al.*, 2000, pp. 159 ff., 163–4, 166–7; Kerpen, 2003, p. 142; Herth, 1989, pp. 29–92; Youngs, 1998, pp. 275–6; Von Bar, 1996, p. 286). However, the idea of personality rights gained acceptance in the USA (Joubert, 1953, pp. 63 ff.; Halpern, 2000, pp. vii–viii) and a basis for the extension of personality protection was created by the recognition of the right to privacy (Halpern, 2000, pp. 410–12; Joubert, 1953, pp. 64–5; Walter, 1996, pp. 134–5; Kerpen, 2003, p. 109–11). This right to be let alone does not only protect privacy but extends much wider, so much so that it portrays surprising similarities to the general right to personality in Germany (Strömholm, 1967, pp. 43–4; Joubert, 1953, pp. 69–70; Kerpen, 2003, p. 139; Keeton *et al.*, 1984, pp. 852 ff., 866–7; Fleming, 1998, pp. 664 ff.; Halpern, 2000, pp. 412–13).

2 General right to personality and particular personality rights

The concept of a general right to personality and its relationship with particular personality rights requires scrutiny. Firstly, the concept of a general right to personality is dogmatically flawed, mainly because a person is functioning simultaneously as subject as well as object of a (subjective) right (Joubert, 1953, pp. 124 ff.; Neethling, Potgieter and Visser, 2005, pp. 14–5; Lemmens, 2003, p. 390). Particular facets of personality can nevertheless function as legal objects, as is apparent even in countries which adopt a general right to personality (cf. Guldix and Wylleman, 1999, pp. 1589–94). Secondly, because the concept of a general right to personality is too abstract to have any practical value (*ibid.*, p. 1621), a concretization of specific rights

of personality is still necessary (Kerpen, 2003, p. 46; Hubmann, 1967, p. 105; Schmitz, 1967, pp. 18 ff.; Smits, 2003, p. 126; Neethling, Potgieter and Visser, 2005, p. 14). In fact, the precise identification and delimitation of recognized rights facilitate their protection and promote legal certainty (Frick, 1991, pp. 24–5; Ulrich, 1995, pp. 19–20; Helle, 1991, pp. 37–40; Neethling, Potgieter and Visser, 2005, p. 24). Moreover, the recognition of personality rights as human rights (see below) enhances their protection (Von Bar, 2000, p. 61). The usefulness of protecting particular rights of personality can therefore not be doubted (contra Larenz and Canaris, 1994, pp. 519–20; cf. Kerpen, 2003, pp. 12–13; Joubert, 1953, pp. 115 ff.). The concept of a general right to personality may nevertheless have a utilitarian function in some systems where it may provide the basis for the recognition of new personality rights when the need arises (Frick, 1991, pp. 24–5; Ulrich, 1995, pp. 19–20). Thus it may both complement and extend the protection which the particular legal system provides (Von Bar, 2000, p. 93). However, this observation applies only to systems which lack a (delictual) basis for comprehensive personality protection (such as Germany and the USA). In other jurisdictions, like France and South Africa, the recognition of a general right to personality is superfluous (Neethling, Potgieter and Visser, 2005, pp. 14–15; Karner and Koziol, 2003, pp. 33–4; Lemmens, 2003, pp. 385 ff.; Kerpen, 2003, pp. 139–40). It does not make sense to incorporate a general clause (the general right to personality) into another general clause (general delictual liability) (Von Bar, 2000, p. 94).

3 Scope of protection of personality rights

Although the focus here is on tort law (see also the title Tort law in general), criminal law (Von Bar, 1996, pp. 597 ff.) and particularly constitutional law (human rights: see below) also play an important role in the protection of personality rights. In many systems wrongfulness is the most important requirement for delictual liability (Von Bar, 2000, pp. 235ff.). It is generally determined by a weighing up of conflicting rights or interests (Bucher, 1995, pp. 162 ff.; Frick, 1991, pp. 232 ff.; Van Gerven *et al.*, 2000, pp. 63, 167; Von Bar, 2000, pp. 235–6; 1996, pp. 1–22; Larenz and Canaris, 1994, pp. 373 ff., 498–9, 500, 501, 518; Karner and Koziol, 2003, pp. 34–5, 40 ff.; Markesinis and Unberath, 2002, pp. 76–8, 81–2; Lindenbergh, 1999, pp. 1677 ff.; Neethling, Potgieter and Visser, 2005, pp. 54–6). In this process various factors may play a part (Neumann-Duesberg, 1991, p. 958; Van Gerven, 2000, pp. 142 ff., 168; Smits, 2003, pp. 123, 124 ff.; Rogers *et al.*, 2001, pp. 120–2; Lindenbergh, 1999, pp. 1694–5; Bucher, 1995, pp. 162 ff.; Frick, 1991, pp. 232 ff.). French and Belgium law do not know the requirement of wrongfulness (Von Bar, 2000, p. 214). If the general delictual requirements of fault, damage and causation are present, liability is established (Kerpen,

2003, pp. 47, 65–8; Van Gerven, 2000, pp. 57 ff.). But, where a personality right has been expressly recognized, its mere infringement, without in addition requiring proof of fault and damage, finds liability (Van Gerven, 2000, pp. 110 ff., 140; Guldix and Wylleman, 1999, pp. 1625 ff., 1634 ff.). In England and other common law countries the scope of protection of personality interests is entirely dependent upon the rules applicable to each relevant tort (Hueston and Buckley, 1996, pp. 120 ff., 138 ff.; Rogers, 2002, pp. 68 ff., 81 ff., 403 ff.; Van Gerven *et al.*, 2000, pp. 45 ff., 90 ff., 159 ff.; Walter, 1996, pp. 115 ff.; Max Planck Gutachten, 1960, pp. 100 ff.; Keeton *et al.*, 1984, pp. 39 ff., 771 ff., 851 ff.; Kerpen, 2003, pp. 125, 130 ff.; Fleming, 1998, pp. 21 ff., 580 ff.).

The legal consequences of a tortious personality infringement are to a large degree similar in different countries. In some systems the victim may approach the court to determine the (threatened) wrongfulness of a personality infringement (Guldix and Wylleman, 1999, pp. 1664–5; Lindenbergh, 1999, pp. 1683–5; Frick, 1991, pp. 238–9). Injunctive relief (prohibitory or mandatory) is often sought in all systems for a threatened or continuous infringement of personality rights (Van Gerven *et al.*, 2000, p. 168; Guldix and Wylleman, 1999, pp. 1645 ff.; Lindenbergh, 1999, pp. 1685–9; Frick, 1991, pp. 58–9, 237–8; Kerpen, 2003, pp. 33 ff., 68–70, 141; Neethling, Potgieter and Visser, 2002, pp. 260–61). Other relief includes a retraction or correction, publication of the court's decision, an apology and the right to reply (Rogers *et al.*, 2001, pp. 125–6, 281, 302–4; Kerpen, 2003, pp. 8–9, 37–8, 68 ff.; Lindenbergh, 1999, pp. 1685–9; Guldix and Wylleman, 1999, pp. 1648–9, 1655–6; Frick, 1991, pp. 239 ff.; Karner and Koziol, 2003, pp. 44–5; Bucher, 1995, pp. 205 ff.). These remedies are probably more effective for natural restitution purposes than a sum of money (Neethling, Potgieter and Visser, 2005, p. 171; *contra* Rogers, 2002, pp. 472–3). However, they – especially the right to reply – do not receive much attention in the Anglo-American systems (Kerpen, 2003, pp. 141, 134; Rogers, 2002, pp. 471–3; Milmo and Rogers, 2004, p. 229; Hueston and Buckley, 1996, pp. 138 ff.; Youngs, 1998, pp. 265–8; Rogers *et al.*, 2001, pp. 73–4, 281).

All systems, in a varying degree, also make provision for damages for personality harm where the infringement was accompanied by fault, but strict liability exceptionally also occurs. In most countries the object of a monetary award is compensation only (Lindenbergh, 1999, pp. 1693–4; Smits, 2003, p. 135; Karner and Koziol, 2003, pp. 24–7, 44–5; Guldix and Wylleman, 1999, pp. 1651–5; Kerpen, 2003, pp. 47, 65–8; Van Gerven *et al.*, 2000, pp. 57 ff.; Frick, 1991, pp. 239 ff.; Rogers *et al.*, 2001, pp. 302–4). Notable exceptions are Germany and South Africa, where an award of satisfaction also has a penal function (Larenz and Canaris, 1994, pp. 375–6, 494–5, 497; Markesinis and Unberath, 2002, p. 78; Neumann-Duesberg,

1991, pp. 958–9; Kerpen, 2003, pp. 24–5, 29–32, 141–2; Van Gerven, 2000, pp. 146–7, 203; Rogers *et al.*, 2001, p. 252; Neethling, Potgieter and Visser, 2002, pp. 5–6, 13 ff., 17–18), as well as England (and other common law countries) where aggravated and exemplary damages may be claimed in instances of, for example, trespass to the person and defamation (Von Bar, 1996, pp. 271–2, 283 ff.; Milmo and Rogers, 2004, pp. 228 ff.; Kerpen, 2003, pp. 102 ff., 125, 130 ff.; Herth, 1989, pp. 125 ff.; Keeton *et al.*, 1984, pp. 39 ff., 771 ff.; Fleming, 1998, pp. 21 ff., 580 ff.). Although punitive damages are in conflict with the compensation function of tort law (Neethling, Potgieter and Visser, 2005, p. 58, fn 218), in cases of intentional or grossly negligent violations of personality such damages may act as a deterrent. There is indeed a tendency in Europe to revive civil punishment for grave violations of the personality (Von Bar, 1996, pp. 604 ff.; Karner and Koziol, 2003, pp. 27 ff.). (As to the assessment of the quantum of damages, see the titles Accident compensation and Damages (in tort).)

However, not every instance of personality harm is compensable. Many systems (such as Germany, the Netherlands and South Africa) require in addition that the infringement of personality interests should be serious or have a particular gravity (Larenz and Canaris, 1994, pp. 375–6, 494–5, 497; Markesinis and Unberath, 2002, p. 78; Neumann-Duesberg, 1991, pp. 958–9; Lindenbergh, 1999, pp. 1693–4; Neethling, Potgieter and Visser, 2005, pp. 85, 87, 93, 112, 113, 201). On the other hand there are systems (like Spain) which compensate harm irrespective of its seriousness (Von Bar, 2000, pp. 20–21). Von Bar (2000, pp. 27–9) supports this view but there is a danger that courts may be swamped with trivial claims for personality harm.

Finally, personality harm increasingly obtains an international dimension and conflict of laws may arise where transborder harm has occurred (Kerpen, 2003, *passim*).

4 Nature of personality rights and personality harm

It is generally accepted that personality rights are private law (subjective) rights (but see Guldix and Wylleman, 1999, pp. 1595 ff., 1603–4) which are by nature non-patrimonial and highly personal in the sense that they cannot exist independently of a person (Joubert, 1953, pp. 121, 129; Neethling, Potgieter and Visser, 2005, pp. 12–13; Frick, 1991, pp. 28–30; Schmitz, 1967, pp. 10 ff.). Accordingly, these rights are non-transferable, uninheritable, incapable of being relinquished or attached, they cannot prescribe, and they come into existence with the birth and are terminated by the death of a human being (Joubert, 1953, pp. 146–7; Neethling, Potgieter and Visser, 2005, p. 13; Van Gamm, 1969, p. 39; Frick, 1991, pp. 28 ff.; Bucher, 1995, pp. 159 ff.; Guldix and Wylleman, 1999, pp. 1594–5; Lindenbergh, 1999,

pp. 1667–9, 1675). As such personality rights form a separate category of rights, distinguishable from real, personal and immaterial property rights (Guldix and Wylleman, 1999, pp. 1594–5; Lindenbergh, 1999, pp. 1667–9, 1675) which are patrimonial rights that can exist independently of the person (Neethling, Potgieter and Visser, 2005, p. 13). The fact that Swiss law also protects patrimonial interests such as the business enterprise (against unlawful competition) and trade marks and trade names as aspects of personality (Frick, 1991, pp. 227–30; Joubert, 1953, pp. 42, 43–4), is thus unacceptable.

From this it follows that the infringement of a personality right primarily results in personality harm or non-patrimonial damage, which is any damage or harm to a personality interest that does not affect the victim's patrimony per se and which therefore cannot be rationally calculated in money by reference to a market value (Karner and Koziol, 2003, pp. 11, 119–20; Rogers *et al.*, 2001, p. 246; Neethling, Potgieter and Visser, 2002, p. 242). It has been opined (Joubert, 1953, p. 121; Frick, 1991, p. 30; Bucher, 1995, p. 160; Schmitz, 1967, p. 13) that, although the infringement of a personality right may also result in patrimonial loss, the personality right concerned does not thereby acquire a patrimonial character. This view can only mean that, in such instances, apart from personality harm, a patrimonial interest connected to the personality has also been damaged. But the exact nature of such interests (related to, e.g., the human body where bodily injuries result in medical expenses) is controversial (Neethling, Potgieter and Visser, 2005, pp. 13, 64).

A distinction should be made between concrete and affective personality harm (Neethling, Potgieter and Visser, 2002, pp. 242–3; Karner and Koziol, 2003, pp. 122–3). Concrete personality harm can exist without the victim's awareness or consciousness, and is possible in instances of assault, deprivation of liberty, defamation, violation of privacy and identity, loss of the amenities of life, shortened life expectancy and disfigurement. Affective loss on the other hand exists only in a person's consciousness, for example physical pain or insult (Neethling, Potgieter and Visser, 2005, pp. 51–3). This distinction is of practical importance in cases of comatose and deceased victims, juristic persons and even infants where harm may concretely exist in the absence of any suffering, and the question as to the compensability of the harm is raised (see below as to the first three). As far as infants and small children are concerned, damages should be awarded for mere concrete personality harm (cf. Von Bar, 2000, p. 22). Compensation of the victim is not possible but the objective function of satisfaction should be employed, as in the case of comatose victims (see below). This view is supported by Roman law (Neethling, Potgieter and Visser, 2005, pp. 52, fn 161).

5 Particular personality rights

This classification takes account of factual reality (Neethling, Potgieter and Visser, 2005, p. 24), the personality rights identified and delimited by jurists, the courts and legislatures, as well as typical examples of infringements of personality sanctioned by the different legal systems (Von Bar, 2000, p. 95).

Right to life

Every natural person has a right to life, his most valuable asset (Von Bar, 2000, p. 63), which is protected by law (Neethling, Potgieter and Visser, 2005, p. 16; Van Gerven *et al.*, 2000, p. 165; Karner and Koziol, 2003, p. 63; Rogers *et al.*, 2001, *passim*; Von Bar, 2000, p. 64). The right to life is closely connected to the right to physical integrity (Neethling, Potgieter and Visser, 2005, pp. 15–16, 26; Karner and Koziol, 2003, p. 60), but, unlike with the latter right, infringement of the right to life, that is death (Larenz and Canaris, 1994, p. 377; Markesinis and Unberath, 2002, pp. 44–5), does not bring about any legally recognized personality harm for the deceased (Von Bar, 2000, p. 62). This position is questionable. As Karner and Koziol (2003, pp. 67 ff.) argue, death is the most serious personality infringement a person can suffer and should therefore be subject to tortious liability. Although the victim cannot be compensated, a symbolic redress of the death should be made, as in the case of comatose victims (see below), by effecting monetary retribution for the injustice the victim has suffered.

Right to physical–psychological integrity

This personality right encompasses the human body which comprehends a physical and a mental element and includes well-being and health. All legal systems give prominent status to its protection. Accordingly, any conduct which has a detrimental effect on the physique, psyche or even sensory feelings (by, e.g., noise or smoke) can be regarded as actionable in principle (Von Bar, 2000, pp. 69–71). In most systems only (serious) medically recognizable psychological lesions or illness qualify as harm and not mere sorrow, fright or anxiety (Neethling, Potgieter and Visser, 2005, pp. 25–6, 87, 90–3; 2002, pp. 17–18, 245 ff., 290 ff., 332–5; Karner and Koziol, 2003, pp. 40–4, 48 ff., 64–7, 74 ff., 89–91; Rogers *et al.*, 2001, *passim*; Frick, 1991, pp. 88–93, 214–15; Larenz and Canaris, 1994, pp. 377 ff., 516–17; Van Gerven, 2000, pp. 78 ff., 110 ff., 140, 129–30, 136–9; Von Bar, 1996, pp. 571–7; 2000, pp. 69–71, 73–88; Markesinis and Unberath, 2002, pp. 45–8, 115 ff.; Youngs, 1998, p. 245; Ehmann, 2000, pp. 669 ff.; Guldix and Wylleman, 1999, p. 1626; Koch and Koziol, 2003, pp. 424–6, 428–9). In England, protection is afforded by the torts of battery, assault, nuisance and negligently inflicted injury (Rogers, 2002, pp. 68 ff., 98–102, 176 ff.,

503 ff., 762 ff.; Van Gerven *et al.*, 2000, pp. 90 ff.). The present personality right naturally includes a person's power of self-determination over the inviolability of his body (Rogers, 2002, p. 75), which applies to organ transplant, blood donation, abortion, sexual intercourse and the like (Guldix and Wylleman, 1999, pp. 1604–7, 1626; Neethling, Potgieter and Visser, 2005, pp. 26, fn 278) and should therefore also encompass the right to sexual self-determination (Karner and Koziol, 2003, pp. 92 ff.; Frick, 1991, pp. 93–94; cf. Larenz and Canaris, 1994, p. 515).

The question arises whether the personality right to physical integrity continues to exist in regard to parts of the body which have been separated from the body itself, such as hair, a tooth, a transplanted kidney, a severed hand or even sperm. Although the matter is controversial (Lindenbergh, 1999, pp. 1675–6; Neethling, Potgieter and Visser, 2005, pp. 24, fn 262, 86, fn 37), German law provides an acceptable answer by making a distinction between body parts permanently separated from the body where ordinary personal property rules apply, parts destined to be reintegrated which remain part of the body, and parts destined to perform a typical bodily function, such as sperm for procreation, which are also treated as part of the body (Van Gerven *et al.*, 2000, pp. 137, 147–9; Karner and Koziol, 2003, pp. 111–12; Larenz and Canaris, 1994, pp. 514–15).

A particular problem is whether comatose victims should be compensated. This is allowed in various countries, while the position in others is unclear (Rogers *et al.*, 2001, pp. 257–9; Koch and Koziol *et al.*, 2003, p. 425; Karner and Koziol, 2003, pp. 58–60; Von Bar, 2000, pp. 22–3, cf. 23–7; Van Gerven *et al.*, 2000, pp. 137–8; Neethling, Potgieter and Visser, 2002, pp. 248 ff.). In spite of strong arguments against awarding damages, it cannot be denied that concrete personality harm, not dependent on the consciousness of the victim, exists (e.g., loss of amenities of life: see above). But such personality harm cannot really be compensated. Therefore the objective function of satisfaction under German and Swiss law (Frick, 1991, pp. 31–2) makes sense, meaning a symbolic redress of the harm by effecting retribution for the injustice the victim has suffered, thereby enabling 'the law to express society's sympathy for the victim and its sense of outrage at his grievous loss' (Neethling, Potgieter and Visser, 2002, pp. 248–53, 251, fn 339).

The actions for wrongful conception, wrongful birth and wrongful life have troubled courts in various countries. The first two actions are mainly concerned with the patrimonial loss of the parents (cost of pregnancy, child-birth and bringing up the child). It is generally accepted that the mere existence of a child cannot be regarded as harming the personality of the parents, although the birth of a deformed child may, for example, cause a parent serious psychological lesions (Karner and Koziol, 2003, pp. 116–19).

The controversial question also arises whether the personality right to dignity of such a child is not (unfairly) infringed by the fact that the doctor, and not the parents, are paying for his upbringing (Smits, 2003, pp. 130 ff.). As regards the action for wrongful life, the following applies. If a foetus which is injured or deformed dies in utero, it has no legal personality, no right to physical integrity and therefore cannot claim non-patrimonial damages. Yet, if a deformed or injured child is born alive, although his mere existence is not regarded as damage – no person has a right to non-existence – he should be able to claim damages for the infringement of his physical integrity (Van Gerven *et al.*, 2000, p. 138; Engelhard, Hartlief and Van Maanen, 2004, pp. 21 ff., 221 ff.; Karner and Koziol, 2003, pp. 72–3; Von Bar, 1996, pp. 576 ff.; 2000, pp. 71–3; Neethling, Potgieter and Visser, 2002, pp. 37, 281; Markesinis and Unberath, 2002, pp. 48–9, 144 ff., 156 ff.).

Right to physical liberty

This personality right is infringed not only by total deprivation of bodily freedom (such as detention or imprisonment), but also by any interference with an individual's liberty to move freely. All legal systems protect this right (Neethling, Potgieter and Visser, 2005, pp. 16, 26, 111 ff.; Karner and Koziol, 2003, pp. 97–8; Frick, 1991, pp. 94–8; Van Gerven *et al.*, 2000, pp. 78, 139; Larenz and Canaris, 1994, pp. 385–6, 513; Von Bar, 2000, pp. 89–93; 1996, pp. 567–8; Rogers *et al.*, 2001, pp. 122–3, 168, 284–5; Youngs, 1998, p. 245; Markesinis and Unberath, 2002, p. 49). In England, this occurs primarily by the tort of false imprisonment (Rogers, 2002, pp. 81 ff.; Hueston and Buckley, 1996, pp. 123–7; Von Bar, 2000, p. 92; Youngs, 1998, p. 245; Rogers *et al.*, 2001, pp. 75–6; Van Gerven *et al.*, 2000, p. 90; Fleming, 1998, pp. 33 ff.). Bodily freedom should be distinguished from the general freedom to act (especially in the economic sphere) or the freedom to develop the personality (cf. Bucher, 1995, pp. 139 ff.; Ehmann, 2000, pp. 613–14; Ulrich, 1995, p. 29; Frick, 1991, pp. 94, 96–8, 259–60). Such freedom to act does not relate to a particular interest of personality but is rather an aspect of human self-determination in society and therefore of legal subjectivity itself (Joubert, 1953, pp. 126–9; Neethling, Potgieter and Visser, 2005, p. 16; cf. Von Bar, 2000, p. 90).

Right to dignity

Dignity embraces a person's subjective feelings of self-respect: his personal sense of self-worth (Kerpen, 2003, pp. 13, 47–8; Son, 1996, pp. 38–41; Neethling, Potgieter and Visser, 2005, p. 28; cf. Fleming, 1998, p. 41). Infringing a person's dignity means insulting that person. It stands to reason that, because of its complete subjectivity, a person cannot be protected against every insult. Therefore, in all systems where the right to

dignity is recognized, protection is directed at serious insults only (Youngs, 1998, pp. 270–1; Kerpen, 2003, pp. 47–8; Guldix and Wylleman, 1999, pp. 1629–30; Larenz and Canaris, 1994, pp. 500–501; Van Gamm, 1969, p. 36; Neethling, Potgieter and Visser, 2005, pp. 28, 194–6; Keeton *et al.*, 1984, pp. 57–60; Rogers, 2002, p. 100). In Austria and England, the protection of dignity is unjustifiably scant (Karner and Koziol, 2003, pp. 98–101; Frick, 1991, pp. 99–100; Hueston and Buckley, 1996, pp. 120–21; Rogers, 2002, p. 69; Von Bar, 1996, p. 285). The concept of dignity is sometimes used in the much broader sense of embracing the whole human personality. A clear example is the recognition of the general right to personality in Germany which primarily emanated from the significance attached to human dignity in the constitution (Larenz and Canaris, 1994, p. 491; Van Gerven *et al.*, 2000, pp. 63 ff., 142 ff., 165–6; Von Bar, 1996, pp. 583–4; Helle, 1991, pp. 6–7). The right to dignity as a human right probably also connotes this broad context (cf. Neethling, Potgieter and Visser, 2005, p. 28).

Right to reputation

A person's reputation or good name is the regard or esteem which he enjoys in society. Any act which tarnishes or lowers his reputation infringes his good name (Neethling, Potgieter and Visser, 2005, pp. 27, 38, 131; Halpern, 2000, pp. vii–viii, 5; Milmo and Rogers, 2004, p. 8; Rogers, 2002, p. 404; Frick, 1991, p. 225; Ehmann, 2000, p. 636). This right is protected in all European systems (Von Bar, 2000, pp. 100–104; Rogers *et al.*, 2001, pp. 150, 280–81; Van Gamm, 1969, pp. 37, 39; Youngs, 1998, pp. 271–4; Kerpen, 2003, pp. 48 ff.; Frick, 1991, pp. 102–3, 225–6). The truth is in principle a defence against an action for defamation (Van Gamm, 1969, p. 37; Youngs, 1998, pp. 269–70; Kerpen, 2003, pp. 21–2, 24, 61–2; Milmo and Rogers, 2004, *passim*). Whether this should always be the case is controversial and the law has been changed in a few common law countries (e.g. Australia) to limit the defence to the publication of true facts which are also in the public interest (Milmo and Rogers, 2004, pp. 267–8). This also reflects the position in South Africa (Neethling, Potgieter and Visser, 2005, pp. 153–5; Burchell, 1998, pp. 272 ff.). In general a flexible weighing up of the rights to reputation and freedom of expression must be undertaken (Von Bar, 2000, pp. 100–106; 1996, pp. 588–99; Guldix and Wylleman, 1999, p. 1629; Kerpen, 2003, pp. 20–21, 24, 63–4; Neethling, Potgieter and Visser, 2005, pp. 129 ff.). Under certain circumstances even the publication of untruth may be justified (Kerpen, 2003, pp. 20–21, 24; Von Bar, 2000, p. 103). In this regard a defence of media privilege has been accepted in some common law countries and South Africa (Milmo and Rogers, 2004, pp. 451–82; Rogers, 2002, pp. 459–63; Neethling, Potgieter and Visser, 2005, pp. 155–7).

In England and other common law countries reputation is protected by the torts of libel and slander (Milmo and Rogers, 2004, pp. 4–7; Von Bar, 1996, pp. 283–4; Kerpen, 2003, pp. 112 ff.). The requirements for libel and slander are the outcome of the balancing process between reputation and freedom of expression (Milmo and Rogers, 2004, *passim*; Kerpen, 2003, pp. 99 ff.; 123 ff.). Liability is generally strict (Milmo and Rogers, 2004, pp. 8–10), but in the USA at least negligence (Halpern, 2000, p. 5), or in the case of public officials and figures, intent or actual malice is required (Keeton *et al.*, 1984, pp. 802 ff.; Rogers, 2002, p. 460). Since strict liability tilts the scale unfairly in favour of the victim, while liability based on intent tends to benefit the defendant, liability based on negligence seems to position the scale in a proper balance (cf. Neethling, Potgieter and Visser, 2005, p. 167).

Right to identity

A person's identity is his uniqueness which individualizes him as a particular person and thus distinguishes him from others (Hubmann, 1967, p. 271; Neethling, Potgieter and Visser, 2005, p. 36; Ulrich, 1995, pp. 52, 131–2). Identity is manifested in various indicia by which a person can be recognized, such as his name, image, voice, fingerprints, handwriting etc. A person's identity is infringed by falsification, i.e., where indicia are used in a way which cannot be reconciled with his true identity (Hubmann, 1967, pp. 273–4; Neethling, Potgieter and Visser, 2005, pp. 36–7; Ehmann, 2000, pp. 628, 643; Ulrich, 1995, pp. 29, 133 ff., 183 ff.; Von Bar, 2000, pp. 105–6). Where a person is identified with true personal facts, the protection of privacy may be relevant (Hubmann, 1967, p. 272, fn 10; Neethling, Potgieter and Visser, 2005, p. 37; Halpern, 2000, pp. 413–14; Frick, 1991, pp. 82 ff., 105 ff., 159 ff.). Indicia of identity may serve as the object of a specific right to personality. In various countries this has happened with regard to, for example, the rights to a name, image and voice (Von Bar, 1996, pp. 584; 2000, pp. 96–8, 107–8; Hubmann, 1967, p. 271; Helle, 1991, pp. 21–2, 45 ff.; Van Gamm, 1969, pp. 39, 40–41; Neethling, Potgieter and Visser, 2005, pp. 36–8, 255 ff.; Rogers *et al.*, 2001, p. 150; Youngs, 1998, pp. 275–8; Guldix and Wylleman, 1999, pp. 1625–7; Frick, 1991, *passim*; Bucher, 1995, pp. 243 ff.; Kerpen, 2003, pp. 17–18). The right to identity has been expressly recognized in, for example, France and Switzerland (Ulrich, 1995, pp. 129–30) and is impliedly protected in the USA, albeit under the banner of the right to privacy, by the false light and appropriation torts (Neethling, Potgieter and Visser, 2005, p. 37; cf. Halpern, 2000, pp. 428–9; Ehmann, 2000, p. 643; Ulrich, 1995, p. 130; Kerpen, 2003, pp. 118 ff.; Keeton *et al.*, 1984, pp. 852 ff.), as well as in Germany where the same tortious acts are sanctioned (Larenz and Canaris, 1994, pp. 499–500, 502, 517;

Van Gamm, 1969, p. 39; Youngs, 1998, pp. 277–8; Ulrich, 1995, *passim*; Kerpen, 2003, pp. 17 ff.; cf. Von Bar, 2000, pp. 98–100). England offers only incidental protection of identity under other torts, for example, malicious falsehood and passing off (Rogers, 2002, pp. 476 ff., 674 ff.; Herth, 1989, pp. 88–91; Von Bar, 2000, p. 107). Although the publication of untruth is in principle wrongful, infringement of identity may be justified by freedom of expression, as with defamation (Ehmann, 2000, pp. 645–6; Neethling, Potgieter and Visser, 2005, pp. 261–2).

Right to privacy

See the contribution on Privacy to this volume.

Other personality rights

Apart from feelings of dignity, a person has a wide variety of other spiritual–moral feelings on matters such as love, faith and chastity (Neethling, Potgieter and Visser, 2005, pp. 28–9, 199 ff.; cf. Larenz and Canaris, 1994, pp. 516–17). However, as with insult, only affective inflictions of a serious nature should be actionable. Feelings are protected in instances of disturbance of the relationship between engaged couples, spouses, and parents and children (Neethling, Potgieter and Visser, 2005, pp. 193, 200, 204 ff.; Von Bar, 2000, pp. 121 ff., 124–9; Frick, 1991, pp. 215–16), bereavement (*pretium affectionis*) for a dead victim and exceptionally even in the case of non-fatal injury of a victim. Countries such as France, Belgium and Switzerland have an almost overly generous approach in this regard (Van Gerven *et al.*, 2000, p. 139; Guldix and Wylleman, 1999, pp. 1628–9), while others (e.g. Germany, the Netherlands and South Africa) have not followed (Rogers *et al.*, 2001, pp. 87 ff., 262–5; Koch and Koziol, 2003, *passim*; Verheij, 2004, pp. 394 ff.; Smits, 2003, pp. 135 ff.; Van Maanen, 2003, *passim*; Frick, 1991, pp. 216–17).

In Germany and the Netherlands, a person's right to know his own descent or parentage has been recognized, but the matter is uncertain in Swiss law (Frick, 1991, pp. 216, 285). This right must be weighed against the parent's right to privacy not to have the information disclosed (Smits, 2003, pp. 126 ff.; Hubmann, 1990, pp. 18 ff.; Nehmelman, 2002, pp. 206 ff.). Whether the present right is an independent right of personality is controversial (Smits, 2003, pp. 127, fn 347, 128).

6 Personality rights and patrimonial rights

Personality rights, with their highly personal and non-patrimonial nature, form a separate category of rights, distinguishable from patrimonial rights (see above). This distinction is problematic in the following instances.

Author's personality right

It is generally accepted in many European countries that, apart from his immaterial property right, an author also has a personality right (*droit moral*) which protects his spiritual relationship with his work (Karner and Koziol, 2003, pp. 107–8; Frick, 1991, pp. 168 ff.; Schacht, 2004, pp. 56–9; Nehmelman, 2002, pp. 58 ff.). In countries such as England, South Africa and the USA, this right has not been recognized, although they arrive at comparable protective results (Dietz, 1978, pp. 66, 77; Neethling, Potgieter and Visser, 2005, p. 22, fn 230; Halpern, 2000, pp. 639–40). The author's moral right particularly encompasses his powers to keep the work secret, to recall the work, to be recognized as author, to make changes and to gain access to the work (Dietz, 1978, pp. 69–77; Joubert, 1953, pp. 22, 133; Neethling, Potgieter and Visser, 2005, p. 22; Hubmann and Rehbinder, 1995, pp. 154 ff.; Halpern, 2000, pp. 635–40; Guldix and Wylleman, 1999, pp. 1627–8; Frick, 1991, p. 168; Gregoritza, 2003, pp. 29–30; Schacht, 2004, pp. 59, 162 ff.; Nehmelman, 2002, pp. 67–70).

In this regard some systems (such as France) support a dualistic doctrine, maintaining that copyright consists of an immaterial property right as well as a personality right. Others (such as Germany) propagate a monistic theory, according to which copyright is a unitary right comprising both patrimonial and personality elements (Dietz, 1978, pp. 67–8; Neethling, Potgieter and Visser, 2005, pp. 21–2; Frick, 1991, p. 168). Although the two theories do not differ much from a practical point of view (Dietz, 1978, pp. 67–8; Gregoritza, 2003, pp. 32–4), the monistic approach seems to be dogmatically sound (Dietz, 1978, p. 67; Gregoritza, 2003, pp. 30–2; Neethling, Potgieter and Visser, 2005, pp. 21–2; Frick, 1991, p. 169). Unlike personality rights, copyright is transferable (Frick, 1991, pp. 170–72; Hubmann, 1967, pp. 342–3; Fisher, 2004, pp. 50–52), but it is controversial to what extent the legal successor of the author may exercise said personality powers (Gregoritza, 2003, pp. 34–6; Schacht, 2004, pp. 123 ff.; cf. Halpern, 2000, p. 639).

Personality rights to creditworthiness and earning capacity

Since aspects of the human personality play an important role in the creation of a person's earning capacity and his creditworthiness, they have been considered personality interests (Neethling, Potgieter and Visser, 2005, p. 17, fn 183). However, although they display similarities to personality interests (they are highly personal: see above) in the sense that they cannot exist separately from the human personality and can exist only during the lifetime of a person, they are immaterial patrimonial assets of a person's estate. Earning capacity and creditworthiness are thus neither only aspects of personality nor pure immaterial property (which can exist

separately from the personality) but contain elements of both. They can therefore be described as personal immaterial property, i.e., immaterial patrimonial property inseparably linked to the human personality (Neethling, Potgieter and Visser, 2005, pp. 17–20; 2002, pp. 52–3, fn 70).

Right to publicity or advertising (market) value of personality interests

The appropriation of a person's identity (name or likeness) which has a market or advertising value infringes not only his personality, but also a patrimonial interest. It has been accepted in the USA (Halpern, 2000, pp. 524 ff.; Ehmann, 2000, p. 667; Götting, 1995, pp. 168 ff.; Neethling, Potgieter and Visser, 2005, p. 37, fn 386; Kerpen, 2003, pp. 60–61, 121–3) and by implication in countries such as Germany and France (Kerpen, 2003, pp. 17–20, 58–61, 142), that this interest embodies an immaterial property right (cf. Koos, 2004, pp. 808 ff.). This right has been described as the right to publicity, the right to the advertising image, or the right to individual marketing power (Neethling, Potgieter and Visser, 2005, p. 37, fn 386; Halpern, 2000, pp. 524–5; Gregoritz, 2003, pp. 100–101; Kerpen, 2003, pp. 121–3, 142). Because of its immaterial property nature, it should be transferable (Fisher, 2004, pp. 199 ff., 266–71; Kerpen, 2003, pp. 43, 123; Gregoritz, 2003, pp. 81 ff., 197 ff.). Fisher (2004, pp. 238 ff., 267) opines that transferability also covers the potential commercial value of indicia of identity, which are known in German law as the patrimonial elements of the right to personality (Gregoritz, 2003, pp. 82 ff., 109 ff.). It is submitted that such commercial value is part of the right to publicity (*ibid.*, pp. 133 ff.) and not an element of the personality right to identity which in essence has a non-patrimonial character (see above). Therefore a dualistic model which recognizes two separate rights in this regard, rather than the monistic model of Germany, is to be preferred (cf. Gregoritz, 2003, pp. 117–23).

Right to a name as trade name

When a family name, which is primarily an indicium of identity, is used as trade name, it simultaneously serves as immaterial property (cf. Koos, 2004, pp. 808ff.). Two different rights are therefore involved (Neethling, Potgieter and Visser, 2005, p. 38). The fact that Swiss law protects the trade name as an aspect of personality (Frick, 1991, pp. 227–30) is thus subject to criticism.

Breach of contract or damage to property and personality harm

It is a moot question whether violation of a patrimonial right, in particular breach of contract and damage to another's property, gives rise, apart from patrimonial damage, also to actionable personality harm. Most legal systems are against or very strict in awarding damages for mere sentimental loss in cases of property damage, while the picture as regards breach of

contract is not clear (Rogers *et al.*, 2001, pp. 285–7; Karner and Koziol, 2003, pp. 108 ff.). This also applies to breach of promise (Neethling, Potgieter and Visser, 2005, pp. 204–5; cf. Von Bar, 2000, pp. 125–6). It submitted that, while all rights serve as a means whereby a person develops and asserts his personality in the legal order, the personality is not directly protected by every private law right. That is the function of personality rights only. For this reason a claim for non-patrimonial damages can therefore only lie where breach of contract or damage to another's property also infringes a personality right of the victim (Neethling, Potgieter and Visser, 2005, pp. 63–5; Karner and Koziol, 2003, p. 110).

7 Personality rights as human rights

Many constitutionally entrenched human rights relate to personality rights, *inter alia*, the rights to life, physical–psychological integrity, freedom of movement, dignity and privacy (Youngs, 1998, pp. 107–25, 155–68; Neethling, Potgieter and Visser, 2005, pp. 16–17). These rights do not for this reason change their juridical nature. They remain personality rights as described earlier (cf. Guldix and Wylleman, 1999, pp. 1609–11; Lindenbergh, 1999, pp. 1669–71) but receive, apart from delictual (and criminal) protection, first of all also vertical constitutional protection against the state. Where a bill of rights has horizontal operation, its protection between individuals is also enhanced (Neethling, Potgieter and Visser, 2005, pp. 16–17). Such constitutionalization of private law (Markesinis and Unberath, 2002, pp. 28–32; Kerpen, 2003, pp. 143–4) is occurring in varying degrees in most systems (Van Gerven *et al.*, 2000, pp. 142–3, 146, 152; Kerpen, 2003, pp. 39 ff., 73 ff.; Frick, 1991, pp. 52–8, 249–51; Von Bar, 1996, pp. 304–6, 567 ff., 581–3; Smits, 2003, pp. 119 ff., 139 ff.; Lindenbergh, 1999, p. 1669–71; Nehmelman, 2002, pp. 175–9; Ehmann, 2000, pp. 638–40; Guldix and Wylleman, 1999, pp. 1612 ff.; Neethling, Potgieter and Visser, 2005, pp. 55–6, 73 ff.; cf. also, as to the right to privacy in England, Smits, 2003, pp. 45–9; Milmo and Rogers, 2004, pp. 609 ff.; Rogers, 2002, pp. 484–6; Von Bar, 2000, p. 95; 1996, pp. 304 ff.). Where an entrenched personality right is in conflict with another fundamental right, for example, the right to reputation (dignity) with the right to freedom of expression, a careful balancing of the opposing rights should take place (Von Bar, 1996, pp. 588–90; Neethling, Potgieter and Visser, 2005, pp. 75, 129 ff.; Keeton *et al.*, 1984, pp. 804 ff.; Kerpen, 2003, pp. 134 ff., 136–7; cf. Larenz and Canaris, 1994, pp. 522 ff.).

8 Post-mortem personality protection

Two main schools of thought can be identified (Von Bar, 2000, pp. 129–30). In France and Switzerland (Youngs, 1998, p. 271; Frick, 1991, pp. 34–5, 217–18), the traditional school asserts that a deceased person's body, privacy

or reputation can only be protected in the context of the personality rights of his (close) relatives (such as their right to feelings of piety for the deceased). It rejects the idea of post-mortem personality rights since all personality rights are terminated by the death of a person (Fisher, 2004, pp. 52 ff.; Gregoritza, 2003, pp. 76 ff.). The other school, for example in Germany and Austria, propagates that the personality rights of a person continue after his death and are maintained by his relatives as fiduciaries (Fisher, 2004, pp. 129 ff.; Gregoritza, 2003, pp. 51 ff.). However, the only remedies are the interdict and a claim for retraction or reply since non-patrimonial damages will not serve any purpose (Larenz and Canaris, 1994, pp. 531 ff.; Bender, 2001, pp. 815 ff.; Hubmann, 1967, pp. 340 ff.; Karner and Koziol, 2003, pp. 106–7; Frick, 1991, pp. 32–4, 36–8; Fisher, 2004, pp. 27 ff., 166 ff.; Gregoritza, 2003, pp. 67 ff.). In the Netherlands these damages are nevertheless allowed (Von Bar, 2000, p. 131, fn 779). As with comatose victims (see above), the objective function of satisfaction also makes sense here. Such damages can then simultaneously salve the injured feelings of relatives. The question of the limitation of post-mortem personality protection is controversial (Fisher, 2004, pp. 188 ff., 195–7).

9 Personality rights of juristic persons

It is generally accepted that juristic persons may possess personality rights which are compatible with their nature or naturally apply to them (Hubmann, 1967, p. 334; Von Bar, 2000, p. 133; Neethling, Potgieter and Visser, 2005, pp. 68, fn 334, 68 ff.). These are the rights to reputation, privacy and identity, the objects of which may be infringed without the victim suffering affective loss, as is the case with juristic persons (Frick, 1991, pp. 40, 255–6; Hubmann, 1967, pp. 336–7; Neethling, Potgieter and Visser, 2005, pp. 68 ff.; Larenz and Canaris, 1994, pp. 520–1; Youngs, 1998, p. 272; Nehmelman, 2002, pp. 51–2). Not so in the case of the rights to dignity and feelings, where actual mental suffering is required for personality harm (see above). It also stands to reason that juristic persons cannot possess the rights to physical integrity and freedom (Neethling, Potgieter and Visser, 2005, pp. 68 ff.; Frick, 1991, p. 40; Hubmann, 1967, p. 335). Apart from Germany (Larenz and Canaris, 1994, pp. 520–1; Youngs, 1998, p. 272; Nehmelman, 2002, pp. 51–2; Frick, 1991, p. 41), various other countries award non-patrimonial damages for infringement of, for example, a juristic person's reputation (Von Bar, 2000, p. 132, fn 783; Youngs, 1998, pp. 267, 271; Frick, 1991, pp. 41–2, 227; Neethling, Potgieter and Visser, 2005, pp. 68–9).

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49 Poland

Michał Gondek

1 Introduction

Poland (Polska) has undoubtedly a civil law system. Major parts of its civil, penal and procedural law have been codified in respective codes. With the exception of the communist period, the Polish legal system has remained under the strong influence of both French and German legal traditions, although it would now be qualified as belonging to a family of former communist countries. At present, although the spirit of the Code Napoléon has not vanished completely from Polish civil law, still being noticeable for example in property law or the law of civil responsibility, the system has moved closer to the German legal family: the Civil Code of 1964 has a general part and is drafted in a rather abstract manner. In the new Commercial Companies Code of 2000 German influence is also visible.

The sole official language in Poland is Polish. It is the language in which all laws and case law are printed and which is used in all court proceedings. The draft law on national minorities allows 'supplementary use' of minority languages in administrative proceedings in localities inhabited mainly by national and ethnic minorities. Considering that such minorities form only around 3 per cent of the country's population, this has a very limited significance in practice.

In the discourse on comparative law, Poland appears usually as a legal system which takes over solutions from other legal systems and lends itself to legal transplants, especially in the context of major economic and social reforms following the collapse of communism. As a country which had to deal with unification of its law reconciling both French and German legal traditions, potentially it can play some role in the debate on harmonization of civil law in Europe.

2 Constitutional law

The Republic of Poland (Rzeczpospolita Polska) has had its current constitution since 1997. However, the process of major constitutional changes related to the transition from a communist to a democratic system started in 1989 and 1990, when the previous constitution of 1952 was significantly amended. The new comprehensive Konstytucja Rzeczypospolitej Polskiej of 2 April 1997 was enacted relatively late in comparison to other post-communist countries, but, thanks to that, its drafting could benefit from

several years of experience of democratic institutions in the new system. The constitution was adopted in a nationwide referendum and contains chapters on the Republic, fundamental rights, sources of law, the Diet and the Senate, the President of the Republic, the Council of Ministers and governmental administration, local self-government, courts and tribunals, organs of state control and protection of rights, public finances, states of emergency and change of the constitution. Customary law practices do not play a significant role in Polish constitutional law. The text of the Constitution in Polish, English, French, German and Russian can be found on the website of the Parliament at <http://www.sejm.gov.pl/prawo/konst/konst.htm>.

Poland is a parliamentary republic and its constitutional system is a monist one: members of the government can at the same time be members of parliament. Parliament consists of two chambers, both of which are elected directly by the people. The more important one is the Diet (Sejm) consisting of 460 deputies elected on the basis of proportional representation, while the 100 members of the Senate (Senat) are elected by majority vote. All draft laws have to go through both chambers, but the Senate's amendments can be overridden by the Sejm, where the core debates take place. On rare occasions (such as receiving the presidential oath) the two chambers come together as the National Assembly (Zgromadzenie Narodowe). President Lech Kaczynski is currently the Head of State. Although elected directly by the people, the President of the Republic has limited powers, the government being headed by the Prime Minister. Poland is a unitary state and has a uniform legal system. At the regional level, there are 16 provinces (województwo) divided into counties (powiat), which in turn consist of communes (gmina).

The Polish Constitution does envisage constitutional review, which is entrusted to the Constitutional Tribunal (Trybunał Konstytucyjny) sitting in Warsaw and modelled largely on the German Bundesverfassungsgericht. The constitutional review takes place in a variety of procedures (abstract and concrete review, review a priori and a posteriori), including individual constitutional complaints. The ordinary courts are not allowed to strike down unconstitutional statutes. Instead, when the question of constitutionality of laws arises in the proceedings, they are under an obligation to apply to the Constitutional Tribunal for a preliminary ruling on such a question.

3 Civil and commercial law

The core part of Polish civil law is the Civil Code of 1964 as amended. The process of unification and codification of Polish civil law was long and cumbersome, mainly owing to the country's turbulent history in the 19th

and 20th centuries. When Poland regained independence after World War I, it found itself to be a country with as many as four different legal systems. In central provinces, which in Napoleonic times formed the Duchy of Warsaw and later the so-called Congress Kingdom of Poland, so-called French–Polish law was in force, consisting of the second and third book of the Code Napoléon, Polish law on hypothec of 1825, Civil Code of the Kingdom of Poland of 1825 which had replaced the first book of Code Napoléon, and marital law of 1836. In eastern provinces, which had not formed part of the Congress Kingdom of Poland but belonged directly to the Russian Empire, Russian civil law was in force. In the western part of the country, which used to belong to Prussia, the German BGB was in force. In southern provinces belonging formerly to the Austro-Hungarian Empire, the Austrian ABGB was the law. A special law on conflict of laws (interprovincial law) had to be developed to reconcile these disparate legal systems.

In the inter-war period, the huge task of developing a unified legal system best suited to the needs of the new state was taken up. As a result of the work of the Codification Commission set up in 1919, major parts of civil law related to economic circulation were unified even before the outbreak of World War II, with modern 1932 Code of Obligations (*Kodeks Zobowiązań*) and the 1934 Commercial Code (*Kodeks Handlowy*) as the most important pieces of legislation. The process of unification was completed after the war when, on 1 January 1947, decrees on general provisions of civil law, on family law, physical and legal persons and the law of succession entered into force. Following the unification of Polish civil law, the process of its codification was undertaken, which led to the enactment of the 1964 Civil Code and the Family Code of the same year. That process, however, already took place in a different economic and social system and mainly according to the Soviet model.

After the collapse of communism the Civil Code has been amended several times. The most important changes occurred in 1990, when, in particular, the system of property law was reformed and the law of obligations adapted to the needs of the market economy. Since then many other amendments have been introduced (the most extensive and recent one in 2003), caused *inter alia* by the need to harmonize Polish law with the law of the European Community.

A particular characteristic of Polish civil law is the fact that some of its important parts are located outside the Civil Code, in separate statutes. The Civil Code contains only four parts: the general part (part I), ownership and other real rights (part II), obligations (part III) and succession (part IV). Family law and law on tutelage are placed in a separate Family Code (*Kodeks Rodzinny i Opiekūnczy*). There are separate statutes on hypothec,

registered pledge and intellectual property law. There are also other statutes regulating more detailed questions. For example, provisions implementing the EC directives on consumer protection in the Polish civil law were placed in a separate statute rather than incorporated in the Civil Code.

It is difficult to characterize the Polish Civil Code in terms of legal families. Many of its provisions are still grounded in the 1932 Code of Obligations, which itself was firmly based on comparative research and which sought to adapt creatively the best solutions of the four legal systems preceding it. It seems that Polish civil law has moved closer to the German legal family as it denotes a structure and level of abstraction similar to that of the German Civil Code. It also contains a number of open-ended norms ('general clauses') that allow the courts some freedom in deciding concrete cases.

Commercial law is regarded as a separate branch of civil law with the Commercial Companies Code (*Kodeks Spółek Handlowych*) of 2000 as its core part. The Civil Code often treats commercial transactions in a different manner than private ones. Cases between commercial enterprises are adjudicated by specialized departments in district and regional courts.

There are several recent translations of the Civil Code into English and German (see references). Foreign case law and doctrine do not play a significant role in Polish court practice.

4 Court system and law faculties

There are the following levels in the Polish system of common courts (i.e., the courts of general jurisdiction: those having jurisdiction in cases not reserved to administrative or military courts or the Supreme Court): *sąd rejonowy* (district court), *sąd okręgowy* (regional court), *sąd apelacyjny* (court of appeal – there are ten of these). At the top of this hierarchy there is the Supreme Court (*Sąd Najwyższy*) located in Warsaw. *Sąd rejonowy* (district court) is usually the court of first instance in civil, labour, criminal and commercial cases. Depending on whether a case was started in the district or regional court, the appeal will go to a regional court or court of appeal, respectively. The main functions of the Supreme Court are adjudicating cassations, which are a form of extraordinary appeal on the point of interpretation or application of law, and adopting resolutions clarifying important questions of interpretation of law. Although there is no doctrine of precedent in Polish law, rulings of the Supreme Court enjoy high authority and are usually followed by lower courts.

There is a separate system of administrative courts with 16 provincial administrative courts and a High Administrative Court in Warsaw.

Legal doctrine plays a considerable role in Polish law. Legal scholars act as experts in bodies drafting the legislation, as commentators on the

legislation and important judicial decisions and as members of the Supreme Court or Constitutional Tribunal, to which senior law professors are often appointed. This is particularly the case of the Constitutional Tribunal, where, of the current 15 justices, four are eminent civil law professors, including the Tribunal's President and Vice-President. Eight others are professors of other disciplines of law.

Sixteen Polish Universities have Law Faculties. The most important ones are located in Warsaw (two), Kraków, Poznań, Wrocław, Łódź, Toruń, Lublin (two), Gdańsk and Katowice. Increasingly law departments are being established in private schools of higher education. An important centre of legal research is the Institute of Legal Sciences of the Polish Academy of Sciences (PAN) in Warsaw. The Polish Lawyers' Association (*Zrzeszenie Prawników Polskich*) is the biggest of the numerous societies and associations in which discussions among scholars and practitioners take place.

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The most important collections of case law are the following: *Orzecznictwo Sądów Polskich* (published by the Polish Academy of Sciences and containing case law of various Polish courts, usually annotated), and *Orzecznictwo Sądu Najwyższego* (official collection of case law of the Supreme Court). The most important recent judgments of the Supreme Court can also be found (in Polish) on the website of the Court (<http://www.sn.pl>). All decisions of the Constitutional Tribunal are published on its website (<http://www.trybunal.gov.pl>), together with English and French summaries and English translations of the most important judgments.

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50 Privacy*

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1 English common law

Privacy possesses an uncertain status in English common law and legislative protection for privacy interests remains piecemeal. The cautious pragmatism of the English common law tradition is particularly marked in this context. However, the impact of incorporation of the ECHR, and in particular of Article 8 of the Convention with its protection of a right to personal privacy, has triggered a kind of ‘mini-revolution’. Under the influence of the Strasbourg jurisprudence, new remedies for breach of privacy are slowly emerging, but not without considerable debate.

In the absence of a written constitution, there was no right to privacy in English law. In addition, and in interesting contrast to many US jurisdictions, no cause of action for breach of privacy has been recognized in the English common law, confirmed by the Court of Appeal in *Kaye v. Robertson* [1991] F.S.R. 62 and recently by the House of Lords in *R v. Wainwright* [2003] U.K.H.L. 53.

However, a combination of legislative provisions and common law developments has over time given a degree of indirect protection to privacy interests. The common law attachment to the rule of law principle has ensured that the English judiciary have historically adopted a narrow and restrictive approach to the interpretation and application of police and executive powers. In cases such as *Entick v. Carrington* (1765) 19 St Tr 1029, this resulted in the courts protecting individuals against state-authorized intrusions upon their personal property. Also the common law protected personal interests in property via torts such as trespass and nuisance, and interests in the autonomy of the person and the maintenance of a good reputation via torts such as trespass to the person, defamation and malicious falsehood. Statutory provisions such as the Data Protection Act 1998 and the Protection from Harassment Act 1997 also provided some protection for privacy interests in specific contexts, as did the equitable remedy for breach of confidence, which provided a remedy for the unjustified disclosure of confidential information. However, the absence of a positive right to

* See also: Damages (in tort); Personality rights; Tort law in general.

personal privacy meant that, where other common law or legislative remedies were insufficiently wide in scope, no remedy existed against intrusions into private life by state or non-state actors. Attempts to fill this gap by straining existing remedies to their limits failed in *Kaye v. Robertson*, and the lack of a privacy right was particularly exposed in *Malone v. Metropolitan Police Commissioner* [1979] Ch. 344, where Megarry VC rejected the existence of a common law remedy for interception of telephonic conversations. The European Court of Human Rights in *Malone v. UK* [1984] 7 E.H.R.R. 14 held that the absence of appropriate controls upon such interceptions constituted a violation of Article 8 of the Convention and, as the Strasbourg court's privacy jurisprudence expanded, it became increasingly apparent that the absence of privacy rights in English common law left a gap in the system of domestic remedies which exposed the UK to the possibility of findings of incompatibility with Article 8.

With the incorporation of the ECHR into domestic UK law in the Human Rights Act 1998, English courts became able to review the acts of public authorities for compatibility with the Article 8 guarantee of personal privacy. Thus a right to personal privacy is now recognized and judicially protected in UK public law when violated by public authorities. However, the position in relation to disputes between private parties is less clear. Section 6 of the Human Rights Act includes courts within its definition of public authorities, and this has been interpreted as requiring the courts to develop the common law so as to ensure that the UK remains in conformity with its positive obligations under the Convention. The response of the English courts has been to expand the scope of the existing equitable remedy of breach of confidence so as to ensure that this action provides a form of remedy for intrusions into personal privacy: this process was initiated by the Court of Appeal in *Douglas and Zeta-Jones v. Hello! Ltd.* [2001] Q.B. 967, and received the approval of the House of Lords in *Campbell v. MGN Ltd.* [2004] U.K.H.L. 22.

The gradual evolution of this new remedy for the disclosure of personal information has occurred through piecemeal and cautious development of the case law, and approaching issues of privacy via the indirect and circuitous route of the confidence remedy has caused particular difficulties. In *A v. B plc* [2002] E.W.C.A. Civ 337 and *Theakston v. MGN Ltd.* [2002] E.W.H.C. 137, the courts were reluctant to protect personal information relating to sexual behaviour from disclosure by the tabloid press which was not linked to the narrow range of personal relationships which the English courts had previously recognized as sufficiently intimate to attract the protection of the confidence action. Uncertainty has therefore persisted as to the type and nature of the information that would be protected, and in particular as to the extent to which activities conducted in a public place

would be classified as 'confidential' and therefore attract protection. In addition, the Court of Appeal in *A v. B plc* adopted a broadly permissive approach to the public interest defence, which can justify the disclosure of confidential material; this decision was widely seen as indicating that the English courts would continue to give priority to freedom of expression interests in English common law, except in cases of a clear and compelling intrusion into a very intimate element of private life.

However, the recent decisions of the European Court of Human Rights in *Peck v. UK* (2003) E.H.R.R. 287 and *Von Hannover v. Germany* [2004] E.M.L.R. 379 may require the English courts to adopt a broader approach in defining what privacy interests will be classed as 'confidential', and may also mean that freedom of expression considerations will not justify the disclosure of private information except where there is a clear and pressing public interest in favour of disclosure. The Law Lords in *Campbell* appear to have taken the first steps towards adopting this approach, and English privacy law may increasingly come to resemble in some aspects the equivalent German law under the common influence of the ECHR. However, how the English law of privacy will develop and be applied remains uncertain, especially given the resistance of much of the English media to external regulation of any kind.

2 Some other common law jurisdictions

In both Australia and New Zealand, the evolution of privacy law has paralleled to an extent these recent developments in English law. Both jurisdictions, sharing the inherited English common law, have also lacked a cause of action for breach of privacy or a judicially recognized right to privacy, and both have utilized legislation (such as the New Zealand Privacy Act 1993 and the Australian Privacy Act 1988 and Privacy Amendment (Private Sector) Act 2000) to fill gaps left by this lack of protection. However, even without the influence of the ECHR, both jurisdictions have seen recent moves by the judiciary to recognize the existence of common law remedies for intrusions into personal privacy, influenced by the shifting position of the English courts and to a degree by the US case law. The Australian High Court in *Australian Broadcasting Corporation v. Lenah Game Meats Pty Ltd.* [2001] H.C.A. 63 considered that a tort of unjustified invasion of privacy could be recognized as existing in Australian common law, although no such breach of privacy had occurred on the facts of this particular case. In *Grosse v. Purvis* [2003] Q.D.C. 151, the Queensland District Court interpreted the decision in *Lenah Meats* as opening the door for the judicial recognition of a new privacy tort.

In New Zealand, the High Court has in a series of judgments recognized the existence of a tort of public disclosure of true private facts where

such disclosure would be highly offensive and objectionable to a reasonable person of ordinary sensibilities, unless justified as necessary in the public interest: see *Tucker v. News Media Ownership Ltd.* [1986] 2 N.Z.L.R. 716; *Bradley v. Wingnut Films Ltd.* [1993] 1 N.Z.L.R. 415; *P v. D* [2000] 2 N.Z.L.R. 591. This development was confirmed by the recent decision of the Court of Appeal in *Hosking v. Runting* [2004] N.Z.C.A. 34, by a majority of three to two, in a judgment characterized by an interesting use of comparative analysis. The majority differed on the degree of intervention necessary to constitute a violation, but all three accepted that there is a defence where the information is of 'legitimate public concern', nevertheless suggesting that the different New Zealand constitutional and social framework meant that the tendency in United States privacy jurisprudence to give presumptive priority to freedom of expression should not be followed. The majority also felt that it was more appropriate to recognize the existence of a privacy tort than to follow the approach of the English courts in expanding the confidence action with all its associated complexities, already evident in the English case law and highlighted in academic commentary.

3 United States and Canada

In contrast to England, Australia and New Zealand, a series of torts based upon the right of privacy has long been developed in the United States, heavily influenced by the famous article by Warren and Brandeis (1890). William Prosser (1960) analysed the tort of privacy as follows:

It is not one tort, but a complex of four. The law of privacy comprises four distinct kinds of invasion of four different interests of the plaintiff, which are tied together by the common name, but otherwise have almost nothing in common except that each represents an interference with the right of the plaintiff, in the phrased coined by Judge Cooley, 'to be let alone'. Without any attempt to exact definition, these four torts may be described as follows:

1. Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs.
2. Public disclosure of embarrassing private facts about the plaintiff.
3. Publicity which places the plaintiff in a false light in the public eye.
4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.

Prosser's categorization has been adopted in *The Restatement of the Law, Second, Torts* at ss. 652A to 625E. Section 625A states the general principle as being 'one who invades the right of privacy of another is subject to liability from the resulting harm of the interests of the other'. The succeeding sections then define four specific ways in which the right of privacy may be invaded, in line with Prosser's categories.

However, in practice, the impact of these privacy torts has been limited, with the exception of the tort of appropriation of name or likeness. For an example of the continued vitality of this tort see *Zacchini v. Scripps-Howard Broadcasting*, 433 U.S. 562 (1977); 376 N.E.2d 582 (Ohio 1978). The US courts have in general given a presumptive priority to First Amendment freedom of expression rights when they come into conflict with privacy rights: see *Sidis v. F-R Pub. Corp.*, 113 F.2d 806 (2d Cir. 1940); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975); and *The Florida Star v. B.J.F.* 491 U.S. 524, 109 S.Ct. 2603 (1989). Nevertheless, the privacy torts provide a vestige of residual protection where First Amendment rights cannot readily be invoked: see *Daily Times Democrat v. Graham*, 162 So.2d 474 (Ala. 1964) and *Dietemann v. Time, Inc.*, 449 F.2d 245, 249 (9th Cir. 1971).

Federal or state legislation also provides a degree of protection for privacy interests, again in the absence of countervailing First Amendment considerations; examples are the right of privacy for contents of telephone conversations, telegraph messages or electronic data by wire (18 USC ss. 2510 et seq) and the denial of federal funds to educational institutions that do not maintain confidentiality of student records (20 USC s. 1232g). At the constitutional level, Brandeis J in a famous dissent considered that the US Bill of Rights could be interpreted as containing:

the right to be let alone – the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment. (See *Olmstead v. U.S.*, 277 U.S. 438, 478 (1928))

In subsequent decisions, the US Supreme Court began to recognize the existence of such a right; see *U.S. v. Morton Salt Co.*, 338 U.S. 632, 651–52 (1949) and *Tehan v. U.S.*, 382 U.S. 406, 416 (1966). In 1967, the Court overturned its ruling in *Olmstead* and held that a recording by police of conversations in a public telephone booth without appropriate justification was a violation of a Fourth Amendment right to privacy; see *Katz v. U.S.*, 389 U.S. 347, 350 (1967). Subsequent decisions saw an expansion of the ambit of this right to privacy, with the Court ruling in 1969 that possession of obscene material in a home was not a crime; see *Stanley v. Georgia*, 394 U.S. 557, 564 (1969). This process culminated in the reproductive rights decisions in *Eisenstadt v. Baird*, 405 U.S. 438, 454 (1972) and *Roe v. Wade*, 410 U.S. 113 (1973). The scope and ambit of this right has continued to generate controversy.

In Canada, the Charter of Rights and Freedoms does not include any specific right to privacy, other than the s.7 right to liberty and the s.8 right to be secure against unreasonable search or seizure, which however has

been interpreted broadly 'so as to secure the citizen's right to a reasonable expectation of privacy against governmental encroachment'; see *R v. Dymont* [1988] 2 SCR 417, 426. In *Dymont*, La Forest J, delivering the judgment for himself and Dickson CJ, went on to state (at 427–8):

society has come to realize that privacy is at the heart of liberty in a modern state; see Alan F Westin, *Privacy and Freedom* (1970), pp. 349–50. Grounded in man's physical and moral autonomy, privacy is essential for the well-being of the individual. For this reason alone, it is worthy of constitutional protection, but it also has profound significance for the public order. The restraints imposed on government to pry into the lives of the citizen go to the essence of a democratic state . . . Claims to privacy must, of course, be balanced against other societal needs, and in particular law enforcement, and that is what s.8 is intended to achieve.

This constitutional protection of privacy has been applied in several contexts, in particular in the criminal law field (*R v. Mills* [1999] 3 S.C.R. 668) and to protect confidential medical information (*R v. Dersch* [1993] 3 S.C.R. 768). Federal and provincial legislation also provides protection for some privacy interests, in particular the federal Personal Information Protection and Electronic Documents Act 2000. The Quebec Charter of Human Rights and Freedoms gives every person 'a right to respect for his private life', and in *Les Éditions Vice-Versa Inc v. Aubry and Canadian Broadcasting Corporation* [1998] 1 S.C.R. 591 this right was interpreted by the Supreme Court as permitting the recovery of damages for the publication of a person's image without their consent, provided the person was identifiable as a result of the publication. The Court accepted that this right to personal privacy and control of one's image could be violated even though the published image was 'in no way reprehensible' and had not caused actual injury. However, the Court also recognized that expectations of privacy could be limited in certain circumstances, including cases where the person was engaged in a public activity or had acquired a degree of notoriety. The Quebec Civil Code also provides for a remedy in law where personal privacy rights have been violated.

In contrast to this high level of privacy protection, the superior Canadian courts have not yet recognized the existence of a Common law tort of privacy: see *Lord v. Canada (Attorney General)* (2000) 50 C.C.L.T. 2d 206 (BCSC) and *Ontario (Attorney General) v. Dieleman* (1994) 117 D.L.R. (4th) 449. Whether this may change in the light of developments in England, Australia and New Zealand, or as a result of the indirect application of Charter values, remains an open question. However, the Canadian common law courts have been prepared to expand existing torts or recognize new torts that provide some degree of privacy protection, such as the common law tort of misappropriation of personality: see *Gould Estate v. Stoddart*

Publishing (1998) 80 C.P.R. (3d) 161. Four Canadian provinces, British Columbia, Manitoba, Saskatchewan and Newfoundland, have also passed legislation that permits individuals to sue for violation of their privacy rights. However, both the effect of these legislative measures and the scope of the relevant common law torts remain uncertain, which appears to have had the effect of discouraging litigation. This reflects the uncertain and developing nature of privacy causes of action throughout the common law world, with perhaps only the United States case law being well established and stable (with its bias in favour of freedom of expression). In general, privacy law remains in a state of some flux elsewhere in the common law world, especially when violations by private individuals (as distinct from public authorities) are alleged.

4 French law

Moving to the European Continent, French law grants to everyone a right to respect for his or her privacy under Article 9 of the Civil Code. This right stems from case law, confirmed by statute in 1970, when it was enshrined in the Civil Code. The right to privacy is, of course, also contained in Article 8 ECHR, which is directly applicable in French Law (see Article 55 of the French Constitution of 1958), and was given explicit constitutional standing in the Conseil constitutionnel's decision of 23 July 1999, known as 'Couverture maladie universelle' (RTDC, 1999, p. 724).

The right to privacy was first seen in French law as an individual prerogative. This meant that the only defence to a privacy claim was the victim's consent (see the decision of the Cour de cassation, 2nd civil chamber, of 5 March 1977, JCP 1977, IV, 925). French judges therefore traditionally focus on analysing the existence of an authorization and on ascertaining whether publication has exceeded the limits of the permission given. Under this traditional approach, individuals are granted a personal and exclusive right to determine freely the extent to which their private matters may be made public, and consent to a first publication cannot be deemed to imply acceptance of a renewed dissemination (see the decision of the Cour d'appel de Paris of 19 June 1998, D 1998, IR, 204). Similarly, consent to the specific use of a photograph – for example to illustrate a brand of products – cannot justify publication of the same photograph for another purpose (Cour de cassation, 1st civil chamber, 30 May 2000, Bull civ I, no. 167).

However, publication of material will be allowed where consent can be seen to derive from the circumstances. If public figures do not forfeit their right to privacy (Cour de cassation, 1st civil chamber, 23 October 1990, Bull civ II, no. 222), they are more likely than ordinary citizens deemed to have accepted a certain degree of publicity (Cour de cassation, 1st civil chamber, 23 April 2003, D 2003, 1854). If privacy rights may extend to acts done in

public places (Cour de cassation, 2nd civil chamber, 18 March 2004, Bull civ II, no. 135), freedom of expression is more likely to prevail where the alleged violation of privacy rights occurred in a public place (Cour de cassation, 1st civil chamber, 25 January 2000, JCP 2000, II, 10257). However, spatial considerations, whether the activity is conducted in a private or public place, are less conclusive than the nature of the activity carried out. A wedding, because of its private nature, cannot be filmed without the spouses' consent, notwithstanding that it is celebrated in a public place (Cour d'appel Paris 6 October 1999, D 2000, Somm com, 268). By contrast, a demonstration, because of its public nature, can legitimately attract publicity from the Press (Cour de cassation, 2nd civil chamber, 11 December 2003, <http://www.legifrance.gouv.fr>, no. 01-17623). In this context, consent seems to have lost its overwhelming importance in French privacy law. It is still a valid defence to a breach of privacy action where private events are concerned but lack of consent or even a clear opposition will no longer bar publication of facts/photographs relating to a public event. This change of emphasis leads to more cases held in favour of the Press: whereas in 2002, for example, the Cour d'appel in Versailles held that publication of photographs of gay rights demonstrators was unlawful because it exceeded the limits of the publicity that the affected person (implicitly) wished to confer upon these events (D 2003, Somm com, 1533), in 2003 the Cour de cassation in the above-mentioned case allowed publication of an article and photographs about a demonstration against the PACS (the French partnership for non-married couples).

Behind the dichotomy of the public or private event, new criteria are emerging: the newsworthiness of the event and the involvement of the claimant in it. Instead of the old subjective approach based on implied or explicit consent, French judges now tend to favour a balancing test, confronting privacy claims with the right of the public to be informed. On 24 April 2003, the Cour de cassation prepared the way for the new criteria by stating in general terms that 'everyone has the right to oppose an unauthorized publication of his or her photograph unless such a publication is justified by the involvement of the photographed person in a newsworthy event which should legitimately be known to the public' (Bull civ II, no. 114). On 30 June 2004, all allusion to consent was dropped and the private nature of the event was disregarded in order to allow publication of a photograph (taken during the funeral of the claimant's father) to illustrate a newsworthy event (the exposure of bribes in the ELF case in which the claimant was involved). The Cour de cassation held in favour of the Press, stating that 'the publication of Mr X's photograph, despite having been taken outside his professional activities, only served to illustrate a topical event in which he was involved'. The question now raised

is what will constitute a 'newsworthy event'. The mere presence of a public figure is not enough (Cour de cassation, 2nd civil chamber, 18 March 2004, Bull civ II, no. 135) but the Press was allowed to comment on the upcoming wedding of a famous TV presenter and add information, inter alia, about how the couple met and where they were intending to spend their honeymoon as these details, according to the Cour de cassation, only constituted trivial additions to a known fact (Cour de cassation, 2nd chamber, 8 July 2004, Bull civ II, no. 389). Consent has also been abandoned in cases where the infringed rights belong to a deceased person. Privacy rights can no longer be invoked beyond death (Cour de cassation, 1st civil chamber, 14 December 1999, Bull civ I, no. 345) but publication of pictures of dead bodies can be limited by the requirements of human dignity (Cour de cassation, 1st civil chamber, 20 December 2000, D 2001, 885).

Where privacy rights have been violated, French judges are free to choose any of the remedies listed in Article 9(2) of the Civil Code. These are said to apply only to the right to intimacy – the core of privacy – but this restriction was ignored by French judges who extended the remedies to general privacy cases (Cour de cassation, 1st civil chamber, 12 December 2000, D 2000, 2434). The distinction between intimacy and privacy is still relevant in criminal law. Criminal proceedings are rare in privacy cases, however, because they are limited to intrusions of the intimate sphere and will only be pursued with success where the information was obtained by means of specific devices described in Article 226-1 of the Criminal Code (see, e.g., the case of 15 November 2004 relating to bugged phone lines of journalists and public figures under François Mitterrand's Presidency: *Le Monde*, 15, 16, 23, 26, 28 January 2004; 9 December 2004; 13, 19 January 2005; and 1, 18, 24 February 2005). In civil cases, there has been a recent awareness of French judges of the need for proportionality between the protection of privacy rights and freedom of expression at the remedy stage (see, e.g., the *Cantat v. Trintignant* case, Cour d'appel of Paris 7 October 2003, D 2003, IR, 2732). This awareness will probably be even more acute now that the European Court of Human Rights ruled against France in the case, *Société Plon v. France* for having in the judgment on the merits confirmed a ban on a book by François Mitterrand's ex-doctor (ECHR 18 May 2004, D 2004, 1838). In view of several factors, particularly the time that had elapsed since the President's death and the legitimate right of the public to be informed, the Court in Strasbourg considered the ban to constitute a disproportionate remedy. At all stages, French judges are therefore likely to pay more and more attention to the balance between privacy rights and the freedom of expression.

5 German law

At the heart of German privacy law lies the so-called ‘general right of personality’ (*allgemeines Persönlichkeitsrecht*), which is, in essence, the right to have one’s personality protected not only from infringements through the exercise of state authority but also in private relationships between citizens. Based on an interpretation of Articles 1(1) and 2(1) of the German Constitution (Basic Law) of 1949, the right provides for compensation where the reputation or privacy of the individual is infringed. The *allgemeines Persönlichkeitsrecht* is thereby regarded as a general right (*Rahmenrecht*) offering protection in a number of unspecified situations. This makes it necessary to determine its protective scope (*Schutzbereich*) and balance the affected legal interests of all parties involved on a case-to-case basis. Much in contrast to the US approach indicated above, German doctrine thereby accords all human rights the same status (apart from human dignity, which is regarded as the most fundamental value) and demands that courts attempt to reconcile any conflicting constitutional positions as far as possible and give pre-eminence to one right only after careful consideration of the particular circumstances of a case. Any balancing of privacy and freedom of expression thus depends on the individual circumstances rather than a constitutional preference of one value over the other (see, e.g., *Landgericht Berlin, Neue Juristische Wochenschrift*, 1997, 1155). In conflicts between the Press and individuals, German courts thus weigh a number of factors including the motives and reasons for the invasion (e.g., private economical interests as opposed to the interest in informing the public about matters of wider political importance); the importance of the speech in question (which can, again, range from material which only promotes the publisher financially to information advancing the public debate); the way in which the information was obtained; the accuracy with which it is presented; and the conduct of the person affected by the publication (who may have encouraged public attention in order to promote a career or benefit financially from increased publicity).

Despite its enormous practical relevance for litigants in private law disputes, the *allgemeines Persönlichkeitsrecht* is still regarded as a ‘special’ right owing to its constitutional roots. It has not been incorporated into the German Civil Code (*Bürgerliches Gesetzbuch*, BGB), though legislative proposals to that effect have been repeatedly put forward (most recently in 2002, in the context of a fairly comprehensive reform of German tort law), and continues to be regarded as an unspecified right (*anderes Recht*) covered by s. 823(1) BGB. Particular aspects of privacy are, however, protected by specific provisions such as s. 12 BGB, which secures the right to the use of a name, and s. 22 Copyright Act for Works of Art and Photography (*Kunsturhebergesetz*), which protects the privilege as to one’s own image.

Because of this background, the protection of privacy is largely based on case law. Since the mid-1950s, German courts have developed a rich jurisprudence with regard to the *allgemeines Persönlichkeitsrecht* (such as the decisions of the Federal Constitutional Court in *Lüth* – BVerfGE 7, 198 – and *Lehbach*, BVerfGE 35, 202, as well as the decision of the Federal Supreme Court in *Herrenreiter*, BGHZ 24, 349). Three types of cases can thereby be identified: (1) the invasion of privacy (especially by publication of unauthorized audio-visual material); (2) the circulation of unauthorized information such as letters or diaries; and (3) infringements of personal honour which do not fall under the protection of criminal law and s. 823(2) BGB. The intensity of an invasion into the private sphere thereby plays a crucial role in the evaluation of an event by the courts. German law has developed various ‘spheres’ of private life which enjoy an increasing degree of protection. The most general level covers freely observable activities, often by participation in everyday situations of social life. Individuals who actively seek publicity must accept potential interest in and discussion of their behaviour. In a similar vein, individuals working, attending public events, eating in restaurants or shopping – without attracting particular publicity – must, in principle, accept coverage by the Press, though this position is likely to be subject to modifications in the light of the *Caroline of Hannover* judgment handed down by the European Court of Human Rights in June 2004 (see *Hannover v. Germany* [2004] E.M.L.R. 379).

On a second level comes the private sphere which concerns areas that are not easily accessible without the consent of the individual (such as family events or household activities). The protection of privacy will carry more weight here. There is an even stronger bias in favour of privacy in the so-called ‘confidential’ sphere, which covers material that is clearly not meant to reach the public eye and often involves highly personal thoughts committed to paper (such as letters, diaries or personal memoranda).

Finally, privacy will in most cases be paramount in the intimate sphere. Strengthened by the notion of human dignity (which requires that every individual must enjoy an area of life which is not visible to others), written and audio-visual material especially related to sexuality, an individual’s medical condition and information confided to priests, doctors or legal representatives, will find the highest degree of protection in German courts. As pointed out above, the behaviour of the individual involved can, however, shift the balance towards freedom of expression even when intimate details are at stake. A celebrity’s former voluntary participation in pornographic films can thus affect the balance between the interest to keep such images out of the public sphere at a later stage in life and the interest of the Press to give a full account of an actor’s past.

Another basic distinction is made between private and public figures, and (among the latter) individuals who feature more permanently in public life, such as politicians, famous actors, scientists or athletes, and figures who attract attention only for a very limited period of time and often only because of a singular event. Public figures will thereby have to accept a more intense coverage of their lives by the Press, though German courts will again be likely to reconsider these categories of victims in the light of recent Strasbourg case law.

Finally, it should be mentioned that the German legislator enacted a new criminal provision in August 2004 sanctioning intrusions into the home or otherwise especially protected spheres of individuals by means of technical devices such as long-lens or hidden cameras, SpyCams, or even mobile phones with a camera function. The images acquired thereby need not be of a sexual nature; the so-called intimate sphere protected by s. 201a of the German Criminal Code (Strafgesetzbuch) also covers, inter alia, photos showing death and illness, highly personal areas such as toilets, dressing rooms, the medical consulting rooms of doctors, or health facilities such as solariums and saunas. According to the legislative explanation, even a particularly secluded garden can qualify as an area protected by the provision.

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51 Private international law*

Horatia Muir Watt

Points of contact between private international and comparative law

Private international law and comparative law are to a large extent complementary, since they both focus on differences between legal systems. While private international law is essentially designed to provide practical solutions to international or cross-border disputes potentially subject to diverse laws and several courts, nevertheless, it cannot dispense with a reflection on the theoretical and cultural significance of the differences between the various responses to an identical problem – a significance which, in many cases, the very use of legal rules outside their original context in order to resolve an issue raising a conflict of laws may serve to reveal. Indeed, firstly, as a tool of governance designed to manage legal pluralism, private international law has always been dependent upon a normative vision of the relationship between legal systems, and in some cases between national systems and a transcendent legal order. This vision is in turn largely evolutive, and varies according to cultural context; it depends upon a certain representation of the nature of law, pertaining to the comparative legal philosophy and epistemology. It explains the way in which diversity is problematized within the many theories of private international law, and accounts for methodological differences both in respect of choice of law and in matters of jurisdiction (Section I). Recently, economic globalization has favoured the emergence of a new paradigm of the relationship between national legal systems, which is captured through the lens of interjurisdictional competition, generated by free movement of capital and products. It affects the foundation and the function of the conflict of laws, which can serve to liberalize or moderate the international mobility of parties and firms. In this context, comparative law serves to highlight the differences which may generate or facilitate competition between legislators. However, it also reveals that different systems of private international law may have varying attitudes towards competition, allowing or disallowing the real or metaphorical mobility involved in the competitive process (Section II). Thirdly, by calling upon legal rules to apply outside their original context, private international law is confronted with difficulties of technical articulation and axiological compatibility between different laws, which comparative law may

* See also: Agency; Arbitration; Comparative law and economics; Trust law.

contribute to solve by suggesting functional equivalents or highlighting fundamental convergences or cleavages. Conversely, from the point of view of the comparative lawyer, such conflicts serve to underline the essential structure and sensitive parts of a legal system, emphasizing commonalities and revealing differences (Section III).

I Methodology and the nature of the law

Interactions and continuity in borrowing

The history of private international law is marked by the successive imprints of different epistemological and philosophical doctrines concerning the relationship between law and the coercive power of the territorial sovereign, the subordination of positive law to a superior, universal norm, or the extent of the separation between the public and private spheres. These ideas have an impact upon the way in which the conflict of laws is theorized, and influence the methodologies designed to select the applicable law or the competent court. Sometimes legal diversity is perceived as a matter of conflicting state policies or as an encounter between sovereign wills; at others it is perceived merely to endanger private interests or create transaction costs in a socially and economically interconnected world. The choice of perspective in this respect enlarges or narrows the field of private international law so as to include or exclude issues of public law, and leads either to assimilating the conflict of private laws to the allocation of prescriptive jurisdiction under public international law or indeed under federal principles, or to placing it squarely within the bounds of private law, as an instrument of substantive justice between individual litigants. It may also explain the variable importance accorded to the jurisdictional dimension of the conflict of laws, which weighs heavily in systems in which the empire of the law is perceived to be coextensive with the jurisdiction of the courts. Constantly influenced by changing ideological political, material or structural factors, different approaches elaborated in the context of religious struggles, movements of populations, technological revolutions or federalism, cross paths, merge, disappear and reappear under new theoretical trappings, in a continual dialectic between territorialism and personalism, independence and community of laws, unilateralism and multilateralism, vested rights and functionalism, dogmatics and politics. Comparative law serves to highlight the paths used by different movements of ideas, be it legal borrowing, cross-fertilization or spontaneous convergence.

American methodological revolution

Private international law in the 20th century was marked by the methodological revolution which swept through the United States in the wake of legal realism. It marked the decline of territorial dogma which lay behind

the then prevailing doctrine of vested rights as expressed in the First Restatement of the Conflict of Laws. Such dogma had in turn been the legacy, via Story's Commentaries on the Conflict of Laws, 1834, of 17th-century Holland, conceived at the time when the Dutch Republic was securing its freedom from the Spanish monarchy, and thus particularly appealing to protestant and independent America. The mid-20th-century methodological crisis of the conflict of laws was also the end of a purely private law perspective, which was equally part of the European heritage of American conflicts, in the age of the pre-regulatory state. Multilateralism, in the shape of wide, abstract jurisdiction-selecting rules such as those consecrated in the First Restatement on the Conflict of Laws, and at least formally similar to Continental European tradition, was rejected in favour of a form of neo-statutism: rule-selective, focusing on narrow issues, and based to a large extent on the interpretation of statutes in the light of the policies they pursue. New functional methods changed the focus from private interests to governmental policies, in an environment which was increasingly hostile to the separation of law and politics. The 'new learning', epitomized in Brainerd Currie's governmental interest analysis, posits that states have interests in the outcome of litigation in the field of private law; in particular, the functionalist revolution served to reveal the regulatory function of tort law, where private remedies were perceived to promote various state policies which involved interests far broader than those of the particular litigants. This perception was met with hostility in Europe, still largely influenced by the dogma of neutrality of private law, supposedly incompatible with the pursuit of collective interests.

Limited novelty

Yet the methodological novelty of the 'new learning' was in fact very relative. On the one hand, the functionalist revolution evokes the statutism of medieval Europe, where conflicting statutes appeared against the backdrop of a legal community, legitimizing a common interpretation of ends and means; simply, Currie's personalism tended to be more expansive than that of his medieval counterparts, which may explain why, combined with its lexforism, his approach has frequently been perceived as discriminating in favour of forum residents. On the other hand, the new learning was designed to a large extent to escape from a rigid form of territorialism which had never affected mainstream European legal theory or practice. The American tradition had inherited from the Dutch school the idea that the scope of the law was coextensive with the coercive power of the local sovereign, so that extraterritoriality of the law was problematic as both a logical matter (how could the forum apply a foreign law?) and a political issue (how could the law of the local sovereign claim to reach subjects or

events outside the jurisdiction?); the vested rights doctrine, according to which the forum never really applied foreign law as such, but simply recognized rights which had vested elsewhere under the authority of a foreign sovereign, provided a practical response to this difficulty, but only served to accentuate the territorial basis of the conflict rules, well illustrated by the notorious 'place of impact' principle (the law applicable to a tort is that of the place of the last event giving rise to the tort). Interestingly, the American hang-up about extraterritoriality has also marked the history of its international economic relations, where the issue is the subject-matter jurisdiction of the federal courts; the interpretation of the scope of federal statutes, on which their jurisdiction depended, was subjected to the constraints of territoriality until the time when functionalism appeared in the field of inter-state conflict of laws, denoting an interesting parallelism in approach despite the recurrent invocation of public international law as guiding principle in international conflicts. Functionalism was, then, a rejection of the mechanical and unfair results achieved by overly rigid rules, and a criticism of the escape devices used by the courts to attenuate this rigidity. But the refusal of multilateralist methodology and jurisdiction-selecting rules was, to a large extent, a case of throwing the baby out with the bathwater, as it was based on a misconception of the real signification of traditional multilateralist methodology, at least as far as its European version was concerned.

Functional nature of European conflict of law principles

As formulated by Savigny in mid-19th-century Europe, the latter is based on the search for the 'seat of the legal relationship', which signifies an adequation of the chosen law, in view of its connections with the facts, to the needs of the latter as analysed through the lens of Roman legal categories. In this context, characterization is not the escape device denounced by legal realists, but an attempt to ensure that each legal issue is governed by the law which fits best. For instance, the law deemed most appropriate to determine the available remedies in tort is considered to be the law towards which the expectations of both parties converge, usually that of the place where the harm or imbalance occurred; if this happens to be the local law, this is not the result of the operation of territorial dogma, but of an analysis of the specific nature or needs of the legal relationship arising from a tort. Such an analysis also provides room for permanent or stable connecting factors such as nationality or domicile according to the needs of the legal relationship, as in the field of personal status, where law will apply extraterritorially, both insofar as it applies to persons outside the jurisdiction, and to the extent that foreign law is applied by the courts of the forum state. Extraterritoriality is unproblematic both from a logical and a political standpoint, since law is

considered in its rational dimension, as a rule of decision, and not as a coercive order, or an expression of sovereign power. In many cases, interest analysis merely serves to reveal the reasons which underlie the choice of connecting factors in a context unconstrained by territorial dogma; Currie's personalism was to a large extent the discovery of the reasons underlying the application of a permanent connecting factor to issues of personal status, even if they arise in the context of tort litigation, which under a territorialist analysis would have been submitted to the local law.

Inadequacies of European contemporary theory

However, this does not mean that European theory has nothing to learn from American functionalist thinking. Modern refinements in traditional methodologies, which now tend to narrow categories and to introduce flexible connecting factors requiring fine-tuning by the court, are largely due to its influence. Nevertheless, the continental European tradition remains attached, for reasons of legal certainty, to multilateralism in the form of general propositions, jurisdiction-selecting rules and the watertight separation of the public and private spheres, which led it to reject a methodology based on the analysis of state policies. However, it became difficult to deal with the presence of economic and social regulatory policies affecting the field of tort and contract. International mandatory rules carrying such policies have been dismissed as exceptions to the traditional conflict rules, and then left in methodological limbo, despite the progressive politicization of private litigation involving such policies, of which the surest sign is the current development of aggressive blocking and claw-back statutes, and the creation of judicial weapons such as provisional measures and injunctive relief. On this point once again, the European tradition, traditionally less attentive to the political and judicial dimension of the conflict of laws, is arguably less well equipped to deal with the growing transformation of international disputes between private persons into conflicts of sovereign power. This conceptualization of the conflict of laws had been that of the Dutch School in the 17th century, soon to be superseded within Europe by the enlightened vision of the law as rationality. It took root in the United States and England in accordance with a more Hobbesian perception of the nature of law, and has to a certain extent been renewed in modern theory under the methodological premises of functionalism, in which conflicts may be false or 'true'.

II The emerging competitive paradigm

Impact of globalization on the relationships between legal systems

Despite these epistemological and methodological cleavages, certain basic postulates are common to both approaches to private international law.

On both sides, the 'law of conflicts' is perceived to determine the scope of law, the jurisdiction of courts and the effect of judgments in respect of persons, events or things which are dispersed geographically. Independently of the means used to achieve this end, it supposes that individual relationships and rights are subjected to the law and not the reverse. On this point, while it is true that the sharpness of the opposition between public and private interests is progressively losing its edge, the distinction remains in an international context between rules which may be set aside by agreement, and rules which carry fundamental policies and are internationally mandatory. However, this shared vision of law's empire in an international setting tends to be profoundly affected by the phenomenon of economic globalization, which involves a triple change of paradigm. Firstly, territory loses its significance not only through accelerated mobility of persons, goods and capital, but through the rise of virtual spaces of pure information which appear naturally resistant to the authority of national laws, or indeed, as the libertarian ideology of the internet would have it, of any form of legal constraint. Secondly, a vast movement of deregulation affects the very role of the state, contributing once again to blur the dividing line between public and private law, whose techniques are increasingly investing the public sphere. Thirdly, because of the increasing liberalization of trade and investment, globalization induces a competitive relationship between national economies. Essential agents of these changes and principal beneficiaries of deregulation, multinational firms adapt their investment strategies in pursuit of financial return, indifferent to geographical location. In turn, national legislators design their policies to attract mobile investment, often without regard for the welfare of the local, immobile, communities. Governmental policies in the fields of labour or environment are largely dependent upon the decisions of mobile capital: states are no longer the exclusive and monopolistic providers of public goods but are subjected to the pressure of competition. Progressively, the relationship between law and market, as they were habitually perceived, is overturned. Law becomes a product, subject to the choice of mobile factors of production. To a certain extent, private international law can favour interjurisdictional competition by liberalizing restraints on mobility. It may also fulfil an important regulatory function, restraining competition when it becomes distorted. On both counts, comparative law also has a significant role to play.

Comparative law and the competitive paradigm

Firstly, the competitive paradigm invests comparative law with a new importance, since in highlighting differences between legal systems, it can point to the factors which may make them more or less attractive, for instance to investors. The recent, controversial report of the World Bank,

'Doing Business' (Djankov and McLiesh, 2004), has pointed out some of the normative and institutional factors which may be more or less conducive to international investment. Comparative law can help show that the competitiveness of a given legal system in this respect, for instance in offering greater legal certainty, may depend not only on the content of its legal rules, but also on the efficiency of its courts, or the availability of effective remedies. Additional tools such as economic analysis, employed in conjunction with legal comparison, may help reveal whether effective competition is actually conceivable in certain fields. Thus it may be that interjurisdictional competition is realistic only in the case of heterogeneous products, where regulatory policies create winners and losers. Comparative analysis may also contribute to reflection on the extent to which such regulatory ends are actually present in the field of private law. Rules which may appear to be 'neutral', or even 'natural' from an internal perspective, such as the rules on formation and validity of contracts, can, when confronted with other legal systems, prove not only to be one legal construct among many other possibilities, but also to comprise an implicit regulatory scheme.

Mobility as a factor of interjurisdictional competition

A second role of comparative law within the interjurisdictional paradigm consists in confronting the systems of private international law themselves, to determine the extent to which they are liberalizing or regulating competition. In this respect, mobility is essentially metaphorical, as it signifies less the possibility of moving physically from one jurisdiction to another (voting with one's feet) than the possibility of choosing to exit a legal system in favour of another. This is precisely where it becomes apparent that, to a certain extent, law is a product on a market. The first and best-known illustration concerns the market for corporate charters, which is a long-established feature of American federalism and is now gaining the European Community. Comparison has highlighted the fact that the European Court of Justice's recent liberal approach to the recognition of companies incorporated in other member states under its *Centros-Uberseering-Inspire* Art line of case law (see C-212/97 [1999] ECR I-1459; C-208/00 [2002] ECR 2002 I-9919; C-167/01 [2003] ECR I-10155), which has practically neutralized the reference to the real seat of the company as connecting factor hitherto practised in certain continental systems such as France or Germany, is clearly engaging on the same path as the Federal Supreme Court. Comparison of the American and European experience also reveals, however, that when there is not a community of ends such as exists in the United States, in the sense that whatever the differences between state corporate legislations, there is a shared conception that they are designed to maximize the value of the actions, competition may be distorted. If certain legislations pursue the

protection of other stakeholders such as employees, the liberalization of the connecting factor through enlarged choice of law by management creates a severe risk of a 'race to the bottom'.

Example of contract and arbitration

Another characteristic example of interjurisdictional mobility is party freedom to choose both the law governing an international contract and the forum competent to decide disputes arising under it. European practice allowed such choice early on – even to the extent of allowing 'le contrat sans loi' at the beginning of the 20th century, in a spectacular explosion of freedom of contract – while American courts and scholars long remained hostile to what appeared to be private lawmaking. The Second Restatement (s. 187) still constrains freedom of choice of law by requiring a substantial connection or a reasonable basis for the parties' choice, even if, in practice, the latter tends now to boil down to the exclusion of fraud and is thus closely analogous to the European position. The tables were turned, however, when in its famous *Mitsubishi* case (473 US 614, 637 n19, 105 S. Ct. 334446, 87 L.Ed.2d 444 (1985)), the American Supreme Court decided that disputes involving the application of antitrust law were arbitrable. To understand the significance of this development, it must be clear that, even under the more liberal European approach to freedom of contract, certain rules remained beyond the pale of party choice. As seen above, these are internationally mandatory rules of the forum (or, under article 7s.1 of the Rome Convention, those of a third state), usually in the field of market regulation, which apply notwithstanding the choice by the parties of a different governing law. Section 187 of the Second Restatement similarly provides that the law chosen by the parties may not prevail over 'a fundamental policy of a state which has a materially greater interest than the chosen state'.

However, if parties are empowered to take their dispute to a different forum, and even to a private arbitrator who is under no obligation to apply the mandatory rules of a given state, including those of the state court otherwise competent, then even these rules may be bypassed. This is an example of the 'barrier-crossing' between the public and private spheres perceived to be the principal side-effect of economic globalization, which to a certain extent privatizes state regulation. Naturally enough, the pressure of competition between different legal systems desirous to attract international arbitration has led various European countries to liberalize their own law in the field of arbitrability, in the wake of *Mitsubishi*. It is probable that unequal liberalization of national laws on this point will lead to a certain amount of forum shopping between world centres of international arbitration, once again accentuating the importance of the

jurisdictional aspects of the conflict of laws. Common law systems are traditionally more familiar with such practices, particularly because traditional rules of jurisdiction are framed flexibly, giving considerable discretion to the court to decide whether or not to exercise jurisdiction in a given case, and correlatively encouraging strategic forum shopping.

III Structural and axiological difference

Traditional tools of conflict of laws

No doubt the best-known instances of interaction between comparative law and private international law concern traditional tools such as characterization or public policy, which reveal the profound structure of a legal system, or its fundamental values, when foreign rules or institutions are imported and called upon to 'fit' with those of the forum. Adjustments may be required and, in some cases, the foreign rule or institution will be rejected. Difficulties of characterization arise under traditional jurisdiction-selecting methodologies; since characterization supposes that a given issue is identified as belonging to a legal category to which a connecting factor is attached (for instance, a given claim for damages will be considered part of contract, tort, or divorce law, the governing law differing accordingly), it does not arise under a functionalist approach which determines the applicable rule for each individual issue, although in the end such an approach tends to reformulate wider categories inductively. In the same way, public policy, which serves to set aside a rule which clashes with fundamental values of forum law, does not have a place within functionalist methodologies. Since their starting point is the analysis of the various policies of interested states, and since a stronger policy of the forum will prevail in cases of 'true conflict', an overriding policy of the forum will be given effect, with no need for the operation of an exception of public policy, whose function is essentially to correct the 'blindfold' approach inherent in traditional methodologies, under which the applicable law is selected without regard for its content. In the context of functionalism, therefore, public policy (or its functional equivalent) only remains relevant in the field of recognition and enforcement of foreign judgments, where a violation of due process, for instance, will lead to a refusal of recognition. This is why these tools have now essentially become a feature peculiar to European conflicts methodology.

Characterization

Difficulties of characterization occur, first, when two legal systems do not acknowledge the same institutions; for instance, civilian systems do not contain rules relating to trusts, or at least, even if a similar institution such as the *fiducie* exists nominally, the distinction between legal and equitable

ownership has no possible significance in a civilian context. Thus, if a civilian court is called upon to determine the law applicable to a trust, or, more realistically, to recognize the effects of a trust constituted under English law on assets within its jurisdiction, it will look to see whether a functional equivalent can be found within its legal system in order to provide a model from which to reason. It will also have to check whether, by giving effect to an unfamiliar institution of foreign law, it is not upsetting a balance which its domestic law may have achieved through the use of different means. In such cases, it is important that analogies found within the domestic system correspond to functional, not formal, criteria. For instance, if a voluntary trust is assimilated to a unilateral declaration of will and thus governed by the law chosen by the settlor, the risk might be that it operates to upset the rules of succession in the system in which the trust assets are situated, which might have a mandatory scheme of devolution of those assets on the death of the settlor. If the aim of the trust is to transfer an estate, then it must be governed by the law applicable to the succession. The 1985 Hague Convention on the law applicable to trusts and their recognition, while designed to create a recognizable legal category in civilian systems in order to facilitate the international recognition of trusts, could not avoid this difficulty (see article 15c).

Secondly, conflicts of characterization arise when two legal systems acknowledge the same institution, but each considers it to be part of a different branch of the law, meaning that various categories on which their conflict rules operate, while nominally similar, in fact have a different content. Classic examples are linked to the variable boundaries between contract and tort, or between the law of succession and matrimonial property, or between formal and substantive validity of marriage. When different characterizations of the same institution occur, it is generally accepted that the characterization of the forum prevails. A claim might then be considered as contractual by the forum, and governed by the law chosen by the parties, even if that law considers the claim to be in tort and does not consider itself applicable. These apparently technical difficulties may reveal divergences in the profound structural patterns of the laws involved, which explain why such situations set off various complex and often circular mechanisms, such as *renvoi*, to avoid distortions.

Public policy

The other touchstone of systemic sensitivity, the exception of public policy, has taken on particular symbolic significance in the European context since it has become the privileged means of expressing attachment to certain fundamental rights, specifically those contained in the European Convention on Human Rights. Although it may be that, in dualist legal systems, an

international norm concerning human rights has primacy over any other norm applied by the courts, using the channel of public policy allows a certain modulation and adjustment of its requirements, since it seems clear that such a norm cannot apply indistinctly to all the situations which come before the courts, and that regard must be had for the connections it entertains with the forum. For instance, sexual equality does not necessarily require invalidation of a Muslim repudiation which took place validly under Algerian law, so that the courts of the forum refuse it all effects and reject a claim for alimony by the repudiated wife. A modulation of the effects of fundamental rights is all the more important since the very concept is inclined to an essentialism which tends to crystallize oppositions in a way more flexible approaches do not. The very term 'conflict of civilizations' which is often used to describe the sharpened opposition between western cultures, in particular those which subscribe to a European reading of fundamental human rights, and the rest of the world is in itself dangerous and misleading. Comparative law can be used here to point out the complexity of the very concept of culture or civilization, which in turn reveals the relativity of certain supposed conflicts. For instance, one may wonder whether polygamy is really morally more contemptible than the possibility of entering into several successive marriages. At the same time, profound moral divergences may be found among systems which subscribe ostensibly to the same human rights culture. Today, these concern the issue of homosexual marriage or, in a very different sphere, the death penalty. In this respect, comparative law enables private international law to adopt a more enlightened approach to oppositions between legal systems and their impact on the resolution of international disputes.

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52 Product liability*

Geraint Howells

Legal actions for damage caused by defective products have a long pedigree and certainly emerged as a recognized area for litigation towards the end of the 19th century when mass manufactured products became available. Nevertheless, few areas of private law have been at the centre of more heated legal policy debates during the last half-century than product liability. This controversy has resulted from a retreat in the product liability context from the privity limitations of contract law (Prosser, 1960; 1966) and a reluctance to accept fault as a satisfactory basis for liability. Strict product liability is now the order of the day in most developed countries (Hodges, 1993; Howells, 1993; Kelly and Attree, 1996; Kellam, 1999). The amount written about product liability is a testament to lawyers' interest in law reform, but, outside the US, this is not justified in terms of the practical importance of product liability as a dimension of legal practice (in the UK, e.g., major works include Clark, 1989; Howells, 2000; Miller and Goldberg, 2004; Stapleton, 1994).

This contribution will chart the development of strict liability in the US, its adoption by the EC and the export of the EC model around the globe. We will note that for all the analysis it is still unclear what policy rationale underpins the introduction of strict product liability. This makes it problematic to determine how the principles should be applied. We will look at five live areas of debate: (i) whether product liability should apply equally to all types of defect, (ii) the extent to which liability should be channelled to the producer or shared with other links in the distribution chain, (iii) the relationship between product liability and other grounds for recovery, (iv) what the concept of defect means, and (v) the role of development risks defence. We will look at the legal contexts within which the product liability regime operates and canvass alternative approaches to civil litigation to compensate those injured by products.

Strict product liability US style

Under this heading, see Owen, Montgomery and Davis, 2004; Phillips, Terry, Vandall and Wertheimer, 2002. Case law in the US gradually chipped away at privity requirements to impose liability directly on manufacturers for harm suffered by consumers. In *Baxter v. Ford Motor Co.* (168 Wash 456, 12

* See also: Tort law in general.

P 2d 409 (1932) (Supreme Court of Washington)), a manufacturer who misrepresented a windscreen as being shatterproof was held liable for delivering a product that lacked the represented qualities. Gradually privity ceased to be an issue for both express warranty (*Rogers v. Toni Home Permanent Co.*, 167 Ohio St 244, 147 NE 2d 612, 22d 291 (1958) (Supreme Court of Ohio)) and implied warranty claims (*Henningsen v. Bloomfield Motors*, 32 NJ 358, 161 A 2d 69 (1960) (Supreme Court of New Jersey)). Traynor J took the first judicial steps to move away from the contractual route and laid down a principle of strict liability in tort in *Greenman v. Yuba Products* (59 Cal 2d 57, 27 Cal Rptr 697, 377 P 2d 897 (1963) (Supreme Court of California)). Dean Prosser took advantage of this impetus to persuade the American Law Institute (ALI) to go beyond merely restating the laws and adopt s.402A of the Restatement (Second) of Torts (1965) which provided that 'One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property.' Product liability rapidly expanded under the influence of this Restatement. We shall see that in 1998, in its Third Restatement of Torts (Product Liability), the ALI attempted to restrict the impact of strict product liability.

European reform

Europe's conscience was pricked by the thalidomide controversy which showed the inadequacy of European liability rules. The Council of Europe adopted the European Convention on Products Liability in regard to Personal Injury and Death in 1976, but few states ratified it because they were fearful of placing their domestic industry at a competitive disadvantage by importing US-style compensation awards. In 1985, the EC adopted a Directive on Product Liability (Directive 1985/374/EEC, OJ 1985 L210/29). The Directive states that compensation without fault is 'the sole means of adequately solving the problem . . . of a fair apportionment of the risks inherent in modern technological production' (Recital 2). Liability is imposed when a defect in a product causes damage. A product is defective when it does not provide the standard of safety a person is entitled to expect. Despite the circularity of this defectiveness standard it has been exported far beyond Europe (Kellam, 1999). The EC model of strict product liability has dominated legal reform debates globally, not so much because of its superior legal form, but rather owing to the bad press that the US product liability regime has attracted.

Reform and policy articulation

The debate had been heated as to whether negligence or strict product liability is the proper basis for product liability. In part this debate reveals the

tensions as to whether product liability should be primarily concerned with compensating individuals harmed by products or whether it should have a regulatory role improving product quality. Those who favour negligence question the value of encouraging producers to take more precautions than are required by a reasonableness test (Posner, 2003), whilst advocates of strict product liability argue a product should bear its full social costs (Calabresi and Hirschhoff, 1972). Equally, it is considered unfair by some to simply pick out a blameless producer as the channel for liability (Owen, 1991), whilst others argue that this is justified as producers know the rules of the game when they enter the marketplace (Honoré, 1988; Stapleton, 1994). Clearly the availability of insurance has an important role to play.

What is surprising is that, for all the ink spilt philosophizing about the basis for product liability, it is not clear what the actual policy objectives of the liability regimes are (for some possibilities, see Owen and Montgomery, 1976). The EC Directive talks about apportioning risks, but its circular definition of defect gives few clues as to how that should be achieved and with what practical consequences. In part this is explained by the poly-centric nature of safety, which requires the product to be assessed in the round, taking into account the benefits as well as the risks of the product (Henderson, 1973).

Nevertheless, it has been convincingly argued that the reform in the Second Restatement was not originally intended to bring about social engineering (Priest, 1989). Prosser had merely intended to tidy up the anomalies of sales law derived from privity and make it easy to recover in cases where foreign matter was present in food, where evidential difficulties might have frustrated legal redress. The drafters of the Third Restatement sought to recover this original intent (Henderson and Twerski, 1992; 1997), but against fierce opposition from those who thought the law had progressed differently in the courtroom (Vargo, 1996). Even those who supported the reforms criticized it for not openly admitting that a negligence standard should be adopted for all but manufacturing defects (Owen, 1996). The reaction of the courts to the Third Restatement has been lukewarm, but, if it does come to represent US law, then the substantive law will be stricter in the EC than in the US (Howells and Mildred, 1998). Nevertheless, product liability remains a more potent force in the US than anywhere else for reasons connected to access to justice and the level of damages.

Categories of defects

It had become conventional for pedagogic reasons to talk of different types of defect: most commonly manufacturing, design, failure to warn and inadequate instructions. Each category raises different concerns. Manufacturing defects are the most self-contained as they affect a limited quantity of

products and do not challenge the basic feasibility of the product design. Recovery for these types of defects is commonplace even under a negligence regime. By contrast, a finding of defective design is often disastrous for the producer. Courts are often tempted to find a middle route by awarding compensation for failure to warn or inadequate instructions, but not fundamentally challenging the product's viability.

This debate has taken on a hard edge with the Third Restatement in the US which reserves true strict liability for manufacturing defects and requires demonstration of a reasonably feasible alternative for design and failure to warn of defects. In the UK, the manufacturing/design distinction was rejected by Burton J in *A v. National Blood Authority* ([2001] 3 All ER 289), but the learned judge introduced his own similar distinction between standard and non-standard products and suggested the defectiveness standard applied in different ways to each with liability being easier to impose on non-standard products possessing harmful characteristics.

Liable parties

In the US, the general approach is that strict liability attaches to anyone in the distribution chain. This promotes consumer redress, but potentially increases costs as each party has to insure against potential liability exposure. In Europe, the policy has been to channel liability to the producer, albeit that the producer has been broadly defined to include the producer of the finished product, components, raw materials as well as own-branders and importers into the EC. Suppliers have only a subsidiary liability that they can avoid if they keep proper records of their own suppliers. The European Court has held that it is impermissible, given the maximal harmonization nature of the Directive for states to make suppliers jointly liable in strict liability (*Commission v. France*, Case C-52/00, [2002] ECR I-3827).

Relationship with other heads of liability

It is common for product liability cases to plead strict liability alongside negligence and contractual claims. In the US, where cases are heard by a jury, the rhetoric of negligence has clear advantages for plaintiffs (Hubbard, 1978). In some countries, like Germany, negligence became a useful weapon for claimants, especially where the burden of proof was reversed. It is also a means to impose liability for the inadequate post-marketing conduct of a producer. In countries where contractual liability is strict, non-excludable in consumer contracts and covers consequential damage it can be a straightforward route to recovery if a party is eligible to bring a contractual claim.

One of the many reasons why France took far too long to implement the EC Directive was the proposal by the Ghestin committee that strict product liability should become the sole source of redress. With maximal

harmonization in vogue within the EC, the Commission has from time to time suggested that the Directive should be the sole source of remedies, but this has not found much support (Lovells, 2003).

Defectiveness

There are two basic competing approaches to assessing defectiveness, although there are many variants on these models. One is a risk-utility standard, the other is based on consumer expectations. The former is resonant of the tortious nature product liability has today; the latter betrays the origins of the liability standard in contract law where expectations generated by the contract dominate.

In the US, possibly because of the use of jury trials, consumer expectations are seen as being pro-plaintiff. One element of the Third Restatement has been the playing down of consumer expectations. In Europe, it was unclear which standard would favour claimants. There were certain fears that the consumer expectation standard would enable producers to lower expectations and prevent recovery for obvious dangers. However, the decision of Burton J in *A v. National Blood Authority* demonstrated that it could also be interpreted in a demanding pro-claimant manner. The judge held that users of blood products did not expect them to be contaminated unless they had been informed of the risks. However, the 'jury' is still out on how the standard will be applied in Europe, as only a limited number of cases have been brought.

The application of the defectiveness standard seems to lack uniformity. In the US, this may be because it turns on jury determinations. In continental Europe, where judicial decision making is viewed as the application of the written law to the facts of the case, one has seen instances of the courts condemning a product as defective simply because the product behaves differently than expected without any explanation: see, for example, cases in France involving a tyre (Court of Appeal of Toulouse, Decision of 7 November 2000) and a glass window exploding in a fire (Tribunal de Grande Instance in Aix-en-Provence, Decision of 2 October 2001) and in Belgium an exploding bottle of carbonated water (Civ. Namur, 21 November 1996, JLMB 1997, p. 104). Burton J in *A v. National Blood Authority* adopted the reasoning of a German scholar that the judge was 'an informed representative of the public at large' (Bartl, 1989). Yet there has been a reluctance of English judges to find a product defective simply because it did not afford the level of safety that was expected. There is a tendency to need to find a concrete defect in the product. Even a bold judge like Burton J was emboldened by being able to point to the fact that the defective blood bags were only those containing Hepatitis-C and went on to compare these non-standard products comprising a harmful characteristic

with the non-contaminated blood. This was despite the fact that the contamination could not be detected in advance. A good example of the weak application of the standard in the UK is *Foster v. Biosil* (Decision of 19 April 2000, 59 BMLR 178). No liability was imposed for a breast implant that leaked, because the claimant could not demonstrate the cause. This was despite the possibility of the harm being caused by surgeon error having been ruled out. It is difficult to evaluate how readily defectiveness should be imputed without a clear statement of the policy rationale that underpins the regime.

Development risks

One of the most contentious issues in this field is the extent to which strict liability includes liability for risks that were unknown and unknowable when the product was put into circulation. This can be viewed as a touchstone marking out the extent to which strict liability is different from negligence (Terry, 1991). Supporters of the development risks defence argue that it is needed to create a balanced regime that encourages innovation and ensures insurance is at affordable levels (Fondazione Roselli, 2004). However, there is little empirical evidence to test such claims. As we shall see, the defence has only limited application in practice and its impact may be largely symbolic.

Although some US courts have imposed liability for development risks (*Beshada v. Johns-Manville Products Corp*, 90 NJ 191, 447 A 2d 539 (1982)(Supreme Court of New Jersey)), the consensus nowadays is that there is no such liability (*Feldman v. Lederle Laboratories*, 97 NJ 429, 479 A 2d 374 (1984) (Supreme Court of New Jersey)). An option to exclude the development risks defence was included in the EC Directive, but only Finland, Luxembourg and Spain (for certain high-risk products) have chosen to take advantage of it. In practice, the development risks defence has not proved a very effective defence, although it was accepted by the Amsterdam County Court in a case involving blood infected with HIV (*Scholten v. The Foundation Sanquin of Blood Supply*, 3 Feb. 1999). When it was reviewed by the European Court in a case challenging the UK implementation of the defence (*Commission v. United Kingdom*, C-300/95, [1997] ECR I-2649), the Court was quite demanding as regards what amounted to knowledge. Producers would not be able to invoke the defence if the knowledge was available, even if it was yet to be popularly accepted. However, the Court read into the Directive the requirement that this knowledge must have been accessible, which may assist producers in limited circumstances where, for instance, a discovery had been published only in an obscure journal in a language they could not be expected to read (Howells and Mildred, 2002).

Legal context

Large product liability claims are associated with the US. The substantive law of product liability is at least as potent in the EC as in the US (Howells and Mildred, 1998). The explanation for the US remaining the hotbed for product liability litigation lies in other factors than the substantive law. The contingent fee scheme provides incentives for plaintiff lawyers to invest in product liability litigation far beyond those available to their counterparts in Europe. Some European jurisdictions are allowing cases to be brought on a 'no win no fee' basis, but none allows lawyers to walk away with a third of the damages, as is possible in the US. In addition most European countries apply the 'loser pays' principle to costs liability. Class actions are also far more common in the US than in Europe. In addition, damage levels generally are higher and punitive damages are a particular magnet for US trial lawyers that has few equivalents elsewhere. Indeed, the lack of healthcare coverage in the US explains why many Americans urgently need product liability to cover the healthcare costs which in other systems are borne by state-backed insurance schemes or, in the case of the UK, the National Health Service.

Alternatives

Some countries provide special regimes for particular products. Notably, Germany has a special pharmaceutical liability regime. However, the boldest attempt to find an alternative to product liability is the New Zealand no-fault accident compensation system. This seeks to avoid the high costs involved in delivering compensation through the litigation system by abolishing most civil claims for personal injury, and instead pays state compensation to all accident victims. The scheme had many supporters when launched, but has been criticized for failing to provide adequate deterrence (Miller, 1989) and failing to maintain levels of compensation (Todd, 2000).

The Nordic countries have successfully developed no-fault schemes for pharmaceutical liability. Norway's scheme is statutorily based, but those in Sweden and Finland operate as a voluntary addition to the legal regimes (Oldertz and Tidelfelt, 1988).

A final word on causation

We have already noted that the legal context affects the impact of product liability laws, particularly with respect to access to justice and damage levels. In many product liability cases, especially those where the alleged harm can also result from environmental and genetic causes, the issue of causation will be determinative. This is often the case in some of the most high-profile cases dealing with pharmaceutical and tobacco litigation.

Causation is an area where legal principles have to be adapted to meet the needs of justice in many areas of civil litigation. Much work still needs to be undertaken with regard to refining causation principles if product liability is to be an effective tool for the injured party in many situations.

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53 Property and real rights*

J. Michael Milo

1 Introduction

Property refers to objects capable of being privately owned; private property law regulates relations between (legal) persons with regard to (rights in) those objects. It deals with the issue of which objects are recognized as object of private property rights; with the determination of form and content of property rights and their protection; with acquisition and loss of property rights. Intellectual property law, though having many similarities on the level of principles, is dealt with in its own specific, often international realm. There is one important distinguishing characteristic of property rights, which may be seen in many jurisdictions: property rights are exigible against an indefinite number of people or have an erga omnes effect, and are as such opposed to personal rights (see, e.g., Rudden, 2002; Swadling, 2000, p. 204, s.4.01; Westermann, 1998, s.3; Terré and Simler, 2002, no. 143). The consequence is that property rights, since they affect the position of third parties, need to have a relatively high level of certainty and predictability. Therefore the regulation of the mentioned issues in national jurisdictions is often detailed, since interests of third parties need to be taken into account, and is often mandatory. The regulations follow certain principles which serve certainty and predictability, and which can also be detected in those national jurisdictions: the principle of specificity of objects of property rights; the principle of numerus clausus of property rights; the principle of publicity of property rights.

Property law is national law par excellence, since the national conflict rules of private international law all mainly use the *lex rei sitae*, the jurisdiction where the object is situated, as the determining factor to arrive at the applicable law to decide on property law aspects of an international case.

While, on the level of principles, and also on the level of outcome of cases, there can be seen many similarities between national systems of property law (Mattei, 2000, pp. 18–21), the detailed technicalities of property law vary to a great extent; the civil law systems of property law especially are completely different from property law rules in common law jurisdictions. This, in combination with the potential involvement of many third-party interests, makes comparative property law, let alone harmonizing

* See also: Personal and real security; Transfer of movable property.

attempts, difficult, which is probably also the reason that there has not been done as much comparative study in this field as, for example, in contract law (Smits, 2002, pp. 245–6). Two general tendencies may be detected. While civil law jurisdictions are moving away from their relatively rigid (but predictable) systematization, towards a more flexible approach of their property law, in common law systems, property law might be subject to a process of increasing systematization, thereby becoming more predictable.

In the following, we will deal with the differences between common law and civil law jurisdictions (section 2); with the achievements in harmonization (section 3); with the types of objects of property rights and their specificity (section 4); original acquisition (section 5); a very interesting general theme in comparative property law is the question of which criteria should be met in order for a right to be accepted as a property right; this will be addressed under the principle of *numerus clausus* (section 6).

2 Common law and civil law

While the legal development in continental Europe has seen a reception of Roman law, the abolishment of feudal law and the emergence of national systematic codifications, these aspects were absent in jurisdictions in the common law tradition. Common law developed autonomously, without substantial reception of Roman law, but with an important position of feudal law, resting on case law, reasoning inductively using precedent, in the absence of a systematic codification (Smits, 2002, pp. 75–84); some argue the civil law influence on common law is more profound (Zimmermann, 2004, pp. 33–41). What is more, there is, within common law jurisdictions, a division between two bodies of law: common law and equity. This is of the utmost importance in common law systems of property law, distinguishing them fundamentally from civilian systems (Harpum, Megarry and Wade, 2000, s.4.001). Though common law knows of strict formal rules with regard to the creation and the transfer of property (rights), equity mitigates, and may consider property (rights) to already have been created or transferred in equity, even though some of common law's requirements have not been met (Rudden, 2002, pp. 82–6). An example is the transfer of a specific piece of land. An obligation to convey needs to be followed by a formal conveyance, which includes a registration. If between contract and registration the seller sells a second time, or becomes insolvent, equity will nevertheless treat the land as the buyer's, even though the formal criteria for conveyance have not yet been met (Swadling, 2000, p. 210, s.4.19; Rudden, 2002, p. 85). On the level of the outcome, this is exactly the same as is reached by legislation in some civil jurisdictions, which have introduced a proprietary protection which favours the buyer of an immovable for residential purposes (as under German law in s.883 BGB, which deals

with the *Vormerkung*; Westermann, 1998, s.83; Wolf, 2005, pp. 220 ff.). On the level of principles in this example, the publicity requirement is more strongly adhered to under German law than under English law, since a registration of the contract of sale is necessary. It must be said that in many cases the concept of equity arrives at results through tracing which are not that easily reached in civil law jurisdictions – by real subrogation. At the same time, careful comparative study has shown important parallel developments (Sagaert, 2003).

Equity thus invades property law by turning personal rights (such as claims for delivery) into property rights. But English authors still stress the importance of meeting specific criteria in equity, laid down in case law, in order to arrive at an equitable property right (Rudden, 2002, p. 86). Furthermore, how far new property rights in equity may be created is under discussion. The restrictive approach in the creation of property rights is illustrated by Megaw LJ, as cited by Harpum: ‘the system of equity has become a very precise one. The creation of new rights and remedies is a matter for Parliament, not the judges’ (Harpum, Megarry and Wade, 2000, s.4-090). The concept of trust, more specifically the constructive trust, may give rise to property rights in the context of specific factual events, particularly wrongs or unjust enrichments (Swadling, 2000, s.4:248; Goff and Jones, 2002, pp. 79–119; Gretton, 2000). ‘It seems to me, that never the two shall meet’ is the rather pessimistic conclusion drawn upon research into the mutual influence of common and civil property law in the mixed jurisdictions of Scotland and South Africa (Van der Merwe, 2002, p. 290).

3 Towards uniformity?

Private property law has not seen many unifying or harmonization projects, not by formal supranational regulation and not by informal methods, as the drawing of principles, and neither has there been a lot of borrowing by national jurisdictions of foreign property law concepts (Smits, 2002, pp. 24–6, 245–70). The focus is particularly (not surprisingly) on those areas relevant to international transactions, of which (recognition of) security rights have drawn the greatest attention (Gambaro, 1997). But there is more to be found of interest. Constitutional law protects the arrangement of private property rights; it does so at the level of national constitutions, but also on the level of international treaties. Article 1, First Protocol of the European Convention of Human Rights, which protects property rights (possessions) against expropriation, might have some unifying force. In the case of *Schirmer v. Poland*, a Polish regulation regarding the lease of immovable property for residential purposes, did not sufficiently safeguard the owners’ interests (ECHR, 21 September 2004) against the interests of the lessee. Decisions like these are guidelines to national legislators and judges

to balance interests in drafting legislation and possibly also in deciding cases (indirect horizontal effect) with regard to property relations.

The following conventions deal with aspects of property law: Convention on the Law Applicable to Trusts and on their Recognition (1985), which has been ratified by the civil law jurisdictions of Italy and The Netherlands; the United Nations Convention on the Assignment of Receivables in International Trade (New York, 2001) and the UNIDROIT Convention on International Factoring (Ottawa, 1988) which deal with the transfer of claims; the UNIDROIT Convention on International Financial Leasing (Ottawa, 1988), which provides for the recognition of the lessor's right in the leased equipment in the lessee's insolvency; the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (Rome, 1995; on which see Siehr, 1995), which deals with the international claims to return illegally exported cultural objects; the Convention on International Interests in Mobile Equipment (Cape Town, 2001), which deals with a supranational security right in objects specified in protocols: aircrafts, satellites and trains (Goode, 2004b).

Some model laws and legislative guides are dealing with property law aspects as well: the UNCITRAL Model Law on Cross-Border Insolvency (1997), which deals with the recognition of foreign property rights in insolvency proceedings; the UNCITRAL Legislative Guide on Insolvency Law (2004). Since 2002, UNCITRAL has been working on a Draft Legislative Guide on Secured Transactions; the European Bank for Reconstruction and Development had already, since 1994, developed a Model Law on Secured Transactions.

With regional supranational organizations there have been some harmonizing activities. The European Union has undertaken some activity in the field of property law. Article 295 of the European Community Treaty on first sight seems to hold a bar to the European Union's competence in regulating substantive property law issues (Rudden, 2002, p. 7), but is more likely to address the member states' competence in nationalization and privatization. In fact, some EU legislation containing aspects of property law has been the subject of legislative debate or has already been made: a Euromortgage has been proposed, and is still strongly advocated, for reasons of economic efficiency and consumer protection in cross-border transactions with regard to immovable property (Wehrens, 2004, pp. 779–80); there is a Regulation on Insolvency (OJ L 160, 30.6.2000; EC 1346/2000); there is a Directive on Cultural Objects (EC 7/1993), which, like the Rome Convention of 1995, deals with the claim to illegally exported cultural objects (Siehr, 1995); the Directive on Combating Late Payment in Commercial Transactions (EC 35/2000) contains a provision regarding retention of title; the Directive on Financial Collateral Arrangements

(OJ L 168/43; EC 47/2002) deals with the recognition of security rights and title transfer structures.

Academic research is more prolific. There are some interesting and promising combined academic initiatives. The Principles of European Trust Law (Hayton *et al.*, 1999) try to provide a systematic framework for trusts and trust-like constructions. Chapter 11 of the Principles of European Contract Law deals with assignment of claims. The Trento Common Core of European Private Law project and the *Ius Commune Casebooks for the Common Law of Europe* have embarked on drawing maps of property law in European jurisdictions. The Trento project has published a very good study on security rights (Kieninger, 2004).

Next to these harmonizing efforts, there is perhaps a tendency for national property laws to open up to other jurisdictions and to be brought in line with international, especially financial–economic, developments, by importing foreign elements in national property law (legal transplants), either by legislation or by case law. In the case of international transactions involving property law aspects, like transfer of property or security rights, the national courts show – often, not always – a flexible approach in the application of the *lex situs*, by, for example, giving foreign concepts a reasonable meaning within the framework of the applicable system of property law, by finding a national equivalent, particularly in the area of security rights. A Tanzanian floating charge has been ‘translated’ as being roughly equivalent to a Dutch right of pledge (HR 14 December 2001, NJ 2002, 241); a French hypothec maritime has been translated into an English maritime lien by the English Court of Appeal ([1923] All ER 531; for more examples, see Kieninger, 1996, pp. 48–51); recognition of foreign security rights and retention of title are mandatory in the European Union, in the specific context of the above-mentioned regulation on insolvency and the directive on collateral arrangements. Furthermore, in the case of retention of title, the *lex contractus* has been advocated, especially in the framework of the free movement of goods principle in the EU (Rutgers, 1998, p. 211); in some jurisdictions the *lex contractus* has been explicitly allowed to decide on applicable law regarding property law aspects in legislation (Dutch law since 2002 in art. 3:92a BW).

4 Objects of property rights

Traditionally, the law of property deals with physical objects, movable or immovable. The German law of property still has this narrow approach, but accepts intangible objects to be pledged (s.1273 BGB), and to be given in a usufruct (Nießbrauch, s.1068 BGB; see Baur and Stürner, 1999, ss.60–62, also with critique on this approach). Property laws in most other jurisdictions take a more encompassing approach, and also deal with

intangible objects: personal rights, public law entitlements; sometimes goodwill is accepted. The list of objects tends to increase, which is the subject of debate: is it possible also to encompass objects like personal data and identities (Prins, 2004)? Common law jurisdictions seem to be most flexible in their admission of new objects (Mattei, 2000, pp. 75–98).

Physical objects may be movable or immovable. The rules regarding (transfer and creation of) property rights in immovables require more formal – and costly – steps to be taken; often public registration is an essential part. The distinction between movables and immovables is of the most fundamental importance in common law jurisdictions where property law is often considered synonymous with land law; other property is personal property (Bridge, 2002, p. 1). Both areas under common law jurisdictions have developed as quite distinct and are treated quite differently. But when exactly is a physical object immovable? This question leaves a margin of appreciation, and in particular the Italian solution of dealing with easily removable objects as immovable is criticized for lack of economic efficiency (Mattei, 2000, p. 86). The issue is narrowly related to accession (*superficies solo cedit*), when a movable is concluded to have become an integral part of the land: see below.

In order for a property right to exist in an object, the object needs to be sufficiently identified: a specific object (van Vliet, 2000, pp. 27–8, 93–105; Baur and Stürner, 1999, s.3, nos 17–19). This is of particular interest in the case of classes of objects, particularly immaterial objects: is it possible to transfer or create a property right in classes of objects or a bundle of claims? There seems to be a tendency in case law to make the law more flexible in this area, especially with regard to the position of the secured creditor: general descriptions suffice, if this makes individual claims identifiable as being comprised in the description (Baur and Stürner, 1999, s.57, nos 12–13; s.58, nos 19–20). This development has also taken place in the Netherlands. The object of security rights is in the case of the Scots and English floating charge (perhaps subject to legislative reform, Goode, 2004a, p. 689) very wide: all that is the charger's property at the moment of crystallization (Goode, 2004a, p. 678). An interesting, but highly criticized, mitigation of the floating charge covering all the debtor's objects has been the Scots case in the House of Lords, *Sharp v. Thomson* (1997 SC(HL) 66). Based on an argument of fairness the conclusion was that, where other contractual and transfer requirements had already been fulfilled, the floating charge did not attach to an apartment prior to the registration of its transfer (Gretton, 1998).

Sometimes the identification of the object seems to be less adhered to, as property rights are concluded to exist in money in a bank account. An important example in English law is the recognition (under certain conditions) of

property claims over money in bank accounts (Rudden, 2002, pp. 88–9) using the concepts of unjust enrichment, constructive trust and proprietary restitution, and the technique of tracing (Goff and Jones, 2002, pp. 79–119; Birks and Mitchell, 2000, pp. 593–609). Sagaert has done important comparative research on the civil law technique of real subrogation in comparison with tracing (Sagaert, 2003).

5 Original acquisition: accession, commingling and specification

In the case of tangible objects, a property right in this object might also encompass its component parts (accession); if tangible objects are commingled, the original objects are no longer individualized: who has the property rights in the commingled object? If a manufacturer produces a new object, who has a property right in the new product? In the case of accession, component parts are considered to be part of the original thing (unity principle). This is a general rule, which may be detected in some form or other in any jurisdiction, for reasons of preservation of economic value and of legal certainty. In addressing the issue of accession, the laws of South Africa and France allow subjective criteria to play a role (for a comparative study containing the laws of Scotland, England, Germany, the Netherlands, France and South Africa, see van Vliet, 2002; see, for German law, Baur and Stürner, 1999, s.3, nos 6–18). This issue is of enormous practical importance, as property rights are acquired and lost, not as a result of a consensus, but *ex lege*, as a result of the law itself, and it is particularly relevant in the conflict with the holders of security rights over the object, which has been subject to accession. But also in the case of other forms of original acquisition, like specification, this conflict of interests appears. Here also, the question to what extent the outcome of a decision on specification may be influenced by a will of the involved parties (deliverer of raw material and producer/producer's financier) is highly interesting, for academic and practice alike. In the case of specification, two subsequent issues need to be addressed: when is the manufactured object a new object and who becomes owner of the new object? It is remarkable how much room again German law allows the involved parties: 'Vertragliche Abmachungen zwischen Lieferanten des Stoffes und den Hersteller gehen aber vor' (*ibid.*, s.53, no. 19; for a comparative overview, see Monti, Nejman and Reuter, 1997, pp. 878–83; more extensive, including many more jurisdictions, is Kieninger, 2004).

6 Numerus clausus

6.1 Meaning and presence of the principle

The numerus clausus probably arose in the 19th century in German jurisprudence, under the influence of Von Savigny. The principle means that the legal system which adheres to it has a closed number of real rights and

also a closed number of ways to acquire these rights. In the German literature the *numerus clausus* principle is dealt with in great detail. Two aspects of the principle need to be distinguished. The principle means that only the recognized rights may be created and, secondly, that the content of the real right may only be determined between the parties within the limitations of the real right. In the German literature the two aspects are known as *Typenzwang* and *Typenfixierung* (Muenchener Kommentar-Quack, no. 29; Baur and Stürner, 1999, s.1, no. 7). It is not a principle which has been dealt with in great detail in other civil law jurisdictions (Terré and Simler, 2002, no. 774; for France and Belgium, see also Sagaert, 2004, pp. 47–51); sometimes it is considered to be absent or not strongly upheld (as regards South Africa, see respectively de Waal, 1999; van der Merwe, 1989, p. 11). South Africa is an interesting jurisdiction since it has case law decide whether a right can be admitted into the category of real rights (de Waal, 2004). The principle serves the goal of reaching for third parties an acceptable level of predictability and certainty with regard to property rights.

The *numerus clausus* rule is less easy to detect in common law jurisdictions, and has only recently been addressed as such. For English law, Swadling (2000, pp. 206, s.4.11) answers affirmatively to the question whether English law knows such a principle, at least for common law, but a competing view does not depict the common law list as closed, but merely difficult to enter (*ibid.*, p. 208, s.4.14). In equity the situation becomes less clear (*ibid.*, p. 211, s.4.21). In United States jurisprudence, the *numerus clausus* rule has recently appeared and is defended as being a necessary part of American property law (Merrill and Smith, 2000, p. 69), from an economic perspective: without the principle information costs would be externalized on third parties. The principle serves an optimal standardization by ‘striking a fair balance between proliferation of property forms on the one hand, and excessive rigidity on the other’. In fact, Merrill and Smith find that US courts and lawyers ‘routinely abide by the principle’ (*ibid.*, pp. 8, 20).

However, the trust seems to blur the separation of personal and property rights, and thereby the *numerus clausus* principle. The possibility that the existing property rights can be held on (constructive) trust is a complicating factor, since it may lead to the conclusion that property rights are held in the interest of a beneficiary. This in itself would not mean that the *numerus clausus* principle is undermined, but it would, if it was unclear which facts would give rise to a constructive trust, and if it would be unknown to third parties. Thus Bridge: ‘Since the beneficiary obtains a proprietary interest in the subject matter of the trust, this property right is shielded from the creditors of the trustee’ (Bridge, 2002, p. 32; see also Gretton, 2000, p. 476). The discussion and development in English positive law with regard to unjust enrichment, constructive trust and proprietary restitution, and the

technique of tracing, does not seem to have cleared the view on the presence of constructive trust and thereby of beneficiaries' property rights.

While common law jurisdictions of England and the United States seem to discover and apply the principle of *numerus clausus*, civilian jurisdictions seem to test the flexibility of the principle. In legal writing, case law and legislation property rights are tried to be made more flexible, in number as well as in content. This development is seen as potentially bringing about a rapprochement between the civil and common law systems of property law (Van Erp, 2003). Both common and civil property law are, each in their own way, restrictive in the recognition of property rights and their content, but show a certain flexibility in allowing atypical property rights. Parisi underpins this balance with an economic analysis pertaining to the choice of optimal rules and the remedies to combat fragmentation (entropy) in property (Parisi, 2002).

6.2 The recognized number of property rights

The property rights which can be found may be boiled down to rights to use, sometimes rights to delivery, and the security rights to dispose, in common as well as in civil law jurisdictions. Possession is seen as a property right in common law jurisdictions and has a varying intermediary position between a fact and a (property) right in civil law jurisdictions. Civil law and common law depart from the opposite in analysing possession: while in common law possession is equated with title ('ownership'), in civil law it is not, as the owner, not the possessor, has the right to possess. Gordley and Mattei defend an approach to possession as a property right to possession, inferior to ownership, which would fit in common law as well as in civil law (Gordley and Mattei, 1996, p. 294).

From the 'most encompassing right a person can have in a thing', ownership (*dominium*), the other property rights (limited real rights to use, to delivery and to dispose) may be derived (*iura minus quam dominium* or limited real rights). The rights to use in civil law jurisdictions involve usufruct (on immovable, movable and intangible property; Baur and Stürner, 1999, ss.32, 54 and 61), and furthermore the rights in immovable or registered property of servitude (*Grunddienstbarkeit*; Baur and Stürner, 1999, s.33; *beschränkte persönliche Dienstbarkeit*, s.34; Terré and Simler, 2002, nos 865–926), sometimes the *emphyteusis* (long-lease; in France: *l'emphyteuse*; Terré and Simler, 2002, nos 928–35) and *superficies* (ownership by preventing accession; in Germany: *Erbbaurecht*, Baur and Stürner, 1999, s.29, nos 28–44; in France: Terré and Simler, 2002, nos 946–53). Apartment rights are a combination of (co-)ownership, a property right to use and a cooperation, which may take many different shapes (Baur and Stürner, 1999, s.29; Terré and Simler, 2002, pp. 463–603). The German

Reallast (Baur and Stürner, 1999, s.35) is of particular interest, since it involves an active duty.

In the civil law of property of Scotland, the lease is also considered a real right (Reid, 2000, p. 191), but in other civil law jurisdictions the lease of immovable property falls – following the text and system of the provisions – into the category of personal (contractual) rights. However, taking a look at the contents of the lease, the personal right of the lessee is often protected against subsequent owners of the immovable (Baur and Stürner, 1999, s.3, no. 47). Rights to delivery are the German Vormerkung (*ibid.*, s.20), which has been imported in the Netherlands into art. 7:3 BW, and the Dingliches Vorkaufsrecht (*ibid.*, pp. 243–6).

The rights to dispose are the typical civil law security rights of pledge and hypothec, but other specific security rights may be found, tailored by the legislator to the needs of a particular setting. Of particular interest are the non-accessory security rights like the German Grundschuld (*ibid.*, pp. 44–7). In case law, retention of title and transfers and assignation for security purposes became widely accepted.

Though English law does use the term ‘ownership’, it does not know of an action to protect it as civil law jurisdictions do (revindication), but uses tort law (on which, see also Huber, 1998). Ownership might be considered a redundant concept (Swadling, 2000, s.4.36; Goode, 2004a, p. 31). It is, however, of fundamental importance in civilian law jurisdictions. In common law, title, or right to possession, is a key concept. Furthermore, these are relative concepts, as opposed to the absolute concept of ownership and other property rights in civil law jurisdictions. As there can only be one owner at any given moment in civil law jurisdictions, there very well may be several rights to possession, and the best right will prevail (Swadling, 2000, ss.4.43–4.44; Bridge, 2002, pp. 16, 28–30).

Under the common law of England and Wales, property rights in land are centred on the concept of estate which developed out of the concept of feudal tenure. The most important rights in land are freehold estate (fee simple, fee tail – no longer to be created since 1996 – and life estate) and the covenants lease (Swadling, 2000, ss.4.83–4.141) and easement (comparable to civil law servitudes; *ibid.*, ss.4.141–152; for USA law of servitudes, see Reichman, 1982). These rights are recognized under English common law. Equity recognizes also other rights, which either do not exist at common law or only as personal rights (*ibid.*, s.4.20): restrictive covenants, options to purchase, equity of redemption, charges and licences. The last property right over land which has been recognized by equity was the restrictive covenant (*Tulk v. Moxhay* (1848), 41 ER 1143). With regard to personal property, English law does not know of the concept of estate, but bailment (leases of personality) has been suggested to be an analogous concept. It is

a right to possession for a limited time (Swadling, 2000, s.4.192; Bridge, 2002, pp. 33–43).

6.3 Typenzwang: additions of new real rights

In jurisdictions which do acknowledge the *numerus clausus*, the *Typenzwang* aspect may be more or less flexible. It is important to realize that the legislature may abolish or add new real rights to the catalogue of acknowledged real rights. This is not in conflict with the principle at all. Sometimes the other authoritative source, case law, may be allowed to create new real rights, but then the *numerus clausus* principle is less obvious. But at least the parties cannot be allowed to create new property rights at will or exceed the limitations of a recognized property right; however, all systems of property law have to be able to meet practice's needs, and need to have a certain amount of flexibility.

Also legislators can introduce constructions like a real right, a *ius ad rem*, such as the German and the Dutch *Vormerkung*. A good example is also the Dutch qualitative obligation (*kwalitatieve verplichting*; see art. 6:252 BW), with which a personal servitude (compare the German *beschränkte persönliche Dienstbarkeit*, Baur and Stürner, 1999, s.34) may be created: a servient tenement with a passive duty in favour of a person. The creation is in conformity with the rules regarding the creation of real rights in land, and requires a notarial deed which is registered in the public registers.

In civil law jurisdictions, the courts do not commonly create new real rights, but accept the primacy of the legislator. An illustrative example of the continental approach is German case law with regard to the position of the buyer under a retention of title clause. Before the buyer has met the condition, usually the full payment of the purchase price, the buyer already has a kind of property right, called an *Anwartschaftsrecht*, which is, compared to ownership (*Eigentum*), often described as a *wesensgleiches* *Minus* (Schwab and Prütting, 1999, nos 390 ff.; *Muenchener Kommentar-Quack*, nos 21–24; Baur and Stürner, 1999, s.59, nos 32 ff.; Wolf, 2005, nos 676 ff.). The buyer can transfer this right and vest (limited) property rights on it. The German Supreme Court (BGH) did not feel itself free to add this 'buyer's right' to the catalogue of German property rights, but, in effect, it did acknowledge its proprietary character (BGHZ 30, 374, 377; repeated in BGHZ 34, 122, 124). The ambivalent German position is wonderfully illustrated by the following quotation from the first mentioned case:

Das Anwartschaftsrecht . . . ist nach überwiegender Meinung kein Sachenrecht und kein gegen jedermann wirkendes dingliches Recht an fremder Sache, weil unser Rechtssystem von einem geschlossenen und beschränkten Kreis dinglicher Rechte ausgeht. . . . Dieses Anwartschaftsrecht des Vorbehaltskäufers ist aber ein sehr starkes Recht und eine Vorstufe des Volleigentums. (The Anwartschaftsrecht

is according to a majority opinion not a real right, as our legal system has a closed number of real rights (*numerus clausus*). The *Anwartschaftsrecht*, however, is a very strong right and a step towards ownership.)

Maybe, therefore, the exact status of the *Anwartschaftsrecht* is unclear and controversial in German scholarly writing (Baur and Stürner, 1999, s.3, nos 44–6).

An interesting, since less national, approach to property law is the use of conditional and temporary ownership. Dalhuisen advocates this to answer the demands of commercial logic and practice for greater flexibility in property law, thus creating a system of property law at the level of the *lex mercatoria*, at least for movable and intangible property (Dalhuisen, 2001).

6.4 *Typenfixierung: flexibility in content of real rights?*

The content of ownership and other property rights are narrowly related. Ownership is a term, in common law as well as in civil law, which is used to describe ‘the right which gives its holder the highest degree of access and control’ (Swadling, 2000, s.4.36). But while it is one of the most important legal concepts in civil systems, it is as such redundant in common law: ‘there is no special claim available to an “owner” in the common law. This means that the legal system has never found the need to identify the individual as an “owner”’ *ibid.*, s.4.37). It is an elusive concept (Goode, 2004a, p. 31). The absolute character of ownership in civil law jurisdictions – at least in theory – is not as such known in common law. It is a relative concept: ‘the owner of a chattel may be described as the person with the best possessory interest in it’ (Bridge, 2002).

Where ownership as a term of art may be absent in common law, in civil law characterizations of ownership can be given relatively easy. Ownership in civil systems is a unitary right, which means that there is only one kind of ownership; this right of ownership is not to be divided: there can only be one right of ownership at any given moment; it is the most encompassing right which a person can have in a thing, with an absolute (*erga omnes*) effect; it is furthermore unlimited in time; it can – just as other property rights – only apply to specific, individualized goods; though, of course, it is possible to limit ownership by way of a (personal!) obligation, in the civil law of property, ownership cannot be limited otherwise than by creating a limited real right. It must be realized that this principled approach leaves room for a lot of exceptions. On the indivisibility of ownership, the fiduciary transfer of ownership leads to relativity of ownership (Baur and Stürner, 1999, s.3, no. 34); the consensual transfer of ownership in French law between transferor and transferee without having third party effect (Terré and Simler, 2002, nos 405–9); on the absolute effect, the

protection of third party acquirers in good faith (Baur and Stürner, 1999, s.52, nos 8–10).

However, as all these characteristics are broad and general concerning the form of ownership, it is far more difficult to get a more detailed grasp on the contents of ownership. Only in very general terms are its contents usually described: for example, *ius utendi et abutendi*; the right to use, to revendicate and to dispose. The restrictions are manifold, however, but have to be found in specific legislation with regard to the use of land (neighbour law; zoning issues; environmental law etc.).

This is quite different from the specific (limited) property rights which have been depicted in much more detail, and either in legislation and/or case law these rights and duties make up the content of these (limited) real rights; often these rights and duties have taken shape consensually, by the grantor of the real right and its grantee. Dogmatically, in civil systems these other property rights are derived from ownership (*iura minus quam dominium*) and thereby the limited real right cannot by definition encompass rights and duties which the owner did not have. Furthermore, as the holder of limited real rights is entitled to encompass this limited real right with subsequent real rights, these subsequent rights cannot by definition encompass rights and duties which this holder did not have himself. And, what is more, ownership as such does not require the owner to act, and therefore (i.e., in civil dogmatics) neither are the holders of a limited real right. South Africa uses the ‘subtraction from dominium test’ to identify and accept new property rights (de Waal, 2004; van der Merwe, 2004).

It is interesting to see that this last line of reasoning may be seen in common law cases with regard to the restrictive covenant: property rights have been shaped, by denying that active duties form a part thereof: ‘enforcement of a positive covenant lies in contract; a positive covenant compels an owner to exercise his rights. Enforcement of a negative covenant lies in property; a negative covenant deprives the owner of a right over property’ (*Rhone and another v. Stephens* [1994] 2 All ER 65 at 67j; see Reid, 2004, p. 32). While enforcement of a positive covenant is therefore dependent upon whether it was contracted upon, and cannot form a part of a property right, the stance seems to be slightly different under a lease (Swadling, 2000, s.4.125), where a positive covenant – which is also considered a property right – can be effectuated.

Civil law jurisdictions do not often allow an active duty to be part of a property right; if they do, they are in general very restrictive. In Dutch law active duties are sometimes allowed which support the exercise of real right. For Belgian and French law, Sagaert confirmed a restrictive treatment in allowing active duties (Sagaert, 2004, p. 70; see also, for USA and Israeli law, Rudden, 1987).

However, there are clear exceptions to this restrictive approach. Scotland knows the real burden (Reid, 2004). In German law, but also in the former Dutch law, there is the Reallast, which by nature is an active duty (s.1105 BGB); the Reallast is a relic from medieval, feudal, German law (Joost, 1985, ad s.1105 BGB). It survived in the BGB, as it was seen as still serving valuable societal purposes, and it is interesting to see that, while there was considerable disagreement about the obligational or proprietary nature of the Reallast before the BGB, it has been conceived as a property right in s.1105. It is still debated, however, whether the active duties, the Leistungsansprüche, are of a proprietary nature. The majority are of the opinion that these active duties are not proprietary, as the owner of a burdened land can never be forced to comply with the active duty. In the case where the owner of the burdened land does not perform, the holder of the Reallast can then at most sell the land and receive monetary compensation (Baur and Stürner, 1999, s.35).

The interconnectedness of *typenzwang* and *typenfixierung* is striking in the following example. Not included in the catalogues of Dutch and German real rights was a non-possessory security right in movables. Practice found a way to circumvent this obstacle for finance possibilities by transferring ownership for security reasons (*fiducia cum creditore*) combined with a delivery by way of *constitutum possessorium*. The German and Dutch courts allowed this fiduciary transfer, but restricted the owner's position. He was not treated as any other owner, but more similar to a pledgee. In Germany, this was considered to be a (new) proprietary security right *praeter legem* (*typenzwang*) It thus seems to be a real right not included in the catalogue, but having been added by case law. Under Dutch doctrinal writing, it seems (on the other hand) to be a reshaping of the content of ownership, comparable to the privileges of a holder of a security right (*typenfixierung*). It illustrates the interconnected nature of both aspects of *numerus clausus*.

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54 Public law*

Jacques Ziller

1 Comparative public law, a new discipline?

For years, a large number of legal comparatists seem to have accepted as true what Henry Puget remarked in 1949: 'jusqu'à présent, le droit comparé a été orienté principalement du côté du droit privé' (Symposium, 1949). This seems a strange remark if one admits that the first author to develop comparatism in social sciences was Aristotle and that he did this by comparing constitutions. More recently, Montesquieu's 'De l'esprit des Loix', which is at the basis of one of the most commonly acknowledged concepts of constitutional law, i.e., the theory of a tripartite separation of power – legislative, executive and judiciary – is certainly a major work of comparative constitutional law. Furthermore, in most countries (with the exception maybe of the United States of America) handbooks of constitutional law contain a general conceptual part which is based on a comparison of different countries' institutional settings and constitutional law, whereas general introductions to civil law are usually strictly focused on a national system, or contain at best some references to Roman law. Furthermore, comparative law has been a methodological component of international public law which plays a particularly important role in the reasoning of international courts, especially the Permanent Court of International Justice between the two world wars, and its successor the International Court of Justice. Most of the fields where comparative law is being applied resort to constitutional law or administrative law, more rarely to criminal law, in those countries where they are being studied by counsels in ICJ cases and taken up by judgments and opinions of the Hague Court.

The reason why comparative law is still often considered as a matter for private law is probably linked to the history of modern comparative law, which has been very much dominated by the Paris Congress of comparative law of 1901. As a consequence of this encounter, which seems to have been dominated by lawyers who were in search of some kind of a *jus commune* in the fields of private law, chairs of comparative law have started to be set up on the initiative of specialists of civil law (in the sense of 'droit civil', not as opposed to common law) or at least general courses in either comparative law or foreign legal systems. Most general handbooks of comparative

* See also: Administrative law; Constitutional law; Legal translation; Legal transplants.

law or foreign legal systems are still the work of specialists of comparative civil law and, apart from methodological considerations and developments about legal families, they most often focus on institutions in civil law (torts, contracts, etc.), commercial law (trade contracts, corporations) or even labour law, but more rarely on matters of public law. The number of general books in comparative constitutionalism has been increasing recently, thanks to the increase in the number of states after decolonization and after the fall of the Berlin Wall.

Comparative constitutional law is nowadays an established discipline, with a number of comparative constitutional legal researches and studies that have been published, with some handbooks, of which several are portraying it as an independent scientific subject. As for comparative administrative law, the discipline as such is less advanced, although – or maybe because – comparative government and comparative public administration are on the contrary well established disciplines, with even an International Institute of Administrative Sciences based in Brussels, which has long been dominated by academics and practitioners in the field of administrative law. Two reasons may explain the lesser development of comparative administrative law as opposed to comparative public law: its higher degree of technical complexity due to a much greater amount of regulation and case law to be studied than in constitutional law, and the huge differences in the boundaries of the object called ‘administrative law’, from one country to another. In Europe, however, comparative administrative law is rapidly developing as an indispensable instrument for the development of the specific discipline of European administrative law.

2 The contribution of comparative public law to the issues of legal families, legal transplants and legal cultures

Whereas comparatists focusing on private law continue to use the civil law/common law divide as a major taxonomy for legal families, even though the number of writings challenging its relevance is increasing, introducing comparative public law, and especially constitutional law, has the advantage of underlining the lack of relevance of this distinction to any attempt of general classification of legal families. The simple fact that Britain does not have a written constitution whereas the United States has been the forerunner of a constitutionalism rooted in an almost holy text, and developed through judicial review, impedes putting the two main countries of the common law tradition in the same family. Furthermore, one of the countries is considered as the paradigm of parliamentary systems and one of the paradigms of unitary nation states – until 1998, with devolution for Scotland – whereas the other is the paradigm of congressional or presidential systems and of federalism.

More importantly, in my view, in the field of administrative law France shows some of the major features which are usually attributed to common law: a judge-made law developed on the basis of precedents without any attempt at general systematization. France and the United Kingdom are therefore much easier to put in the same category as France and Germany or Italy. Furthermore, France and the UK are countries which have very much resisted a general codification of administrative procedure, as against the United States who adopted the Administrative Procedure Act in 1946 and Germany who adopted federal and Länder legislations on administrative procedure 30 years later. In fact the German or Italian administrative law are very much under the influence of a traditionally strong tendency to systematize administrative procedure (*Verwaltungsverfahren*, *procedimento amministrativo*), whereas the French or British administrative law remains mainly a law of judicial review of decisions of public administration.

3 The shifting boundaries between public law and private law and between different component branches of public law from one legal system to another

The opposition between, on the one hand, a public law ruling relationships between those governing and the governed – and between those governing – and a private law on the other, ruling the relationships between individuals, is known to all modern legal systems, but the areas of public law and private law differ from one system to another. They are determined not only by a conceptual definition but to a very great extent also by factors dependent on the organization and functioning of the legal professions, the organization of remedies and often even of the courts in different specialist branches, with their very variable criteria of competence. In countries such as the United Kingdom and the United States or Denmark, and in most former British colonies, which have only ever had one single system of courts, procedures differ according to whether they concern disputes between individuals or disputes with the public authorities. In Britain, judicial review (the remedies for legal control of public authorities by courts) applies specifically to ‘public law’ disputes, which leads naturally on to a discussion about what is public law and what is private law. In the United States, however, the system of remedies is somewhat different from Britain’s, owing to different reforms of procedural regulations in the second half of the 20th century. In many European countries, such as France, Germany, Belgium, Italy, Poland, Portugal and Sweden, as well as most Latin American countries and some Asian countries as well, such as Thailand, specialist jurisdictions (administrative courts, *tribunaux administratifs*) have jurisdiction to hear disputes between the administrative authorities and individuals. In yet other countries, while there is formally only one jurisdictional system,

an internal specialization (of judges or chambers) has the same results as in Spain, or the Netherlands, once the reform of the judicial system, which was undertaken in 1992, has been achieved. Criteria are developed to determine which jurisdictions are competent, very often by the courts themselves as and when difficult cases arise, and these criteria are then taken up in academic doctrine or by the legislature, and ultimately determine the areas of public law and private law, respectively. These criteria differ from one country to another, with the result that the areas of public and private law vary with the crossing of borders.

The same variations as to criteria have a consequence for the legal instruments seen as forming part of one branch or another of law. Whatever the country, public authorities enter into contracts with individuals (even if only to acquire certain resources necessary for the functioning of the administration) and must compensate damages that may result from their activities (or inactivity). Differences between the criteria for the competence of jurisdictions and procedures have the result that contracts with the administration and the liability of public authorities are at the heart of administrative law in France whereas, in many European countries, such as Germany, Belgium, Greece or Italy, such contracts and actions giving rise to liability arise in principle under civil law. The result is that, in certain countries, the traditional instruments of public law are in fact merely normative acts and unilateral decisions, whereas in others they also include contract, liability and, indeed, property law.

4 Comparing national legal systems with supranational and international legal systems

A branch of comparative public law which is only starting to develop is that of the comparison between national legal systems on one side, and supranational or international legal systems on the other. This happens most in two fields. Studies of the institutional setting, distribution of powers, the legal instruments and judicial review in the European Union very often are based upon comparisons with the Federal Republic of Germany and also with the United States of America. Unhappily enough, many of those studies miss an important element, the functional nature of European Community competences, which are corollary to its non-state nature. The second field for this type of comparison is the field of human rights. Here again some studies are based on an erroneous bias, i.e., those which compare the system of the European Convention of Human Rights, and especially the jurisprudence of the Strasbourg Court, with the US federal law (and especially the case law of the US Supreme Court) without taking into consideration either the existence of relevant law at state level in both systems, or the differences in procedure, especially the principle of exhaustion of

local remedies under the ECHR. What is far more interesting and rich is the comparative study of the regional-level law – ECHR or Organization of American States – with national law in the same region. In those two fields, amongst others, comparative public law demonstrates both a dynamism and a capacity of affecting *de lege ferenda* which might be envied by many private comparative law studies.

One field of study which needs to be further developed is that of the instruments of international public law and national public law. The treaty, international normative instrument *par excellence*, is by nature a contractual instrument; this is indeed underlined by the use of the same word (*Vertrag*) in German to designate both treaty and contract. The use of contract for normative purposes exists in national settings, especially in the framework of standard setting, but is being neglected by studies in comparative public law, while attracting the attention of private lawyers (see Cafaggi, 2004). Custom still plays an essential role as source and instrument of international law, while it has disappeared almost entirely from most national public law systems; conversely, jurisprudence, especially that of the International Court of Justice at The Hague, retains a limited role, whereas it plays a fundamental role in most national administrative law systems. Confidence-building measures, and reprisals, remain essential instruments of international public law while national public law is based on unilateral enforcement, which is not always as effective as theory indicates.

5 Is there a specificity of comparative methodology in public law, and is it possible to find a ‘common core’ of public law principles?

According to some authors, comparative public law is in need of more contextualization than comparative private law. This might be true for those fields of private law which are mainly linked to the functioning of modern markets, but certainly not for fields like family law, which is considered as part of private law in many countries. What might also be true is that the type of contextualization needed for comparative public law is requiring a far broader knowledge of history, society and economy than comparative private law. One of the arguments sometimes used in order to demonstrate the difference between comparative private law and comparative public law has long been that only the first can lead to the approximation of laws or even uniform legislation. The entire development of secondary European Community law is demonstrating how wrong this assumption can be. The recent debates around European private law might indicate that it is the other way round, and that approximation of laws is easier in the fields of public law than those of private law, but no convincing argument has been produced in order to support these ideas either.

One of the recent applications of functionalist methodology has been the 'common core' project on European civil law. Public law, such as Human Rights law, is the field 'par excellence' where a common core of European law is easy to detect, but it has not attracted the same efforts of conceptualization by comparative lawyers. This brings us back to the continuing imbalance between comparative studies in public law and in private law.

6 Language issues in comparative public law

Language issues are inherent to comparative law, and sometimes underestimated. A look at comparative public law studies gives the impression that they are indeed very much underestimated.

A lot of the literature in comparative public law – especially in constitutional law – is based upon available translations of constitutional texts. This has a number of worrying consequences, as translations are not always up-to-date, even though this issue is far less important since the development of official governmental Internet sites; translations are very often proposed in an English language which is being written either by non-native speakers or by translators who have very little experience in legal translation. What is worse from the methodological point of view is that the availability of constitutional texts in foreign languages – and sometimes of the most important decisions of constitutional courts – enables scholars to engage in comparative research without being aware that the lack of language knowledge will limit them to the top of the iceberg as far as legislation and case law are concerned. This leads to an increased formalism in legal analysis and – to put it bluntly – to very superficial analysis.

Furthermore, comparative public law is very often based upon non-legal literature, especially political science literature. This is usually the case for smaller countries and especially countries whose language is a minority language – like Nordic countries in Europe. Whereas legal scholars are usually educated in assessing the importance of legal formulations, this is not the case of political scientists or sociologists.

Finally, within the same language, there is often more diversity of signification of the same words in public law than is the case in private law. For instance, the French word 'décret' is applied to a normative act issued by government in France, whereas in Belgium the word is being used for regional legislation; Belgian public enterprises are being called 'parastataux' a word that is never used in France; etc.

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55 Remedies for breach of contract*

Marco Torsello

1 Introduction

According to the basic rule of contract law, common to all western legal systems, *pacta sunt servanda*; accordingly, even in purely consensual contracts, the reciprocal promises and rules agreed upon by the parties are to be treated as legally binding rules governing the relationship between those parties (Watson, 2001, p. 40). In fact, in the simplest legal system one could theoretically think of, that basic principle could be regarded as the only necessary substantive mandatory rule, any other contractual settings being left to the freedom of contract of the parties. Even in such an oversimplified contract law system, however, the question would still need to be addressed as to what consequences derive from the breach of that fundamental rule; i.e., what legal tools are made available to the aggrieved party to react to (or possibly to prevent and avoid) the detrimental consequences stemming from the default of the breaching party in a contractual relationship. The remedial system in contract law, therefore, may be regarded as the bundle of legal tools available to the aggrieved party to react against the non-compliance by the other party with its contractual obligations, thus making the aggrieved party's contractual rights enforceable (Friedmann, 2005, p. 10). Any legal system which aims at governing contracts cannot overlook the need for remedies, although the comparison of different legal systems shows that the tools made available to the aggrieved party may differ in various respects. Indeed, the very concept of legally binding obligations ultimately lies in that there is a public authority endowed with the power to enforce the obligations that the parties to a contract undertake with each other (Sherwin, 1993, p. 90).

At first sight, all major legal systems adopt a similar approach to remedies in contract law, in that they all make a distinction between three different types of tools made available to the aggrieved party in the event of a breach. First, given certain circumstances, the aggrieved party may bring the contract to an end, thus legitimately refusing to accept further performance and at the same time freeing himself from the duty to perform his contractual obligations (and, where appropriate, enabling himself to claim back any performance that he has already rendered). Secondly, and

* See also: Mistake; Supervening events.

alternatively, the aggrieved party may claim performance in kind and for that purpose he may rely on proceedings possibly requiring the use of public authority to enforce his right to obtain the performance contractually agreed upon. Finally, the aggrieved party, either in conjunction with, or as an alternative to, one of the previous solutions, may claim substitutive relief, which in the great majority of cases takes the form of monetary relief. These three different remedial schemes will be referred to with the terminology most frequently adopted in the comparative literature, although the language used in domestic legal writings may at times not reflect the language which will be adopted here. Hence the three different remedial schemes will be referred to respectively as termination of contract, claim for specific performance and monetary relief.

Although the aforementioned threefold division of courses of action exists in all legal systems considered here, 'the exact conditions in which each remedy is available, and the precise effects of the remedy when granted, differ considerably in legal theory, and often in actual practice' (Treitel, 1976, p. 3), and this makes the study of similarities and differences found in the different legal systems of particular interest and significance (Gambaro and Sacco, 2003, p. 3). As a consequence of the difference of remedial schemes, the possibility of obtaining recognition and enforcement of a remedy in a legal system different from the one where the right to that remedy has been judicially affirmed may at times prove rather problematic. The issue of remedies in contract law has thus been treated as a significantly relevant issue whenever attempts have been made towards the international unification of contract law. This observation at the same time requires and justifies the attention which will be paid to some of the most relevant instruments of international uniform contract law, such as the United Nations Convention on Contracts for the International Sale of Goods (hereinafter: CISG), the UNIDROIT Principles of International Commercial Contracts (hereinafter: PICC) and the Principles of European Contract Law (hereinafter: PECL).

Moreover, as for the justification of the attempts at unifying the law of remedies in contract law, one has to consider that substantive rights in order to exist 'must coexist with their remedies' (Morineau, 1959, p. 267). Default contract rules serve the purpose of supplementing the parties' contractual arrangements whenever the cost of negotiating tailored rules is too high. Hence, given the widely accepted justification for unifying the default rules applicable to international contracts (i.e., to limit the need to resort to a domestic law which is foreign to at least one of the parties) (Ferrari, 2004, p. 55), it would not make sense to limit the scope of the suppletive uniform rules only to the rights and obligations stemming from an international contract. In fact, such a solution would leave the contractual parties with

the alternative, as regards remedies, either to fall back on the domestic default rules to be determined by resort to private international law, or to make their own contractual arrangements as to the consequences of a breach, thus bearing the costs of that additional negotiation (Torsello, 2005, p. 48). The former alternative (falling back on domestic rules) would seem to betray the very purpose of the unification of default rules for international contracts, which aim at limiting the need to resort to domestic law in order to reduce the costs and uncertainties determined by both the resort to private international law (David, 1969, p. 212) and the application of domestic rules which are likely to be entirely foreign to at least one of the parties to the contract. The latter alternative (making private contractual arrangements on remedies) would seem to increase unreasonably the transaction costs in most cases, in particular in the light of the fact that the rules on remedies apply only in the event that something goes wrong, whereas they do not have a role to play in most contractual relationships where the parties satisfactorily comply with their obligations (Torsello, 2004, p. 272).

2 Termination of contract and restitution

One of the central issues to be dealt with as regards the performance of contractual obligations refers to the standards that parties have to comply with in order to perform satisfactorily the obligations stemming from the contract that they are bound to (Gillette and Walt, 2002, p. 189). The issue may be addressed either in positive terms, thus analysing what the debtor is required to do in order to be discharged from his obligations, or in negative terms, by way of focusing on what degree of lack of performance triggers negative legal consequences for the non-performing party. The former profile is commonly referred to as 'performance' of the contractual obligations, while the latter may be addressed with different terminology, although referring to the same phenomenon: 'non-performance', 'breach of contract', 'default'.

The basic dichotomy as to the performance of contractual obligations may be described as the alternative between requiring 'perfect tender' and seeking 'substantial performance'. The traditional rule, common to most domestic legal systems, imposes on the debtor perfectly to fulfil all of his contractual obligations in order to be discharged (Zweigert and Kötz, 1992, p. 504); whenever an inconsistency, even a very minor one, occurs between the terms of the promise and the concrete performance of the obligation, the performance is not deemed satisfactory and the debtor is not deemed discharged from his obligation to perform perfectly and fully. This traditional solution, however, has been criticized because it enhances strategic behaviour and moral hazard on the part of the creditor, who may opportunistically take advantage of the possibility to reject any tender which is

less than perfect, in order to refuse a substantially correct performance, whenever he seeks to free himself from his obligations promised in consideration of the debtor's full performance. Alternatively, therefore, the debtor's performance may be evaluated according to a 'substantial performance' standard. While this alternative solution reduces the possibility of strategic behaviour on the part of the creditor, it enhances that of strategic behaviour on the part of the debtor, who may opportunistically perform his obligation in a way that, although substantially fulfilling the required standard, ranges below the average standard performance (Gillette and Walt, 2002, p. 212). Rules on termination of the contract thus reflect the balance between two coexisting functions: to protect the aggrieved party, and to put pressure on the defaulting party (Beale, 1998, pp. 349–50). Moreover, rules on termination also reflect the value, which is of particular importance in transnational transactions, placed on the completion of the contractual bargain, according to a *favor contractus* principle (Torsello, 2005, p. 55).

The foregoing suggests that the first profile to be considered in order to assess how different legal systems deal with the issue at hand is that of the degree of seriousness of a breach required in order to allow the aggrieved party to bring the contract to an end (Treitel, 1976, p. 126). In fact, although in most legal systems the remedy of termination is available both when the performance on the part of the debtor has become impossible and when the debtor fails to perform for subjective reasons, it is the latter situation which proves more revealing, as it imposes a choice between competing interests. In this regard, it is worth noticing that, in order to grant the right to terminate the contract, most civil law legal systems (such as the French, Italian and Dutch legal systems) require the breach to be of a certain level of seriousness, although in most cases the precise meaning of that requirement is not explained in codified rules, and its application is left to the 'pouvoir souverain' of the judges (Beale, 1998, p. 352). As far as German law is concerned, the original text of the BGB 'did not contain a general statutory right of termination but used to provide a highly fragmented regime' (Zimmermann, 2002, p. 35). However, the reform of the law of obligations ('Gesetz zur Modernisierung des Schuldrechts' of 26 November 2001) has brought about some significant innovations in this respect, and at present, in line with most national and international legal regimes dealing with this issue (Heldrich and Rehm, 2005, p. 128), German law provides for a general remedy of termination of contract if the non-performance proves significantly detrimental for the creditor (Coester-Waltjen, 2005, p. 140).

In particular, when the non-performing party fails to perform an ancillary obligation, the creditor may directly terminate the contract under s. 324 BGB, provided that the creditor may no longer be reasonably expected to accept performance; conversely, in most other cases of non-performance

(with the exceptions listed in s. 323, II, BGB), in order to ensure that termination be based on serious (not merely opportunistic) grounds, s. 323, I, BGB requires 'Nachfrist', i.e. the fixing of an additional time of reasonable length to be granted to the debtor; failing performance after the additional time, the mechanism leads to a situation which has been pointed out as 'a form of fundamental breach' (Zimmermann, 2002, p. 44, n.228). Furthermore, in cases of breach of contract other than impossibility, the mechanics of termination may differ considerably. In French law (Art. 1184 C.C.) and Italian law (Art. 1456 C.C.) termination can only be ordered by a court (thus suggesting that these legal systems disfavour termination) (Laithier, 2005, p. 116), although in both systems various exceptions apply, the main one being the existence in the contract of a 'clause de résolution en plein droit' (Gallo, 2003, p. 111). Dutch law requires either 'a judgment or a written declaration of termination by the aggrieved party' (Art. 6:267 BW) (Beale, 1998, p. 352). Conversely, under German law, an order by a court is never required (nor was it before the Schuldrechts reform), and termination is effected by a declaration made by the aggrieved party (s. 349 BGB). In line with the mechanics of termination, there stands a significant difference as regards the possibility to terminate the contract before the date for performance. In French (Whittaker, 1996, p. 662) and Italian law (Conte, 1998, pp. 485–6), as a general rule, the contract may not be terminated before the date for performance has passed. German law takes a different approach, which was developed in case law and legal doctrine and has now been codified in the new text of s. 323, II, n.1, BGB; accordingly, the creditor may terminate the contract where the debtor has seriously and definitely refused to perform (Zimmermann, 2002, p. 45).

The traditional common law approach towards termination of contract is rather peculiar. Instead of requiring the breach to reach a minimum level of seriousness, the classical English law approach was based on the distinction between warranties and conditions. The latter ones, which go to the root of the contract, denote essential terms whose non-performance gives the aggrieved party the right 'to refuse to perform his own obligations' (Zweigert and Kötz, 1992, p. 541), thus bringing the contract to an end without 'prior formal notice in the nature of a Nachfrist' (Treitel, 1976, p. 119). Likewise, where it becomes clear that the debtor will fail to perform a condition, the creditor is granted a general right of anticipatory repudiation as a consequence of the breach of a constructive condition of exchange, applicable both in the event of a breach and in that of a justified non-performance (Farnsworth, 2004, p. 540). However, the traditional dichotomy between warranties and conditions has proved in many instances to be too rigid. English courts, as well as American ones, have therefore increasingly adopted a different approach, aimed at determining whether

the creditor has been deprived of what he had contracted for (Beale, 1998, pp. 352–3). This approach, which clearly favours a substantial performance standard over the perfect tender rule, imposes looking primarily at the extent to which the aggrieved party has received the benefit that he expected from the contract (Gergen, 2005, p. 77). The perfect tender rule, however, has remained unchallenged with respect to most commercial contracts and in particular with regard to contracts for the sale of goods. Significantly, the rule has been adopted under Art. 2-601 of the UCC, although a number of exceptions to the rule apply and the debtor is granted a general right to cure the breach after rejection of the goods (Schneider, 1989, p. 76).

The foregoing dichotomy is reflected in the text of the CISG, which, not unlike Dutch law and the Scandinavian legal systems (Lando, 1998, p. 341), impliedly differentiates, in positive terms, between ‘perfect tender’ and ‘substantial performance’, in that it distinguishes, in negative terms, between consequences deriving from a ‘mere breach’ of contract, and remedies available only in the event of a ‘fundamental breach’. The distinction is of utmost relevance as it precludes the different remedies accessible by the aggrieved party. Only a fundamental breach, indeed, entitles the aggrieved party to terminate the contract, although termination may also be the result of a ‘Nachfrist’ mechanism in the event of absolute non-performance (Torsello, 2005, p. 53). An identical approach, making termination of contract possible in the event of a ‘fundamental’ non-performance, is found also in the PICC (Art. 7.3.1) and in the PECL (Art. 9:301). Moreover, all three sets of supranational rules allow for the termination to be effective, based on the sole notice given by the aggrieved party, without the need for a court’s declaration to that effect (Art. 7.3.2. PICC and Art. 9:303 PECL), and all provide for the right to anticipatory repudiation (Art. 7.3.3. PICC and Art. 9:304 PECL).

The immediate consequences of termination of contract may be regarded from two different perspectives. On the one hand, in all legal systems termination operates prospectively, i.e., it liberates the parties from their obligations of future performance (Treitel, 1976, p. 141). This same rule also applies under Art. 81(1) CISG, Art. 7.3.5(1) PICC and Art. 9:305(1) PECL. On the other hand, termination may also operate retrospectively, thus placing the parties back into the situation in which they would have been had the contract never been concluded, possibly imposing on the parties the duty to return what they have already received on the basis of the contractual agreement. The retrospective operation of termination, however, requires further analysis and some distinctions between different legal systems. In German law, after termination, both parties have a duty to return to each other what they have received under the contract (Zimmermann, 2002, p. 40). Whenever possible, restitution should be made

in kind; however, if restitution in kind is not possible, what is to be returned is an allowance in money for the value received. German law creates only a personal duty of restoration and has no proprietary effects (Treitel, 1976, p. 141). Conversely, in French law, the retrospective operation of termination has proprietary effects, which favour restitution in kind also in situations where the rights conferred under the terminated contract had been transferred to a third party. Notwithstanding this difference, all civil law legal systems follow the same approach leading to a distinction between isolated contracts to be performed instantaneously and long-term and instalment contracts. Indeed, with regard to the latter types of contracts, termination, as a general rule, has no retroactive effects (in French law this distinction is reflected in the language used, which differentiates between 'résolution' and 'résiliation'). The general idea that termination is not retroactive has been adopted and expressed in very clear language under Art. 9:305 PECL (Olsen, 1999, p. 32), according to which termination, 'subject to Articles 9:306 to 9:308, does not affect the rights and liabilities that have accrued up to the time of termination'. The same principle applies under Art. 7.3.6 PICC.

Common law legal systems take a more differentiated approach as regards the retroactive effects of termination. As a general rule, under English law termination of the contract 'does not involve an undoing of what has already been performed under the contract' (Atiyah, 1995, p. 410). This does not prevent restitution being necessary or appropriate in all cases in which what has been conferred cannot be regarded as an independent performance in a contract divisible into corresponding pairs of part performances. The point is that what justifies termination is the breach of the constructive condition of exchange, i.e. the lack of an exchange performance which qualifies as consideration. As a consequence, each party may entirely recover what he conferred under the contract (or its value in money) in the event of a total failure of consideration, i.e., 'if he has not received any part of what he bargained for' (Treitel, 1976, p. 142): the party in breach, for instance, may recover money paid if he received nothing in exchange (Beale, 1998, p. 356). If that is not the case, however, the party in breach claiming restitution can succeed only upon restoration of the very performance bargained for under the contract: under English law, if restoration is not possible, the aggrieved party cannot claim back an advance payment. In the course of time the situation has progressively changed under US law (The Reporter's Note to Restatement Second s. 374 states that it 'is more liberal in allowing recovery' than first Restatement s. 357) and the principle has emerged (although limited to service contracts) that, if a party derives 'a benefit and advantage, over and above the damage which has resulted from the breach of the contract by the other party . . . the law thereupon

raises a promise to pay to the extent of the reasonable worth of such excess' (*Britton v. Turner*, Supreme Court of New Hampshire, 1834; 6 N.H. 481).

3 Claims for specific performance

The analysis of the remedy of termination made it clear that, in the event that one party to a contractual bargain substantially fails to perform his obligation, the aggrieved party does not have to confer his counter-performance and can bring the contract to an end. Under some circumstances, however, the innocent party may be veritably dependent on the exact performance of the contract. The question then arises as to whether, and under what circumstances, a legal system should enforce the contractual obligation and provide for a mechanism aimed at ensuring that the aggrieved party obtains the promised performance in kind.

The availability of specific performance has traditionally been dealt with as one of the most critical issues in comparative contract law, and one with respect to which civil law legal systems and common law legal systems are separated by an 'abyss' (Rabel, 1938, p. 559), the former ones being 'semi-active' (they do not take the same far-reaching, thus 'activist', approach of socialist legal systems), as opposed to the common legal systems, which have been defined as 'reactive states' (Bejesky, 2003, p. 354). Indeed, unlike the case in Roman law (Dawson, 1959, p. 496), in modern civil law legal systems a contractual obligation entitles the promisee to claim performance in kind from the promisor (Schlesinger, Baade, Herzog and Wise, 1998, p. 738). Not unlike the case in Swiss law (Szladits, 1955, p. 228), this clearly remains (notwithstanding the recent reform) the general starting point in German law, as the new s. 241, I, BGB provides that the effect of a contractual obligation is 'that the creditor is entitled to claim performance from the debtor'. Relevant exceptions, however, limit the scope of application of the general rule. First, according to the principle 'ad impossibilia nemo tenetur', specific performance cannot be claimed in the event that the debtor's obligation has become impossible (s. 275, I, BGB). This exception applies to all types of impossibility (Zimmermann, 2002, p. 10), thus not only to objective, excusing impossibility, but also to subjective impossibility, which does not exclude the debtor's liability. Moreover, the new text of the BGB also makes it clear that the debtor may refuse to perform insofar as such performance would require an effort which would be grossly disproportionate to the interest of the creditor in receiving performance (s. 275, II, BGB), as well as in cases where the debtor has to perform in person, but it would be unreasonable to expect him to perform in view of the changed circumstances (s. 275, III, BGB).

Of course, in all cases in which the non-performing debtor is not excused on the basis of an objective impossibility, the exceptions to the creditor's

right to require performance in kind do not interfere with his right to claim alternative remedies, such as damages and/or termination, provided that the requirements for these remedies are met (Heldrich and Rehm, 2005, p. 131). Notwithstanding the aforementioned exceptions, German law continues to favour specific performance, which remains the primary remedy, and under s. 285 BGB even 'sets incentives for performance insofar as the creditor can claim the substitute which the debtor would receive through the act making his performance impossible' (Coester-Waltjen, 2005, p. 138). Specific performance is the common remedy also under Dutch and Danish law, whereas Italian and Spanish law take a slightly different approach, in that in these legal systems the creditor is given more of a choice between specific performance and termination and damages (Art. 1453 Italian C.C.; Art. 1124 Spanish C.C.). Also in French law specific enforcement of contracts ('exécution directe') 'is a generally accepted institution and is contrasted to enforcement by way of damages (exécution par équivalent)' (Szladits, 1955, p. 214). Under Art. 1184 of the Code civil the creditor in a bilateral contract is entitled, as an alternative to termination and damages, 'to require the other party to perform the agreement in so far as that is still possible'. This approach seems very similar to the one adopted under German law. However, a sharp distinction derives from the rule set forth in Art. 1142 of the code, according to which the duty to do or not to do something ('toute obligation de faire ou de ne pas faire') gives rise, in the event of non-performance, to liability in damages (Zweigert and Kötz, 1992, p. 510).

Hence, unlike the German BGB (as well as other civil law legal systems, like the Italian C.C. under Arts 2930–2933), which provides for specific performance of all types of obligations (the Code of Civil Procedure regulates the mechanisms adopted by courts' officials to perform the various types of obligations in lieu of the debtor), the French Civil Code seems to limit the general availability of specific performance only to the obligations to give something ('obligation de donner'). The language of the code, however, 'has not prevented the French and other civilian courts from adhering to the same principle' (Schlesinger, Baade, Herzog and Wise, 1998, p. 739). Specific performance of obligations to do or not to do something is in fact limited to exceptional cases in all civil law legal systems. This, however, is not the consequence of a special codified rule dealing with that type of obligations, but rather the consequence of the application of the common general principle that specific performance cannot be granted when enforcement in kind is impossible (Szladits, 1955, p. 216). Instead, what still differentiates the French legal system is the distinctive legal technique developed by French courts to coerce a judgment for specific performance, that is the technique called 'astreinte' (Zweigert and Kötz, 1992, p. 511). An

astreinte is a 'judgment for performance coupled with a condemnation by which the debtor has to pay a fixed sum for each day (or other named period) that he remains in default' (Treitel, 1976, p. 15).

The starting point in common law legal systems is the opposite of that described in civil law jurisdictions. In English law the plaintiff (creditor) does not have a free choice between claiming specific performance or compensation in damages (Burrows, 1997, p. 157). Although the early history of the Court of Chancery 'shows that generally, where contractual promises remained to be performed, an order for specific relief would lie: *pacta sunt servanda*' (Berryman, 1985, p. 297), the modern approach of English common law has reached opposite results. Accordingly, as a general principle, the aggrieved party cannot compel the actual performance of the contract by the defaulting party, but can only bring a secondary claim for compensation in damages (Atiyah, 1995, p. 424). However, the traditional existence of equity as a distinct body of law has led to much flexibility in the remedial system (Szladits, 1955, p. 209), and the availability in equity of a judgment for specific performance has not entirely disappeared (Zweigert and Kötz, 1992, p. 515). For, under exceptional circumstances, an English court may grant a decree of specific performance (when the defendant breached an obligation to do something), or an injunction (when the defendant breached an obligation not to do something or to forbear), whose execution is compelled primarily by means of the threat of imprisonment for contempt of court (Atiyah, 1995, p. 424). The most important and oldest group of contracts for which a judgment for specific performance is normally granted are contracts for the sale of land, but in the course of time the remedy at hand has been extended to other types of contracts, whenever the award of damages is 'inadequate'. As a result, the granting of specific performance remains largely at the discretion of courts, although a number of guiding principles have been pointed out, among which is the principle that specific performance can only be granted when damages are inadequate, that it cannot be granted of a long-term contract (Szladits, 1995, p. 210), that it will not be granted unless the court is in a position to see that the order is executed (Atiyah, 1995, p. 425) and that it will not be granted of contracts for personal services from the defendant (Zweigert and Kötz, 1992, p. 517).

All the aforementioned common law principles are applicable also in the United States, where the authority of Justice Holmes has for long time played a relevant role in supporting the preference for damages over specific performance (Holmes, 1897, p. 469). However, those principles are somewhat modified, both in England and in the United States with regard to contracts for the sale of goods as a consequence of the adoption of commercial codes (Bejesky, 2003, p. 364). Although this statement also applies

to English law under the Sale of Goods Act, 1979, s. 52, it is particularly appropriate to describe the present state of American law by virtue of UCC Article 2-716(1), according to which 'specific performance may be decreed where the goods are unique or in other proper circumstances'. The Official Comment on the provision at hand makes it clear that 'this Article seeks to further a more liberal attitude than some courts have shown in connection with the specific performance of contracts of sale'. In the United States, the buyer can thus obtain specific performance (or *replevin*) when the goods are unique, unless the performance is impossible, impracticable or another defence is available (Ulen, 1984, p. 396). Moreover, it has also been pointed out that party autonomy may play a relevant role in this respect, and that the right to specific performance may be contracted out by the parties (Farnsworth, 2004, p. 751). In this respect, it should be noted that generally the opposite does not apply and that the parties cannot enlarge the availability of specific performance by agreement; however, the 2003 suggested amendment to Article 2-716(1) adds to the pre-existing provision that, 'in a contract other than a consumer contract, specific performance may be decreed if the parties have agreed to that remedy', unless the only remaining contractual obligation is the payment of money.

The disparity of approaches under civil law and common law jurisdictions with respect to specific performance made any attempt to reconcile those approaches in international uniform instruments extremely challenging (Garro, 1989, p. 458). Nonetheless the CISG sets forth the general rule according to which the aggrieved party has the right to require performance in any event of non-performance; in particular, as far as the remedies available to the buyer are concerned, Article 46 CISG recognizes him a generalized right to require performance from the seller (Torsello, 2005, p. 62). However, it is self-evident that the substantive right to require performance is of limited benefit if that right is not accompanied by the possibility to resort to the judicial intervention of domestic courts. The compromise reached under Article 28 CISG, according to which a national court 'is not bound to enter a judgment for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by' the CISG, creates a gap in the uniform instrument, to be filled by resort to the law of the forum, which may preclude the availability of specific performance (Flechtner, 1988, p. 59). The need to provide for comprehensive sets of rules prevented the drafters of the PICC and those of the PECL from relying on the same gap-based compromise. As a result, both sets of principles, which yet have partially different purposes and scopes of application (Bonell, 2004, p. 31), adopted as a general rule the availability of specific performance (Zahraa and Ghith, 2002, p. 752; Olsen, 1999, p. 30). However, they both provide for a number of exceptions with respect to non-monetary obligations

(Art. 7.2.2. PICC; Art. 9:102 PECL). The exceptions are common (although not identical) to the PICC and the PECL: the aggrieved party may not claim specific performance if performance is impossible in law (unlawful) or in fact, if it is unreasonably burdensome, if performance may be obtained from another source, and if it is of a personal character. The PICC also list another exception (which is dealt with as an autonomous condition for the availability of the remedy at hand under Art. 9:102(3) PECL), which makes specific performance unavailable if the remedy is not required within a reasonable time. In the absence of relevant case law, it is rather difficult to predict whether a domestic court called upon to adjudicate a contract governed by either the PICC or the PECL will enter a judgment for specific performance in a situation where that court would not do so under its own law.

4 Monetary relief

As pointed out above, in many cases of breach of contract the possibility to compel performance in kind is precluded, in particular when performance has become impossible. Moreover, in other circumstances, notwithstanding the availability of specific performance, the creditor may have lost interest in obtaining a compelled performance, which may require time and efforts. Given these circumstances, the aggrieved party may prefer (or have the sole option) to bring a claim for damages, usually coupled with a claim for termination (Zweigert and Kötz, 1992, p. 535). The aggrieved party is thus given the right to claim a substitutionary relief in money. In fact, a judgment for a sum of money may also be rendered in the form of a judgment for specific performance whenever the breached obligation is a payment obligation. This is the usual option in civil law legal systems, which grant the right to compel performance of the payment obligation (deducted all benefits, if any, obtained as a consequence of the counterparty's non-performance), as opposed to the common law legal systems which, upon failure of payment, grant the right to compensatory damages as substitutionary relief. Yet 'the practical result of the two approaches will often be the same' (Treitel, 1976, p. 24).

The starting point common to all western legal systems is that the purpose of damages is 'to compensate the victim of breach for his injury' (Cooter and Eisenberg, 1985, p. 1434). Damages are thus generally based on the loss suffered by the creditor, rather than on the benefit obtained by the defaulting debtor by way of breaching the contract; this principle also explains why punitive damages, which can at times be awarded in tort cases (especially in common law jurisdictions), are not awarded for a breach of contract, not even for a faulty or intentional one. In assessing the loss suffered by the creditor, all legal systems take account of various principles, on the basis of the interests of the aggrieved party which call for protection.

Leaving aside the restitution interest, which has been dealt with above, the two types of interest protected in contract law are the reliance interest and the expectation interest. The reliance (or negative) interest refers to the object to put the aggrieved party 'in as good a position as he was in before the promise was made'; the expectation (or positive) interest refers to the object to put the aggrieved party 'in as good a position as he would have occupied had the defendant performed his promise' (Fuller and Perdue, 1936, p. 55). According to a distinction which is common to most civil law legal systems, although not unknown in common law ones, the actual loss deriving from the non-performance ('*damnum emergens*') is contrasted to the loss of profits ('*lucrum cessans*'), which in common law jurisdictions is at times referred to as 'consequential damages' (Treitel, 1976, p. 30).

Notwithstanding the common starting point, differences among legal systems exist with respect to the limitations placed on the recoverability of damages and up to seven different techniques have been highlighted, which are used to achieve the aim of limiting damages (*ibid.*, p. 56). Among those techniques, most civil law legal systems, as well as Scandinavian ones (Lookofsky, 1989, p. 137), share the view according to which damages can only be awarded if the breach is 'imputable' to the debtor. This principle is clearly expressed in French law in Art. 1147 of the Code civil. As for the requirement of imputability, although Art. 1148 does not expressly refer to a fault on the part of the debtor (but rather to '*force majeure*' or '*cas fortuit*'), the large majority of French legal scholars and court decisions interpret the provision at hand as requiring a faultious liability (Zweigert and Kötz, 1992, p. 536). However, not unlike under Italian law, under French law the reference to 'fault' should not be overestimated in that the debtor may be discharged on the sole basis of the proof of objective circumstances qualifying as an exemption (Galgano, 1999, p. 115). In this regard French courts, followed by Italian ones, have developed the distinction between '*obligation de résultat*' and '*obligation de moyen*': in the former type of obligations fault is entirely irrelevant for the assessment of liability, whereas it is the basis of the imputation in the latter type. The German system resulting from the recent reform is not too far from the French one in this respect. The claim for damages under the BGB 'is still based on the notion of fault' (Zimmermann, 2002, p. 17); however, under the new s. 276 BGB, a stricter type of liability may be inferred from the assumption of a guarantee or of a risk, leading to imputability without fault (Coester-Waltjen, 2005, p. 144). As a result, in all civil law legal systems considered above, as well as in others such as the Swiss and the Austrian ones, fault seems to play an increasingly greater role in determining the extent of liability rather than in assessing its very existence (Treitel, 1976, p. 56). In particular, one should recall the limitation of liability only to foreseeable damages, which does not apply, under Art. 1150 of the

French Code Civil and similar provisions in Italian and Austrian law, where the debtor's non-performance is intentional (Gallo, 2003, p. 113). Conversely, fault has no role to play in common law legal systems, nor has it in some civil law jurisdictions, such as the Dutch and Scandinavian ones, as well as in international uniform law instruments (Lando, 1998, p. 343).

The foregoing suggests that in French law (as well as in other civil law systems) the method of limiting damages based on fault coexists with different methods based on directness of causation (Art. 1151 C.C.) and foreseeability (Tallon, 1992, p. 679). Foreseeability as a method of limiting damages entered also in the common law world as a consequence of the influence of Pothier's ideas (Ferrari, 1993, p. 1265) and was soon affirmed as a basic principle in the leading case, *Hadley v. Baxendale* (Court of Exchequer, 1854; 9 Ex. 341), which explicitly referred to French law. Accordingly, the party in breach may be held liable only for damages which he could reasonably have foreseen as a 'not unlike' consequence of his breach of contract (Atiyah, 1995, p. 465). In fact, however, the rule of *Hadley v. Baxendale* 'is more or less a question of causality' (Tallon, 1992, p. 678), rather than a matter of foreseeability: firstly, the aggrieved party may recover damages for loss that 'may fairly and reasonably be considered arising naturally, i.e., according to the usual course of things, from such breach of contract'; secondly, consequential damages are available to the aggrieved party only insofar as the loss 'may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract as the probable result of the breach of it' (*Hadley v. Baxendale*) (Farnsworth, 2004, p. 793). The criteria of foreseeability and causation thus overlap in common law, while they are distinct but often confused in French law (Treitel, 1976, p. 61). On the other hand, causation is the main method of limiting damages under Dutch, Swiss or German law where, instead of foreseeability, the principle of adequate causation applies (Coester-Waltjen, 2005, p. 152). As a consequence, the debtor is liable only if his failure to perform appreciably increased the likelihood of the loss; to put it differently, the debtor is discharged if he can give proof that the loss is the result of unusual or intervening events (Treitel, 1976, p. 66).

As far as damages under the CISG are concerned, irrespective of the availability of any other remedy and of the type of breach committed, the aggrieved party will always have the option to claim damages for breach of contract provided only that the party in breach is not exempted from liability under Article 79 CISG (Torsello, 2005, p. 79). A general entitlement to damages is also set forth in Art. 7.4.1 PICC and in Art. 9:501(1) PECL (MacQueen, 1997, p. 219). The limits to the availability of the remedy are strictly connected to the notion of damages under these instruments, which under Art. 74 CISG consist of 'a sum equal to the loss, including loss of

profit, suffered by the other party as a consequence of the breach' (Lookofsky, 1989, p. 268). The damages claimed, however, have to pass the test of remoteness, as is made clear by the language of the provision, which refers to the loss being a 'consequence' of the breach. The issue of causation is dealt with under the Convention in close relation to the requirement of 'foreseeability', according to which damages obtainable in satisfaction by the aggrieved party are limited to those that were 'foreseeable' at the time of the conclusion of the contract (Ferrari, 1993, p. 1262). A similar approach is taken under Art. 7.4.4 PICC, as well as under Art. 9:503 PECL, but under the latter the restriction does not apply if the 'non-performance was intentional or grossly negligent'. A possible mitigation of the damages recoverable may derive, under Art. 77 CISG, Art. 7.4.8 PICC and Art. 9:505 PECL, from the aggrieved party's failure to take measures as are reasonable in the circumstances to mitigate the loss (Olsen, 1999, p. 35).

The compensation principle common to all legal systems provides guidelines as to what loss is to be taken into account in assessing damages. The translation of the loss into a sum of money is left with the domestic courts, called upon to apply the various principles dealt with above and thus left with a significant degree of discretion, particularly when it comes to non-pecuniary loss (McKendrick and Worthington, 2005, p. 287). Party autonomy, however, may play a relevant role in determining the amount due by the debtor upon breach of contract. Indeed, the parties to a contract may have different reasons to determine in advance the amount of damages (Mattei, 1995, p. 429): first, they may want to avoid the harshness of providing proof of the exact amount of damages; secondly, they may want to coerce the debtor into performance; thirdly, they may want to limit liability of the debtor (Gallo, 2003, p. 116). In the first situation the parties genuinely pre-estimate the likely loss, thus making the 'liquidated damages' more readily enforceable (Farnsworth, 2004, p. 811). These kinds of clauses are valid and enforceable both in civil law and in common law jurisdictions. The latter ones, however, make a relevant distinction between these 'liquidated damages' clauses and 'penalty' clauses, which are stipulated 'in terrorem', as a threat intended to coerce the debtor into performing his obligation (Miller, 2004, p. 82). Notwithstanding strong criticism of this solution, penalty clauses are declared unenforceable 'even where the evidence shows a voluntary, fairly bargained exchange' (Goetz and Scott, 1977, p. 555). On the opposite extreme as regards penalty clauses there stands the French solution as originally set forth under the Code Civil (Miller, 2004, p. 86), which rendered the 'clause pénale' inviolable. Although penalty clauses had been enforceable in continental Europe since Roman times (Hatzis, 2002, p. 399), the original (Napoleonic) liberal approach adopted in France in 1804 is not found in most subsequent civil

law codifications. Indeed, in German law, as well as in Swiss, Austrian, Spanish, Dutch and Italian law, if a penalty is disproportionately high, it can be reduced by the court to an appropriate amount (Mattei, 1995, p. 438). This solution has finally been adopted also in France by way of a revision of the Code Civil (Schlesinger, Baade, Herzog and Wise, 1998, p. 746). In fact, the revision at hand has also brought about another relevant change, in that it has endowed courts also with the power to increase penalty clauses which are 'ridiculously small' (Art. 1152 C.C.). This change is in line with the German and Swiss solution of making possible a claim for damages beyond those liquidated in the contract whenever the latter ones do not lead to full compensation (Treitel, 1976, p. 95). More generally, while exemption clauses in French, Italian and Swiss law are unenforceable if the non-performance is intentional or grossly negligent (Tallon, 1992, p. 680), German law, as well as common law legal systems, uses a standard of reasonableness in order to assess whether the clause may be enforced (Farnsworth, 2004, p. 815).

The issues of penalty clauses and exemption clauses are not dealt with in the CISG, given the exclusion from its scope of application of validity issues (Art. 4 CISG); conversely, those issues are addressed both by the PICC and the PECL. Under Art. 7.4.13 PICC, a clause which provides for an agreed payment for non-performance is enforceable irrespective of the actual loss, unless the liquidated sum is grossly excessive (Fontaine, 1998, p. 407). The same rule applies under Art. 9:509 PECL (MacQueen, 1997, p. 223). Conversely, partly different rules are set forth as regards exemption clauses: under Art. 7.1.6 PICC, the clause may not be invoked 'if it would be grossly unfair to do so'; under Art. 8:109 PECL, exclusions or restrictions of remedies are precluded when it would be 'contrary to good faith and fair dealing to invoke the exclusion or restriction'.

5 Concluding remarks

The brief comparative overview of remedies for breach of contract which has been conducted has highlighted a number of differences among common law and civil law legal systems, as well as some differences among the various civil law jurisdictions. However, to a large extent those differences have proved to be more theoretical than practical ones and the analysis of the final practical solutions reached in the legal systems considered suggests that there is an increasing convergence among them towards similar solutions with respect to the remedial schemes made available to the aggrieved party in the event of a breach of contract.

First of all, all major western legal systems make the same distinction between three different types of remedies in contract law. The most drastic remedy is termination of contract, by means of which the aggrieved party

is given the option to bring the contract to an end. Notwithstanding some differences as to the mechanics of termination, all legal systems set the same substantive requirement according to which the remedy at hand is available only in the event that the breach is a serious one on the basis of the substantial detriment to the creditor's reasonable expectations. As for the consequences of termination, in all legal systems termination operates prospectively. Unlike common law legal systems, most civil law systems also attribute a retrospective effect to termination; however, they also make a distinction between isolated and long-term contracts, excluding, as a general rule, the retroactive effects of termination with respect to the latter ones: this distinction makes the practical effects of termination in civil law and common law systems much more similar than it would appear at first sight.

Similarly, as far as the secondary relief in damages is concerned, notwithstanding the variety of techniques adopted in different legal systems to limit the availability and amount of damages, all western legal systems adopt the same purely compensatory principle, although civil law systems are more inclined to enforce penalty clauses insofar as they are not grossly disproportionate.

The most relevant difference still existing between civil law and common law jurisdictions regards the availability of specific performance, which is the rule in the former ones, but the exception in the latter ones, which as a general rule grant substitutionary relief in damages. This difference remains in place notwithstanding the enlargement in civil law of the scope of rules excluding specific performance and the common law trend more favourable towards the granting of remedies in kind. However, the difference does not seem to play a paramount role in practice and it is of some significance that the only reported decision which granted specific performance under the CISG was rendered in a common law jurisdiction (*Magellan International v. Salzgitter Handel*, Fed. District Court [Ill.] (US), 7 December 1999). In fact, in most commercial contracts specific performance is not the best option for the aggrieved party, who will most likely prefer to enter a cover transaction and claim damages from the party in breach; on the other hand, cases where the aggrieved party has a special interest in obtaining the exact performance contracted for are dealt with in common law jurisdictions as the exceptions which qualify for the award of a judgment for specific performance.

The progressive convergence of common law and civil law legal systems with respect to contract remedies can be regarded as a significant hint of the existence of a common core of the western legal tradition, based on similar values, a common background and a continuous circulation of models and solutions. These commonalities certainly favoured the drafting of uniform contract law instruments, like the CISG, the PICC and the PECL, which in

turn play a relevant role in accelerating the convergence towards harmonized solutions. It is of utmost significance that these instruments adopt coherent, and often identical, solutions with respect to remedies for breach of contract: they all adopt a unitary notion of non-performance, and they all make a distinction based on the seriousness of the breach, making termination available only in the event of a fundamental breach; they all adopt a general rule of strict, objective liability, thus relegating the evaluation of the (faultious) conduct of the party in breach to the role of one of the possibly concurring criteria to assess the amount of damages available. Finally, unlike the CISG, which made the availability of specific performance dependent upon its availability according to the law of the forum (thus creating a gap in the uniform instrument), both the PICC and the PECL granted as a general rule the right to obtain performance in kind, although this general rule is accompanied by a number of exceptions which soundly identify the cases in which that remedy would not be granted either in civil law or in common law jurisdictions.

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56 Russian law

William E. Butler

The term 'Russian' in the field of comparative law has referred at various times narrowly to the law of Kievan Rus (9th–11th centuries), the whole of the territory that came to be known as Muscovy (11th–16th centuries), the Russian Empire in its greatest territorial expanse (16th century to 1917), the former Soviet Union (1917–91) and, officially, the Russian Federation from 1991 to the present. Insofar as 'Russian law' refers generally to the law in force on these territories, it encompasses a vast number of subsystems, including the customary law of hundreds of ethnic minorities, the influence of neighbouring peoples and kingdoms (Byzantium, Central Europe, Tatar-Mongol, Islamic, Scandinavia and Eastern, Central and western Europe), the legislation (broadly understood) of principalities, khanates and other entities on Russian territory, and the full range of sources of law from top to bottom of the Russian Federation.

1 The role of law in Russia

Under its 1993 Constitution, Russia is a 'democratic federated rule-of-law State with a republic form of government' (Art. 1). Russia also is a 'social State whose policy is directed towards the creation of conditions ensuring a life of dignity and the free development of man' (Art. 7). These formulations, and others like them, are unique in more than a millennium of Russian legal history. Although legal documents are among the most important surviving written sources for understanding the history of ancient Russia, we have the most imperfect understanding of the role, nature and concept of law from that and subsequent periods. The general impression cultivated is that law played a minor role in Russian life, that legal progress in Russia lagged two to three centuries behind western Europe, that Russian legal institutions were strongly disposed towards authoritarian patterns of rule, and that for all their claims to distinctiveness and even uniqueness, Soviet legal rules and institutions incorporated or drew upon the most negative features of prior Russian legal mores and traditions. These are all propositions or theses that require re-examination against a more thorough investigation of the Russian legal past.

Few would contest, however, that since becoming the 'legal continuer' of the former Soviet Union, Russia has envisaged a new role for law in Russian society which incorporates the principle of the 'rule of law'. That principle,

whatever its meaning comes to be, is not yet a 'part of Russian blood', and a deep-rooted cynical exaggerated Russian scepticism sometimes asks whether or not 'Russian law' is a contradiction in terms. Foreigners should not be deceived by folk cynicism, for Russians can be as legalistic and formalistic as any other people and have a rich tradition and literature, mostly unknown abroad, discussing the proper relationship between the ruler, the state and the people and the relationship of each to law and the legal system.

A key issue at this juncture in Russian legal development is the nature of the 'law' underlying the rule of law, whether such law has a natural or other origin superior to the state itself (*pravo*) or whether such law originates in the state (*zakon*). Those jurists partial to the first approach believe most constitutional rules are a written expression of '*pravo*', but that the constitution does not exhaustively state these rules; it would therefore be possible, in their view, for Russian judges to identify rules of '*pravo*' not necessarily contained in the constitution but higher and more fundamental than constitutional rules and to apply these to limit the abuse of state power. Those jurists who adhere to '*zakon*' recognize as highest only those rules emanating from the people in duly constituted assembly expressing their will directly (referendum) or indirectly (duly elected representatives). Written legislation is the embodiment of '*zakon*'. The extent to which there exists a rule of law in Russia may ultimately turn on the outcome of this most fundamental and portentous of debates.

2 Characteristics of Russian law

2.1 Sources of law

Although the Russian Constitution and federal laws have 'supremacy throughout the entire territory of the Russian Federation', they are not, on one reading of the constitution, the highest source of law, for the constitution recognizes that 'the basic rights and freedoms of man shall be inalienable and shall belong to each from birth' (Art. 17), that the rights and freedoms of man and citizen shall be of direct effect (Art. 18) and that recognition of, compliance with, and defence of the rights and freedoms of man and citizen is the duty of the state (Art. 2). These provisions, among others, lend support to the view of those who believe that Russian '*pravo*' is the highest or most fundamental source of Russian law.

Russian legal doctrine postulates a formalistic hierarchy of sources of law. Legislation of the former Soviet Union continues to be in force to a significant, albeit declining, extent. USSR enactments which are not inconsistent with Russian sovereignty, not repealed, not superseded by later legislation, not obsolete, or not contrary to Russian legislation remain in force on Russian territory. In some instances special provision has been made for USSR legislation to continue in force in Russia.

The highest source of man-made law in Russia is the Russian Constitution, adopted by all-people's referendum on 12 December 1993. All other enactments are classified as 'subordinate' legislation. Legislation in the broad sense is thus the paramount source of law in the Russian Federation. As a rule, the place of the issuing state agency or official in the constitutional or administrative hierarchy determines the position of the respective normative legal act in the hierarchy of sources of law. The 1993 constitution as the apex of the pyramid of sources of law gives primacy of place next to federal constitutional laws, then to federal laws, then to enactments confirmed by federal laws (statutes, codes, fundamental principles, and others). The President of the Russian Federation issues edicts and decrees, which must be consistent with the constitution and federal laws but are supreme within the competences of the president. The government of Russia issues decrees and regulations that must be consistent with the constitution of Russia, federal laws and edicts of the president. And so on through the descending hierarchy of state agencies and officials.

A similar hierarchy exists within each of the 88 subjects of the Russian Federation, and their legislation must be consistent with their own constitutions or charters and relevant legislative acts of the central authorities.

The three 'Treaties of the Federation' concluded on 31 March 1992 are an integral part of the 1993 Russian Constitution and collectively constitute a special source of Russian public and private law. They are elaborated by a considerable network of supplementary treaties and agreements concluded between subjects of the Russian Federation and central agencies or directly between subjects of the Russian Federation. Since November 2001, a number of these treaties have been dissolved by mutual agreement between the Russian Federation and the subject of the Russian Federation concerned.

Judicial practice is increasingly being recognized in Russian legal doctrine and practice as a source of law, whether in the form of judicial decisions having the value of precedents or in the form of judicial explanations and decrees filling gaps in legislation or offering interpretations of law tantamount to law creation.

In stipulated instances customs of business turnover, charters or constitutive documents of juridical persons, collective labour agreements and tribal or folk customs may be drawn upon or invoked before courts and tribunals as 'local' sources of law.

The Russian Federation and Belarus are, under a Treaty on the Creation of the Union State of 8 December 1999, committed to forming a new state having its own organs, which include a parliament, High State Council, government, court and audit chamber. Pursuant to the treaty, these organs have commenced operations and are beginning to issue laws, décrets, decrees and resolutions which are binding upon publication throughout the

territories of the two states concerned. In the event of a conflict between a law or décret of the Union state and a normative legal act of Russia or Belarus, the enactment of the Union state prevails.

Russia is a founding member of the Commonwealth of Independent States (CIS), an international organization which is estimated to have generated more than 8000 normative documents during its nearly 15 years of existence. The great majority of these have the status of an international treaty, and insofar as that is the case, would enjoy precedence and priority in the Russian Federation by reason of Article 15 of the 1993 Russian Constitution (see below).

Doctrinal writings are not a formal source of law in Russia, and Russian courts do not refer to the published works of jurists in decrees or judgments. Russian advocates, however, routinely refer to doctrine in oral pleadings and argument before Russian courts and Russian academicians are the senior figures in the Russian legal establishment.

2.2 Federation and legal plurality

Russia is a federated state, also officially known as the Russian Federation, which operates on the basis of a written constitution adopted by popular referendum on 12 December 1993 and incorporating as integral parts three Treaties of the Federation concluded on 31 March 1992 with the 89 subjects of the Russian Federation (now reduced to 88 subjects by the merger of two). Each of the 88 subjects of the Federation has its own constitution or other constitutive document. The Treaties of the Federation clarify the allocation of jurisdiction between the central authorities and the subjects of the Federation. The 1993 constitution replaced the 1978 constitution of the RSFSR, as amended.

The Treaties of the Federation were augmented by a series of bilateral and tripartite treaties and agreements concluded by the central authorities with individual subjects of the Federation. Commencing in 2003, many of the treaties began to be terminated by mutual consent of the parties on the grounds that they had served their purpose.

The Russian approach to federation is deeply indebted to realities of Russian history, above all the 'nationality question'. The hierarchy and designation of the 88 subjects of the Russian Federation are closely, although not exclusively, linked to the concentrations and size of ethnic populations on the territory of the Russian Federation. Nonetheless, there remains the actual delimitation of competence between the 'centre' and the 'regions'. In the view of Russian 'federalists' the Treaties of the Federation ceded too much competence to the regions, which has led to excessive regional autonomies and corruption. Changes introduced in December 2004 to the Federal Law on General Principles of the Organization of Legislative (or

Representative) and Executive Agencies of State Power of Subjects of the Russian Federation (adopted 6 October 1999) significantly strengthened the role and powers of the President of the Russian Federation in appointing to office or suspending the powers of regional leaders who do not act in compliance with Russian law.

Whatever the shifting balance among the competences of the central federal authorities and the regions, there is substantial plurality of law in Russia. The 88 subjects of the Federation operate in some senses as 'mini-states', each with their own legislative, executive and judicial branches and each with their own legal systems. Nearly all of the regional legislation is now accessible on commercial regional databases, although still greatly neglected by legal scholars. Many issues that plague American federalism, however, are absent or *de minimis* in Russia. Jurisdictional overlap is readily resolved by centrally imposed conflicts rules and not an issue in practice. On the most crucial issues of federalism the central authorities enjoy predominance. Competition between subjects of the Federation, although present, is not particularly significant; foreign investors, however, may experience competition for certain levels and types of investment.

2.3 Legal institutions

State power is exercised in the Russian Federation on the principles of separation of powers and checks and balances. The structure of the state is organized around the President of the Russian Federation, the bicameral Federal Assembly (State Duma, Soviet of the Federation), the Government of the Russian Federation, the Procuracy, the Counting Chamber of the Russian Federation, and the courts of Russia (Constitutional Court, courts of ordinary jurisdiction headed by the Supreme Court, arbitrazh courts headed by the Supreme Arbitrazh Court, justices of the peace and arbitration courts).

The Russian Federation is under the constitution a secular state. No religion and no ideology may be established as a state religion or ideology.

There have been no amendments to the Russian Constitution since it was enacted in December 1993. Nonetheless, there have been adjustments to checks and balances during the decade since. These have mostly accrued to the benefit of the President of the Russian Federation, who for a certain period in the mid-1990s saw certain of his edicts enjoy the force of a law and in general has been issuing edicts on subjects that many jurists regard as the prerogative of parliament. A series of amendments to legislation in the second half of 2004 increased presidential authority over the appointment of regional leaders and judges. Because these changes were implemented on the basis of federal laws enacted by the Russian parliament, the alterations to checks and balances have enjoyed parliamentary support and endorsement rather than resistance in principle.

2.4 *Legal style*

The formation of a Russian legal style in post-Soviet Russia remains at an embryonic stage. On the map of the world's legal systems Russia falls into the category of 'transitional' (see below), and her future remains undetermined and speculative in this respect. Approaches to constitutional and statutory construction are textual and formalistic, and although the legacy of Marxism–Leninism is discredited, patterns of thought and analysis remain strongly indebted to that era of Russian experience. Theories of state and law, definitions of legal concepts, notions of legal science and categories of legal classifications continue to be profoundly influential in the dispensation of justice. Most of the jurisprudential trends influential in Europe and North America during the past half-century are alien to Soviet and post-Soviet legal thinking in Russia, although there is ready receptiveness to interdisciplinary approaches to legal phenomena.

The trendy offshoots of American legal philosophy during the last quarter of the 20th century have found no response or echo in Russian legal thinking and are largely unknown there. Law and economics, however, in the Soviet context were intimately related within a planned economy and conceptually have continued to be so in the post-Soviet era.

2.5 *Legal doctrine*

The late years of perestroika and early years of post-Soviet independence in Russia saw the rapid removal of compulsory courses in Marxism–Leninism from the Russian law faculty syllabus. Russian legal theory was left without the ideological certitude which had so characterized the approach to an understanding of state and law. Legal doctrine, in effect, was left without its theoretical underpinnings.

Nonetheless, Russian legal theory, absent Marxism–Leninism, continues to develop using essentially the same legal categories and classifications without the planned economy. Discussions are advanced as to what the 'system of law' should consist of, but consensus is still lacking and most textbooks in the field adhere to more or less long-established approaches. Law remains a science and a discipline. Legal concepts and definitions have meaning and are used to settle disputes, frame legislation and resolve issues. 'Law' exists, is real, and should be applied in Russia and in the international community.

Post-Soviet schools of legal thought are only beginning to emerge and it would be premature to undertake a classification. Some remain deeply indebted in every respect to Marxism–Leninism, although they no longer mention Marxian roots. Those which venture into non-Marxian terrain do so chiefly within the framework of Russian history and experience rather than attraction to foreign approaches. The interdisciplinary nature of

foreign schools of thought is welcome in Russia and encounters no special antipathy. Other movements in western thought have no Russian roots and are little understood and exceedingly difficult to translate into meaningful Russian concepts.

3 Russian law and other legal systems

The place of Russian law on the map of legal systems during the pre-revolutionary era (prior to 1917) has never been thoroughly or exhaustively determined by the science of comparative law. Superficially, the Russian legal system would probably have been placed within the Romano-Germanic family of legal systems, with which Russia felt and continues to feel a certain kinship. During the Soviet era, the socioeconomic, legal and political transformations collectively introduced in Soviet Russia were regarded by many comparatists as sufficient to justify classifying the Soviet Union, together with other countries in which communist regimes had come to power, as a separate and distinct family of legal systems called 'socialist legal systems'. With the demise of the Soviet Union and the market-oriented law reforms introduced in the Independent States of the former USSR, and the express repudiation of many public law foundations of the Soviet regime, Russia no longer qualified as a 'socialist legal system'. Most Russian comparatists categorize Russia today as a 'transitional legal system', together with the other former Soviet republics, en route from the socialist family to a destination i.e. uncertain. Some might argue, utilizing comparative law classifications of the past, that Russia had moved from being a 'socialist legal system' to a 'legal system of a socialist orientation', the latter being used during the 1970–80s to describe third world countries which had taken certain steps towards becoming a socialist legal system.

3.1 Influences of foreign law on Russian law

Although the definitive history of the development of Russian law remains to be written, there is ample influence of contact between the legal systems and cultures of Kiev Rus and Muscovy, on one hand, and neighbours near and far on the other. Russian treaties with Byzantium of the 10th century give evidence of influences Byzantine and Scandinavian, and perhaps Slavonic Balkan territories. Textual analysis of later documents (such as contracts inscribed on birchbark) discloses foreign influences via traders and merchants, and an examination of major statutes and charters indicates that the Tatar domination of Muscovy left an imprint on the language and concepts of administrative and criminal law and that Muscovite legislative draftsmen were familiar with enactments emanating from Lithuania, Poland, Scandinavia and other realms and principalities.

Peter the Great, as part of his westernization policies, encouraged the adaptation of foreign legal institutions and concepts, reaching as far abroad as France, Italy, Netherlands and England, among others. Catherine the Great was influenced by Montesquieu and Voltaire, conducting an extensive correspondence with the last, and by Sir William Blackstone, a translation of whose major work she commissioned. Throughout the 19th century Russian legal statesmen followed the development of law and legal thought throughout Europe, including that of Jeremy Bentham (whose principal work on codification appeared in Russian translation before English). French and German codifications, among others, influenced Russian approaches, as did the Civil Code of California (translated into Russian in full). Scottish enlightenment thought entered Russia at an early stage through the studies in Glasgow of S. Desnitskii and I. Tret'iakov; upon returning home to Russia they accepted appointments at Moscow University and published influential works opposing the German natural law school predominant in Russian universities at the time.

Foreign professors of law did take up service in Russian universities from the 1720s onwards, initially in Moscow and St Petersburg and later in Kazan, Odessa, Kiev and, especially, the Baltic regions. Throughout the pre-revolutionary period they were an important component of Russian legal education.

Although the Soviet era was basically antipathetic to foreign legal influence in principle, certainly from the 1960s onward state research institutions followed foreign legal developments with care and interest and drew upon foreign experience when necessary, perhaps more than is a matter of public record. Even where foreign experience was not used, it was taken into account in the conceptualization and shaping of legislation.

In post-Soviet Russia, foreign legal assistance was made available on a considerable scale from international institutional, national governmental and private sources to the Russian government and non-state organizations. The Know-How Fund of the United Kingdom, American Bar Association, United States Agency for International Development, World Bank, European Bank for Reconstruction and Development, German, Dutch and Japanese sources, among others, made substantial contributions to the drafting of Russian reform legislation. In several instances Russian legislation has already gone through several generations, moving sometimes to or from Anglo-American to continental approaches. Post-Soviet Russia has been truly a 'laboratory' of comparative law reform whose end is not in sight.

3.2 Influence of Russian law on foreign law

This is a little-investigated subject which deserves attention. Within the confines of the Russian Empire at its territorial apex prior to 1917 the

growing influence of Russian legislation and legal thinking upon indigenous legal cultures and systems was immense. The extent to which these influences were enduring on territories that subsequently became part of another state (e.g., Finland, eastern Poland, Romania and others) remains to be studied. Insofar as the Soviet legal model may be considered to be Russian, its influence throughout what was known at one time as the 'Sino-Soviet bloc' was enormous, such that Soviet law served as the primary model for Central Europe, Mongolia, China, Vietnam, Cuba and North Korea directly and, indirectly, for major portions of the 'third world' in Asia and Africa (less so in Latin America). Russian legal approaches and experience continue to be influential in China, where they are followed closely.

Certain doctrines or principles of Soviet law left their imprint on western legal institutions and doctrines by way either of influence or of reaction against them at the time.

3.3 Russian law and international law

Russia is officially recognized as the 'legal continuer' of the former Soviet Union and, by agreement with the other former republics of the USSR and the international community, assumed the seat of the Soviet Union in the United Nations, participation in treaties of the former Soviet Union, external debts of the former USSR and most property of the USSR located beyond the limits of the former Soviet Union.

The 1993 Russian Constitution is the highest source of written law. However, under the Constitution (Article 15[4]), generally recognized principles and norms of international law and international treaties of the Russian Federation are an integral part of its legal system. If rules have been established by an international treaty of the Russian Federation other than those provided for by a law, the rules of the international treaty apply. The Supreme Court of the Russian Federation has construed this provision to mean that it refers only to treaties ratified by the Federal Assembly of the Russian Federation and therefore excludes intergovernmental and interdepartmental treaties.

It is arguable that Article 15(4) of the Russian Constitution is one of the most fundamental and far-reaching provisions in that document. Russian treaty practice is extensive, and perhaps to a degree not emulated by any other country Russia has brought into its legal system the rules of the international legal system to which it has consented. At the present time, there is a certain reaction against the influence of international law, and the Decree of the Supreme Court is a tangible expression of such a reaction, although it is binding only upon the courts of ordinary jurisdiction and its constitutionality is open to doubt.

In the post-Soviet era Russia has taken a cautiously more optimistic approach to international adjudication. Soviet reservations opposing compulsory jurisdiction of the International Court of Justice have been withdrawn in selected instances, and a case was actually brought by the Russian Federation before the International Law of the Sea Tribunal (against Australia).

3.4 Comparative law in Russia

Although comparative legal studies may be said to have commenced in Russia with the publication of A. A. Artem'ev's comparison of Russian and Roman law and foreign law and legal thought played an important role in Russian legal education and legislative drafting, the application of the 'comparative-historical method' to Russian law on a sustained and systematic basis was a development of the late 19th century. Just as in Europe, many Russian legal scholars were attracted by comparative legal studies and produced works on the usefulness of the comparative method in studying Russian law. Russian legal scholars were in fact as a rule proficient in more than one European language and many had, either as postgraduate students or later in their scholarly research, spent time in the leading European universities. It was routine in Russian doctrinal writings to cite European doctrinal writings extensively, and even to quote from such works in the original language. Sir Paul Vinogradoff (1854–1925), who held chairs of history and law both at Moscow and at Oxford universities, based nearly all of his works upon the comparative method.

During the Soviet era, there were severe constraints upon comparative legal studies. Interesting, even learned, comparative legal studies were published during the 1920s, but thereafter the emphasis was upon purely foreign law studies and any comparison was reduced to ideological justifications of the superiority of socialist law over bourgeois law. A more enlightened view emerged in the early 1960s. The comparative method was recognized to be useful in studying internal Soviet law, i.e., the legal systems of the union republics of the USSR. Soviet legal institutions encouraged investigations of foreign law as such, albeit with an ideological tinge. During the late 1980s, bilateral symposia between Soviet institutions and associations were increasingly of a comparative-legal nature and collectively contributed to the emergence of perestroika.

Although the presence of more than 60 foreign law firms operating in the Russian Federation has made its own contribution to the development of a comparative law mentality, in fact comparative legal studies have developed remarkably slowly in Russia since 1992. A Society of Comparative Law, not formed until May 2000, has been largely inactive; chairs and/or sectors of comparative law have been established in only a few Russian law

faculties. The publication of comparative legal studies or studies of foreign law are impressive and increasing, but they appear in an institutional vacuum. The place of comparative law in the Russian law curriculum and in Russian legal science generally is far from assured.

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57 Scots law*

Hector L. MacQueen

Modern Scots private law is the product of a mixture of the civilian and the common law traditions. It may be unique among mixed systems, because it is not one where a civil law system was overlaid by the common law, as in South Africa, Louisiana, Quebec or Sri Lanka; rather the mixture in some shape or form seems always to have been present. Certainly Scots law is the only major mixed legal system in Europe. Opinions vary as to the consequences of being a mixed system. It can be described as a seat on a fence, not very secure, but offering the conspicuous advantage of a view on both sides (Cooper, 1957, p. 201). It has also been said to be a potential bridge between the civil and common law traditions, of potential importance for the development of a European private law within the European Union (Zweigert and Kötz, 1998, p. 204). On the other hand, there is the criticism that the Scottish mixed system is essentially a muddled one which is in a state of transition leading inexorably, given the proximity and strength of the English model, to a common law system in substance as well as in many aspects of form (Evans-Jones, 1998).

Scots law can be dated back as early as the 12th century and the origins of the kingdom of Scotland (see, for an overall account, Cairns, 2000). In its early development the system was much influenced by developments in the neighbouring kingdom of England, especially the feudal system of landholding which came about through Anglo-Norman penetration into Scotland in the century following the conquest of England in 1066 (MacQueen, 1993). Despite this early connection, Scots law always saw itself as different from its English cousin, and successfully resisted attempts to merge it with English law, notably after the Union of the Crowns in 1603, when James VI, king of Scots, succeeded to the English throne (MacQueen, 1995). In 1707, the Agreement for the Union of the Scots and English Parliaments recognized and preserved the two laws as separate and distinct systems (Article XIX). Crucially, however, the 1707 Treaty provided that the 'laws concerning regulation of trade, customs and . . . excises [should] be the same in Scotland, from and after the Union as in England' (Article XVIII); the same Article also allowed change to the law of 'private right' where that was for the 'evident utility' of the Scottish people.

* See also: Common law; Legal culture; Mixed jurisdictions.

Despite this early recognition of the possibility of assimilation, the Scottish and English systems of private law remain substantially different. The common law of England was essentially an insular product, all but closed to the influences which shaped the development of law elsewhere in Europe, including Scotland. These were the civil law, ultimately derived from the law of ancient Rome, and the canon law of the Catholic Church, both taught in the universities. Unlike their English counterparts, before and after 1707, Scots lawyers studied at continental universities, and as a result brought back to their domestic system the structures, concepts and substance of the learned laws. The effects are particularly clear in the monumental works of jurists such as Thomas Craig (1538–1608), James Dalrymple, Viscount Stair (1619–95), and John Erskine (1695–1768), whose writings manifest continental influences in both form and content, and remain authoritative in Scottish legal practice to the present day.

A direct consequence was that Scots law became the first of the mixed legal systems, with elements of mixity apparent from the Middle Ages on. By 1707, key differences from English law included the absence of any division between a legal and an equitable jurisdiction, with one consequence being that ownership was (and is) an undivided (unititular) concept in Scotland; the enforceability in Scots law of simple promises and contracts even when undertaken without consideration or exchange; the recognition of third party rights in contract; the right to suspend performance of a contract if the other party failed to perform; and the recognition by Scottish courts and writers of a principle against unjustified enrichment some 300 years before that principle was finally accepted in England (see, generally, Reid and Zimmermann, 2000).

The Industrial Revolution of the later 18th century led, however, to the beginnings of modern commercial law as a common set of rules within the Union. Scottish writers on the subject, such as George Joseph Bell (1770–1843), continued to look to the continent and authorities such as Pothier; but they also turned increasingly to the decisions of the English courts, while the Westminster legislature intervened more and more with the creation of enactments applying equally in both jurisdictions. A common appeal court, the House of Lords, also emerged after 1707 in civil matters; but this included no judges trained in Scots law until the second half of the 19th century, and even then had no more than two, when panels normally consisted of five altogether. One result was increasing Scottish acceptance of the strict English doctrine of precedent, replacing the former theory that only the establishment of a general custom could be shown by a concurring chain of judicial decisions.

The 19th century also saw the rapid development in both countries of what in Scotland is called *delict* and in England *tort*, both denoting the body

of law under which a person injured through the intent, fault or negligence of another may claim monetary compensation (damages) from that other. However, by 1932 and the great Scots House of Lords case of *Donoghue v. Stevenson* 1932 SC (HL) 31 (concerning the liability of a Paisley ginger beer manufacturer to a consumer for the illness caused by the presence of the decomposed remains of a snail in one of his bottles), the two systems had converged on an approach to cases of unintended injury which began from the question of whether a duty of care existed between the parties at the time the harm was caused (MacQueen and Sellar, 2001). Again, despite the absence of the law/equity jurisdictional divide which supported the development of a law of trusts in England, the trust was recognized early in Scotland, and has become a key part of modern legal practice, as an efficient means of administering wealth and minimizing tax (Gretton, 1998). Nineteenth-century Scots lawyers also developed the law of contract along English lines when they recognized the right of a contracting party to terminate the contract following breach on the other side without having first to seek the authorization of a court (McBryde, 2002).

The factors underlying the Scottish reception of English law in the 19th century included a common language, ready access to sources and texts of English law (contrasting with a relative paucity of indigenous material) and the existence of a common appeal court in the House of Lords in which the Scots judges were almost always a minority of the panel. Judicial perceptions that the unified commerce and increasingly unified culture of a great imperial nation required at the least a harmonized or common approach to legal issues probably also played their part (Rodger, 1996). The influence, or even reception, of civilian concepts and thinking in 19th-century English law may also have made it seem more intelligible to lawyers brought up in another tradition altogether.

The legal profession itself took shape somewhat along English lines, with a split between advocates, who have exclusive rights of audience in the higher courts and are governed by the Faculty of Advocates and its dean, and solicitors, practising mainly in offices and regulated by the Law Society of Scotland. Entry to the profession is normally by way of a university law degree, the university-based Diploma in Legal Practice, and a period of practical training. A partial fusion of the two branches of the profession took place following legislation in 1990, under which a solicitor might gain rights of audience as a solicitor–advocate. It is also now the case that an advocate may be instructed directly by a client without the intermediation of a solicitor. Solicitors generally practise in partnership, although other business structures are possible. So far the idea of the ‘multidisciplinary’ organization in which one business would offer the client a variety of professional services has been resisted. However, the larger Scottish law firms

specializing in commercial law now typically have offices in London and other major European cities and participate in network schemes linking them with other foreign law firms, enabling them to offer their services wherever their clients are doing business.

The Faculty of Advocates continues to require entrants to study civil law, albeit only the law of property and obligations. This requirement is under pressure, as debates about the subjects which lawyers ought to study rage to and fro; for many, if not most, modern lawyers, a need for civil law seems both irrational and impractical. The existence of the requirement means that there is a course in civil law at most of the Scottish universities offering the LLB degree. Typically, such courses concentrate on Justinianic and pre-Justinianic law, rather than on the development of that law as the medieval and early modern *ius commune*. It has been argued that this has led to a 'third Reception' in Scotland in that, on the rare occasions today when a Scottish court turns to the civil law, it looks to the Digest and the Institutes rather than (as it should) to the law received in the early modern and institutional periods of Scots law. However this may be, it is fair to say that there is no articulate or developed modern theory about when or how there should be resort in practice to the civil law, Justinianic or otherwise; and Lord Rodger (1995, p. 210), a leading Scottish judge as well as a Roman law scholar of the highest distinction, may well be right in his comment that the tendency is to look to the civilian sources only when they do not provide an answer to the problem at hand. See also, on unsystematic use of foreign sources by the Scottish courts, MacQueen, 2003.

The result today, in particular for legislation, is that it is possible (although not strictly accurate) to speak of a United Kingdom law of companies, financial services, taxation, intellectual property, consumer protection and employment, while very similar results will arise in the law of supply of goods and services, partnership, security rights and insolvency, whether Scots or English law applies. Indeed, in many of these areas of law, the driving force is now the European Union, as it pursues the creation of a new and far larger single market and harmonization of the law which regulates and facilitates that market. As part of the United Kingdom, Scotland is also part of the European Union. The traditionally European orientation of Scots law may explain why two of the first three British judges in the Court of Justice of the European Communities (Lord Mackenzie Stuart and Sir David Edward) were Scots lawyers. Nonetheless, the civilian tradition in Scots law is usually seen as under more pressure now than ever. The chief vehicle of current legal development is legislation, which, whether it comes from the European Union or Westminster, is rarely concerned with purity of tradition and generally deals with issues on which the civilian tradition has little if anything to say. The civil law may surface from time to

time in cases, but the competence with which it is handled is dependent on the knowledge and skill of counsel and judges – and in general that is not great, unsurprisingly, given lack of regular practice in the research and handling of the sources. Many lawyers, both academic and practising, are concerned more with law in particular contexts (environment, welfare, commerce, labour) than as an intellectual discipline or system in its own right, and to such people the civilian tradition is at best of marginal interest. The problem here may not be so much active hostility towards the civil law tradition as the much more deadly complete indifference (Whitty, 1996).

Doughty defenders of the civilian tradition are still to be found, however. The late Sir Thomas Smith (1915–1988) was its great champion in the 20th century, both as a writer of texts (1962, 1963) and as a Scottish Law Commissioner, but in his lifetime his writings were unsympathetically received by the courts, and his legislative proposals made little headway (Reid and Carey Miller, 2005). More recently, however, the civilian approach has gained new protagonists whose writings have begun to find a more receptive audience in the courts. Striking developments have included the reaffirmation of the unititular basis of the law of property in the House of Lords despite the doubts of some of the English judges there (*Burnett's Trustee v. Grainger* 2004 SC (HL) 19); the reorientation of the law of unjustified enrichment so that enrichments which lack a legal ground or causa fall to be reversed (*Morgan Guaranty Trust Co of New York v. Lothian Regional Council* 1995 SC 151; *Shilliday v. Smith* 1998 SC 725); the recognition of an underlying principle of good faith in contract law (*Smith v. Bank of Scotland* 1997 SC (HL) 111; see also *R v. Immigration Officer at Prague Airport* [2004] UKHL 55 *per* Lord Hope of Craighead at paras 59–60); and the revitalization of the remedy of specific implement as a basic entitlement of a contracting party in cases where the English courts would have refused to grant specific performance (*Highland and Universal Stores v. Safeways* 2000 SC 297).

The modern Scottish court system is divided between criminal and civil (i.e., non-criminal) business. Criminal prosecutions are in the hands of the state, ultimately under the Lord Advocate (a government minister). Most crimes are prosecuted in the local Sheriff or District Courts, but serious offences requiring longer sentences go to the High Court of Justiciary. Trials are generally held in the area where the offence took place; appeals, usually against the sentence imposed, go to the High Court in Edinburgh. The High Court sat outside Scotland for the first time in 2000–2001, in the trial of the two Libyans accused of bombing the Pan-Am jet over Lockerbie; this took place at Kamp Zeist near Utrecht in the Netherlands.

Civil business is also conducted by a mix of local and central courts. The local courts are again those of the sheriff, who has a very wide jurisdiction

within his or her sheriffdom. The main central court is the Court of Session, which sits in Edinburgh. It too has a wide jurisdiction, with the result that very often a prospective litigant has a choice between it and the Sheriff Court. The courts are armed with wide remedial powers, which include the ability to compel the performance of contracts, to act quickly to prevent the commission of wrongs, to seize evidence in advance of litigation and to execute their own judgments. As elsewhere, the courts have been criticized for the slowness of their procedures. Strenuous efforts to improve and accelerate procedures have been made in recent years. One example is the establishment of a special commercial judge in the Court of Session, with the express aim (very largely achieved) of ensuring the speedy and efficient despatch of commercial cases. It is now quite common for such cases to be dealt with within a period of six months.

In commercial matters Scots law is generally committed to the principle of freedom of contract and giving effect to the intentions of contracting parties. This means that, when parties provide for the resolution of disputes by private arbitration, the courts accept without question that their jurisdiction is excluded, while at the same time being willing to give effect to the arbitral award. Legislation in 1990 also sought to create rules to make Scotland an attractive forum for international arbitration, and lawyers have taken with some enthusiasm to the practice of mediation and 'alternative dispute resolution'. In sum, therefore, the Scottish legal system has been trying hard for some time now to make itself a good place in which commercial disputes may be settled expeditiously and effectively, whether by formal or informal means. That commercial law may be so treated raises the question more sharply for other kinds of case (see Genn and Paterson, 2001).

Following devolution under the Scotland Act 1998, the Scottish Parliament became responsible for private and criminal law on 1 July 1999. Before then legislation had often contributed to the continuation of a distinct Scottish dimension in private law. This can be attributed largely to the existence since 1965 of the Scottish Law Commission, which has greatly improved Scottish legislation in private law. The Commission works by detailed research on Scots law and the comparative position, wide consultation and the presentation of generally well argued reports and draft Bills. In contract law, the Commission has been responsible for the modernization of the rules on requirements of writing; the undoing of the parole evidence rule (another piece of 19th-century borrowing from England); and the de-Anglicization of the United Kingdom sale of goods legislation as applied in Scotland by the removal of ambiguous references to the condition/warranty dichotomy in the rules on implied terms and buyer's remedies.

Following Law Commission work, the Scottish Parliament has already tackled such questions as the abolition of the last lingering traces of

feudalism in land law and the problems of incapable adults; it may soon go on to complete modernization of the law about the use of writing in contracts and to rights in security. On the other hand, much of what in its original devolution proposals the United Kingdom government called 'common market law' (i.e., companies, financial services, intellectual property, employment and insolvency) is reserved to the Westminster Parliament. Indeed, in reality, these are matters now mainly in the hands of the European Union. But there is nothing to stop members of the Scottish Parliament talking about such reserved matters, and there is every chance that their discussions will have an impact upon decision making in Whitehall and, indeed, Brussels.

The Scotland Act subjected both the Parliament and the Scottish Executive to the European Convention on Human Rights; and on 2 October 2000 the whole legal system came under the sway of Convention rights as a result of the UK Human Rights Act 1998. The effect of this 'domestication' of human rights has already been considerable: Acts of the Scottish Parliament are subject to challenge in court, long-established features of the system such as temporary sheriffs have been swept away in a single case, the system of land use planning inquiries has been reviewed, and lawyers are learning the full implications of such things as rights to a fair trial, liberty, privacy and freedom of expression and association. There are effects for private law: the courts as public bodies are obliged to observe Convention rights, probably meaning that their decisions even in purely private ('horizontal') cases must be Convention-compliant. It is already accepted that judicial remedies must be so. Working out exactly what all this means for the development of the substantive law, whether by the Parliament or the courts, will be one of the major challenges of the first decades of the 21st century (see further, Boyle *et al.*, 2002).

Devolution is not generally being seen as a way of preserving or restoring legal distinctiveness or peculiarity for its own sake; rather, it gives opportunities to develop the law in accordance with modern standards and thinking. One proposal, driven to some extent by human rights considerations, is for codification by the Parliament of all, or parts of, Scottish private and criminal law (Clive, 2000; 2003a). At least part of the idea is that the Scottish people will find it easier to know the law codified than they do when it consists, as at present, of a jumble of statutes and precedents. The work of the Law Commission, the completion in the 1990s (and subsequent revision) of the 26-volume *Laws of Scotland: Stair Memorial Encyclopaedia*, an extensive academic analysis of Scots law, means that much of the basic research on the current state of the law has been done. A draft criminal code was published in 2003 (Clive, 2003b).

The codification proposals have also been stimulated by work on European private law, in which several Scots academic lawyers have

participated. Thus it has been argued that in a number of important respects the Scots law of contract anticipated the position arrived at by the Commission for European Contract Law in considering the best rules of contract law (MacQueen, 2001a; Zimmermann, 2001); accordingly the Principles of European Contract Law could be taken as a starting point for a Scottish contract code (Clive, 2003a, p. 95). The Principles, together with the Vienna Convention on International Sale of Goods (CISG) and the Unidroit Principles of International Commercial Contracts, can also be used as a basis for more limited reforms of the law than comprehensive codification. So, in 1993, the Law Commission proposed adoption of a number of the general contract formation rules in the CISG, and later in the 1990s examined the rules on the interpretation of contracts, penalty clauses and breach of contract with the Unidroit and European Principles very much in mind. Further, the results of such projects as the Study Group on a European Civil Code have also been taken as highly relevant to the potential development of Scots law, whether or not they go on to become a basis for a Europe-wide 'Common Frame of Reference' for contract law.

Scots law also offers a number of perspectives on the development of a European private law. Perhaps the foremost of these is that the single market which was created in Great Britain by the 1707 Union (which was as much an economic as a parliamentary project) continues to exist to this day without a unified system of private law, in particular in the field of contract (Weir, 1998). Where a common British law has been found important is in the commercial and social arenas, more or less anticipating where European Union legislative activity has also been most significant. Even in such 'single market' fields of law, distinctive Scottish provision has been found workable: see for example the Sale of Goods Act which even in its original incarnation in 1893 contained special rules for Scotland and which now has a more or less specifically Scottish regime of buyers' rights and remedies, compatible with the principles of Scots contract law. A further example is provided in consumer protection law by the control of exclusion clauses under the Unfair Contract Terms Act 1977, which has similar but not quite the same provisions in separate Scottish and English parts.

On the other hand, the argument that, since the mentalités of the civil and the common laws are fundamentally incompatible, a European private law is infeasible is challenged by the existence of the mixed system of Scots law. The similarity of Scots contract law to the European Principles has already been noted: an interesting dimension to this is that Scots law reached its position largely through the decisions of the courts, i.e., it reflected problems that actually arose in practice, and the choices made pursued what seemed to the judges in the cases the most practical outcomes

for those specific problems, rather than some grand overall design (MacQueen, 2001b). Another potentially significant example is provided by the law of trusts, which developed in Scotland from the 17th century on, despite a unititular concept of property and the absence of the divide between law and equity supposed to be the lifeblood of the trust in the system where it is most developed, England (Gretton, 2000). As an efficient means of managing and distributing wealth the trust is likely to form part of any European private law, and the Scottish model has already attracted considerable attention as a possible basis for such a development (Hayton *et al.*, 1999; Milo and Smits, 2001; Zimmermann, 2001, pp. 158–69; Grimaldi and Barrière, 2004).

In conclusion, Scots law can be both a contributor to, and a beneficiary of, the work going on towards a European private law. It has survived and developed as an independent legal system by dint of borrowing ideas from outside and then often giving them a characteristic twist of its own devising; so a fresh transplantation is unlikely to be rejected as a result of genetic incompatibility. But if Scots law is in turn to make its full potential contribution to European legal development, it must do more to put its house in order, in terms of making the law more readily accessible and understandable to those approaching it from other traditions. This might also have the not so incidental benefit of improving public understanding of the law in Scotland itself. Whether or not this is to be achieved through codification, much will inevitably depend upon academic Scots lawyers, as teachers and writers, to continue the work begun by Sir Thomas Smith in the 1950s, whether or not they take up his civilian sword as the way to tackle the problems. In a small system, talent can become thinly spread; and in that lies the greatest danger to healthy development in the future.

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Useful websites

- Scottish courts: (<http://www.scotcourts.gov.uk/>).
- Scottish Law Commission: (<http://www.scotlawcom.gov.uk/>).
- Scottish Parliament: (<http://www.scottish.parliament.uk/home.htm>).

58 Social security*

Frans Pennings

1 Introduction

The first social security laws were adopted in the 1880s in Germany (Köhler and Zacher, 1982). They were not the first forms of social security – in early civilizations already arrangements were made to protect persons with an insufficient income – but they are generally taken as the start of a legal approach towards social security. The reason for this is obvious: the new acts introduced an enforceable right to benefit when the insured risk materializes, whereas the earlier forms of social protection were not enforceable by law.

These early German laws were limited to one specific contingency each, for instance industrial accidents and sickness. They were supplemented by later laws, which followed the same approach: they each covered one contingency only, of which old age, disability and unemployment are obvious examples.

During World War II a new concept of social protection was developed in Great Britain, where, in 1942, the Beveridge Report was published (Beveridge, 1942). This report expressed the feeling that after the war society had to be more responsible for its members. Social security was to be approached in a new way: social security was to be universal and comprehensive. It was no longer to be limited to specific categories of the population and poverty had to be fought. The new concept of comprehensive protection led to the introduction of the term ‘social security’ in government papers, official declarations and academic studies. Article 22 of the Universal Declaration of Human Rights of the United Nations, for instance, provides that ‘Everyone, as a member of society, has the right to social security.’

However, this does not mean that there was now a definition of this term. In fact, mentioning this term in official instruments makes it even more difficult to reach consensus on its contents, since such a definition could now also affect and sometimes even bind international organizations and national states, and that was not their intention.

2 The scope of social security

Social security is not exclusively the topic of lawyers. To the contrary, economists and social scientist are active in this area as well. However, since

* See also: Insurance law.

this book is dedicated to comparative law, discussion here will be limited to comparative social security law.

In the past decade the scope of social security (law) has become fuzzier, since income protection, if the conditions are met, is also legally enforceable against parties other than the state. In fact the statement in the first section which made an exclusive link between an enforceable right to benefit and public social security is no longer true. Since the role of these other parties is growing, notably of private insurance companies and of employers, this is a very important development.

It is beyond dispute that also non-public social protection is part of social security and that such new forms of social protection have to be described and analysed in studies on social security. However, this makes comparisons of national systems or schemes more complex, since these developments are not the same in all countries.

Social security can best be described on the basis of its objectives. The first objective is to provide income security. Social security thus provides for an income, in the form of benefits in cash and benefits in kind, if a person no longer participates in work owing to certain circumstances, such as disability, old age and unemployment. Social security can also supplement incomes, including those of persons in work, if they are below the applicable social minimum. It can also provide (partially) for compensation for the costs of medical care, housing and raising children.

A second – more modern – objective of social security is to assist people to find work again; this assistance is given, in particular, to those who have lost their job or who are threatened with unemployment or disability. This assistance may have different forms; examples are adaptation of the workplace to the needs of the disabled person and training of those with insufficient qualifications or in need of new qualifications. If this second aim is met successfully, the income guarantee function of social security becomes less important.

Since these aims themselves do not define the scope of social security, in each instrument and/or publication in which the term is used there has to be described what areas are dealt with. Often this is done in a highly pragmatic way, such as that an overview of social security concerns the areas covered by the national Ministry of Social Security; an example of this approach can be found in Ogus and Barendt (1982, p. 38). Such an approach cannot be followed, of course, in the case of comparative studies.

3 Development of the forms of social security

The social security laws which were established before World War II (the German ones instigated by Reichskansler Bismarck, referred to in the first section, and the laws adopted in other European countries following the

German example: see Köhler and Zacher, 1982) were aimed at workers. They were meant to compensate their loss of income in the case of sickness, disability, old age and unemployment, respectively. These laws were based on the insurance principle: individuals were eligible for benefit only if they had been insured during a specified period before the materialization of the risk. This insurance model, inspired by the insurance schemes set up by trade unions in the 19th century, was useful, since in several countries there was an adverse attitude towards state responsibility for social protection. Sometimes this reluctance was based on reasons of principle: the legislator considered that the primary responsibility for social protection lay within the community to which the person concerned belonged and the state had no particular role in providing this protection. As a result the position of these communities was strengthened. In other countries the reluctance of the state to interfere was based on more pragmatic reasons, in particular the fear that benefits were being paid to persons who did not deserve them. The insurance principle was considered a useful selection instrument, since only those who were insured for a sufficient period were entitled to benefit.

A consequence of this approach was that protection of the social security laws was limited to insured persons, i.e. workers. The level of benefit and in some cases the duration of benefit were linked to the previously earned wages and the duration of the insured period. These characteristics are often denoted by the term 'equivalence principle', which refers to the triangle of relationships between contributions, benefits and risks: benefits are awarded only if the insured risk materializes, the level of benefit depends on the amount of paid contributions, the level of contributions depends on the actuarial calculations of the insured risk, etc.

Although the terms 'insurance principle' and 'equivalence relationship' are useful to describe the characteristics of social security laws, they cannot serve as hard prescriptions for the schemes concerned, since in the national context the schemes can be elaborated in various ways.

In the course of time another principle began to have a large impact on social security: the solidarity principle. This principle weakens the impact of the equivalence relationship in favour of persons who have problems with meeting the insurance conditions. For instance, unemployed workers above the age of 50 may be entitled to a longer period of unemployment benefits than younger ones.

After World War II, it was acknowledged that several categories of the population were without adequate protection, whereas there were no good reasons for this. As mentioned above the objective to fight these gaps in protection and the resulting poverty became important during and after the war. A partial solution was found in creating specific insurance schemes for particular categories, such as the self-employed.

The concept of social security, which requires a general comprehensive scheme providing for basic protection, also required more general schemes. In line with this, in several countries national insurance schemes were established. These cover the whole population residing in a country, regardless of whether they are working or have been working. The employees schemes did not disappear, so social security is now often a patchwork of various types of schemes.

A third type of schemes completing the employees' insurance and national insurance schemes is that of public assistance. This is meant for those not or no longer entitled to benefit based on an insurance scheme or to supplement benefit payable on the basis of an insurance scheme.

4 Recent extensions of the scope of social security

The forms of social security provisions discussed above are elaborations of the obligation of the state as acknowledged in many countries to provide for income security for its citizens. This obligation came under pressure when, over recent decades in several states (if not all), problems began to occur or threatened to occur for the social security system. The main threats are the low labour market participation rates, in particular of those between 55 and 65, and the greying of the population, which raises and will further raise the expenditure for pensions and healthcare schemes dramatically.

For this reason the social security systems of many countries are undergoing continual reforms. One of the approaches chosen is to increase the responsibility of employers for parts of the social protection of their employees. The most common example concerns sickness. Apart from entailing a shift in costs, this approach is also meant to encourage employers to increase their attention to ill employees and to reinforce the efforts to have their ill or disabled workers reintegrated into work. This development means that part of labour law has now become part of social security law.

In addition, the role of the state is reduced in order to make more room for individuals to make their own provisions, for instance by buying private insurance. Indeed, protection by statutory old age pensions and healthcare schemes is often supplemented by private insurance. This means that also private law has entered the area of social security. This inclusion of parts of labour and private law is not made for imperialist reasons, but to show that the provisions which provide for protection are becoming more and more varied and complex. As a result comparison of national systems also is becoming more complex.

5 Comparison of social security systems for policy reasons

In the development of the national social security systems the information about other national security systems played an important role, as

was indicated above. Comparison of national social security systems has taken place from the very first statutory laws. Even before the creation of these laws, experiences with social protection systems were exchanged. For the subsidy methods of voluntary unemployment insurance schemes, for instance, the Ghent and Danish models served as examples.

The experiences with the German statutory employees insurance schemes were closely followed by other countries (Köhler and Zacher, 1982) and in some explanatory memorandums of social security bills in this early period of creating social security laws comparative overviews can be found (Pennings, 2001). However, already at that time it could be seen that references to foreign examples were often rather ad hoc and were mostly made simply in order to support the argument of the person or the body which mentioned the foreign example.

Also in later periods and still at present, we can see a lively interest in comparative studies which are carried out for policy purposes. This may be done in order to argue that the costs of particular benefits are too high, for instance the costs of sickness and disability benefits. Such studies are also made for the purpose of finding best practices in the area of reintegration of the unemployed and the disabled. These studies have in common that they are mainly made for policy reasons and not for academic purposes. Although they may lead to some interesting ideas and discussion issues, they do not really contribute much to the increase of academic knowledge. Often they are the target of academic criticism for not comparing comparable issues or not giving all relevant information on issues such as costs and success rates.

Here we come to a sensitive issue: social security is a highly political area and politicians are often concerned to reduce expenditure. For this purpose references to foreign examples with lower costs and/or figures which show that the domestic system is better or more generous than foreign examples are very useful. For criticism on such use of comparisons and for requirements for academic studies, see Zacher (1977, 1978) and Pieters (1992).

6 Academic approaches to comparative social security law

The references just given (Zacher, 1977, 1978) and (Pieters, 1992) are the few methodological works on comparative social security law, and in these works it is easily admitted that they are the first works and that the theoretical foundations are at a very early stage.

These theoretical foundations can be broadly summarized as follows: be very careful in descriptions, terminology and conclusions in order to avoid comparing different issues which may lead to wrong or incomplete conclusions; try not to take your own system as the point of reference when describing other systems and try not to overlook relevant rules and facts.

These remarks will not differ very much from those given for other comparative studies. The main special characteristic of comparative social security law is that it is a politically sensitive area, so abuse is easily made of comparisons. A second characteristic is the extremely rapid changes in legislation, which makes comparisons difficult.

There does not seem to be much discussion on these theoretical starting points. Another issue, however, is whether these requirements are and can be met in practice, even though meaning, this time, in academic studies. First mention will be made of the studies in which national systems are compared. Later sections will mention studies which do so in the light of international or European law. Academic studies in which national systems are compared (horizontal comparisons) are scarce. These studies are mostly PhD theses; if the present overview is not complete, this is due to the fact that in some countries such studies are not published.

First of all we have to realize that social security is – certainly if we approach this from a (comparative) law perspective – a typical European phenomenon. This was remarked by Pieters (1992, p. 8). Social security is fundamentally different from the protection given in Africa, Asia or the United States; in any case its extent is much wider. As a result (comparative) studies in English, French or German on non-European social security are scarce (for an example on the social security systems of French-speaking African countries, see Kaufmann, 1997).

An example of a comparative publication of national social security schemes is Kloss (1989), which compares disability benefit laws and reintegration measures in Germany and the Netherlands in the light of the human damage theory developed by the Belgian professor Viane (1975). As can be seen, the second objective of social security – promotion of reintegration into work – is integrated in this comparative study of social security. The same is true of a second example, which is Pennings (1990). This is a comparative study of unemployment and employment schemes in Great Britain, Germany, France and the Netherlands, this time not in the light of the human damage theory, but in view of the right to work and right to income principles. The last PhD thesis realized within this 'series' was by Westerveld (1994), who compared the old age and survivors' schemes of Great Britain, Germany and the Netherlands.

These books were extensive works, which describe the (changes) in the legislation through time, while putting the legislation into context and explaining the choices which were made. Although the historical descriptions and analyses in these works keep their value, a problem with this type of research in social security is that the descriptions of the more recent developments soon become outdated. The PhD thesis of Pieters (1985) on constitutional social rights may to some extent be an exception to the last

remark, as constitutional rights do not become outdated so soon, although also here there may be developments in the ideas and elaborations of these rights.

This overview will not be complete as there may be many unpublished comparative works and there are also articles with shorter comparative studies (an example is Pennings, 1992). There is no systematic overview of all comparative materials. It seems also to be the case that more and more academic comparative studies, if made at all, are made in the light of international and European law (see below).

7 Supranational sources of social security law

So far we have described the contents and developments of national social security schemes. In addition it is relevant to look at international developments in the area of social security, since these have an important impact on comparative social security law as well. The international organizations most relevant to our topic are the United Nations, the International Labour Organisation, the Council of Europe and, last but not least, the European Union.

We have already mentioned Article 22 of the Universal Declaration of Human Rights of the United Nations, stating that 'Everyone, as a member of society, has the right to social security.' Much more fully elaborated and extensive are the international standards for social security set by the International Labour Organisation (ILO). This organization takes a leading position here. At present, almost all countries of the world are members of this organization. The ILO was established after World War I, with the aim to promote social peace and to prevent a new war. Social unrest was considered a serious threat, and the Russian Revolution of 1917, which took place shortly before the creation of the ILO, confirmed the founders of this organization in their view that measures had to be taken in order to raise the standards of living in the world. This view was laid down in the Preamble of the Constitution of the ILO, in the famous phrase: '... universal and lasting peace can be established only if it is based upon social justice' This concern was reaffirmed in 1944 by the International Labour Conference in the Declaration of Philadelphia, which endorses a very broad view of social security in calling, among other measures, for the provisions of 'a basic income to all in need of such protection'.

In order to realize the objectives mentioned in the constitution, the ILO developed a large codex of standards in the form of conventions and recommendations. These standards give minimum rules on the contents of the national legislation, including the persons covered, the content and level of benefits, conditions for entitlement to benefit and the administration. These standards are minimum standards; the conventions themselves

explicitly allow higher levels of protection, a position reinforced by the ILO constitution.

The adoption of the standards went hand in hand with the establishment of social security systems in many countries of the world and had an important impact on these systems at the regional level, particularly in Europe and South America. The standards reflect the common objectives and principles on which a social security system has to be based.

Publications

There are relatively few recent academic publications on the social security standards of the ILO. Fortunately, older publications have maintained their value (Follows, 1951; Laroque, 1969; Nußberger, 2002; Schuler, 1988; Tamburi, 1981). Important changes in the past decade in many national schemes and the responses of the ILO to these changes, however, require new studies of the legal standards developed within the ILO framework. Such studies can be found in von Maydell and Nußberger (1996) and Nußberger (2003). A study in which the impact of ILO conventions on national systems is compared, appeared in 2006 (see Pennings, 2006).

8 The Council of Europe

The Council of Europe was founded after World War II. This organization also developed social security standards, which were laid down, primarily, in the European Code of Social Security, adopted in 1964. Another instrument from the Council of Europe is the European Social Charter (ESC), introducing social and economic rights. The ESC guarantees the following fundamental rights: the right to work, the right to adjust conditions of work, to safe and healthy working conditions, the right to a fair remuneration, the right to freedom of association, the right to bargain collectively (including the right to strike), the right of children and young people to protection, the right of workers to protection, the right of migrant workers and their families to protection and assistance, the right of physically or mentally disabled people to rehabilitation, vocational training and resettlement, the right of the family to social, legal and economic protection, the right of mothers and children to social and economic protection, the right to vocational guidance, the right to vocational training, the right to proper health facilities, the right to social welfare services, the right to social and medical assistance and, last but not least, the right to social security.

Publications

In respect of the Council of Europe there are a few general works: Council of Europe (1979), Jaspers and Betten (1988) and Wiebringhaus (1983).

Most often it seems that, if social security standards of the Council are discussed, this is together with the corresponding ILO standards. The European Institute of Social Security made some studies on the compatibility of Central and Eastern European social security systems with the European Code of Social Security (www.eiss.be/research.php), but these were not published.

Some instruments introduced by the Council are supervised by the European Court of Human Rights and the judgments of this court often have a considerable impact on national systems. An example is *Pennings* (1999), in which an overview of the impact of the case law of the European Court of Human Rights on property protection and social security is given.

9 European Union law

EU law is becoming more and more relevant to national law systems and this is to some extent also true for social security. Article 2 of the Treaty on the European Communities (EC) provides that the Community has as its task, among other things, the raising of standards of living and quality of life, and economic and social cohesion and solidarity among the member states. However, the legislative powers of the Council of Ministers in the area of social security are limited to producing standards on the coordination of social security in order to promote the free movement of workers (Article 42 EC). In addition the Council made binding rules on equal treatment of men and women in social security.

Consequently, the Council does not have the power to adopt binding legislation which fixes standards for the contents of national social security systems. The only Treaty provision which concerns fundamental social rights is Article 136 EC. This article states that the Community and the member states, having in mind fundamental social rights such as those set out in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers, shall have as their objectives the promotion of employment, improved living and working conditions, proper social protection, dialogue between management and labour, and the development of human resources with a view to lasting high employment and the combating of exclusion.

Article 136 EC, like its predecessor, Article 117 EC Treaty, does not grant any powers to the Community legislator to realize the objectives of this article. Article 94 EC and Article 308 EC can, in principle, be invoked as a legal basis for binding rules, as these articles provide for a general competence to take measures when necessary for the approximation of the provisions laid down by law, regulation or administrative action. They were the basis of another set of binding rules in social security, mentioned above,

the directives on equal treatment of men and women. However, these articles are applicable only within the limits drawn by the principle of subsidiarity. This principle means that the Community shall act only if the objectives of the proposed actions can be better achieved by actions at Community level than at member state level.

Instead of binding rules, the Council of Ministers issued several forms of 'soft law', such as recommendations. An example is Council Recommendation 92/442/EEC of July 1992 on the Convergence of Objectives and Policies in Social Protection (OJ L 245/49, 1992); another, with regard to minimal protection, is Council Recommendation 92/441/EEC on Common Criteria for Sufficient Benefits and Services within Social Security Systems (L 245/46, 1992). On these directives, see Cousins (1993).

As the recommendations did not have much impact, more recently a different instrument was developed to promote improvement of living standards, in particular to combat social exclusion. This is the Open Method of Co-ordination, a new type of instrument, which is meant to influence the policies of the member states in a 'soft' way. The purpose of the Open Method of Co-ordination is to generate systematically information on best practice, taking account of national circumstances, which is useful for member states striving to realize the objectives of the Treaty. Within the framework of the Open Method of Co-ordination, member states must produce national action plans in which they make clear how they aim to realize the objective of combating social exclusion. These reports are used to identify exams of best practice, which are disseminated amongst member states, and to help the European Commission formulate guidance for the improvement of employment policies. Moreover, the Open Method of Co-ordination studies made within the EU framework are examples of such approaches. On the Method of Open Co-ordination, see Schoukens (2002) and Schulte (2003).

The main area of hard law concerns the coordination rules relevant to migrant workers. These rules have to prevent migrant workers from being insured in two countries at the same time or in no country at all and from having double obligations to pay contributions owing to a positive conflict of laws. Although ILO conventions and bilateral agreements between countries envisage finding a solution to these problems, by far the most extensive and powerful coordination rules are found in Council Regulation (EEC) 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community.

The other area of binding EU law concerns equal treatment of men and women in the area of social security, of which Directive 79/7 and Article 141 EC are the most prominent instruments.

Publications

Whereas the comparative horizontal studies mentioned in the previous sections were meant to analyse problems and inconsistencies in national systems and to describe 'good practices' which may be useful as an example, the types of comparative studies to be discussed below are made in the light of international or European questions.

Pieters (1992, p. 11) argued that comparative social security (law) is of practical relevance in particular in the case of actual themes of harmonization and coordination of social security schemes, at the time of writing of this book in view of the European common market ('1992': see Pieters, 1991) and later in view of the accession of Middle and Eastern European states. A famous example is the description of the systems of the then 15 EU member states in Pieters (1990). Such studies are useful in order to identify the problems and opportunities which might occur after introduction of new EU rules and/or in the case of proposals for convergence. They can also be used for educational purposes. Such a study covering all member states – made on the basis of a questionnaire sent to experts in all member states – certainly cannot meet the requirements for comparative social security as outlined by Pieters (1992).

There are also several more profound studies which make comparisons of national systems with a view to making proposals to solve particular EU problems, and it seems that these mixed vertical and horizontal studies are now more often made than the horizontal ones. Although also in this type of comparison there is the risk that the departing point is based too much on the system of the researcher (for instance, when a western researcher compares an African scheme with an ILO Convention) this risk is much slighter when schemes of EU member states are studied in the light of a particular EU rule.

This 'light' version of comparative law – light in the sense that not the full history, economic contexts and neighbouring areas of law need to be studied since the specific research topic often does not require it – is therefore becoming popular, even though it requires very much work. One advantage is that it is easier to formulate the research topic, since the research is done in the light of European law. Another advantage is that, because of its relevance for policy reasons and the interpretation of law, it will attract the attention of many readers.

An example of this type of study is the PhD thesis of Schoukens on self-employed schemes in the EU member states with a view to trying to make better coordination rules for the self-employed in cross-border situations. At the same time this book provides comparisons of national protection schemes of the self-employed (Schoukens, 2000, 2001).

In order to make recommendations for coordinating non-statutory pension schemes within the EU in order to promote free movement of

workers, the PhD thesis of Wienk (Wienk, 1999) compared British, German and Dutch schemes. Vonk did so with respect to minimum subsistence benefits (Vonk, 1991), in which area Van der Mei (2002), who compared the free movement of persons without a sufficient income within the EU and USA, gave an interesting follow-up study. A final issue, now solved for the greater part, concerns the position of the third country nationals, which led to a profound PhD thesis (Jorens, 1997) and collections of papers (Jorens and Schulte, 1998; Von Maydell and Schulte, 1995).

Also the preparation of the accession of Central and Eastern European states lead to many studies. These concern the characteristics of these schemes and their transformation to a market economy (see Von Maydell and Hohnerlein, 1994) and the adjustments of the systems to EU law and studies of the effects of EU law (Jorens and Schulte, 1999).

Works which are focused on EU law itself are Pennings (2003), Eichenhofer (1997), Jorens and Schulte (2004) and the reports by the national experts of the member states on the application of Regulation 1408/71 in the member states within the framework of the European Observatory. These reports are very useful for increasing the knowledge of the working of the regulation in practice (Jorens and Schulte, 2001). In this area there seem to be the most active international debates, in which EU coordination, based on the *lex loci laboris* or *lex loci domicilii* principle, is rigorously discussed; see Christensen and Malmstedt (2000) and Pennings (2005).

There are also studies which do not make a comparison as such, but which describe scenarios for a better coordination of social security systems, while taking account of the effects on national systems (see Vansteenkiste, 1991). A general work on soft law and the EU is Senden (2003).

10 Conclusions

Comparative studies of national social security schemes are of great importance, both for the development of knowledge of the foundations and developments of social protection and to reflect on the individual system. They are also useful for policy recommendations and social security comparative research is, given its political context, often done for this purpose. The danger which lies in doing such work is widely recognized, but the theoretical requirements for adequate comparisons are not very sharply defined.

Comparative studies are now often done in the light of international or European law. As was explained above, these studies have advantages as their topic is often more specifically governed by a question which is common to these schemes. However, there is still also the need for horizontal studies for the original reasons: acquiring more knowledge and developing theoretical notions.

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59 South Africa

Jacques E. du Plessis

1 Introduction

Since 1961, the country's official name has been the Republic of South Africa. Previously, it was known as the Union of South Africa, which was formed as a dominion of the British Empire in 1910 through the joining of the former Boer Republics of the Transvaal and the Orange Free State, and the Cape and Natal Colonies. The legal system is often described as 'mixed' on the basis that it has been influenced substantially by Roman–Dutch civil law and English common law. It can be argued that the 'mix' also includes African customary law, which enjoys recognition as a source of law under s. 211(3) of the Constitution of the Republic of South Africa 1996. However, since African customary law has only interacted in a very limited way with the civil law and common law mix, it is perhaps more appropriate to state that South Africa has a 'pluralist' system, in which the civil law/common law mixture and customary law are separate components. Of course, this description would no longer be appropriate if the components were to interact more strongly in future (on the need for such a development, see Mahomed, 1985, p. 363).

South Africa has 12 official languages (s. 6(1) of the constitution). Although all of these languages theoretically could be used in the courts and in legal practice, English is the dominant legal language. Afrikaans traditionally has been very influential, but its use is declining. In the Supreme Court of Appeal of South Africa, the legal languages are English and Afrikaans, while the Constitutional Court essentially uses English. By far the greatest share of reported judgments of the High Court are in English, while the rest are in Afrikaans. In the Magistrates' Court, the official languages other than English are used more often, usually on a regional basis. National legislation appears in English and another official language, but only the English version is signed by the President.

The distinction is hardly watertight, but it is useful to differentiate between the importance which foreign lawyers attached to South African public law (and especially its constitutional law), compared to its private law. Although the Constitutions of the Boer Republics elicited some favourable comment (see Bryce, 1901, pp. 359–89), the view of South African public law was traditionally negative, especially from the official introduction of apartheid in 1948 until the adoption of the first interim constitution of 1992.

In essence, the system was important to foreign lawyers as an example of formalized discrimination and repression. The only really positive dimension of these developments was that, as Dugard put it, South Africa made an 'enormous, although unintended' contribution to international law, owing to the need to develop new rules of treaty and customary law to combat the effects of apartheid (2003, p. 20). However, nowadays, South African constitutional law, and especially the jurisprudence of the constitutional court, is in many instances regarded as path-breaking and progressive, and reflects a commendably innovative approach to comparative law.

Recently there has been a significant growth in interest in the family of mixed legal systems (see, e.g., Palmer, 2001). In the context of South African private law in particular, mixtures of civil law and common law in the fields of obligations and property have attracted the interest of Scottish lawyers – a sentiment which is reciprocated, and reflected in joint comparative studies (Zimmermann, Visser and Reid, 2004). This interest is not only expressed by foreign lawyers from mixed jurisdictions, but also by lawyers concerned with the development of private law in Europe. In this regard it has been suggested that mixed systems such as South African law can provide valuable indications of what a future unified private law in Europe could look like, since these systems were constantly faced with the challenge of blending civil and common law (see Zimmermann, 2001, pp. 126ff.; Smits, 2001; 2002).

2 Constitutional law

South Africa has a written constitution, formally called the Constitution of the Republic of South Africa 1996. It was adopted by the Constitutional Assembly (comprising the National Assembly and the Senate) on 8 May 1996 and entered into force on 4 February 1997. The promulgation of the constitution signalled the end of apartheid and the introduction of a new, democratic dispensation for South Africa. The constitution also introduced a comprehensive Bill of Rights. The constitution can be accessed at www.info.gov.za/documents/constitution/index.htm.

The national legislative authority is vested in a bicameral Parliament, consisting of two Houses, namely the National Assembly and the National Council of Provinces (NCOP). The NCOP represents the interests of the nine provinces in the national legislative process. Executive authority at national level is vested in the President, currently Thabo Mbeki, who is head of state and head of the Cabinet. The Cabinet consists of the President, the Deputy President and the Ministers, excluding the Deputy Ministers. Once Ministers and Deputy Ministers have been appointed, most of them remain members of the National Assembly. The constitution provides for a system of cooperative federalism, which means that the legislative and the executive authorities vest in different spheres of government.

The constitution entrenches the principle of constitutional supremacy (s. 2). Provided it has the necessary jurisdiction, a court 'must declare that any law or conduct that is inconsistent with the Constitution, is invalid to the extent of that inconsistency' (s. 172(1)). However, an order whereby an Act of Parliament or a provincial statute is invalidated has no force or effect until 'confirmed' by the Constitutional Court (s. 172(2)). When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights (s. 39(2)). The Bill of Rights does not only bind the state, but also operates 'horizontally' in the sense that it also protects individuals against violation of their rights by other individuals (further, see De Waal, 'Constitutional law', in Van der Merwe and du Plessis (2004, 55 at 89ff.).

3 Private law and commercial law

The main sources of private law are court decisions, based on earlier decisions according to the doctrine of precedent, and ultimately on the two main foundations of South African private law, namely Roman–Dutch civil law and English common law. Although some aspects of private law are strongly influenced by statute (cf. e.g., the Matrimonial Property Act 88 of 1994, Divorce Act 70 of 1970, Wills Act 7 of 1953) the greatest part of private law is still uncodified. Commercial law is not dealt with in a single code, but legislation plays an important role in certain branches of commercial law, most notably corporate law (cf. the Companies Act 61 of 1973, currently under review); insolvency (Insolvency Act 24 of 1936), bills of exchange (Bills of Exchange Act 34 of 1964), insurance (Long-Term Insurance Act 52 of 1998, Short-Term Insurance Act 53 of 1998), labour law (Labour Relations Act 66 of 1995, Basic Conditions of Employment Act 75 of 1997, Employment Equity Act 55 of 1998) and tax law (Income Tax Act 58 of 1962). A number of these acts are based on English legislation, so that it safely can be said that the common law has been much more influential than Continental European law in the development of statutory commercial law. But it should not be forgotten, of course, that the legislation has to be applied against the backdrop of laws of property and contract that strongly bear the imprint of the civilian tradition.

South African courts have a long-established practice of drawing inspiration from foreign legal materials, especially case law from common law jurisdiction. For example, the 2003 Juta's Index and Annotations to the South African Law Reports contain over 300 references to Australian, Canadian, English and American cases. The constitution further explicitly mandates courts to consider foreign law in interpreting the Bill of Rights (s. 39(1)(c)).

4 Court system and law faculties

The judicial authority of the Republic of South Africa is vested in the courts (s. 165(1) of the constitution). The Constitutional Court, which is seated in Johannesburg and consists of the Chief Justice, Deputy Chief Justice and nine other judges, is the highest court in all constitutional matters. It deals only with constitutional matters and issues connected with decisions on such matters (but this limitation is under review).

The Supreme Court of Appeal, which is seated in Bloemfontein, consists of a President, Deputy President and a number of other judges of appeal. It is the highest court of appeal in all but constitutional matters and can hear and determine an appeal against any decision of a High Court. Decisions of the Supreme Court of Appeal are binding on all courts of a lower order. Next in line is the High Court, followed by the Magistrates' Court. Judges, who are usually drawn from the ranks of senior practitioners, preside in the High Court, whereas magistrates, who are usually drawn from the ranks of civil servants employed by the Department of Justice, preside in the Magistrates' Court. The High Court has an inherent or unlimited jurisdiction, whereas the jurisdiction of the Magistrates' Court is limited to R100 000 in civil matters (in 2005), and to certain crimes. Decisions of the High Court are binding on the Magistrates' Court within the area of jurisdiction of a particular division of the High Court.

At the lowest level are the Small Claims Courts, which are presided over by Commissioners and can only deal with civil matters limited to R7000 (in 2005). There are also a number of specialist courts established or recognized by an Act of Parliament, for example the Land Claims Court and the Labour Court.

South Africa does not have a penal code, but criminal procedure is regulated in detail in the Criminal Procedure Act 51 of 1977.

Although legal doctrine, in the sense of academic writing, is not a source of law, some academics are quite influential and are often cited in judgments. There are 19 law faculties at South African universities. The most important include the faculties of the Universities of Cape Town (UCT), Johannesburg (which incorporates the former Rand Afrikaans University), Pretoria (UP), South Africa (UNISA), Stellenbosch (US) and Witwatersrand. The association of legal academics is called the Society of Law Teachers of Southern Africa (www.uovs.ac.za/fac/law/sltsa).

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Statute law is published in the Government Gazette (GG). Free electronic access to statute law is provided in www.polity.org.za, www.gov.za and www.parliament.gov.za. These sites contain the full text of legislation from 1993 onwards, and some of them also provide information on bills and regulations. Comprehensive, searchable databases of all South African legislation can be accessed through subscription to Jutastat, a product of Juta & Co Ltd (www.jutastat.com), and LexisNexis Butterworths (www.butterworths.co.za).

The most important collection of case law is the South African Law Reports, published by Juta & Co Ltd since 1947. These reports are also available electronically through subscription to Jutastat. Since 1996, Butterworths publish the All South African Law Reports, which can be subscribed to electronically via LexisNexis Butterworths. Electronic searches of cases can further be conducted by subscribers to the Butterworths Legal Citator (www.legalcitor.co.za/index.htm). Since 1998, all decisions of the Supreme Court of Appeal are available on the websites of the Universities of Witwatersrand (wwwserver.law.wits.ac.za) and Free State (www.uovs.ac.za/fac/law/appeal/index.php), while all decisions of the Constitutional Court since 1995 are available at www.concourt.gov.za. Land Claims Court decisions from 1996 onwards and Labour Appeal Court decisions from 1998 onwards are also available at wwwserver.law.wits.ac.za. The University of Stellenbosch hosts decisions of the Cape High Court (<http://law.sun.ac.za>) and, the University of the Free State, decisions of the Free State High Court (www.uovs.ac.za/fac/law/highcourt).

For general guidance on doing research on South African law, see www.lrx.com/features/southafrica.htm; and for more detailed references to various sources on specific branches of the law, see the entry on South Africa in the database of the website of the World Society of Mixed Jurisdiction Jurists (www.mixedjurisdiction.org).

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60 Spain

Antoni Vaquer

1 Introduction

The Kingdom of Spain (*Reino de España*) is a plurilegislative state. Several Spanish regions have their own, different systems of private law. From east to west, there are private laws in force in the Balearic Islands, Catalonia, Aragon, Navarre, the Basque Country and Galicia. An autonomous private law is also claimed to exist in Valencia. The main legal systems in force can be qualified as civil law systems as the major parts of private law and criminal are codified (*Código civil*, *Código Penal*) and all other requirements usually attributed to civil law systems are met. Spanish law is characterized as belonging to the French legal family, although from an academic point of view the German and the Italian influence is remarkable. On the one hand, the French influence cannot be exaggerated. For instance, the Spanish code rejects the consensual transfer of property and requires delivery whilst succession law and the law of marital property are rooted in the Castilian tradition, only to highlight some examples. On the other hand, it is noteworthy that Spain has traditionally considered German doctrine very highly. One of the main features of this German influence is to be found in legal doctrine, since the curriculum and consequently handbooks follow, not the system of the Civil Code (based mainly on that of the French *Code civil*), but the pandectist approach.

The only official language in the whole state is Spanish. Other languages are also official in some autonomous communities: Catalan in Catalonia, the Balearic Islands and Valencia (where it is called *valenciano*), Basque in the Basque Country and Navarre and Galician in Galicia. Regional official languages can be used in court proceedings as well.

2 Constitutional law

The Spanish Constitution (*Constitución española*), passed in 1978 after the end of General Franco's dictatorship, reorganized Spain into autonomous regions with legislative power. A double series of competences is listed in arts 148 and 149. Art. 149 deals with the exclusive competence of the state, while art. 148 deals with the competence that can be assumed by the autonomous regions. The possibility of assuming powers in private law does not appear in art. 148, but in art. 149. Thus the regions do not need expressly to assume competence in their Statutes of Autonomy (*Estatutos*

de Autonomía) (implicitly admitted by the Constitutional Court in its decision 88/1993). Nevertheless, not every region can legislate in the area of civil law. The competence is restricted to those regions where a civil law was in force before the constitution was passed. In other words, only the regions whose civil law had been compiled are empowered to legislate on civil law. However, the competence on civil law of the regions is by no means unlimited. On the one hand, some areas of the civil law are reserved 'in any case' to the state: (1) rules on the application and efficacy of legal norms, (2) legal relationships related to the forms of marriage, (3) organization of public registers, (4) bases of contractual obligations, and (5) norms to solve conflicts of laws. Determination of the sources of law also belongs to the state, but with full respect to the sources of the regional laws. On the other hand, art. 149, 1.8 of the Spanish Constitution qualifies this competence with three substantives: conservation, modification and development of the 'foral' or 'special' civil laws.

Of course, the key concepts are 'development' and 'civil law'. As for its interpretation, several positions can be found among the authors. The more restrictive approach identifies 'civil law' and compilation, so that the 'development' refers to the institutions enshrined in the respective compilation of each Spanish regional law. The more extensive approach considers that the only limitation to the competence of the autonomous communities resides in the aforementioned areas reserved 'in any case' to the state. The Constitutional Court has adopted a more cautious approach (decisions 88/1993 and 156/1993) since it has rejected the idea of a competence limited only by the aforementioned five areas, with the argument that art. 149, 1.8 refers firstly to the exclusive competence of the state on private law, yet at the same time goes beyond the idea that the regions can only develop the 'compiled' institutions. In the opinion of the court, the regions can legislate on 'linked institutions' to the ones compiled. But this is a new concept, which adds further doubts to its interpretation. The constitution and the regional Statutes of Autonomy can be found in Spanish on the site <http://www.congreso.es/constitucion>; the constitution is also on the site <http://www.tribunalconstitucional.es/CONSTITUCION.htm>.

The *Código civil* sets up different criteria in order to decide which of the different civil laws in force in Spain is to be applied to citizens. Concerning personal status, the application of a concrete law depends on the *vecindad civil* of the party. *Vecindad civil* is a term barely translatable into English, and one that does not match the concept of residence. An individual acquires *vecindad civil* in one territory firstly because of *ius sanguinis*, so that the children acquire the *vecindad* of their parents. In cases where the parents have a different *vecindad*, the children acquire the *vecindad* of that parent whose affiliation has been previously established. If it is still not

possible to determine the *vecindad*, it will be the one of the place of birth. As a final criterion, the personal law will be the *Código civil*. But a *vecindad civil* can also be acquired by means of residence. Residing for ten years in a territory where a different civil law is in force without expressing the intention to keep the previous *vecindad* leads to the automatic acquisition of a new *vecindad*, that of the place of residence. Moreover, after two years' residence, the individual can opt for the *vecindad* of that place. Aliens who acquire Spanish nationality must opt between one of these *vecindades*: (1) that of the place of residence, (2) that of the place of birth, (3) the last *vecindad* of their parents, (4) that of the spouse. Concerning real status, the applicable law is the *lex rei sitae*.

The constitution sets out the principle of separation between the three powers of the state. The legislative power is wielded by the Spanish Parliament (*Cortes*). The Parliament consists of two chambers, namely the Congress (*Congreso de los diputados*) and the Senate (*Senado*). The two chambers do not have the same powers and, although they share the legislative power, the Congress takes the ultimate decision; nevertheless, the Congress normally adopts the amendments on the bills introduced by the Senate. The Senate is intended to be the house of territorial representation, taking into account the existence of Autonomous Communities with their own legislative assemblies. The executive power is vested in the president of the government and the ministers. The Congress elects the president of the government on the proposal of the King (King Juan Carlos I). A member of the government can be at the same time a member of the Parliament. Similarly, there is a government in every Autonomous Community, whose president is elected by the regional Assembly.

3 Civil and commercial law

The Spanish Civil Code (*Código civil*), promulgated in 1889 and still in force, was mainly inspired by the French Civil Code. It is not surprising, therefore, that the Civil Code has been repeatedly amended, especially in relation to family law. The enactment of the Civil Code was a long and cumbersome process. The first Spanish Constitution of 1812, still under French occupation, fostered the legislative unification of Spain by means of 'single codes for the whole monarchy'. The desire for a unifying codification was repeated in every constitution, but the successive drafts did not succeed; only a Commercial Code (*Código de comercio*) was passed in 1829. Some of the contents of the Civil Code exceed private law (e.g., the regulation of nationality). Moreover, the Civil Code supplements private and public law statutes. The provisions of the Preliminary Title dealing with the sources, effects and application of the law are applicable to the whole system of law. However, the Civil Code does not encapsulate the

entirety of private law. Land register and mortgages are regulated in the *Ley Hipotecaria* passed in 1946 (the first *Ley Hipotecaria* was enacted in 1856). Consumer law is regulated in a series of statutes, as well as leases, horizontal property or some specific torts. Commercial transactions are governed by special rules to be found in the Commercial Code (in force since 1885) and related legislation. The new Insolvency Act (2003) has paved the way to Commercial Courts, but only in the biggest cities are they going to be settled separately from civil courts.

Spanish courts seldom refer explicitly to foreign case law and doctrine, although occasionally some institutions have been successfully transplanted (e.g., a concretion of the principle of good faith such as *Verwirkung*). Quotations of Spanish doctrine are also infrequent. There are specialized journals devoted to comments upon relevant decisions (*Cuadernos Civitas de Jurisprudencia Civil*, *Revista de Derecho Patrimonial*).

4 Court system and law faculties

The judiciary is hierarchically organized, so that at least one appeal is allowed. The first layer consists of the magistrates' courts. Magistrates can be laymen, in which case they decide minor cases (litigation value up to €90). The magistrates' judgments can be appealed to the court of first instance. The judge of first instance is the ordinary judge in private law litigation. His decisions in first instance are appealed to the *Audiencia Provincial* (court of appeal). There is one *Audiencia Provincial* in each province. Usually, if the litigation value is not higher than €150 000, there is no appeal against the decision of the *Audiencia*. Otherwise, the decision can be appealed in cassation. But, if contradictory case law of the *Audiencias Provinciales* exists, cassation is also permitted regardless of the litigation value. If the appeal is based on regional law or on procedural breach, the Superior Court of Justice of the Autonomous Community decides the cassation. If, instead, the appeal is based on general private law or on the infringement of a constitutional provision, cassation is decided by the *Tribunal Supremo*. There is no formal rule of stare decisis. Lower courts are not bound either by the decisions of the upper courts or even by the jurisprudence of the *Tribunal Supremo*. Nevertheless, it has to be taken into account that one of the grounds for cassation is the contradiction with the case law of the *Tribunal Supremo* or the Superior Court in matters of regional law. Therefore, even if the lower judge is not compelled to apply the doctrine established by upper courts, his/her decisions may be reversed on this ground. If the decision has no further appeal but the party considers that a constitutional provision has been infringed, it can lodge *recurso de amparo* before the Constitutional Court. The *recurso de amparo* is not a new instance. The Constitutional Court cannot review the decision of the

ordinary court, since its task is limited to the constitutional aspect of the case. If the ordinary judge is doubtful about the constitutionality of a statute, he/she can lodge a *cuestión de constitucionalidad* before the Constitutional Court, which will decide on it or give a compulsory interpretation of the statute or the particular norm at stake. But if the ordinary judge considers that a statute enacted prior to the constitution is contrary to the constitutional principles, he/she can simply not apply it. It has to be taken into account that the constitution repealed any previous statute contrary to its dispositions when it entered into force (29.12.1978).

There are more than 40 law faculties in Spain. In big cities like Madrid or Barcelona there are four or more, although the number of students has been decreasing in recent years.

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61 Statutory interpretation*

Stefan Vogenauer

1 Introduction

Statutory interpretation, in a broad sense, involves determining the meaning of a statute. In practice, this is only rarely done for its own sake. People usually engage in this exercise in order to establish whether a particular statute applies to a given case. Thus statutory interpretation in a narrow sense is concerned with determining whether a given set of facts falls within the scope of a particular statutory provision and therefore triggers the legal consequences spelt out in the provision.

The word 'interpretation' is derived from the Latin *interpretari* and *interpretatio* which has connotations of 'exposition', 'explanation', 'meaning' and 'understanding'. In medieval and early modern legal Latin it was often used synonymously with *explicatio*, *expositio* or *declaratio*. The term also found its way into the Romance languages (*interprétation*, *interpretazione*, *interpretación*), into English via the medieval 'law French' and, in the 16th century, into German (*Interpretation*). The older German expression *Auslegung* (Dutch: *uitleg*) is still used synonymously. So is, in English, the term 'construction' which indicates that interpretation is a 'constructive' exercise which does not only explain a word but actively 'sets up' something (Vogenauer, 2003, pp. 564–5).

Statutes are interpreted in all legal systems which employ statutes as a source of law, and thus in all modern systems. In fact, statutory interpretation is even a particularly important feature of most of these systems because it is relevant to all cases in which a statute is or at least might be applied. Accordingly, in most countries there is at least one standard work devoted to the topic; for instance, in Australia (Pearce and Geddes, 2001), Austria (Bydlinski, 1991), Canada (Côté, 1999; Driedger, 1994), England (Bennion, 2002; Cross, 1995), France (Gény, 1919), Germany (Larenz, 1991), South Africa (Steyn, 1981), Switzerland (Kramer, 2005) or the United States (Hart and Sacks, 1958; Dickerson, 1975; Eskridge, 1994). These writings usually treat the subject entirely from the domestic point of view. With the exception of common law systems displaying some interest in other systems belonging to the same legal family, the national discourses on statutory interpretation are conducted in isolation.

* See also: American law; Interpretation of contracts; Legal reasoning.

2 The place of statutory interpretation in comparative law

In spite of the situation just described, statutory interpretation has for a long time been a pet subject of comparatists. This is so for at least four reasons. First, the interpretation of statutes is explored in most general treatises of comparative law since it occupies a special place in many theories of legal families. These theories divide the various legal systems of the world into larger groups with a view to organizing and classifying them in a rational way. Traditionally, the prevailing legal sources and the methods of reasoning from them were seen as a defining, if not *the* defining, criterion of classification. The importance of this factor was somewhat played down by the theory of legal families that dominated the second half of the 20th century. However, the criterion was still included in the list of five factors whose interaction was said to constitute the 'style' of a legal system which in turn was seen as the decisive criterion for assigning a given system to a particular legal family (Zweigert and Kötz, 1998, p. 71). Since all modern systems are at least partly based on statute law that is interpreted in one way or another, it is almost inevitable that studies attempting what can be termed a 'macrocomparison' of legal systems deal with statutory interpretation.

Secondly, not even the most superficial introduction to a foreign legal system can omit an overview of that system's legal sources and the way in which they are applied by local lawyers. Thirdly, even authors embarking on a narrower, 'microcomparative' analysis find it hard to avoid the subject. When taking a close look at a particular legal problem in different systems the legal solutions offered to this problem are frequently based on statutory provisions. In order to understand these provisions in the same way that a lawyer in the respective system would understand them it is imperative to know the system's approach to statutory interpretation. Fourthly, interest in the subject has recently rekindled in the context of unification of law, especially, but not limited to, the European Union. It is universally acknowledged that substantive uniformity of law cannot be achieved by simply enacting the same substantive and procedural provisions in various legal systems, but only if these provisions are applied and interpreted uniformly across the board. Thus unification of law in the context both of international uniform law in general (Kropholler, 1975, pp. 258–304) and of European Union law in particular (Vogenauer, 2005a) necessitates a uniform legal method and, more particularly, a uniform set of rules and principles of statutory interpretation. These can only be devised on the basis of preliminary comparative studies.

3 Comparative scholarship on statutory interpretation

Given the central importance of statutory interpretation for the discipline of comparative law, there is a surprising dearth of comparative research in

the field. As has just been said (above, section 2), the issue is usually allocated some space in the great treatises of comparative law and the introductions to particular legal systems aimed at foreign readers. An extremely thorough and broad account on 'legal methods' in the major western and some non-western systems, covering all sorts of issues of legal thinking and legal reasoning in general, was published in the 1970s. This also contained material on statutory interpretation (Fikentscher, 1975–7). Since then, detailed comparative studies have not abounded; they have been limited to the western legal traditions and they have mostly been undertaken by German scholars who, on the whole, display a certain obsession with questions of legal method. An attempt at a more or less comprehensive comparison of the rules and principles of statutory interpretation of two or more legal systems was only rarely undertaken (MacCormick and Summers, 1991; Vogenauer, 2001; Melin, 2005). Some authors used broader comparative observations as a preliminary step in developing a theory of interpretation for uniform international law (Kropholler, 1975, pp. 258–304; Diedrich, 1994; Kleinheisterkamp, 2000; Gruber, 2004). Others did not try to give an overall picture but focussed on interpretation in more or less narrowly defined specific areas of law, such as public law, tax law, family law or the law of unfair competition (Potacs, 1994; Nevermann, 1994; Zitscher, 1996; Ohly, 1997).

4 Statutory interpretation and other forms of legal interpretation

No legal system regards the interpretation of statutes in isolation. Interpretation is not a specifically legal activity. Scientists and social scientists, for instance, 'interpret' the phenomena they observe in nature and society. The humanities are concerned with the interpretation of pieces of music, other works of art and, most importantly, with the construction of all sorts of texts, be they religious, philosophical or belletristic. At all times the theory and practice of legal interpretation have been inspired by these other disciplines, and this has not only been the case in religious laws, such as Islamic law, where it is hard to distinguish legal from theological interpretation: Roman lawyers drew heavily upon the so-called 'stasis-' or 'issue-theory' developed by the rhetoricians of ancient Greece, legal scholars in the Middle Ages were affected by the scholastic methods of biblical exegesis, the early modern jurists drew upon the topical approach pursued in the liberal arts, from the 18th century onwards ideas from the philosophical subdiscipline of hermeneutics have influenced legal writers, and the current 'law and literature' movement is just the most recent case in point.

In the legal context, all sorts of human activities can become the object of interpretation. These include oral statements, conduct in a business relationship, gestures or even silence. The main focus of legal interpretation,

however, is on written texts, be they contracts, wills, international treaties, local byelaws, Acts of Parliament or constitutions. There has traditionally been a close interplay between the theory and practice of statutory interpretation and that of the construction of other legal documents (Vogenauer, 2003, pp. 565–71, 583–4). Up to the 18th century legal writers were not concerned with the *interpretatio legis*, the *interpretatio pacti* or the *interpretatio testamenti* in particular, but with the *interpretatio iuris* in general. Grotius, Pufendorf and Vattel, for instance, developed their ideas on interpretation mainly with a view to international treaties, but were frequently quoted in works on statutory construction. The Austrian Civil Code of 1811 contained a part on the interpretation of contracts which stipulated very few rules, supplemented by a blanket reference to the Code's provisions on statutory interpretation (ss. 914–15). Conversely, in legal systems lacking statutory provisions on the interpretation of statutes, such as England, France or Germany, courts and legal writers have constantly referred to the established rules and principles of contractual interpretation when construing statutes.

Currently, the prevailing view is that there are certain features that are common to all kinds of legal interpretation. Still, most authors agree that various types of legal documents possess distinctive features and thus cannot be schematically construed in the same way. It is indeed acknowledged in all modern legal systems that not even all Acts of Parliament can be interpreted in a uniform fashion, but that there are certain classes of statutes which necessitate a special approach, for instance in criminal or tax matters (cf. below, section 8). The most strongly debated question at the moment is whether constitutions have to be, in principle, interpreted like Acts of Parliament or whether they necessitate a special approach. The problem arises from the fact that both types of legal instruments have many similarities: they are, in many legal systems, formally enacted in an identical or at least a broadly similar way, they are unilateral declarations of the will of organs or agencies of the state representing the people and they are, in most cases, intended to apply universally. There is an interesting disparity of views on this issue between legal systems which have a tradition of codification and those which do not. In the former group constitutional interpretation is mostly seen as a special case of the interpretation of ordinary statutes which follows, in principle, the same rules and principles, although these might have to be adapted or modified in order to accommodate certain particularities of constitutional documents. In the latter group, constitutional interpretation is usually regarded as being different in kind, and not only in degree, and there is much talk of the constitution having to be construed 'as a living instrument' etc. This is especially so in the USA where the constitution is of pivotal importance and

was in force long before statute law became a qualitatively and quantitatively important source of law.

5 The authority to interpret

Legal systems differ as to the groups of persons which are granted the power to interpret statutes. Religious laws, for instance, commonly reserve this function to spiritual leaders or high priests, as still can be seen in canon 16 of the Catholic *Codex iuris canonici* of 1983. In secular western societies there is no restriction as to the power of interpretation. Legal scholarship is predominantly concerned with judicial interpretation since this is the most visible and usually the decisive and conclusive kind of statutory interpretation. However, others are entitled to construe statutes as well, be they state officials, administrative agencies, legal writers or ordinary citizens. This was not always so. There is a long tradition of legislators trying to monopolize the interpretative function, maybe realizing what was formulated by the English bishop Hoadley in an oft-quoted sermon in 1717, namely that ‘whoever has an absolute authority to interpret any written, or spoken laws, it is he, who is truly the lawgiver, to all intents and purposes: and not the person who first wrote, or spoke them’ (Vogenaer, 2001, p. 743).

Justinian famously tried to safeguard his grip on the substance of his *Corpus iuris civilis* by requiring judges to submit difficult cases which required interpretation of the Code to him. Legislative prohibitions on interpretation were directed not only against courts, but also against legal academics. Napoleon is said to have exclaimed, ‘Mon code est perdu!’ when he heard of the first commentary on the *Code civil*. In the 13 centuries separating the two emperors from each other, there were plenty of attempts completely or at least partially to stifle the interpretative activities of judges and legal scholars. Traces of this can still be found in the textbooks of some modern legal systems, for instance in France. They preserve a distinction developed by the Northern Italian writers of the 14th century, although it does not serve a useful function any more. It divides the interpretation of statutes into three categories according to the persons engaging in it: ‘authentic interpretation’ which is the preserve of the legislator, ‘forensic interpretation’ which is the prerogative of the courts, and ‘doctrinal interpretation’ which is allocated to legal scholars. Historically, each of these could either be attached to special cases and special types of statutes or be accorded different degrees of bindingness (Vogenaer, 2001, pp. 581–5; 2005b, pp. 486–90). Still the issue as to who has the authority to interpret cannot be consigned to the dustbin of legal history, as can be seen by the 1997 Hong Kong Basic Law. This, in its article 158, provides that, in certain circumstances, the power of interpretation of the Basic Law shall be vested

in the Standing Committee of the National People's Congress of the People's Republic of China.

6 Rules on statutory interpretation

The interpretation of statutes, in the narrow sense defined above (see section 1), is a legal activity. As such, it is desirable that it advance the two ultimate aims most legal systems pursue – justice and certainty – and thus generate results that are fair (or at least widely acceptable) and predictable. In order to achieve this all modern systems rely on a set of rules (or ‘canons’) of statutory interpretation that are rational and are applied consistently.

In the common law world these rules are generally regarded as judge-made, and thus belonging to the common law. However, some common law systems have statutory provisions dealing with the interpretation of statutes. These ‘Interpretation Acts’ can be of two kinds. Some of them exclusively contain legal definitions of frequently used words and expressions, for instance the Irish Interpretation Act 1937 or the UK Interpretation Act 1978. Others also comprise general rules on interpretation, such as the provision on the use of legislative materials in s.15AB of the Australian Acts Interpretation Act 1901, as amended in 1984, that is mirrored in the legislation of some of the Australian states, cf. s.34 of the New South Wales Interpretation Act 1987 and s.19 of the Western Australia Interpretation Act 1984. An attempt to codify a few such general rules in the UK failed when the House of Commons defeated the Interpretation of Legislation Bill 1981.

Civil law systems have a longer tradition of codifying the rules of statutory interpretation, beginning with some fragments compiled in Justinian's *Corpus iuris civilis*. The *Corpus iuris canonici* of the Catholic Church added others, and the first modern codifications contained more or less elaborate sets of rules, such as the Bavarian *Codex Maximilianeus Bavaricus civilis* of 1756 (I, 2, ss.9–11), the Prussian *Allgemeines Landrecht* of 1794 (ss. 46–50 of the Introduction) or the Austrian *Allgemeines Bürgerliches Gesetzbuch* of 1811 (ss.6–9). The draftsmen of the French *Code civil* of 1804 devised a similar set of rules for the *livre préliminaire* they suggested, but this was ultimately not enacted. This may be seen as a first example of legislators recognizing that it is virtually impossible to develop a coherent statutory regime capable of embracing all the aspects of statutory interpretation. This view continues to prevail in civilian systems where today the task is seen to be one that has to be solved by the courts and legal scholars acting in cooperation. Consequently, the draftsmen of more recent codes, such as the German *Bürgerliches Gesetzbuch* of 1900, the Swiss *Zivilgesetzbuch* of 1907 or the Dutch *Nieuw Burgerlijk Wetboek* which has gradually come

into force from the 1970s onwards, refrained from drawing up rules on statutory interpretation. However, some European codes still contain provisions in point, for instance in Austria (see above), Italy (arts 12, 14 of the *Disposizioni sulla legge in generale* of the *Codice civile* of 1942) and Spain (arts 3, 5 of the *Código civil* of 1889).

In all legal systems there is considerable uncertainty about the legal status of the ‘rules’ or ‘canons’ on interpretation, be they derived from legislation or from judge-made law. It is far from clear whether they are rules in the strict jurisprudential sense or whether they should rather be classified as principles or standards. The unease about their legal character is demonstrated by the fact that they are often called ‘maxims of interpretation’, and that judges often speak of mere ‘guides’ as opposed to binding rules.

Whatever their legal status, in all legal systems the rules on statutory interpretation can be grouped into two categories, one concerning the admissibility of interpretative criteria (cf. below, section 7), the other concerning the relative weight of these criteria (cf. below, section 8). As to all these rules, comparative studies for a long time emphasized the difference between legal systems, especially between the civil law and the common law world. Recently, it has been shown that such differences exist but that they primarily concern the terminology and the classifications used in scholarly writings, rather than the substance of statutory interpretation (MacCormick and Summers, 1991; Vogenauer, 2001).

7 Interpretative criteria

There are rules determining whether a particular interpretative criterion may be drawn upon for the purpose of interpreting a statute at all. Such criteria include the language of the provision, prior legislation, draft legislation, governmental reports, debates of bills in a legislative chamber, the scheme of the statute, other provisions in the same statute or in other statutes, the constitutional background, the international law context, the ‘statutory purpose’ and considerations of fairness, equity and justice.

Views on their admissibility differ between legal systems, and they change over time. In 19th-century continental systems, for instance, references to titles, subtitles or marginal notes of statutes were widely held to be inadmissible, as was the recourse to the ‘purpose of the statute’ or to considerations of fairness. The position under English law and with other members of the common law family was similar up to the second half of the 20th century. Furthermore, under the famous ‘exclusionary rule’, stemming from 1769, common law systems did not admit statements in parliamentary debates as aids to interpretation. From the beginning of the 20th century the rule was successively abandoned to varying degrees in the USA, Australia and New Zealand. In England, the 1992 decision in *Pepper v. Hart*

[1993] AC 593 relaxed the rule as well. The House of Lords held that clear statements of ministers and other promoters of legislation are admissible for the purpose of interpreting legislation which is ambiguous or obscure or leads to an absurdity. However, recently the House of Lords seems to have tightened its position on the admissibility of such statements again (Vogenauer, 2005c). Apart from this minor exception there are, today, no significant differences between the interpretative criteria employed in the major legal systems of the western world. There remain, however, strong differences with respect to the terminology and classifications used to describe them in scholarly writings (Vogenauer, 2001, pp. 1254–61).

8 The relative weight of interpretative criteria

The second category of rules on statutory interpretation concerns the weight which ought to be attributed to the interpretative criteria if they point in different directions in a given case. The law on statutory interpretation knows ‘rules’, ‘canons’, ‘maxims’ and ‘presumptions’ on how to weigh the criteria if such conflicts arise. Traditionally, the balancing exercise required was often presented in terms of rules and exceptions, or of conflicting rules. A well known example in English law pertains to the relative weight to be attributed to the statutory language, on the one hand, and to the potential absurdity of a linguistically feasible interpretation, on the other hand. This used to be framed in terms of the so-called ‘golden rule’ which was meant to qualify the ‘plain meaning’ or ‘literal rule’ and stated that, ‘in construing . . . all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no farther’; see *Grey v. Pearson* (1857) 6 HLC 61, 106, *per* Lord Wensleydale. A more progressive version of the exercise of balancing the statutory text against considerations of justice was framed a couple of years ago when another English Law Lord stated that ‘the more demonstrably unfair a suggested interpretation is the clearer must be the statutory wording necessary to support it’ (Steyn, 1996, p. 50).

There are plenty of such maxims determining the weight of interpretative criteria and it is impossible to mention them all. Historically, the most important of these maxims is the ‘plain meaning’ or ‘literal rule’ which is encapsulated in the first half of the passage from *Grey v. Pearson* just quoted. The rule has its equivalents in all legal systems. In France, for instance, it is called the doctrine of *sens clair*. German lawyers speak of the *Eindeutigkeitsregel*. Prima facie, it accords absolute preference to the wording of the statute. However, today it is rather used as a kind of presumption

in favour of adhering to the supposedly 'clear' meaning of the statute which can be rebutted if, in the case at hand, other interpretative criteria provide strong arguments for reaching a different result. As a result, a statutory provision is sometimes not applied to a case that is clearly covered by the words of the statute if other interpretative criteria strongly militate for such a result. This was traditionally called *interpretatio restrictiva* or 'restrictive interpretation'. Today, expressions such as 'reading down a statute' or 'undertaking a reduction of the scope of the statute' are used. Conversely, a statutory provision is sometimes applied to a case that is clearly not covered by the words of the statute if other interpretative criteria strongly militate for such a result. This was traditionally called *interpretatio extensiva* or 'extensive interpretation'. Today, this exercise of 'gap filling' is also called an 'extension' of the statute's scope which is mostly conducted by 'analogy'. The techniques of both restrictive and extensive interpretation were widely recognized in all European legal systems, including England, from the Middle Ages onwards. This changed on the continent towards the end of the 18th century and in England around 1830. The pendulum swung back again, on the continent towards the end of the 19th century and in England in the second half of the 20th century.

Still, there are certain areas of law where much stronger weight is accorded to the wording of the statute even today. These concern statutes which encroach on the liberty and the property of the individual, i.e., in matters of criminal law, tax law or areas such as police powers. At least since the days of the Enlightenment it has been universally acknowledged that such statutes may not be interpreted extensively to the detriment of the citizen. This principle of *nullum crimen, nullum tributum sine lege* is called 'strict interpretation' by English lawyers, the French speak of *interprétation stricte* and the Germans of *Analogieverbot* (Vogenaier, 2001, pp. 1262–79).

9 Interpretation and lawmaking

Writings on statutory interpretation in the Germanic legal family insist that there be a sharp distinction made between interpretation and 'further development of the law', or *Rechtsfortbildung*, by the interpreter, particularly by judges. The dividing line is said to depend on whether the 'borderline of the meaning of the words', the *Wortsinnngrenze*, has been crossed. This is essentially so in the cases of interpreting a statute restrictively or extensively just mentioned (above, section 8). There are elaborate distinctions of various kinds of *Rechtsfortbildung* and of the 'gaps' and 'hidden gaps' required in order to engage in this activity. Once such a gap has been discovered, the question as to the limits of the further development of the law arises, so that 'legitimate' judicial lawmaking can be distinguished from 'illegitimate' judicial lawmaking.

From a comparative perspective this seems to be strange since neither the Romanistic nor the common law systems operate with the fundamental distinction between interpretation and ‘further development of the law’. The German approach is a historical peculiarity which arose out of the general hostility towards the *interpretatio restrictiva* and *extensiva* during the 19th century. It was meant to admit these activities in a narrowly circumscribed way. Since then it has lost its function. The issue of *Rechtsfortbildung* can and should be framed as one of the weight of interpretative criteria, as has just been shown (above, section 8). However, the question of the limits of judicial lawmaking cannot be avoided. Most legal systems have not found a satisfactory answer to it yet (Vogenauer, 2001, pp. 1280–82).

10 The object of interpretation

Much ink has been spilt, again especially by writers from the Germanic legal tradition, on the question of the overarching object of interpretation. Traditionally, this was presented as a struggle between two rival ‘theories’ of interpretation. The ‘subjective theory’ maintained that the aim of interpretation consisted in determining ‘the will of the legislator’ or ‘the intention of Parliament’. According to the adherents of the ‘objective theory’ the aim of interpretation consisted in determining the ‘objective’ or ‘true meaning of the statute’. The discussion has recently been revived in the United States between ‘originalists’ and ‘intentionalists’ on the one side and ‘textualists’ and those favouring a ‘dynamic approach’ on the other. It is futile. As has been said (above, section 1), interpretation, in practice, is concerned with determining whether a given set of facts falls within the scope of a particular statutory provision and therefore triggers the legal consequences spelt out in the provision. In order to achieve this, interpreters in all legal systems employ criteria drawing upon the intention of the people involved in drafting and enacting the statute as well as criteria designed to establish the ‘objective’ meaning of the statute. The true question is which of these criteria shall be determinative. Again, it boils down to weighing the different interpretative criteria in case of conflict. One may call this, as is sometimes done, a ‘mixed objective–subjective theory’. One might as well abandon the whole discussion altogether (Vogenauer, 2001, p. 1254).

The only practical consequence arises on a procedural level. In legal systems such as France which, *prima facie*, follow the subjective approach, issues of interpretation turn into questions about the subjective state of mind of the legislators. They are thus treated as questions of fact which cannot, in principle, be reviewed by the supreme court. In legal systems such as England which, at least *prima facie*, follow the objective approach, issues of interpretation are treated as questions of law and are fully reviewable by the supreme court.

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62 Supervening events and force majeure*

Martin Schmidt-Kessel and Katrin Mayer

1 Introduction

The concepts of supervening events and force majeure are well known to many legal systems. Although their primary function is contractual, they also exist in tort law and play an important role in public international law. As a general defence, the concept of force majeure is also contained in the Principles of International Commercial Contracts (Art. 7.1.7 P.I.C.C.) and in the emerging Principles of European Contract Law (Art. 8:108 P.E.C.L.; see both the text and comparative notes). Finally, the notion of force majeure is well known to European Community Law as well (Parker, 1995). However, there do exist significant differences as regards the place of supervening events or force majeure within individual legal orders: in the UK, for example, force majeure is not contained in any Act, but rather dealt with in the sphere of contractual liability, especially under so-called force majeure clauses.

2 Functions of the concepts

The concepts of supervening events and force majeure may be employed in various ways, as a defence against claims for damages, as a basis for the avoidance of a contract, as a bar to specific performance and, in certain limited circumstances, as a basis to find a duty to renegotiate.

2.1 *Force majeure as a defence against claims for damages*

The notion of force majeure may constitute a defence against claims for damages under contract law. In some legal systems, for example under French law, force majeure provides a defence for the tortfeasor as well. There exists an academic view to the effect that this French principle has become a principle of the emerging European tort law (cf. Art. 5:302 Principles of European Law on Torts).

To some legal orders the notion of force majeure is not very familiar because the respective cases are solved by recourse to the fault principle. In Germany, 'höhere Gewalt' (i.e. force majeure) as a defence against contractual liability only occurs in the context of the implementation of the EC Directives on Cross-border credit transfer of 27 January 1997 (OJ 1997

* See also: Mistake.

L 43/25) and on Package Holidays (OJ 1990 L 158/59) and under the law passed as a result of the Council of Europe's Convention on the Liability of Hotel keepers concerning the Property of their Guests (1962) (see Schlechtriem and Schmidt-Kessel, 2005).

In some other legal systems, and especially in an international comparative context, the notion of force majeure is first and foremost dealt with in relation to duties to achieve a specific result. This category of duties and its complement, the duty of best efforts, were developed in the 1930s by René Demogue in his famous Treatise on the French law of obligations, thereby dissolving the uncertainty caused by the coexistence of two different standards of liability in Art. 1137 Code Civil and Arts 1147 and 1148 Code Civil, respectively. According to this theory, a duty of best efforts (*obligation de moyens*) obliges the respective party to undertake such efforts as would be undertaken by a reasonable person of the same kind in the same circumstances. In order to avoid liability, it will be sufficient for the debtor of such a duty to show that he has taken the appropriate care in order to fulfil his duty. Therefore, under a duty of best efforts, force majeure is not a particularly relevant topic. On the other hand, where a party owes a duty to achieve a specific result (*obligation de résultat*), it is bound to achieve that result and may evade liability only by showing that there is a case of force majeure (see Arts 1147–8 Code Civil); in those cases, the defence of force majeure may be brought if there was no possibility to achieve the result required.

This dichotomy of *obligation de moyens* and *obligation de résultat* has been adopted by many comparative lawyers (Jones and Schlechtriem, 1999, ss. 202–3; Treitel, 1988, ss. 8–14 and 32–3) and was included in the Principles of International Commercial Contracts in its Arts 5.1.4 and 5.1.5 and will form part of the future Common Frame of Reference for Contract Law in the European Community (cf. Art. 6:102 P.E.C.L. and lit. D of the comments thereto). The same could be said for the 1980 Convention on the International Sale of Goods (Schmidt-Kessel, 2003, p. 294).

2.2 *Avoidance of the contract*

Secondly, the concepts of supervening events and force majeure may serve as a basis for the avoidance of a contract if the performance of the contract has become impossible (see the English doctrine of frustration: Treitel, 1994); under 'old' German law – before 2002 – this was dealt with by means of § 325 B.G.B. whilst § 326(5) of the 'new' law of obligations only contains an exception to the 'Nachfrist'.

Generally, a kind of notice or acceptance of the repudiatory breach is necessary. In some cases of supervening impossibility of the performance of the contract, however, such notice or acceptance becomes superfluous as the supervening event leads to an ipso facto avoidance. This is the case

under the English doctrine of frustration, Art. 1463 of the Italian Codice Civile, § 326(1) B.G.B. and Art. 9:303 (4) P.E.C.L., whereas, under French law, there is no connection between the supervening event and avoidance in that the courts apply Art. 1184 Code Civil, thereby overruling the idea of a 'théorie des risques' promoted by the majority of academic writers.

It is therefore important to point out that there are two different ways in which supervening events influence the rules on avoidance or termination of a contract: either by being the basis for the avoidance or by rendering the requirement of the notice to terminate superfluous.

2.3 Bar to specific performance

Thirdly, the notions of supervening events and force majeure may serve as a bar to specific performance. Regarding the principle of specific performance as such, very different concepts exist in different countries. Thus, in the mixed French system, no performance is possible in accordance with Art. 1142 of the Code Civil if obligations are concerned where the action itself is the obligation: with regard to all obligations concerning an 'obligation de faire' or 'de ne pas faire', no judgment for specific performance will be given. In Germany, specific performance is generally awarded and only under specific circumstances is it not awarded; there are restrictions mostly in the realm of the execution of judgments. In the UK and in other common law jurisdictions, specific performance constitutes one of the most important equitable remedies but is not available as a remedy at common law.

However, all legal systems examined have in common that the notions of impossibility or of supervening events exist as a bar to specific performance (see also Art. 7.2.2 of P.I.C.C.: 'may require . . . in law and fact'). It may be concluded that the principle applies independently of the legal system of the jurisdiction concerned, the only remaining question being whether there are any doubts as to the factual impossibility of the performance (cf. below, section 4.1). In all systems examined, there is no possibility of an order for specific performance where the performance would be impossible or unlawful. However, national legal orders diverge when the performance is only impractical or has become more difficult for the debtor. Some of those cases are governed by the rules of impossibility, bringing the claim for specific performance to an end ipso iure (cf. Treitel, 1994, paras 6-001 et seq.) while others are only dealt with in this way if the debtor raises an exception to that effect (see § 275(1) and (2) B.G.B.) or pleads hardship (see Arts 6.2.1–6.2.3 P.I.C.C.).

2.4 The duty to renegotiate

Finally, the concept of force majeure may provide a legal basis for duties to renegotiate. It is mostly contractual clauses which contain a duty to

renegotiate if a supervening event has taken place. Normally, no such duty is imposed by law.

There are many legal systems in which rules exist to the effect that some supervening events dealt with under the headings of hardship or change of circumstances (see below, section 3.1 (d)) will not strike out the contract or its specific performance altogether. However, the contract will need to be adapted. Some legal orders in which contracts will be adapted correspondingly contain provisions on the judicial adaptation of contracts; in these cases, one party needs to sue the other party either for amendment of the contract or to renegotiate. Adaptation will prevail if it is possible and reasonable. There exists no change of circumstances rule in the UK and the doctrine is not accepted. Furthermore, there is no change of circumstances rule in French private law officially (cf. the famous judgment on the *Canal de Craponne*, 1876), although corresponding judicial precedents exist in French administrative law (see the judgment in *Gaz de Bordeaux*, 1916). Since the coming into force of the new law on obligations in Germany in 2002, the newly introduced § 313 B.G.B. provides a legal basis for a claim against the other party to amend the contract, thereby bringing the codification into line with the view of the courts under the former law of obligations; but a duty to renegotiate was not established.

3 Notions and cases of supervening events

3.1 Notions

The notion of supervening event is not one of specific technical relevance; however, many other notions with technical meaning exist in the field, but not all of these are combined with all the functions of supervening events as outlined above.

(a) The most important concept contained in the 'old' German law on obligations until 2002 was that of 'impossibility' (Unmöglichkeit) which attained central importance. Under the 'new' German law on obligations, the notion of impossibility has been structured differently. Under the 'old' law, the finding of impossibility could serve several functions: a basis for the avoidance of a contract, a bar to specific performance and, in some rare circumstances, a duty to renegotiate. The former § 325 B.G.B. stated that damages had to be paid if it was impossible to perform and not because of non-performance.

(b) Both in French law and in its internationally accepted meaning, force majeure clearly constitutes a defence against claims for damages. In some legal orders, it is also a basis for the avoidance of a contract as it clearly is under the P.E.C.L. In France, force majeure is in general not linked to Art. 1302 Code Civil where the obligation of a debtor is extinguished by 'perte de la chose', but instead belongs to the sphere of damages.

The situation in the UK is similar insofar as force majeure clauses are not normally connected to claims for specific performance. In those rare cases of force majeure in German law, it will not constitute a bar to specific performance either, but it is a bar to a claim for damages and even, in one clearly circumscribed case, a legal basis for the right to terminate a contract (see § 651j B.G.B.). This provision derives from Art. 4(6)(2)(ii) of the Package Holiday Directive (OJ 1990 L 158/59) and is therefore in force throughout the European Economic Area.

(c) English law has developed its own concept for dealing with cases of supervening events by creating the doctrine of frustration. Frustration of a contract brings that contract to an end because the distortion is too massive to allow further performance of the contract. The notion of frustration therefore contains cases of impossibility (such as destruction of the subject-matter, death of a particular person) even if that impossibility is only of a partial or temporal kind, cases of illegality (such as trading with the enemy), frustration of purpose and some rare cases of impracticality (cf. Treitel, 1994).

(d) The notions of hardship, change of circumstances, *imprévision*, *Clausula Rebus Sic Stantibus* and *Wegfall der Geschäftsgrundlage* are not always a subcategory of that of supervening events but there is a significant overlap. Perhaps owing to this substantial overlap both in law and in fact, they are frequently dealt with together in academic writing (Jones and Schlechtriem, 1999, s. 181).

Hardship is often understood as the occurrence of an event which fundamentally alters the equilibrium of the contract, for example by increasing costs or diminishing value of the performance. Where hardship rules apply, they serve to deviate from the usual standard of distribution of risks in exceptional cases. Rules of this kind are well known to international commercial law (cf. Arts 6.2.1–6.2.3 P.I.C.C.) where hardship clauses of a sophisticated nature are frequently employed. However, in many legal orders there is no doctrine of hardship (cf. above, section 2.4). This may be exemplified by reference to English law where some of the classic cases of hardship are dealt with under the doctrine of frustration (see Treitel, 1994, paras 6-020 et seq. and para. 7-001), while French law does not accept a general *théorie de l'imprévision* in private law at all. The situation under German law, as in most Romance legal orders, is totally different in that the new law of obligations of 2002 contains a specific provision thereon in § 313 B.G.B.

3.2 Groups of cases (cf. Treitel, 1994; Löwisch, 2004, ss. 7–92)

The starting-point is cases of impossibility. The most important impossibility cases are those dealing with the destruction of the subject-matter;

for example s. 7 of the Sale of Goods Act 1979, where the contract is avoided if the specific goods sold 'perish'. Other types of impossibility concern cases of the unavailability of the subject-matter (e.g. by theft), the destruction or unavailability of a thing essential for performance and the death or supervening incapacity of a person closely connected to the performance of the contract. Supervening illegality is referred to as legal impossibility, if the contract is not, as in rare cases it is, stricken out altogether.

Of great practical importance are cases in which the method of performance becomes impossible (e.g. by closing the Suez Canal); there are also cases of partial impossibility (either in general or in a source of supply) and of temporal impossibility where time is of the essence, for example because of the delay making performance useless to the party to whom it is to be rendered or because of the delay making performance more onerous to the party rendering it.

Other types of supervening events of a significant practical relevance are impracticability, sometimes referred to as factual impossibility, and frustration of purpose. These are both closely connected to the doctrines of hardship, *imprévision* and change of circumstances.

4 Limits to the effects of supervening events

Several effects of supervening events will not arise if the event is at the respective party's risk or default or, as a subcategory of the latter, the single effect in question has been thus excluded. There are three classic limits of this kind. First, there might be a contractual provision dealing with the event, thereby deviating from the rules applied by law; second, the event in question could have been anticipated by the respective party; third, if the event was induced by the party relying on it, for example because he was at fault or the event was under his control or he could have overcome it. But not all three limits apply to all consequences a supervening event may raise.

4.1 Contractual provisions to the contrary

Most consequences of supervening events may be contractually excluded as far as they are not induced intentionally or by gross fault of the party relying on them. Yet contracting out of every right to terminate a long-term contract will bring a contract into conflict with rules protecting market competition and freedom of contract. There is a further important exception to that limit, namely the bar to specific performance. Where specific performance is simply impossible, that remedy will not be available to the creditor. Under the former German law of obligations there was one counter-exception in cases where the impossibility pleaded by the debtor was doubtful and the debtor was at fault. But this rather strange counter-exception was due to systematical reasons only (cf. Kohler, 2005, p. 93).

Even if the creditor succeeds in obtaining a judgment for specific performance, that judgment will at least not be executed.

The effects of a supervening event as a defence against claims for damages, as a basis of rights to terminate the contract or of a duty to renegotiate may be excluded explicitly or by an implied term of the contract allocating the risk to the party relying on the event. Both ways are normally not spelled out explicitly by contractual clauses and legal provisions. As to legal provisions, this follows from the characteristic of most contract law provisions as *ius dispositivum* (Schmidt-Kessel, 2003, pp. 91–113).

4.2 Foreseeable events

Several contractual clauses, legal provisions and judicial precedents contain a further limit to the effects of a supervening event by saying that the event must not have been foreseeable at the time of the conclusion of the contract (cf. Art. 79 I C.I.S.G.; § 313(1) B.G.B.; Arts 7.1.7 (1) P.I.C.C and 8:108(1) P.E.C.L.). The idea underlying this limit is that the party relying on the event should have provided for it under the contract and, by not taking the opportunity to do so, has taken the risk of the event occurring (Stoll and Gruber, 2005, ss. 22). In cases where the parties have or ought to have foreseen a risk of the kind occurred and where the distortion of the contract is of a totally different quality, the foreseeability of the risk will not preclude the consequences of the supervening event. To take an example: at the beginning of the 19th century, war clauses were widely used because the parties foresaw a military conflict in Europe. However, these clauses normally did not bar the effects of the supervening event because World War I (1914–18) did not come under the anticipated kind of war. The underlying idea and cases to the exception of foreseeability show that foreseeability as such is not a category of facts limiting the effects of a supervening event, but rather merely a sign indicating that a risk-taking term could or should be implied on the facts (Schmidt-Kessel, 2003, p. 126).

4.3 Self-induced events

It is common ground that a party cannot normally rely on a supervening event if that event was self-induced by the party attempting to rely on it (cf. e.g. Art. 80 C.I.S.G. and § 326(2) B.G.B.). But, as a contractual provision to the contrary, the self-inducement does not exclude every effect of the supervening event as, in most cases, the bar to specific performance is again not excluded even if the debtor is responsible for the event. However, the debtor then has no defence against the claim for damages and has no right to renegotiate. On the other hand, a breach of duty by a creditor resulting in impossibility for the debtor to perform the contract excludes not only the creditor's claims for specific performance, damages and renegotiation

but also his right to terminate based on the debtor's non-performance (cf. Art. 80 C.I.S.G. and § 323(6) B.G.B.). Yet in some legal orders this will not aid the debtor with his own claim for the price. Under Art. 9:109(2) P.E.C.L. and under English law, he has no claim for the price unless he has performed his own obligation and is therefore, in cases of supervening events brought about by the creditor, forced to terminate the contract and claim damages.

There is no uniform answer to the question as to when an event is self-induced. In contractual force majeure clauses and legal provisions on force majeure, the term 'under the control of' is often used (e.g., Art. 79 C.I.S.G.). Other provisions deal with possibilities to overcome the supervening event (e.g., Art. 8:108 P.E.C.L.). Formulations of this kind will need to be applied on a case-by-case basis. In some legal orders, and especially in international conventions and principles unifying contract law, there remains unanswered the question for which third persons (who brought about a supervening event or did not overcome it) a party to a contract is responsible. While liability for employees is widely accepted, there is no common ground as to which independent contractors may raise 'contractual vicarious liability'. This is especially the case with the confusing Art. 79(2) C.I.S.G., where it is open to debate what the expression 'third person' really means (cf. Stoll and Gruber, 2005, ss. 25–9).

5 Famous cases

For common law systems, the former leading case was that of *Paradine v. Jane* ([1647] Aleyn 26): a farmer was sued for the payment of rent arrears and, in defence, stated that he had been ejected from his land by an army for four years during the Civil War. The farmer's defence was not heard because the rent was held to be an absolute duty and the ejection had not terminated the contract.

Nowadays, the leading authority is *Taylor v. Caldwell* ([1863] 3 B & S 826): a music hall situated in a London pleasure garden was hired for a series of concerts. Before the date set for the first concert, the hall was completely destroyed by a fire for which neither of the parties was responsible. The hirer sued for damages but the defendant was not liable because the contract had been discharged by frustration; as the latter Lord Blackburn put it, 'a condition is implied that the impossibility of performance arising from the perishing of a person or thing shall excuse the performance' (at 839).

A further aspect was added to the doctrine of frustration in *Krell v. Henry* ([1902] 2 KB 740): Henry had hired a room in order to watch the coronation procession of Edward VII. The coronation was postponed because of the King's illness and this 'supervening event' led, as was held by the Court of Appeal, to a frustration of the hire contract.

The so-called Mississippi Flood Disaster had its origin in the flooding of the lower Mississippi in 1973 which resulted in the US Department of Commerce issuing an export prohibition on soya bean meal; subsequently, the export ban was gradually lifted. Contracts in the soya market are of a highly speculative nature: thousands of these contracts were brought to an end by the US export prohibition, leading to some 1000 arbitration procedures in London and about 45 published judgments by English courts. The force majeure and prohibition of export clauses in the respective contracts in most cases did not protect the respective seller from being liable for damages, the reason being that most sellers were unable to show that they could not have overcome the effects of the embargo by using one of the several 'loopholes' left open by its provisions (Bridge, 1995).

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63 Sweden

Rolf Dotevall

1 Introduction

The official name of the country of Sweden is *konungariket Sverige* (the Kingdom of Sweden). The Swedish legal system belongs to the Nordic legal family, which is a branch within the family of Roman–Germanic law. Compared to the other branches of Roman–Germanic law, there are differences in Swedish law that go beyond the level of details. There are also clear differences among the Nordic legal systems themselves.

In the comparative law literature it is highlighted how successful the Nordic countries have been during the last hundred years in harmonizing their legal systems. The coordination of Scandinavian law has been mentioned as an example for cooperation in Europe as a whole (Strömholm, 2000, p. 31; Zweigert and Kötz, 1998, p. 284).

Another common way of characterizing Swedish law is to say that it holds an intermediate position between continental law and the common law system. However, this is a questionable way to describe the Swedish legal system. There are very few examples in Swedish law that present features found in common law but not in the continental legal system. There are some Roman law institutions which are lacking as well in Swedish law and in common law. This absence does not say much about the relationship between the two legal systems concerned. The history of Swedish law has been quite independent from common law (Zweigert and Kötz, 1998, p. 277).

Roman law has played a less important role in Swedish law than in German or French law. Sweden and the other Nordic countries do not have codes like the civil codes of France and Germany. The Nordic law is regarded as a special legal family beside the French and German legal families. The legislative cooperation among the Scandinavian countries began in the late 1900s. It has since then been a characteristic attribute of legislation in private law except real-estate law. It has been far less important in public law, penal and procedural law and tax law.

Sweden has been the leader in the field of consumer protection. Several special statutes have been enacted which arrange the terms of contracts entered into by consumers. This is a characteristic feature of Swedish law. An important institution for consumer protection is the consumer ombudsman. Each individual consumer can use this institution instead of going to court to protect his rights in a particular case.

Sweden has a uniform law system. The courts in Sweden do not accept various languages in court procedure: in practice, only Swedish is accepted.

2 Constitutional law

Sweden has a written constitution. There are four different basic laws, which all have constitutional statutes. They are the instrument of government (*Regeringsformen*) of 1974, the Freedom of Press Act (*Tryckfrihetsförordningen*) of 1949, which regulates the freedom of speech in books and journals, the 1991 Fundamental Law on the Freedom of Expression (*Yttrandefrihetsgrundlagen*) and finally the Act of Succession of 1810. Only the Fundamental Law on the Freedom of Expression is in fact entirely new. It was introduced in 1991 to bring the protection of freedom of expression in the new media in line with that which already existed for printed material.

The Swedish constitutional laws are found on the official website (www.riksdagen.se). They are translated into English. Sweden is a unitary state and a monarchy. The king is H.M. Carl Gustav XVI. The Swedish parliamentary system is monistic. It is possible for members of government to be members of the parliament. The Swedish parliament (*Riksdagen*) consists of one chamber. The Swedish Constitution does not allow constitutional review.

3 Civil and commercial law

Sweden does not have a general civil or commercial code: the statutory regulation of civil and commercial law is fragmented in Sweden. The main statutes in this area of law are the 1915 Contracts Act and the 1990 Sales Act that are based on the CISG. The Sales Act is applicable to sales of goods as well as to the sales of shares and other negotiable instruments and intellectual property rights. Other important statutes are the 1914 Commission Agency Law and the 1991 Commercial Agency Law. The older civil codes are derived from German law. The Consumer Sales Act of 1990, the 1980 Consumer Insurance Act and the Consumer Credit Act of 1992 are important statutes in the consumer area. A statute that has a purpose to protect consumer interest is mandatory.

Since there is no general civil code in Swedish law, a common method to solve problems in the commercial law area, besides using case law and preparatory work, is to apply the Contracts Act, the Sales Act and the Commercial Agency Act in analogy.

4 Court system and law faculties

The court of first instance in civil, commercial and criminal matters is called *Tingsrätt*. The administrative court is called *Länsrätt*. The appeal in civil, commercial and criminal cases is allowed to one of six Courts of Appeal.

For administrative and tax, the appeal court is one of four *Kammarrätt*. The *Högsta domstolen* is the court of cassation in civil and criminal cases and the *Regeringsrätten* has the same function in administrative cases. The supreme courts may grant a leave to appeal only if it is of importance for guidance in the application of law if the Supreme Court decides the case. Every important decision of the Supreme Courts is often commented upon by legal academics.

There are five legal faculties in Sweden, located in Lund, Gothenburg, Stockholm, Uppsala and Umeå.

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64 Switzerland

Pascal Pichonnaz

1 Introduction

The official name of Switzerland is the Swiss Confederation (Die Schweizerische Eidgenossenschaft, La Confédération suisse, La Confederazione svizzera). The country's legal system belongs to the Germanic family. The influence of the German Pandectists was important. First the drafting of some Cantonal Codes (previous to the Swiss Civil Code) was influenced by them, such as the Civil Code of the Canton of Zurich of 1853/1855, drafted by Johann Kaspar Bluntschli, a student of Savigny. While drafting the Swiss Civil Code, Eugen Huber was very much influenced by the work of Bluntschli and the Pandectists. However, since some cantons had a civil code influenced by the French Civil Code, the result of Huber's work, the Swiss Civil Code, is a sort of compromise between the French and the Germanic influences, with a higher impact of the Pandectist approach.

Switzerland is a monist system and also a pluralist system. On the one hand, there is the Federal legal system dealing with all subject matters attributed by the constitution to the federal level (exhaustive attribution of competences). On the other hand, there are 26 cantonal legal systems for all subject matters kept within the competence of the cantons.

In Switzerland, there are four national languages: German, French, Italian and Rhaeto-Rumantsch (art. 4 Fed. Const.), but only the first three are official languages. Nevertheless, Rumantsch is used in official communications with Rumantsch speakers, who in turn have the right to use their native language in addressing the central authorities. Language rights are enshrined in the Federal Constitution. For authorities to decide which language to use depends on the part of the country (Territorial Principle) and, in some regions, on the persons involved in the relationship. Federal Supreme Court cases are in the language of the Decision of the cantonal Supreme Court, which is determined by the cantonal official language.

2 Constitutional law

The written Federal Constitution from 18 April 1999 (into force on 1 January 2000) is a renewed version of the Federal Constitution of 1874, legal foundation of the modern federal state. It contains the most important rules for the smooth functioning of the state, guarantees the basic

rights of the people and the participation of the public. It distributes the tasks between the Confederation and the cantons and defines the responsibilities of the authorities.

The Federal Constitution of the Swiss Confederation exists in four national languages: die Bundesverfassung der Schweizerischen Eidgenossenschaft, la Constitution fédérale de la Confédération Suisse, la Costituzione federale della Confederazione Svizzera, la Costituziun federala da la Confederaziun svizra. The Swiss Constitution is to be found on www.admin.ch, the website of the Swiss government. There are translations in English (official site: <http://www.admin.ch/ch/it/rs/1/c101ENG.pdf>, last visited: 28 February 2005), Arab, Japanese, Portuguese and Spanish.

The constitution of 1999 is the result of a complete revision undertaken since 1994. It was important to fix the political and economic achievements of the 120 years since the last complete revision of the constitution in 1874 (the first constitution dates back to 1848), that was followed by 140 partial revisions. Over time the constitution had become incomplete, partly obsolete and difficult to understand for citizens.

The constitution allows its revision. According to art. 192, para. 1, Fed. Const., its text can be revised at any time, totally or in part (art. 192, para. 2 of the Fed. Const.). A partial revision can be decreed by the Federal Parliament or asked for by the citizens by means of a constitutional initiative (100 000 signatures). The procedure of revision is settled by the constitution itself and differs according to the fact that the revision has been initiated by the political authorities or by the people. All revision proposals must respect the mandatory provisions of international law (*ius cogens*) and the principles of unity of form and subject matter (art. 194, para. 2, Fed. Const.).

According to art. 190 of the Fed. Const., 'The Federal Supreme Court and the other authorities applying the law shall follow the federal statutes and international law . . .'. This means that, according to art. 189, para. 4, Fed. Const., 'Enactments of the Federal Parliament and of the Federal Government cannot be challenged before the Swiss Federal Supreme Court. Exceptions may be provided for by statute.' There is no control of constitutionality for statutes adopted by the Federal Parliament. Cantonal statutes within the competence of cantons can, however, be challenged for unconstitutionality at cantonal and also Federal level.

Since 1848, Switzerland has been a Federal State. The central state is called the 'Confederation'. The Confederation has authority in all areas in which it is empowered by the Federal Constitution (art. 3, Fed. Const.). Tasks which do not expressly fall within the province of the Confederation remain in the competence of the cantons. Switzerland consists of 23 cantons (three of which are divided into 'half-cantons': Obwald and

Nidwald, Basle City and Basle Land, Appenzell Outer Rhodes and Appenzell Inner Rhodes). Each canton has its own constitution, parliament, government and courts. They are divided into municipalities or communes. The scope of the municipal autonomy is determined by the individual cantons, and therefore varies widely.

There are four authorities in Switzerland: the legislative authority (Parliament), the executive authority (government), the judicial authority (Supreme Court) and finally the supreme authority (the people). The Swiss Parliament consists of two chambers: the National Council (House of Representatives) and the Council of States (Senate). When in joint session, they are known as the Federal Assembly. Both chambers are directly elected by the people. The Swiss government consists of the seven members of the Federal Government (or Federal Council). The Federal Chancellor directs the Federal Chancery (general staff of the Federal Government). The Chambers elect the Federal Government and the Federal Chancellor for a four-year term. They also elect the Supreme Court Justices for a six-year term. The president of the Confederation is elected each year by the Parliament according to a rotation system determined by time of appointment. The president is considered the first among equals during that year. He chairs the sessions of the Federal Government and undertakes special ceremonial duties. According to the separation of powers, members of the Parliament cannot be members of the government at the same time (dualist approach).

3 Civil and commercial law

During the 19th century, most of the cantons had their own Civil Code, since the creation of the Federal State did not mean the unification of Civil Law on the Federal level. These Cantonal Civil Codes were influenced differently: some were influenced by the French Civil Code, some by the Austrian Civil Code, others by the Pandectists. In 1874, the competence was given to the Federal State to unify contracts and commercial law; this was done by the enactment on 1 January 1883 of the so-called Federal Code of obligations of 1881 (*Das Schweizerische Obligationenrecht*, le *Code fédéral des obligations*, il *Codice dei obbligazioni svizzero*). In 1898, the Federal state obtained the competence to unify the whole civil law. The draft was prepared by Eugen Huber, who had already proceeded previously to a large comparative analysis of all Cantonal civil laws. The Swiss Civil Code was adopted on 10 December 1907 and a new version of the first part of the Code of obligations was adopted on 30 March 1911. The Code of obligations (*Das Schweizerisches Obligationenrecht*, le *Code des obligations suisse*; il *Codice dei obbligazioni svizzero*) was adopted formally as a fifth book of the Civil Code. Both codes entered into force on 1 January 1912 in

the three official and equal languages (German, French and Italian): Das Schweizerisches Zivilgesetzbuch, le Code Civil Suisse; il Codice Civile Svizzero. The second part of the Code of obligations, dealing with corporation law and commercial law in general, was adopted on 18 December 1936, and entered into force on 1 January 1937.

The Civil Code and Code of obligations have been subject to many punctual revisions. Important parts of the Civil Code have been adapted to the evolving social context (mainly filiation, property matrimonial law, marriage and divorce, foundations) as well as some elements in property law and registration of land. The Code of obligations has been adapted among other subjects in the lease contract, in some parts of the labour contract, of the surety contract and important aspects of corporation law, especially joint stock company, limited liability company. A new law on merger, demerger, conversion and transfer of assets and liabilities was enacted in 2004. The law of torts and the law of tutelage are also under revision.

The Swiss legal system does not provide for a different set of rules for merchants. Civil procedure and courts are normally the same for all kinds of contracts. Since cantons are still exclusively competent for civil procedure, some few cantons have introduced specific courts for commercial law (so-called *Handelsgerichte*). This is the case in Zurich, Berne, Aarau and St-Gallen. Most cantons however, have, special jurisdictions for labour law and lease law.

According to art. 1 Swiss Civil Code, the judge must apply written law first. In the case of absence of such a provision, the judge has to look for customary law and, in absence of this, has to apply the law he would draft if he would be a legislator (so-called 'praetorian law'). By all means, he must inspire himself through well accepted doctrinal works and case law. Swiss Judges do not hesitate to refer to foreign law in order to find new solutions, and in particular to the German legal system. The case law of the European Court of Justice is also taken into account in certain cases.

There is no stare decisis principle. Lower courts may differ from the Federal Supreme Court case law, but only if there are valid grounds to revisit the standing position of the Supreme Court. Since the Supreme Court will decide on all the cases brought up to it in accordance with procedural laws, the likelihood of diverging opinions from lower courts is slight.

4 Court system and law faculties

Switzerland has a judicial organization, as well as civil, criminal and administrative procedures different for each canton, as well as a specific judicial organization and procedures on the Federal level. The new Federal Constitution provides for unification of civil and criminal procedures at the

Federal level (art. 122, para. 1 and 123, para. 1 Cst.). These unified codes however, are, not adopted yet.

Article 29a seq. Fed. Cst. and art. 6 ECHR guarantee a right of access to a legal authority for any dispute. Except for some specific matters, the dispute will be instructed and judged first at the cantonal level. Cantons must provide for at least two levels of instances, at least the second being a judicial one. However, the judgment or decision of the highest Cantonal Court may be appealed to the Federal Supreme Court in Lucerne for social insurance cases and in Lausanne for all other cases. The Supreme Court then decides definitively. According to the type of subject-matter, to the value at stake and to the contents invoked, the court may have more or less power of appreciation. The recourse is normally limited to questions of law and arbitrary appreciation of facts. In principle, if the recourse is admitted, the case is sent back to the cantonal level for new decision.

For some matters, a Federal Court of first instance (in Bellinzona for criminal cases and in St-Gallen for administrative cases) may judge the case directly, without prior cantonal procedure. Appeal to the Federal Supreme Court is then still possible.

Doctrine has three different roles in Switzerland. First, it has an influence on/over the legislative process, by participating in federal expert commissions for drafting new laws and by making proposals in scientific writings. Secondly, it has an influence on case law, since the judge has to take into account 'solutions established by the doctrine' according to art. 1, para. 3 Civil Code. Finally, scientific books and articles participate in the systematization of the law and guarantee a proper teaching in law. Without being as such a source of law, it undeniably plays an important role.

In Switzerland, there are at present time nine Law Schools. French-speaking faculties exist in Fribourg, Geneva, Lausanne and Neuchâtel; German-speaking faculties exist in Zurich, Berne, Lucerne, St-Gall, Basle and Fribourg (which allows studies in French, in German or in both languages). There is also an academic institute for law at the Swiss Italian University. Lausanne is the seat of the Swiss Institute for Comparative Law. There is an association of Swiss lawyers and another for judges, but there is no specific association for academics.

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The official journal for publication of Swiss statutory law is called the Official Collection. Publication in all three languages is made weekly in a chronological way. The law is also presented in a systematic way in the so-called Systematic Collection, published on paper and in three languages several times a year by the Federal Chancery. Official and systematic collections are also available on the Internet (www.admin.ch). English versions of Swiss statutes may be found on <http://www.amcham.ch/> (then click on publications).

The leading decisions of the Federal Supreme Court (DFS) and their preambles are published in the official collection of the decisions of the Supreme Court and for those later than 1954, also on the Internet (www.bger.ch). Moreover, nearly two-thirds of all decisions of the Supreme Court since 2000 are available – often anonymously – on the Internet (www.bger.ch; decisions since 2000 ‘not published’).

All cantons also have systematic collections of their statutory law (very often also on the Internet) and publications of the leading Cantonal Supreme Court cases. For details, see Tercier and Roten (2003).

Swiss literature is mostly published in German, with some books in French. There are very few books in English. Hereunder, we will indicate some important books about Swiss Law:

Texts of the civil code and code of obligations (also available on <http://www.admin.ch/ch/d/sr/sr.html>)

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65 Tax law*

Victor Thuronyi

1 Introduction

The literature on comparative tax law is substantial, even though it represents only a small portion of the tax law literature. Most of it is descriptive or, even if analytical, has a single-country focus. Such material might not properly be considered as comparative, although it furnishes a good basis for comparative study. Relatively few comparative studies are comprehensive in scope.

The comparative tax literature is typically written by tax specialists, rather than scholars of comparative law generally. This might be due to the specialized nature of tax law. It has meant that comparative tax law scholarship has developed somewhat in isolation from comparative law scholarship generally. Relatively few have published on comparative tax law and the comparative dimension tends to be a relatively small part of their professional life. The approach in much of the literature tends as a consequence to be pragmatic.

Despite the limited development of comparative tax studies, the demand for comparative knowledge of tax law is strong and increasing and the actual use of comparative knowledge in law reform is substantial. This is evidenced by substantial cross-jurisdictional borrowing of tax rules. EU integration fuels some of the demand for comparative tax law knowledge. At least the more sophisticated tax lawyers practising in the EU are aware of the tax laws of other EU member states, and policymakers in EU member states are aware of differences in country practice. Of course, tax lawyers whose practice includes cross-border transactions need to be aware of the tax laws of other countries; the amount of such transactions has risen over time.

Tax is an interdisciplinary field. Much analysis of tax policy is conducted by economists – or by lawyers using economic reasoning. This makes it somewhat arbitrary to define a field of comparative tax ‘law’ as compared with tax ‘policy’. While, at the extremes, one can identify contributions that are predominantly legal or economic, a good deal of the literature on comparative tax policy represents a mixture of legal and economic approaches. This literature may compare general tax structures,

* See also: Administrative law.

the course of tax reform and the effects of tax policy on the economy in different countries. The focus here is on literature that is predominantly legal in approach, while noting the overlap with public finance literature.

Language and other barriers make comparative law research difficult. Research in comparative tax law is particularly difficult because tax law is notoriously complex and fast-changing. Of all practice areas, it has among the most voluminous literature, suffers more changes on an annual basis and involves the longest statutes. In a number of OECD countries, the level of complexity is such that there are relatively few generalist tax lawyers: specialization within tax is the norm. Getting a grasp on the tax system even of one's own country is therefore quite a challenge. It is virtually impossible for a single individual to get a full understanding of tax law of more than one country.

Although each country's tax laws are unique, tax law has seen a substantial degree of convergence on numerous issues (Thuronyi, 2003, pp. 15–17). Partly this may be explained by the rapid change of tax legislation. Governments wishing to follow successes of other countries often have a legislative vehicle for doing so. Another reason is the eminently practical nature of taxation: techniques that are found to work in one country tend to be transplanted to others. Sometimes this follows transplantation of commercial or financial transactions from other countries. Finally, regardless of differences in legal culture or tradition, legislatures in different countries often come to similar tax policy judgments. For example, governments typically do not want taxpayers to be able to avoid the tax law through artificial transactions. If the courts refuse to interpret the tax laws so as to preclude such avoidance techniques, governments tend to insert anti-avoidance rules into the law. If the courts read narrowly provisions imposing a tax, legislatures tend to broaden the statute, where such broadening is justified by tax policy principles.

To be distinguished from comparative tax law is international tax law. The latter, which might also be called taxation of international transactions, is an important element of the domestic tax law of each country, and forms a subspecialty within tax. Its rules have two main sources: domestic rules, and rules of public international law, derived principally from treaties. International tax law can be studied without studying comparative tax law or foreign tax law. However, international practitioners often encounter foreign tax law issues. The negotiation and application of treaties inevitably involve confronting the domestic tax rules of the treaty partners. Therefore, foreign or comparative tax law tends to be of interest to international tax law practitioners.

2 The World Tax Series

Literature has been developed to make information about the tax law of other countries more accessible. One of the best examples is a series of books prepared in the 1960s by the Harvard International Tax Program (Harvard Law School, International Tax Program 1957 et seq.). The Harvard World Tax Series allows scholars working in English to review the tax law of a number of countries. The Harvard books go into considerable depth in terms of history and particular details that are of systematic importance. They are in English, and therefore generally accessible, and do not assume a background knowledge of the country's legal system, and so are oriented to foreigners.

In depth and sophistication, the Harvard series often provides insights that cannot be provided by briefer summaries. They provide a thorough introduction to the tax systems of the countries covered, even though they cannot handle every issue in depth. Unfortunately, the Harvard books are generally about 40 years old and so now out of date. Even so, they are still useful as long as they are supplemented by more current information.

Each of the Harvard books is organized according to the same outline. This organization facilitates cross-country comparison of tax policy issues. However, it tends to make it more difficult to see each country's own conceptual structure of tax law. In that sense, the organization responds to the interdisciplinary nature of tax law discussed above, emphasizing comparative tax policy more than comparative tax law. Again, this is typical of the mind-set of many tax analysts: policy issues are at the forefront in tax, while differences in the legal concepts that implement the policy might be considered of lesser importance.

3 Cahiers de droit fiscal international

The annual volumes of the *Cahiers de droit fiscal international* produced by the International Fiscal Association (IFA) provide a steady and significant contribution to comparative tax. IFA is a professional association which includes practitioners, academics and government officials, and predominantly consists of tax lawyers whose practice involves the taxation of cross-border transactions. Each year, IFA organizes the preparation of two volumes (devoted to two separate topics), consisting of numerous country reports on the selected topic, tied together with a general report. The general reports are usually quite well done, and identify trends in country approaches to a particular problem, as well as possible future directions. The topics selected tend to focus on matters that are of greatest concern to the international tax practitioners who comprise most of the IFA membership. For example, a recent volume on partnerships focused on the international tax problems of partnerships, covering issues such as whether

partnerships are entitled to the benefits of tax treaties, and how tax treaties are applied to them. But, despite this narrow focus, the volume provides a good overview of the taxation of partnerships in general in different countries. The advantage of the IFA volumes is that they involve contributions from a goodly number of countries which analyse the particular problem addressed by the volume in question in depth and which are tied together by a general report. This can be achieved only by organizing the collaboration of experts from many countries, and to this extent the IFA effort is quite successful. Not all countries of the world are covered. Fuller coverage could be achieved by combining reports from groups of countries having a similar approach, but so far this has not been done: essentially the same matters are repeated in individual country reports from countries with the same systems.

Because the Cahiers consider in depth only two topics per year, some gaps remain to be filled. First, there are issues that may be of importance but that do not make it onto the IFA calendar. Second, the Cahiers focus on specialized issues rather than on more global comparative analysis, for example, a general comparison of VAT or sales tax laws in a region or around the world. The Cahiers also tend to get out of date, particularly where they focus on a topic that is of current interest and therefore likely to change relatively quickly.

4 General books on comparative tax law

Only a handful of books deal with comparative tax law generally. A comprehensive review of the field (by the present author) appeared in 2003 (Thuronyi, 2003). Designed to be introductory in nature, it does not carry out the detailed analysis that would be required to show, for example, how one tax system influenced another or the reasons why countries have adopted convergent solutions to many tax problems, leaving these for further and more specific research.

A recent Italian contribution reviews comparative tax law from a more theoretical point of view, discussing appropriate methodology in light of the comparative law literature (Barassi, 2002). This is one of the very few cases where a tax specialist has tried to grapple explicitly with the methodology of comparative tax law. The methodology is applied to a few specific areas as case studies.

Although restricted to the income tax and to eight countries, a volume edited by Hugh Ault represents an in-depth comparative study which does take into account conceptual and structural differences in the way the countries approach income taxation (Ault *et al.*, 2004). The work includes country chapters providing an overview as well as a main text organized by subject matter.

5 Descriptive material

The need for an understanding of the actual black-letter law of other countries has spawned a number of descriptive books, loose-leaf services and periodicals designed to make the tax law of other countries accessible. These include tax law summaries ranging from very brief articles about each country to much more in-depth summaries. In addition, several periodicals carry articles about tax law developments oriented to readers outside the country. There are also several texts on specific topics that consist of descriptions of the law on that topic in several or numerous countries. Because of space limitations, descriptive literature has not been included in the References.

6 Specific studies

A few articles have studied specific questions of comparative tax law (Barker, 1996; Infanti, 2003; Tiley, 1987). In addition, several books have made in-depth studies of specific areas of tax law. In many cases, the analysis is by way of comparing the relative effectiveness of tax law provisions in various countries in the specific area, although there are several studies that focus on comparative development of the law and cross-country influences.

7 Periodicals

Articles on comparative taxation, or on foreign tax law, are occasionally found in general law journals or in specialized tax periodicals of various countries (e.g., *Australian Tax Forum*, *British Tax Review*, *Canadian Tax Journal*, *Tax Law Review*). In addition, a number of periodicals with an international emphasis contain articles of a comparative law nature as well as descriptive or analytical articles on aspects of the tax law of countries throughout the world. The principal ones are included in the References.

8 Practitioners

Tax may be one of the areas with a large number of practitioners of comparative law, although they might not think of themselves in that way. International tax planning often involves transactions requiring an understanding of the tax consequences of a transaction in two or more jurisdictions. Some transactions, known as tax arbitrage, explicitly take advantage of differing treatment of a particular transaction in two jurisdictions. For example, a cross-border lease where the lessor is in jurisdiction A and the lessee is in jurisdiction B may be structured to take advantage of the fact that for tax purposes the lessor is treated as the owner of the property in jurisdiction A while the lessee is treated

as the owner in jurisdiction B, with the result that both are entitled to depreciation deductions.

9 International organizations

Perhaps an even purer form of comparative tax law practice is found in international organizations that facilitate tax law reform. Organizations such as the IMF, the World Bank, regional development banks, regional tax administration associations and bilateral aid agencies assist in law reform in many developing and transition countries. Necessarily, the recommendations involve canvassing rules in other legal systems to determine whether and to what extent they can be usefully transplanted, with appropriate modifications (Thuronyi, 2000).

The OECD also does substantial work in coordinating tax policy among its member countries, particularly relating to rules on international transactions. In-depth studies on particular topics are conducted to identify best practices and appropriate ways forward. Recently, the major organizations involved in taxation have agreed to cooperate under the umbrella of the International Tax Dialogue (ITD) and to include governments in the information sharing. The ITD promises to be an avenue for even more intensive networking and awareness of practices in other countries than had been available previously.

10 Teaching and research

A number of law schools offer an LLM degree focusing on international taxation where, in addition to studying international tax law, students also spend a substantial amount of time on comparative tax law. These include Harvard Law School, the University of Florida, New York University, the University of Sydney, the European Tax College (Tilburg/K.U. Leuven), the University of Paris I (Sorbonne) and the Vienna University of Economics (Wirtschaftsuniversität Wien). Since 2002, comparative tax has been included as a subject of research for the Max Planck Institute for Intellectual Property, Competition and Tax Law in Munich. The international Bureau of Fiscal Documentation in Amsterdam also carries out comparative tax law research.

11 Primary sources

Tax law is, of course, statutory. Because tax statutes tend to suffer frequent amendment, it is handy to work from consolidations rather than having to piece together the current law by consulting all the amending acts. In the vast majority of countries such consolidations are available, either through commercial publishers or on the web. A good source for tax information about different countries is the website of the International Tax Dialogue

(www.itdweb.org). This website contains tax law research guides for many countries, with links to information available on the web. A bibliography of tax laws is provided in Thuronyi (2000). Few are available in translation, perhaps because they change so fast.

In addition to the laws, governments issue a variety of normative acts (decrees, regulations etc.) as well as explanatory material (circulars, rulings, practice notes, and etc.). These may be commercially available or available on the website of the tax administration (for which, see the ITD website). Court cases are important in many countries.

Treatises on the tax law of specific countries can be found in academic libraries. Because of the expense, these libraries may not subscribe to all of the commercial services which summarize the law (including court decisions and administrative rulings). Tax law journals exist in many countries. A bibliography for (primarily) Germany can be found in Tipke (1993). Thuronyi (2003) contains a general bibliography, albeit selective.

12 Conclusion

Tax law is a productive area for studying comparative law. Just as the fast multiplication of fruit flies makes them suitable for genetic study, the rapid change of tax law allows one to observe cross-country influences, convergent development and parallel development of law. While some insights can be gained by going further back in history, the history of modern taxation is relatively recent (the last 200 years or so) with much that is of interest taking place much more recently. The historical record therefore is widely accessible and not obscure.

Tax law also furnishes a rich environment in which to observe country differences in the interaction of civil law, constitutional law and general administrative law principles with a specific area of regulatory or administrative law (there is, e.g., a substantial literature on the relationship between tax law and civil law; see Thuronyi, 2003, pp. 125–8).

At the same time, the political high profile of tax law means that many developments are specific to the politics of each particular country and cannot easily be analysed in a cross-country context. Like the weather, tax is produced by the intersection of powerful competing forces, and a general theoretical explanation of why a particular provision can be found in a particular country at a certain time is often difficult to produce. However, the prevailing winds are often subject to more systematic analysis. A good deal of this analysis – tracing the development of tax law over time and across countries, and studying how legal systems have influenced each other – remains to be done.

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66 Tort law in general*

Ulrich Magnus

1 Definition

Every legal system knows of tort law as a substantial part of its law. Even countries like New Zealand, which have almost entirely abandoned tort law with respect to personal injury cases and have replaced it with a social insurance scheme, still retain it for cases of damage to property and economic interests (cf. Todd, 1997, pp. 62ff.). Tort law is therefore an indispensable part of law; it is that branch of law which provides remedies for civil wrongs, in particular where one party has caused damage to the other. But, unlike contractual liability, tort liability arises irrespectively of any prior agreement between the parties that the damage should be made good; liability in tort does not depend on whether the tortfeasor has – by the prior conclusion of a contract – agreed to its sanctions (see von Bar, 1999, 2001, vol. 1). Tort law fixes general duties which bind every member of a society and whose breach obliges in any event (see, for more or less identical definitions, Kötz and Wagner, 2001; Winfield and Jolowicz, 2001, p. 4; generally also England, 1993).

2 Aims, functions and interests

2.1 Aims

Tort law pursues no single aim but a number of aims. One of its main aims is to provide for the compensation of losses which unavoidably occur in society and which tortfeasors cause to others (agreeing to the compensatory aim, for instance: Koziol, 1997; Viney, 1992, 324; Winfield and Jolowicz, 2001, pp. 1ff.; sceptical Kötz and Wagner, 2001). Where justified, victims must be granted redress for such loss. The general aim is compensation of the victim's full loss (*restitutio in integrum*). This compensatory aim has decreased in importance (though by no means entirely vanished) since today more often than not social or private insurance agencies are the claimants which have already covered the primary victim's loss according to their rules. But where insurance steps in nonetheless tort law governs the question whether the victim is entitled to compensation from the insurance of the tortfeasor where this insurance agency is the loss bearer. Tort law also remains decisive on the question if the insurance agency which has

* See also: Damages (in tort); Personality rights; Privacy; Product liability; Social security.

covered the victim's loss can – by way of subrogation or otherwise – claim compensation from the tortfeasor or its insurer (as to the relationship between tort law and social security law, see the reports and comparative conclusions in Magnus, 2003a).

Besides the aim of compensation of losses there are, however, further aims. Tort law also aims at the prevention of damage (in accord: Koziol, 1997; Winfield and Jolowicz, 2001, p. 2) and knows of specific remedies in this respect, in particular injunctions. Prevention works both in the direction of general prevention towards the public at large and as special prevention that the single tortfeasor will in future avoid the sanction of damages.

In some legal systems, in particular in many individual states of the United States, also the aim of punishing the tortfeasor by the civil sanction of money payment to the victim ('punitive damages') is recognized (in depth on punitive damages: Schlueter and Redden, 2000; see, for exemplary damages in England, *Rookes v. Barnard* [1964] A.C. 1129; *Cassell & Co. Ltd. v. Broome* [1972] A.C. 1027; *Thompson v. M.P.C.* [1997] 3 W.L.R. 403). The money sanction shall 'teach the tortfeasor that tort does not pay'. Sometimes also the tortfeasor will be stripped of the gain which he made by the tort.

2.2 *Functions*

Tort law's most prominent function is to draw the borderline between liability and non-liability. It fixes by law the conditions under which those who have caused damage have to compensate those who have suffered it (cf., e.g., Kötz and Wagner, 2001; Winfield and Jolowicz, 2001, p. 3). The regular starting point is that the victim himself must bear the loss unless there is good reason to shift the loss onto another natural or legal person: 'sound policy lets losses lie where they fall except where a special reason can be shown for interference' (Holmes, 1881, p. 50). But even where the loss can be attributed to the conduct or activity of another it is quite clear that not every loss deserves to be compensated. It is for instance the very aim of a market system of competition that competitors act and are being forced – to some extent by the law itself, in particular by antitrust legislation which forbids contracts for the restraint of trade or other anti-competitive practices – to act to the disadvantage or even detriment of their competitors. However, as long as this occurs by fair means no claim for compensation will ever lie even where the losing competitor must close down its business, is driven out of the market and suffers great loss. Tort law has therefore the function to define and to distinguish those socially accepted activities which, though being detrimental to others, do not lead to liability from those which do.

This leads to a certain steering function of tort law. Tort law has a certain deterrent effect (Schwartz, 1994; 1997). By establishing general duties and liability for their breach, tort law influences the conduct and activities of persons – both of potential tortfeasors and of potential victims – at least where these persons plan their activities in a rational way. But even where there is normally not much time for well planned acting, as in traffic accidents, serious research has revealed that the consciousness of one's own personal liability on the one hand or of the fact of being insured on the other has an impact on driving behaviour (Cohen and Dehejia, 2004). Where a personal liability regime governs, the accident figures are significantly lower than where a (compulsory) insurance regime exists. Though it is difficult to quantify the steering effect of tort law, this function should also not be underestimated.

The economic analysis of law has highlighted the fact that tort law has also an economic function which relates to the wealth of society as a whole (on the economics of tort law, see in particular Shavell, 1987; Schäfer, 2000, pp. 569ff.). By granting or excluding compensation tort law gives economic incentives either to potential tortfeasors or to potential victims to avoid damage. According to this theory efficient, i.e. economically rational and reasonable, incentives should be given so that, for instance, expenditure for preventing harm should not exceed the compensation costs for the expectable damage (for a detailed discussion, see Schäfer and Ott, 2000, pp. 145ff.). For this reason the so-called 'Learned Hand formula' (named after a US judge) defines negligence as the failure of a person to invest so much for preventive measures as equals the amount of damages multiplied by the probability of the entrance of the damage (see *United States v. Carroll Towing Co.*, 159 F. 2d 169 (2d Cir. 1947)). It has been doubted whether the economic analysis alone can set the standard of negligence or that of other requirements of tortious liability. But the economic analysis certainly contributes useful considerations and adds to rationalized decisions on tort law issues.

2.3 Interests

Tort law defines the general field in society in whose borders a person can freely act without being threatened by impending sanctions even if damage to others is caused. By this it fixes at the same time those ordinary risks of life which the victim has to bear itself. On the other hand, tort law defines the protected sphere of the victim whose violation is not permitted and obliges the tortfeasor to compensate the ensuing damage (see, e.g., Viney, 1995, pp. 67ff.). Setting tortious liability standards therefore means always a balancing of the interests of tortfeasors in their freedom of acting against the interests of victims in the integrity of their protected rights.

3 Relationship with social and private insurance law

If the aim of compensation of loss of accident victims is regarded as the primary aim of tort law it can be, and has been, doubted with good reasons whether the tort law machinery with its individualistic approach suits this purpose (see, in particular Atiyah, 1993; von Hippel, 1968; Report of the Royal Commission on Civil Liability and Compensation for Personal Injury, the Pearson Report (Cmnd 7054, 1978); Schilcher, 1977). Social security law or private (compulsory) insurance which anyhow overlap tort law considerably may be much better tools to achieve an efficient regulation of the 'accident problem'. And in fact accident victims regularly approach first their social or private insurer for compensation instead, to set the cumbersome tort law machinery in motion even if there are good prospects of the victim being granted compensation from a tortfeasor (see Magnus, 2003b, pp. 303ff.). In this perspective tort law then only retains the already indicated residual function of a law of redress. However, if tort law was entirely abandoned also its preventive and steering function would be given up. To some extent, then, carelessness – of both tortfeasors and victims – would be rewarded because compensation would depend on the mere occurrence of a damage no matter who caused it, how it occurred and whether it could have been prevented. The temptation and incentive to rely then on the social or private insurance benefits at the expense of all contributors to the insurance (the so-called 'moral hazard' problem) is rather high and real (for a detailed discussion, see in particular Faure, 2004, pp. 5ff.; Faure and Hartlief, 2003, pp. 222ff.).

In all modern legal systems there is therefore a mixture of basic protection of all accident victims via social security and of further protection through tort law which can result in full compensation of damage caused by a liable tortfeasor (cf. van Gerven, 1998, pp. 1ff.). The precise mixture of these different sources of protection which is still supplemented by private insurance is peculiar to each legal system. But it can be observed that the reconstruction and reduction of the welfare state which has taken place in the western industrialized countries over one or two decades necessarily strengthens tort law which regains importance as a source of protection against accident damage (see Magnus, 2003b, p. 304 on the basis of a broad comparison of mainly, but not only, European countries).

4 History

Even the earliest written legal texts of mankind, such as the Codex Hammurabi (about 1700 BC) contain rules on tort cases (on the Codex Hammurabi, see Edwards, 1904). But the sanctions provided there were mainly those of revenge and private punishment. The victim was allowed to do the tortfeasor the same damage as the victim had suffered (talion).

Roman law, in particular the Lex Aquilia (probably 286 BC) developed the idea of compensation of damage as a substitute for private revenge and talion and required regularly intent, in certain cases negligence, for liability. Nonetheless, claims for private penalty and claims for damages existed side by side (for Roman tort law, compare Zimmermann, 1990–92, pp. 914ff., 953ff.).

Modern tort law has its foundations in the age of enlightenment. The basic idea and justification of tort liability then was, and still is, that the tortfeasor should bear the loss which he caused another person only if he neglected the necessary diligence which could be expected of a reasonable person, namely if such a person could and would have foreseen and avoided the damage (see Grotius, 1625, lib. II, ch. 17; Domat, 1777: liv. II, tit. VIII, s.IV §§ 1, 3). In essence, the misapplication of the free will makes a person liable. This idea fitted well with, and supported, early and then rapidly growing industrialization since it excluded or at least limited liability for new and unforeseeably dangerous activities whose risks could not be fully controlled, as was the case with exploding steam engines, derauling trains or other massive accidents connected with technical progress (see Veljanowski, 1981, pp. 135ff.). Only in the second half of the 19th century did the idea gain ground that the author of a permitted but particularly dangerous risk should compensate such losses which resulted from the specific risk irrespective of fault (see in particular the ‘*théorie du risque créé*’ in France). In the 20th century the concept of strict liability became a strong additional second pillar of the system of extracontractual liability.

5 Grounds for tortious liability

It has already become apparent that the general starting point of tort liability is to let losses lie where they fall (*casum sentit dominus*). Only where there are justifying grounds can the victim’s loss be shifted onto another’s shoulders. Causation of damage alone, though certainly a necessary ingredient of tort liability, does not justify such a shift. The most common justification is the tortfeasor’s faulty conduct as the cause of the victim’s damage, whether the conduct be intentional or negligent (compare von Bar, 1999, 2001, vol. I, p. 11). The tortfeasor could and should have behaved in another way so that the damage would not have occurred. For this reason the tortfeasor is held liable. But, as indicated, also the creation of a specifically dangerous risk like the operation of a nuclear power plant or the like is a justifying and widely accepted ground for liability (for a broad comparative survey, see Koch and Koziol (2002a), von Bar, 1999, 2001, vol. II, pp. 306ff.). So is the employment of another person who performs duties of the liable person and from whose activities the liable person benefits (cf. Spier, 2003; also von Bar, 1999, 2001, vol. II, pp. 309ff.). And finally,

reasons of equity may, exceptionally, justify a person's liability though in fact, for instance because of lack of tortious capacity, there would be no liability (an example of this kind of liability is s.829 German Civil Code).

6 Elements of tort law

Each system of tortious liability builds on certain elements which are in principle the same conceptual stones even though their exact meaning often – and often widely – differs from one legal system to the other. The precise scope of the single element depends on the general attitude of the respective legal system towards the aims and functions of tort law indicated above. Finally, all these elements form a rather flexible system which determines when liability is incurred. The following survey summarizes the main elements necessary for tortious liability.

6.1 Protected interests

At the heart of tort law lies the question of which rights and interests of a person deserve protection against infringement. Only damage to a protected right or interest is disallowed, and is therefore regarded as wrongful by the law and makes its author liable (see van Gerven, 1998). There is wide agreement among legal systems that an 'inner circle' of certain essential interests must be protected in any event. This circle consists of the right to life, bodily (physical and psychic) integrity and property of a person and is everywhere acknowledged (*ibid.*, pp. 83ff., 207ff.). With respect to other interests such as a general personality right, immaterial and pure economic interests etc., such uniformity is, however, much less extensive (for a comparative survey, see *ibid.*, pp. 171ff., 252ff.). The scope of their protection varies considerably among countries and also over time, thereby mirroring differing and changing views on the value of these interests.

6.2 Further general conditions of tortious liability

Each legal system requires as necessary though not sufficient further conditions for tortious liability that there is damage and a link of causation between the tortfeasor's activity and the damage of the victim.

The basic concepts of causation do not differ very much: in principle, causation requires that the damage should not have occurred in the absence of the damaging activity (for a comparative survey, see Spier, 2000; von Bar, 1999, 2001, vol. II, pp. 411ff.). However, the more the link between the activity and its consequence is indirect and distant the more policy considerations have to be applied regarding whether or not causation (and liability) should be accepted. Among those considerations rank the foreseeability of the damage, the magnitude of the damage, the value of the violated right or interest and the protective purpose of the violated rule or duty.

Damage – or threatened damage where injunctive relief is sought – is a further necessary ingredient of tort liability. It is one of the elements on which legal systems differ widely (for a comparative survey, see Magnus, 2001; von Bar, 1999, 2001, vol. II, pp. 1ff.). The damage governs the extent of compensation. And though the aim of full compensation is common ground, the evaluation of the damage and the calculation of damages are far from being uniform. In particular the assessment and compensation of permanent physical damage and future losses, the recognition and compensation of immaterial damage, compensation of pure economic loss etc. vary remarkably (see, on a broad comparative basis, Koch and Koziol, 2003; Rogers, 2001; van Boom, Koziol and Witting, 2004). Damage being the central element of tort law, it is, however, no surprise that here in particular the differing views on the aims and functions of tort law and of the justified scope of tort liability play a role.

6.3 Negligence

Fault-based liability means in most cases liability for negligence. The general concept of negligence is rather similar everywhere: the tortfeasor must have neglected a duty of care which a reasonable person under the same circumstances would have observed and the observance of which would have avoided the damage (see, e.g., for England, Winfield and Jolowicz, 2001, pp. 90ff. (with respect to negligence as an independent tort); for France, Le Tourneau, 2004, no. 6705 f.; Viney and Jourdain, 1998: no. 444; for Germany: Kötz and Wagner, 2001, pp. 106ff.). The standard of conduct is very flexible. It always depends on the respective situation in which care is necessary and could be expected; and this question is decided by the courts from an *ex post* viewpoint. In principle the standard is also an objective one (see the reports in Widmer, 2005). The tortfeasor must generally conform to the average standard; personal shortcomings regularly do not excuse (compare the above references). Fault and, in particular, negligence have lost almost all subjective tone. Personal capacity matters only insofar as the general delictual capacity of the tortfeasor is still required.

6.4 Strict liability

The general idea that a person who creates, and benefits from, a particularly dangerous risk should compensate losses which result from this very risk is today widely accepted and also part of international conventions like the Conventions on Civil Liability for Nuclear Damage or the Conventions on Liability for Oil Pollution. However, for practical reasons, most countries regard a general provision of strict liability for particularly dangerous risks as too vague (a certain exception is art. 2050 of the Italian Civil Code, which provides for liability for damage due to dangerous activities in general

unless the tortfeasor proves that it observed all measures apt to avoid the damage). They therefore define specific extraordinary risks where mere causation of damage suffices to incur liability if the specific risk realizes (see the country reports in Koch and Koziol, 2002a). Not surprisingly, there is only limited uniformity as to the risks for which particular danger justifies strict liability. Even with respect to traffic accidents caused by cars almost as many countries as accept strict liability deny it in this field (e.g., Great Britain and the Netherlands do not consider the keeping of a car so dangerous as to justify strict liability for all damage caused by a car; cf. the reports of Rogers (England) and du Perron and van Boom (Netherlands) in Koch and Koziol, 2002a, pp. 101ff. and 227ff.).

As far as strict liability applies, this does not in most cases mean liability under all circumstances. Regularly there are grounds of exemption such as force majeure, unavoidable independent act of a third party and act of the victim itself which excuse from liability (Koch and Koziol, 2002b, pp. 420ff.). Where unavoidable external sources which are unrelated to the specific risk have caused the damage the strict liability of the author of the risk is generally no longer justified.

Strict liability regulations sometimes contain caps which limit the maximum amount of compensation. This is particularly true for the mentioned international conventions but also, for instance, for the European Product Liability Directive. It is said that such caps enable the insurability of those risks. In fact they subsidize particularly dangerous activities because part of the damage attributable to the risk must be borne by the victims themselves. Rules of that kind lack a convincing justification (in the same sense, see *ibid.*, pp. 428ff.).

Since strict liability does not require fault, also the delictual capacity of the liable person is generally no requirement of liability (*ibid.*, p. 419).

6.5 *Liability for conduct of others*

Modern division of labour necessitates that individuals and enterprises often if not regularly act through others. Though this cannot be regarded as a particularly dangerous activity, also here a kind of strict liability for the fault of another has developed (cf. the country reports in Spier, 2003). With few exceptions legal systems provide uniformly that a person is liable without excuse if his employee has acted within the course of employment and has at least negligently caused damage to another person (an exception to this rather common rule is, for instance, s.831 German Civil Code, which excuses the employer if he proves that he diligently selected and controlled the employee).

Not only employment of others but also the duty to care for others may be a ground for liability (cf. again the country reports in Spier, 2003). Where

persons such as parents or guardians are obliged to supervise the person under their care and control they are held liable if they negligently disregarded their duty of supervision and the supervised person caused damage to others which correct control would have prevented.

6.6 *Defences*

Liability in tort has to be denied if, and to the extent that, the tortfeasor can rely on a valid defence. Some of these defences are commonly recognized, in particular, justified self-defence, necessity (help to others in their urgent state of need) or consent of the victim (for a comparative survey of defences, see von Bar, 1999, 2001, vol. II, pp. 485ff.).

6.7 *Contributory negligence*

Every legal system has to take a stance on the case where the victim had contributed to its own damage. Where the victim was negligent the amount of damages otherwise due is generally reduced and, where the victim's negligence clearly prevails, even excluded. And the victim is negligent if it disregarded such diligence as could be expected of a reasonable person under the same circumstances. The victim's self-protection is encouraged and requested.

Though this is a rule of general application in almost all legal systems (for a comparative survey, see the country reports and the comparative conclusions in Magnus and Martín-Casals, 2004; von Bar, 1999, 2001, vol. II, pp. 517ff.) there is a more recent tendency in some systems not to take into account the victim's contributory negligence in specific fields, in particular where the victim suffered only personal damage (e.g., in Sweden, ch. 6, s.1, Skadeståndslag, Tort Law of 1972, provides that contributory negligence does not reduce a tort claim for personal injuries unless the victim acted with intent or gross negligence; see Dufwa, 2004, pp. 199ff.) or through a traffic accident (not being the driver; e.g., in France, see art. 3 of Loi No. 85-677 of 5 July 1985, 'Loi Badinter', according to which the victim's contributory negligence is disregarded unless it was 'inexcusable' and the sole cause of the damage; persons under 16, over 70 or at least 80 per cent incapacitated are always entitled to full compensation irrespective of their contributory negligence). It is thought that in these cases victims should be better protected and should not lose part or even all of their compensation. The high degree of bodily integrity and the specific vulnerability, in particular in traffic accidents, are the justifying reasons.

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67 Transfer of movable property*

Lars van Vliet

1 The three main transfer systems

Many of the world's legal systems for the transfer of movable property fit into one of three types of transfer system: the causal consensual system, the causal tradition system and the abstract tradition system. Here two dividing lines intertwine: the distinction between causal and abstract systems and the distinction between consensual and tradition systems. As examples we will look at the transfer of movable property in German, French, English and Dutch law. The transfer using negotiable instruments and the transfer by way of security will not be considered, nor will transfers which require registration.

A causal transfer system (examples: Netherlands, Switzerland, Austria) demands that the transfer be based on a valid legal ground, i.e., a legal reason justifying the passing of ownership (*iusta causa traditionis*). In an abstract system, on the other hand, the transfer is valid even if it is not based on a valid legal ground. Under the influence of Savigny and his pupils, German law opted for the abstract system. Other legal systems which use an abstract transfer system for the transfer of movables are South African law and Scottish law.

The sharp distinction between the extremes of causal and abstract has been in existence only from the beginning of the 19th century. In the learned law of the period from the rediscovery of the Digest up to the beginning of the 19th century no consistent transfer theories can be found, let alone the terms 'abstract' or 'causal' transfer (Van Vliet, 2003).

In a consensual system a valid transfer of ownership in principle does not require any transfer or providing of possession (examples: French law and the English and Scottish law regarding sale of goods). In the current view ownership passes simply as a result of entering into a contract which imposes an obligation to make a transfer. A tradition system, on the other hand, distinguishes between the underlying contract and the legal act of transfer. Whereas in a consensual system the contract, i.e., consensus between the parties, suffices (hence its name), in a tradition system the contract merely calls into being an obligation to transfer. In the latter system

* See also: Insolvency law; Property and real rights.

ownership will pass only after the legal act of transfer and traditio have taken place.

The division between consensual systems and tradition systems is not as sharp as might seem at first glance. The existence of fictitious traditio and exceptions to the requirement of traditio have reduced the difference between consensual and tradition systems to a distinction only of *ius dispositivum*. In both systems parties are able to let ownership pass when they think fit, provided the assets are specific and existing goods. Owing to the principle of specificity, ownership of generic goods cannot pass to the acquirer before the goods to be delivered to the acquirer have been ascertained. Ownership of future goods cannot pass to the acquirer: the transfer will be effective only from the moment the asset has come into existence.

2 Practical differences between causal and abstract systems

If I sell my bicycle the contract of sale is said to be the *causa traditionis*, the legal ground, for the transfer. The *causa traditionis* makes clear what the legal reason for the transfer of ownership is: sale, barter or a gift, for example. Suppose now that one of the parties has entered into the contract under the influence of a mistake. According to Dutch, German, English and French law the party influenced by the mistake has under certain circumstances the power to annul or avoid the contract, that is to say, to render the contract void. Avoidance of the contract has retroactive effect: having been avoided, the contract is deemed never to have existed. In a consensual system, where the contract of sale itself is said to pass ownership, it is obvious to assert that avoiding of the contract will inevitably lead to ownership reverting to the seller with retroactive effect. Moreover, if the contract is void from the outset, it has never been able to transfer ownership. So, in a consensual system, it seems as if the transfer of ownership necessarily depends on the validity of the contract. Such a transfer system that needs a valid *causa traditionis* is called a causal system.

In a tradition system the act of transfer is considered as a distinct legal act. Having made the distinction between the underlying contract, which serves as *causa traditionis*, and the transfer, a legal system is confronted with the question how the latter act relates to the former one. Does invalidity of the underlying contract affect the validity of the transfer? Legal systems in which the validity of the transfer does depend on a valid *causa traditionis*, the Dutch, Swiss or Austrian systems for example, are called causal tradition systems. If in such systems the obligatory contract is void or has been avoided with retroactive effect, the transfer is invalid and either ownership has never passed (in the case of a void contract) or it is deemed never to have passed to the buyer (where the contract has been avoided). The seller is then able to claim back the bicycle on the basis of his ownership.

In legal systems based on Roman law, he would be said to have an action of revindication (*rei vindicatio*).

In German law, on the other hand, the act of transfer is independent of the validity of the obligatory contract. Systems like the German are called ‘abstract transfer systems’ because the validity of the transfer is judged abstractly, i.e., independently, of the contract. The invalidity of the obligatory contract has no effect on the validity of the transfer; the transfer will stay valid even if the legal act that obliged to make the transfer is void or has been avoided. Yet where there is no valid *causa traditionis* the transfer, though valid, leads to an unjustified enrichment of the buyer. It obliges him to undo his enrichment by retransferring the thing to the seller. It is a transfer similar to the first transfer and it should accordingly fulfil all requirements every transfer should meet. The *causa traditionis* of the retransfer is the buyer’s obligation ex unjustified enrichment.

If the contract of sale is avoided the entire transaction should be reversed: the money, if already paid, should be paid back to the buyer, and the bicycle should return to the seller. This applies to a causal system as well as to an abstract system. However, the way in which the transfer of ownership is reversed differs. Whereas in a causal system ownership of the bicycle reverts automatically to the seller when the contract is avoided, in an abstract system the validity of the transfer will not be affected. Here the buyer has an obligation ex unjustified enrichment and the seller a correlative personal right to the retransfer of ownership.

Yet this difference, however important, should not be overestimated. The difference will normally be limited to the transfer of the thing. As to the money paid to the seller, all three systems, the causal tradition system, the abstract tradition system and the consensual system, cope with a similar problem: apart from rare exceptions the money will have been mixed with the rest of the buyer’s money, rendering the money paid unidentifiable. As a result the money cannot automatically revert to the buyer after avoidance of the contract.

3 Importance in insolvency

The difference between having a real or rather a personal right is important especially in the case of insolvency. Let us take the example of the sale of a movable. The seller has entered into the contract under the influence of a defect of will, for example duress. As the transaction does not correspond to his true will the seller has the power to avoid the contract of sale. Where the thing has already been delivered avoidance will oblige the buyer to return the thing to the seller.

In the German abstract transfer system the seller merely has a personal right to the retransfer of the thing. As a result the seller does not have any

priority in the buyer's insolvency: he is an ordinary unsecured creditor. In a causal system, on the other hand, the seller will in principle be able to claim back the thing relying on his right of ownership, which will normally revert to him as a result of the avoidance. When ownership reverts to the seller the thing does not form part of the buyer's goods available for realization and satisfaction of the buyer's debts. It should be returned to its owner by the liquidator or trustee in bankruptcy. For that reason it is often said that a causal system gives a better protection to the transferor against insolvency of the other (i.e., the receiving) party.

We should bear in mind, however, that the protection against insolvency of the receiving party is rather imperfect. Firstly, the seller's protection against the buyer's insolvency is limited by a few exceptions: as the protection depends on the transferor's ownership the protection is no longer available when for some reason it is impossible for ownership to revert automatically to the transferor. To give an example, the transferor's action of revindication may be frustrated when the transferee has sold the object to a bona fide third party: if available, third party protection will deprive the original owner of his right of ownership. The reverting of ownership to the transferor may also be barred as a result of original acquisition, for example when the thing has been mixed with identical assets in the hands of the transferee (*confusio* and *commixtio*), or if the thing has been used to make a new thing (*specificatio*) or if it has been attached to another thing (*accessio*).

Secondly, in German, Dutch and French law, the protection is in principle offered only to the transferor of the thing. The buyer, who has a duty to pay for the goods, is not given a similar protection against the seller's insolvency. The reason is the different nature of the assets both parties have to transfer: a thing and money.

4 The German transfer system

The German abstract system distinguishes between the contract containing the obligation to transfer property (*Verpflichtungsgeschäft*) and the transfer itself (*Übereignung, Veräußerung*). The transfer is valid even if the preceding contract is void or has been avoided with retroactive effect. If ownership has been transferred under a voidable contract, avoidance will not automatically revest ownership in the transferor.

Yet there are several exceptions to the abstraction. First of all, certain severe defects of will, such as fraud, duress and undue influence, may affect the validity of both the contract and the transfer. Such a common defect of will is called *Fehleridentität* (identity of defect). Second, the abstraction is merely *ius dispositivum*: the parties may, expressly or tacitly, make the transfer depend on the validity of the underlying contract.

The German transfer system is at the same time a tradition system: apart from *Einigung* (real agreement) § 929 BGB requires *Übergabe* (a transfer of possession). The transfer of possession needs the will of the transferor to make the acquirer possessor, and the corresponding will of the transferee to acquire possession from the transferor. It is an act aiming at the passing of possession. As possession is not only a fact but also a right, the transfer of possession can be regarded as a legal act. Still, in German law this is recognized only in regard to the transfer of possession mentioned in § 854, subs. 2 BGB, a transfer of possession by mere agreement. On the other hand, the transfer of possession by providing actual power (§ 854, subs. 1 BGB) is seen as no more than a factual act. For practical reasons German law provides that in some instances no transfer of actual power is needed as between the transferor and transferee. The instances are *Geheißerwerb*, *traditio brevi manu*, *constitutum possessorium* and the assignment of the *Herausgabeanspruch* (Van Vliet, 2000, § 2.4).

As a rule a valid transfer also demands that the transferor should be privileged to dispose (*Verfügungsbefugnis*). Normally the owner of the thing will be privileged to make a transfer, but he is no longer so privileged if he is declared bankrupt (§ 22, 24, 80, 81 *Insolvenzordnung*). On the other hand, a non-owner may, by law or by a legal act, be given the privilege to dispose. The pledgee, for instance, has a right to seize the pledged asset and sell and transfer it in execution (§ 1242 BGB). However, in certain cases a person who is not privileged to dispose is nonetheless able to make a valid transfer. For, if the acquirer is in good faith, and if all other requirements for third party protection are met, the transfer is regarded as valid. A non-owner is thus able to transfer a thing belonging to another. Here the transferor is the non-owner, yet the *bona fide* third party succeeds in a right (i.e., ownership) which previously belonged to the owner. We may call this ability to transfer ‘the power to dispose’.

5 The French transfer system

The French causal and consensual transfer system does not require a transfer of possession. Here consensus between the parties suffices. Traditionally in this system the contract itself is held to pass ownership. Ownership passes at the moment the contract is made. Yet there are some very important exceptions to this principle. As a result of the principle of specificity, ownership of generic goods can pass only when certain goods are separated and appropriated for delivery to the acquirer. And, where there is a contract for the transfer of future goods, ownership can pass only after the goods have come into existence. Furthermore, it is often overlooked that, in the case of sale, the ‘translative effect of obligations’ applies only to the passing of ownership of the thing, not the transfer of the money due in exchange.

The French consensual system originated in a frequent use of *constitutum possessorium* and similar forms of *traditio* in contracts for the sale of land. In pre-civil code law the requirement of *traditio* was deprived of all practical consequences as a result of notaries enclosing in contracts for the sale of land a standard clause that possession was transferred by way of *constitutum possessorium* or otherwise. Thus, in practice, ownership of land passed when the contract was made.

The French causal system originated in the consensual system of the Code Civil: where the contract itself passes ownership a valid transfer necessarily depends on the contract being valid. Even so, the choice of a causal system was not deliberate: it was merely a logical consequence of opting for a consensual system, a consequence one did not realize when the Code was enacted.

6 The English transfer system

Another example of a consensual system is the Sale of Goods Act 1979 which applies in England, Wales and Scotland. Outside the sale of goods the transfer of movables is based on the ancient common law system of transfer: a tradition system requiring a transfer of possession. As in French law, in the consensual system of the Sale of Goods Act immediate passing of ownership is possible only as regards specific existing (in contrast to future) things. As in French law, the purchase price will not pass to the seller when the contract is made. The rule that ownership of generic goods cannot pass to the buyer before certain goods have been appropriated to the buyer led, in 1995, to an amendment of the Sale of Goods Act. Where the contract stipulates that the goods should be taken from a specified bulk the buyer will under certain conditions (among which payment) become co-owner in the bulk (ss. 20A and 20B SGA).

It is likely that the English consensual system originated in a way similar to the development of the consensual system on the continent. Originally the common law requirement of *traditio* applied to every transfer of movables. However, it was gradually held that, when a contract for the sale of a movable was made, it immediately passed constructive possession to the buyer, making the seller a bailee for the buyer. As a consequence ownership passed when the contract was made, before any physical handing over had taken place. It involved a fictitious *traditio* similar to the continental *constitutum possessorium*.

The question whether the tradition system of the Sale of Goods Act is causal or abstract is not discussed in English law. Still, on systematic grounds, it can be demonstrated that the system is causal (Van Vliet, 2000, § 4.5).

Outside the area of sale of goods movable property should be transferred on the basis of the ancient common law system of transfer which requires

a transfer of possession (*traditio*). An important instance to which the ancient requirement still applies is the gift from hand to hand (in contrast to the gift by deed). Here *traditio* may take the form of providing actual power, but in some cases a fictitious transfer of possession will suffice (*ibid.*, § 4.8). It is difficult to ascertain whether transfers outside the scope of the Sale of Goods Act need a valid legal ground. Most probably a transfer by deed is abstract, but as to the ancient common law transfer by *traditio* no conclusion is possible: there is no legislation, case law or literature which could give us any clue whatever (*ibid.*, § 4.5).

7 The Dutch transfer system

For a valid transfer of movables Dutch law in principle requires the providing of possession to the acquirer. Furthermore, unlike the old civil code, the new 1992 code expressly provides that every transfer needs a valid legal ground (art. 3:84 BW). As a result the transfer system may be classified as a causal tradition system. Moreover, art. 3:84 BW requires that the transferor should be privileged to dispose (*beschikkingsbevoegd*).

There is some controversy whether the transfer of ownership needs a real agreement (*goederenrechtelijke overeenkomst*). Most authors assert that a real agreement is essential to any transfer. The act of transfer, the act aiming at the passing of ownership to the acquirer, should be regarded as a legal act the nucleus of which is formed by the real agreement. Any formalities required in addition to the real agreement should be seen as *condiciones iuris* (conditions required by the law rather than conditions stipulated by the parties). They suspend the effect of the legal act until certain additional requirements, such as *traditio*, have been met. Possession may be provided by giving actual power or by using a form of fictitious *traditio*. In one instance, article 3:95, not even a fictitious *traditio* is needed: here a simple deed suffices.

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68 Transnational law*

Peer Zumbansen

1 Introduction

The first usage of the term ‘transnational law’ (TL) continues to be disputed. While scholarship focused on the origins of the term for a long time, it has since become apparent that the real challenge of TL lies in its scope and conceptual aspiration (Jessup, 1956; Koh, 1996). Alongside the domestic–international dichotomy that marked international law for a very long time TL offers itself as a supplementary and challenging category within interdisciplinary research on globalization and law. As famously conceptualized in a series of lectures by Philip Jessup at Yale Law School in 1956 (Jessup, 1956), TL ‘breaks the frames’ (Teubner, 1997b) of traditional thinking about inter-state relationships by pointing to the myriad forms of border-crossing relations among state and non-state actors. Now, half a century after Jessup’s lectures, one is well advised to reread the slim but nevertheless immensely rich volume. Without many references, Jessup invites his audience to imagine an altogether different conceptual framework. This framework would help to reflect on the dichotomies underlying and informing international law while decisively moving onward to embrace a wider and more adequate view of global human activities. Jessup writes that he ‘shall use the term “transnational law” to include all law which regulates actions or events that transcend national frontiers. Both public and private international law are included, as are other rules which do not wholly fit into such standard categories’ (Jessup, 1956, p. 2).

When examining the inescapable ‘problem’ of people worldwide whose ‘lives are affected by rules’, Jessup wastes no time in pointing to the contingency by which we attribute the label of ‘law’ to rules, norms or customs that govern various situations. ‘As man has developed his needs and his facilities for meeting his needs, the rules become more numerous and more complicated. History, geography, preferences, convenience, and necessity have dictated dispersion of the authority to make the rules men live by’ (ibid., p. 8). Jessup complements this bold exposition of the multitude of norm-producing institutions and actors with an intriguing presentation of three short dramas that illuminate the parallels between domestic and international constellations. While the first scenes of two of the three dramas

* See also: International commercial regulation.

feature individuals caught up in disturbing, doctrinally challenging, legal conflicts – variously involving divorce or the exercise of membership rights in a stock corporation – the complementing scenes invoke a very similar problem set on the inter-state level. Set against an ensuing discussion between the art critics, Mr Orthodox and Mr Iconoclast, Jessup extrapolates the inseparability of the issues that underlie the allegedly exclusively ‘domestic’ versus the likewise purely ‘international’ constellations. The truly subversive thrust of Jessup’s vision of TL lies in the parallels that can be recognized between supposedly regional or internal issues in one place and those in another one. ‘One’s idea of what constitutes a “region” is apt to be artificial and highly subjective. The people in Boston and New York today might quite properly feel that they have a closer identity with the people of India than their grandfathers felt interest with the farmers of Iowa’ (ibid., p. 26). With regard to stockholders, Jessup lets Mr Iconoclast point out the parallels between purportedly domestic discussions concerning ‘shareholder democracy’ and those involving increased demands for improved participatory rights in the United Nations and other international organizations.

For the sake of both accolades and brevity, it must suffice to point to the collection of tributes appearing almost 20 years after *Transnational Law* was published (Friedmann, Henkin and Lissitzyn, 1972), as well as mention Jessup’s clairvoyant treatment of issues that would – much later – still occupy our legal minds. One of these issues concerns the problem of the extraterritorial reach of antitrust statutes (Jessup, 1956, p. 75; Buxbaum, 2004); another issue involves the uprooting of dearly-held convictions of jurisdictional boundaries and competences (Jessup, 1956, pp. 72–7; Michaels, 2004). These elements clearly underscore the relevance of Jessup’s ground-breaking work with regard to the continuing and further differentiating inquiry into the law of globalization.

Although the term ‘globalization’ had not yet entered the lexicon at the time of Jessup’s lectures, TL has begun to reach deep into the heart of even our present-day struggles over the role of law within dispersed and fragmented spaces of norm production (Fischer-Lescano and Teubner, 2004). TL presents a radical challenge to all theorizing about law as it reminds us of the very fragility and unattainedness of law. At the beginning of the 21st century, we are still at a loss to identify a theory of law that would be subtle enough not to stifle emerging identities in a post-colonial era while providing forms, fora and processes (Wiethölter, 1986) for the collision of discourses that mark post-metaphysical legal thinking (Habermas, 1996). TL works itself like a drill through the few remaining blanket covers hastily thrown over an impoverished and internally decaying conceptual body. TL lays bare a description of a world that long ago began to give testimony of

Philip Allott's international 'unsociety' (Allott 1990, p. 244). In this world in our conceptual, political and theoretical preoccupation with interstate relationships has worked to disregard the projection of unreflected domestic notions of power and legitimacy onto the international scene (Zumbansen, 2001, 2002a; Koskeniemi, 2005, p. 122) while otherwise failing to imagine the emergence of an international society of connected individuals. With the dominance of state-to-state relationships, 'progress in international organization' was seen primarily as relating to state actors and functions (Hudson, 1932, 1944). Against this background we can begin to grasp and assess the revolutionary potential of Jessup's concept of TL, which he unfolded in the light of an 'international society in its present condition of still embryonic organization' (Jessup, 1956, p. 104).

In the term's long history, its variances can be attributed mostly to the different doctrinal and theoretical backgrounds of those employing it. This short exposition of TL will introduce the grand strands of discussion in different branches of legal doctrine and theory by way of visiting and revisiting the places and times of TL in the historical and legal consciousness. Inspired by Philip Jessup's exposition of the idea and concept of TL (Jessup, 1956; Schachter, 1986, p. 878), this chapter will address TL from the viewpoint of the commercial (arbitration) lawyer, the corporate and the public international lawyer and the human rights lawyer. Finally, the chapter will conclude with brief remarks on the relationship between the emerging field of transnational (legal) history and TL and the impact of TL on legal education.

2 Lex mercatoria

The rediscovery of the medieval law merchant through the works of commercial lawyers after World War II, began a great revival of the notion of a borderless, universal trade law of nations (Goldman, 1964; Schmitthoff, 1964). This notion had received a great deal of attention and intellectual conceptualizing as early as the 17th century (Milgrom, North and Weingast 1990; Stein, 1995; Cordes, 2003). As seen above, Jessup proposed that TL should encompass and simultaneously challenge public and private international law were the latter to maintain their explanatory and guiding potentials in an ever more integrating world. Commercial lawyers seized this moment and engaged for decades in a far-reaching enterprise of collecting, consolidating, codifying and harmonizing the various laws governing international trade. Peculiarly mirroring today's dispute of 'fervent imagination' versus the 'school of hard knocks', i.e., visionary, theoretical, perhaps religious, legal thinking as opposed to realist, pragmatic, result-oriented doctrine creation (Thomas Franck, in Philip Allott Symposium, *EJIL* 16, 343, 2005), lawyers carried on a dispute over both

the legal nature and the very existence, of *lex mercatoria* as an autonomous legal order (Schanze, 1986; Stein, 1995; Teubner, 1997; Mertens, 1997; Berger, 2001; Gaillard, 2001). Aptly characterized as a battle between 'transnationalists' (those embracing the emergence of a self-producing legal order among commercial actors) and 'traditionalists' (emphasizing the continuously important role of the state in enforcing arbitral awards), the dispute over *lex mercatoria* exposed the vulnerability and burdens of a practice/theory-based challenge to 'official' law, being those state-made norms and statutes, embedded in an institutionally sound enforcement environment (Berger, 1996; Calliess, 2002; Zumbansen, 2002a).

Two developments, however, have shifted the focus away from such preoccupations. Far from being the product of powerless processes of negotiation, the 'common law of contracts' (Teubner), the autonomous legal order of *lex mercatoria* could be shown to continue and amplify the power cleavages between the haves and have-nots, between the North and the South, the West and the East (Dezalay and Garth, 1995, 1996; Shalakany, 2001). In part this critique premeditated today's scepticism towards what has been coined 'new constitutionalism' (Schneiderman, 2000). However, the proponents of an autonomous legal order are well aware that *lex mercatoria* will inevitably undergo dramatic phases of repolitization (Teubner, 1997), by having to meet itself some of the nation states' structural challenges with regulating the economy. This process of repolitization forms only one layer of *lex mercatoria's* coming of age. The concept of TL that underlies and continues to shape the appearance and applicatory scope of *lex mercatoria*, must be seen as unfolding in a much more radical, reflexive manner. Much as in Jessup's drama, TL points to the overarching political, perhaps utopian struggles that are shared among comparable developments and social movements in different 'regions'. The struggle for (legal) recognition of a transnational, denationalized *lex mercatoria* is the otherwise left behind, domestic struggle for the power and legitimacy of order through law. As it is exemplified through *lex mercatoria*, TL reminds us of the never attained positivity of legal rule, which is a conflict that we have come to address by distinguishing between legality and legitimacy. TL breaks with the separation of domestic and international legal (economic, social, cultural, political) problems and, instead, seeks to assess the inner connections and resemblances in their alleged differences. These differences are not, however, the result of the opposition between its domestic and international qualities. Rather, the labels of 'domestic' or 'international' are merely the exertions of definitional and conceptual sovereignty over an otherwise untameable power.

Dramatically exemplified through the emergence of a denationalized commercial law, TL is nothing but a resurgence and restatement of the very

problem of regulatory power and autonomy, of private and public autonomy. In this way, TL reconnects inseparably with both 'domestic', private law discussions (over freedom of contract, duress, unconscionability and consumer protection) and the public law themes of deregulation and privatization. These discussions characterize the continuing ideological struggle over the delineation of the state from the market, and of the public from the private. Seen against this background, the project of a constitutionalized private law undertakes the impossible task, of sustaining the paradox between these irreducible spheres of societal freedom. This project should not be dismissed solely for lacking the enthusiasm to (re-) embrace a perhaps inadequate conception of the 'state' simply to prevent the market from taking over.

3 Corporations

Administered both centrally and from within inter-firm networks, trans-territorialized globe spanning company activities bring together a multitude of autonomous organizational and economic actors that can easily exhaust the traditional regulatory aspirations of nation states and other political bodies (Hertner, 1998; Herkenrath, 2003). The study of the transnational law of corporate governance focuses on the various existing regulatory frameworks for business corporations on the domestic, transnational and international level and helps to illuminate the embeddedness of firms in layers of rules (produced by regulatory and self-regulatory bodies), economic and political constraints and historically evolved legal cultures (Shonfield, 1965; Granovetter, 1985; Boyer and Hollingsworth, 1997; Zumbansen, 2002b). The embeddedness of business corporations must be understood as relating to their origin and development in systems of production (Storper and Salais, 1997; Jacoby, 2004) as well as in legal and socioeconomic cultures. In relation to the regulation of business corporations, TL differentiates between the hard law that governs the corporation through company law or, for example, securities regulation and even labour law on the one hand, and the soft law of voluntary codes of conduct, corporate governance codes and human rights codes on the other. As the latter present a dramatic challenge to traditional understandings of lawmaking, the analysis of voluntary codes of conduct further illuminates the complex nature of the regulated and self-regulating firm. Considering the embeddedness of business corporations in an increasingly denationalized knowledge economy, their placement in a multi-level regulatory field, comprised of official and non-official norm producers, becomes more visible. On the one hand, TL comprises the law governing the global business corporation through a multi-level and multipolar legal regime of hard and soft law, statutes and recommendations, command-control structures of mandatory rules as opposed to an ever

more expanding body of self-regulatory rules (Zumbansen, 2002b; Arthurs, 2002). On the other hand, TL constitutes a reflexive practice that critiques itself with regard to its regulatory and legitimizing aspirations. Thus, TL provides a better understanding of the changing nature of the applicable law itself. As we witness the emergence of soft-law standards against regulatory dead-ends and political blockades, the question inevitably presents itself as to how we ought to draw the line between official law and non-official law, between hard and soft law, ultimately between law and non-law. In the context of contemporary struggles over the adequate regulation of business corporations and their relations to shareholders and stakeholders, TL must be seen as holding a central place within a legal theory inquiry into the nature of governance through law.

4 Public (international) law

In the eyes of both the public international lawyer and the domestic administrative/constitutional lawyer of the second half of the 20th century, TL marks a significant challenge to the state-centred view of international relations and international, constitutional and regulatory law. TL undermines and complements the legal view on relationships between states and state actors in the international arena by emphasizing the importance of non-state actors in cross-border relationships. This recognition of private actors' growing relevance in cross-border relationships allows for a much richer understanding of the international community than would otherwise have been possible under the pressure of the oppositional ideology of the Cold War. However, TL offers itself as a label for more than merely private law-based, cross-border transactions involving non-state actors. Rather, TL also encompasses those relationships between state and non-state actors and regulatory networks across state boundaries that fall short of leading to official international legal acts such as treaties or conventions.

Often overlooked in Philip Jessup's famous definition of TL (Jessup, 1956, p. 3), this public dimension turns the term into both a concept which questions the international law regime based upon the separation of state and non-state actors and a programme, that provokes a more radical legal theory conceptualization of denationalized human and institutional interaction (Sassen, 2003). At first glance, TL apparently prompts the legal imagination of a wealth of untraditional, alternative forms of border-crossing activity through regulatory and judicial networks (Slaughter, 2004). Looking again, it also sparks a rediscovery of the informal, unofficial, contractual *lex mercatoria* of the medieval merchants (Dezalay and Garth, 1995; Teubner, 1997; Berger, 2001; Cutler, 2003; Zumbansen, 2004). Additionally, however, TL must also be seen as shaping and informing a much wider field of work on legal concepts. The fruitful dynamic of

TL today lies in its capacity for illuminating the overwhelming complexity of decentred and highly fragmented socio-legal and political discourses around transnational activity.

From a public law-inspired view on international activity and norm production, TL has both a destructive and a constructive thrust. It is employed to destroy, erode and relativize the view that states alone are relevant actors in border-crossing activity (Zumbansen, 2002a; Berman, 2005). Frequent exchanges and increasing cooperation among different state representatives nurture the view of a highly fluid and increasingly cooperative international field (Slaughter, 2004). Moving from the realism and anarchy of post-war international relations (Bull, 1977; Morgenthau, 1978) to an era of international coexistence and further onwards to one of coordination and cooperation (Fox and Roth, 2000), the beginning of the 21st century is marked by strongly antagonistic dynamics in international relations (Kaldor, 2003; Byers and Nolte, 2003; Paulus, 2004). Forming the background of any legal theory of globalization, the soul searching of public international law and the subversive notions of exclusion and inclusion (Slaughter, 1995; Anghie, 2005), mitigate the persisting hopes for a non-antagonistic international legal order (Tully, 1995; Koh, 1997; Koskenniemi, 2005). While public international law struggles for de-ideologizations and reformalizations (Alvarez, 2001; Koskenniemi, 2002), arises as an alternative to the continuously state-centred oppositional theoretical framework that informs international law – and sometimes dominates international law (especially in times of perceived ‘crisis’ and ‘exception’) (Morgan, 2004; Scheppele, 2004).

For the domestic constitutional and administrative lawyer, the role of the state has been changing dramatically (Di Fabio, 1997; Zumbansen, 2000; Arthurs, 2001). Lawyers, political scientists and sociologists are heavily invested in a deconstruction of the state. While they see an emerging multipolar network of state regulatory agencies (Slaughter, 2004; Schimmelfennig, 2004) and non-state actors (Hofmann and Geissler, 1998; Kaldor, 2003) in the international arena, it is also mirrored by the overwhelming presence of intermediaries and other non-state agencies and public–private actors on the domestic regulatory level. Again, Harold Koh’s work on the transnational legal process is of great significance (Koh, 1996). It exposes the challenge of the Westphalian legal order – centred around nation states that relate to each other in accordance with the principle of sovereign equality – and traces the narratives of these changes back to national trajectories of studying and teaching these transformations (Perez, 2003). TL short-circuits legal concepts with regard to the global against the background of the domestic. In that sense, TL makes visible the projection of domestic analogies onto denationalized spheres of social activity. Parallel to the increased exchange among these border-crossing actors, whose status

can only inadequately be reassigned to well-known public/private distinctions, we witness the emergence of a large, decentralized and non-harmonized body of norms. Whether or not the focus is on agreements between large corporations and other commercial actors (*lex mercatoria*), policy negotiations within regulatory networks (Slaughter, 2000, 2004; Schimmelfennig, 2004) or the still much more fragile and fleeting principles and standards of an emerging global humanitarian law (Scott, 2001; Wai, 2003; Scott and Wai, 2004), these norms constitute an emerging transnational normative regime that links current searches for law across territorial and conceptual divides. The most abiding example of such a divide emerges between the domestic and the international. Transnational law is both and neither.

Both constitutional and administrative law give strong testimony to the in-between state of TL when reacting to the shifting balance between public administration and private execution, between government and governance (Aman, 1997; Freeman, 2000). After early, unheard, recommendations to consider administrative law as a core element of a transnational legal science (Joerges, 1972; Wiethölter, 1977), its recognition as an important field of such a science is of more recent date (Aman, 2004; Shapiro, 2000). The background is constituted partly by what has been called 'regulatory fatigue' (Stewart, 2003), which has otherwise been depicted as the welfare state's increased inability to adequately structure widespread public law and public policy interventions into the social sphere. The promises of a transnational administrative law in the sense of a widely conceived administrative science as regulatory science (Aman, 2004) particularly lie in the unfolding of a more responsive and experimental approach to public administration (Ladeur, 1997). This approach must be understood in two ways. First, in a procedural sense, transnational administrative law seeks to facilitate processes of participation and deliberation in an otherwise highly dispersed and fragmented public sphere. Second in a normative sense, it aims at the creation of a regulatory regime that can accommodate public and private claims evolving from privatized and deregulated frameworks of (formerly) public administration (Frankenberg, 1996; Zumbansen, 2003). TL's focus on norm production is connected closely to this twofold experiment in administrative theory. Here, TL allows for a parallel view on the allegedly separated spheres of domestic and international legal struggles. The global arena is populated by a multitude of norm makers and rule producers, such as standards and standard-setting organizations. While these entities materialize in widely differing fields, their appearance raises closely connected questions with regard to regulatory base and scope, as well as legitimacy of grounds and enforcement (Salter, 1999; Brunsson and Jacobsson, 2000; Schepel, 2004).

5 Human rights litigation

In the last two decades of the 20th century, civil litigation seeking compensation for human rights abuses occupied courts and – on all fronts – lawyers, academics, practitioners, politicians and journalists around the world (Scott, 2001). Inspired by the *Filartiga* decision (630 F.2d 876 [1980]), many claims by former victims of human rights violations have been brought against states, state officials and private corporations. The fate of these cases has been mixed at best. While they mostly fail to overcome various existing state immunity thresholds (whereby states and their officials are immune from lawsuits before courts in foreign states) or are rejected because the courts in question were declared ill-suited to hear cases involving far away incidents (the so-called *forum non conveniens* doctrine), plaintiffs and their lawyers do not seem willing to give up their struggle for legal recognition of the wrongdoing (Neuborne, 2002; Stephens, 2002).

At this juncture, Justice Story's invocation of a law governing commercial transactions and itself being a branch of the 'law of nations' (*Swift v. Tyson*, 41 U.S. (16 Pet) 1 [1842]) meets the jurisprudence in the U.S. involving the 1789 Alien Tort Claims Act (28 USC 1350). Reaching back to Cicero (*Non erit alia lex Romae, alia Athenis, alia nunc, alia posthac, sed et apud omnes gentes, et omni tempore una eademque lex obtinebit*), Justice Story and Lord Mansfield before him recognized the law merchant as border-transgressing and as a genuinely denationalized body of law. While subsequent times did see some domestication of this jurisprudence in federalist disguise (*Erie R.R. Co. v. Tompkins*, 304 U.S. 64 [1938]), the frame-breaking character of a transnational law of human rights protection remains a pressing challenge and promise (Scott and Wai, 2004). Such a body and practice of law arises against the resistance of jurisdictional and conceptual boundaries firmly erected by private international law(yers). Against this background, TL illuminates the degree to which issues of jurisdiction flow from a state-based understanding of jurisdictional competence. However, the conflict of laws that purportedly confronts the respective courts refusing to hear these cases can no longer be confined to territorial borders. Increasingly, the norms governing the human rights claims are of such border-transgressing nature that they both undercut and surpass the territorial boundaries upon which various jurisdictional competences have been predicated up to this point. While this observation applies naturally to the case for universally binding norms of international law regardless of whether or not states have transposed these obligations into their domestic legal regime, cases involving civil suits against states, present and former state officials and against corporations do not (yet) build on binding international law. Clearly, the general openness and receptiveness of domestic courts towards international law

becomes a prime issue in ascertaining the prospects of cases for human rights abuses committed on foreign soil (Scott, 2001; Brunnée and Toope, 2000–2001; Zumbansen, 2005). TL suggests nothing less than an alternative interpretation of the process whereby domestic courts apprise themselves and appraise human rights abuses and the need to grant legal standing to the victims. Simultaneously, this re-interpretation requires a nuanced apprehension of the relevant norms that courts will have to draw upon in order to resolve these cases (Scott, 2001; Wai, 2001). TL offers itself as a means to capture the ambiguous dream of transnational civil human rights litigation in its widest sense. No-one can deny that there are more problematic aspects to such human rights litigation than mere issues of merely procedural or even substantive law. Through an increasingly widespread discussion, concern and awareness of distant rights abuses, transnational human rights litigation is preceded and fuelled by a global scandalization of human rights abuses.

At present, the importance of past cases and current proceedings can be measured in so far as they resound in a greater wave of legal initiatives and court decisions in other countries. Among these echoes we find cases in the United States, beginning with the aforementioned *Filartiga* case of 1980 and culminating for now, in the *Sosa v. Alvarez-Machain* decision that was delivered by the Supreme Court in 2004. As it severely limits the scope of the *Filartiga* case law, this decision will most certainly overshadow subsequent decisions by the Supreme Court, and lower-level courts alike. The most recent and notable example of this effect was the November 2004 decision in the *Apartheid* litigation. Heavily relying on *Alvarez-Machain*, a US District Court dismissed the *Apartheid* class actions that had been brought by a large group of former Apartheid victims and related interest groups against corporations for their alleged collaboration with and support of South-Africa's Apartheid regime. Along with a number of decisions coming out of Germany, Great Britain, Italy and Greece, this case forms part of a compelling series of judgments that show courts addressing issues that go beyond the boundaries of their own respective legal regimes jurisdictional competences and immunities. In an almost urgent sense, the cited decisions all reflect the courts' shared awareness of the necessity of considering the current developments in neighbouring jurisdictions. For the longest time, decisions such as *Filartiga* served as a transnational reference point for similar court proceedings in many parts of the world. *Filartiga* was both a precedent and an inspiration. Far from being judicial events of merely domestic significance, these cases have and will continue to exert considerable influence in shaping transnational legal consciousness in many other jurisdictions.

6 Transnational (legal) history and societal memory

The 'big bang' of military or political revolution, setting free dynamics of transition and transformation, of post-conflict, post-apartheid and post-war justice, has triggered a widespread and wide-ranging research agenda around the world that is concerned with the chances of a new 'beginning' and the need to account adequately for legacies and past experiences in the process (Teitel, 2000). Countries such as post-apartheid South Africa, the East- and West-German narratives of the Nazi past to post-genocide Rwanda and the current nation building in Iraq, the existing accounts of this process challenge our understanding of how to go about the future while minding the past.

Such fragile and vulnerable societal projects challenge the role of law. In the context of and in concert with other complementing disciplines, TL reveals the distinct quality of fertilizing other conceptual searches while being informed by the transformations occurring within these disciplines. As much as TL has been shown to lay bare the raw and vulnerable foundations of law in all of its absurd contingency and utopian aspiration while being based in social practice administered with violent denominational authority (Moore, 1973; Bourdieu, 1987; Derrida, 1990; see the Special Issue of *German Law Journal*, 6 (1), 1 January 2005), law itself reaches out to disciplines such as history, cultural studies and anthropology to tell its own story. With legal history emerging as a transnational enterprise (Merry, 1992; Anghie, 2005), such valuable undertakings can build on and learn from the work being done by historians and cultural studies scholars. The emergence of transnational history gives overwhelming testimony of the border crossing inquiry into the legitimacy narratives of state and nation building. Formerly conceived and framed in discrete fashions, domestic, national historical narratives are discovered as sharing and being informed by experiences and semantic appropriations in comparative, transnational and global perspectives (Bright and Geyer, 1995; Bentley, 1996; Middell, 2000; Conrad and Osterhammel, 2004; *Geschichte-transnational*). This research bears large potential for concurrent explorations in work done in transnational legal history and TL in general (Zumbansen, 2006).

7 Transnational legal education

The preceding sections demonstrated the degree to which transnational human rights litigation, transjudicial communications and constitutional 'borrowing' (Slaughter, 2004), 'constitutional analogies' (Helfer, 2003) and the 'proliferation of international judicial bodies' (Romano, 1999) have long ceased to be of concern only to those working in international law. Any assessment of current developments in core fields of a law school curriculum will inevitably be informed by 'outside' influences of international,

transnational and comparative law. While this insight is beginning to take hold in curriculum reform committees everywhere, there is still a long way to go to bridge the gap between the mostly traditional canon of First Year courses and the *crème de la crème* curriculum specializations that are usually restricted to Upper Year programmes. While the struggle for democratic access to higher education still continues today (Boyd, 2005), change has been long in coming with respect to the demographic and territorial transformation of today's student (and faculty) bodies. With prospective students likely to be more mobile and deterritorialized in their selection of higher education institutions, the same is suggested to them with respect to employment opportunities after graduation. In this light, the questions regarding the direction and content of curricula might have progressed, matured and changed to reflect a higher degree of the Law School's nervousity and responsiveness to the 'needs of the market' (Arthurs, 2000). And yet current, sometimes frantic, attempts to adapt the university to market demands also speak of a lack of self-reflection, reconsideration and wider-scale assessment of the conditions, role and function of education and learning as such (Macdonald and MacLean, 2005; Macdonald, 1990). With national traditions and trajectories proving to be very influential in shaping future conceptual thinking about education and university reform, the need arises to bring together these distinct, nationalized or segregated discourses. Focusing on legal theory from the perspective of the 'political economy of (legal) education', the formation and training of lawyers becomes a crucial inquiry into the democratic accessibility of university studies, into the training of elites, and into questions of power and exclusion, of identity and of finding oneself again (Goodrich, 1996).

This dialectical process is painfully felt throughout one's academic career. The ambiguity of technical terms, legal concepts and principles coincides with the daily challenge to position oneself and one's work (Wiethölter, 1965, 1968, p. 168). This anxiety is particularly prevalent where academic research, writing and teaching is so intertwined with real politics (Arthurs, 2002a; Weiss, 2003). The open-endedness of categories such as labour law, economic law, social law, 'public' and 'private' law, allows us to lay bare and to make visible 'national traditions' of legal scholarship; in turn, these traditions are themselves intertwined, non-linear, disputed and contested. And of course, how could this not be otherwise? (Glenn, 2004, 2005). It is the constant challenge of the researcher and the teacher to work in the light of this complex history in order carefully to help shape the future. Whether or not keywords, suitable for database archives or for bullet-pointed speech outlines, succeed in capturing the wealth of complex history hidden behind simple formulae matters less than that they are taken as invitations to dig

deeper into the history and into the sociological, political, economical and legal discourses through which these terms have come to prominence. While such an undertaking inevitably reveals local, regional and national histories, it also highlights the connections, interdependencies and parallels between different national and transnational discourses. Why not use keywords in transnational legal scholarship to strive for a better understanding of the law – and of ourselves?

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69 Trust law

Marius J. de Waal

1 Introduction

'A trust is an arrangement recognised by law under which one person holds property for the benefit of another' (Riddall, 2002, p. 1). This definition describes the basic 'trust idea' underlying the whole concept of the trust. However, as a definition of the trust it is too wide because it could apply to a diversity of legal relationships. Included in this definition could therefore be persons such as tutors administering property for their pupils, curators for the mentally ill and agents holding property for their principals. Relationships such as these are sometimes referred to as trusts 'in the wide sense' (Cameron *et al.*, 2002, p. 3) and could include trust-like institutions (i.e., not 'proper' trusts) in Continental Europe. In other words, there is a difference between 'a law of entrusting and a law of trusts' (Honoré, 1997, p. 794).

A definition of the trust must therefore be narrower and more specific (De Waal, 2000, p. 548). Hayton (2001, p. 1) provides such a definition for English law: 'A trust arises where ownership of property is transferred by a person to trustees to be managed or dealt with for the benefit of beneficiaries or a charitable purpose.'

This corresponds closely to the definition found in article 2 of the Hague Convention on the Law Applicable to Trusts and on their Recognition (1985): 'For the purposes of this Convention, the term "trust" refers to the legal relationships created – inter vivos or on death – by a person, the settlor, when assets have been placed under the control of a trustee for the benefit of a beneficiary or for a specified purpose.'

Although these definitions are more specific they still do not capture, in a comprehensive sense, the real nature of the trust institution. One of the reasons why such a definition would be almost impossible to give is the fact that the trust is an extremely adaptable and flexible institution that can be used to achieve almost any lawful end. Trusts can, by way of illustration, be set up to protect the wealthy, to protect the poor and handicapped, to provide education, to benefit employees, to provide pensions, to defeat creditors, to arrange collective investment and to carry on a business (Moffat, 1992, p. 124). The trust's 'contemporary pervasiveness in a wide range of personal and commercial contexts' (*ibid.*) is emphasized by authors on trust law in numerous jurisdictions, for example, in American

law (Curran and Fratcher, 2002, pp. 270–72), Australian law (Meagher and Gummow, 1997, pp. 3–4), English law (Hayton, 2001, pp. 1–3; Hudson, 2003, pp. 44–6; Oakley, 2003, pp. 6–12; Riddall, 2002, pp. 3–9), Scots law (Wilson and Duncan, 1995, pp. 30–40) and South African law (Cameron *et al.*, 2002, pp. 19–20).

2 The trust as a unique institution of the common law?

It had long been (and in some circles still is) accepted as conventional wisdom that the trust is a distinctive institution of the English common law. Typical assertions in this vein are that the trust is a ‘uniquely Anglo-American institution’ and that the ‘Continental legal tradition did not develop the trust’ (Langbein, 1995, p. 669).

At the heart of this lies the insistence of many Anglo-American (and specifically English) lawyers that the trust should be defined in terms of a divided title between the trustee and the beneficiary (De Waal, 2000, p. 550). The trustee has ‘legal ownership’ of the trust property and the trust beneficiary ‘equitable ownership’ or ‘beneficial ownership’. The explanation for this is historical (Hayton, 2001, pp. 8–16; Hudson, 2003, pp. 31–2; Martin, 2001, pp. 5–17; Oakley, 2003, pp. 1–6). There is a close link between the English trust and equity, the system of law developed by the Chancellor in reaction to the more rigorous common law. The interest of the beneficiary under the use (the forerunner of the trust) could not be enforced under the common law. However, in equity, the Chancellor acknowledged the beneficiary’s interest in the property. In due course it was recognized as a proprietary interest (i.e., equitable ownership) that could in general be enforced also against third parties. This was the origin of the distinction between the trustee’s ‘legal ownership’ and the trust beneficiary’s ‘equitable ownership’, a distinction that was perpetuated in some British colonies, for example, America, Australia, the Bahamas, Bermuda and the Cayman Islands (Hayton, 2001, p. 5).

However, more recent trust scholarship is critical of this inclination to define the trust strictly in terms of a divided title (De Waal, 2001, p. 65). First, the assertion that the trust is completely foreign to the Continental legal tradition has been shown to be an oversimplification from an historical perspective. Although it is generally acknowledged that Roman law did not know the trust as such, research has indicated that there are signs in Roman law of ‘trust-like’ devices and ‘trustee-like’ persons (Johnston, 1998, p. 45). This already tends to show that there are indeed links between the English trust and Continental institutions such as *fideicommissum*, *fiducia* and *Treuhand*: that there is a ‘common core’ that unites them (Helmholz and Zimmermann, 1998, p. 30). Some researchers see an even stronger link. Lupoi (1999, p. 975), for example, argues that the English Chancellors

(without mentioning their sources) drew on a wealth of 13th- and 14th-century civil law authority in their development of the English trust. For him it is therefore not far-fetched to refer to these civil law institutions as being the 'foundation' of the English trust. Even though his research is conducted from a different angle, the conclusions of Glenn (1997) broadly echo those of Lupoi. Thus, according to him, the introduction of the trust into a civilian context is not a question of the importation of a foreign legal institution but rather of 'revivifying ideas of the common law of Europe' (*ibid.*, p. 776).

But, secondly, the issue can also be approached from an angle other than the historical one (De Waal, 2001, p. 66). According to Rudden (1994, p. 89) the orthodox explanation of the trust in terms of the distinction between law and equity in any event provides only 'an historical and not a rational account of the trust'. Approached rationally, the question is therefore: can one have a 'proper' trust without such a divided title? This is the question that will be the focus of the next section.

3 The trust in civil law and mixed jurisdictions

The question whether one can have a 'proper' trust in civilian and mixed jurisdictions where the law/equity distinction is unknown has also received much scholarly attention. An analysis and a synthesis of research done especially in the context of the mixed jurisdictions such as Scotland and South Africa (De Waal, 2000, 2001; Gretton, 1996, 2000; Honoré, 1997, 2003; Reid, 1999, 2000) have shown that this question can be answered in the affirmative if at least the following 'core elements' are present: (a) a trustee who fills a fiduciary position (meaning, among other things, that the trustee must act with scrupulous loyalty in the interest of the trust beneficiaries); (b) a separation between the trustee's personal estate and the trust estate; (c) the operation of real subrogation (meaning that the proceeds of a trust asset, if it has been sold, or a substitute asset, if the proceeds have been used to purchase another asset, will also be subject to the trust); and (d) the construction of trusteeship as an office.

Lupoi (1999) is critical of this 'common core' approach. He prefers to define the trust in comparative law terms and to investigate whether the trust is to be found in civil law countries. For Lupoi an appropriate definition of the trust in comparative law terms would include the following elements (p. 970): (a) the transfer of property to the trustee or a unilateral declaration of trust; (b) the absence of 'commingling' between trust property and property in the trustee's personal estate (this corresponds with the second 'core element' above); (c) the loss of any power of the settlor (or founder) of the trust over trust property; (d) the existence of trust beneficiaries or a trust purpose; and (e) the imposition of a fiduciary component

upon the exercise of the trustee's rights (this corresponds to the first 'core element' above).

Once one has concluded on a rational level that the concept of a divided title is not a prerequisite for a proper trust, the focus can shift to the different possible ways in which the trust can be introduced into civil law or mixed jurisdictions. Here comparative research has shown that it is not possible, or indeed necessary, to identify one single model for such an introduction (De Waal, 2001). By way of illustration, a few examples from some of the civil law and mixed jurisdictions can be given. Thus, for example, the trust was introduced into civil law jurisdictions such as Liechtenstein, Mexico and Panama by way of specific legislation during the 1920s (Ryan, 1961). Interestingly enough, the legislation in Mexico and Panama was inspired by civilian concepts (particularly the *fideicommissum*), while the Liechtenstein statute was drafted under the influence of Anglo-American law (*ibid.*). Lupoi (2000) provides numerous further examples (such as Argentina, Colombia, Ecuador, Japan and Israel) that are worth analysing from a comparative perspective. This work of Lupoi should ideally be read against the background of the earlier comprehensive comparative study by Fratcher (1973).

The introduction of the trust into some of the mixed jurisdictions also followed different patterns. In Scotland, for example, the trust emerged in the course of the 17th century. It is not clear exactly how this happened but it is possible that civilian concepts such as *depositum*, *mandatum* and the *fideicommissum* did play a role (Gretton, 1998, p. 516). However, the important point is that available evidence does not indicate anything like a reception of English trust law in Scotland (*ibid.*, p. 511). Considerable English influence in the 19th century and later came only after the trust had established itself as an independent institution in Scots law. The story of the introduction of the trust into South African law is quite different. The trust that first appeared in South Africa was indeed the English trust, as introduced into South Africa by British settlers in the course of the 19th century (Honoré, 1996, p. 850). However, this trust was quickly transformed into an institution that could be explained in civilian terms. This was done, again, by the extensive use of civilian concepts such as the *fideicommissum* (in the case of the testamentary trust) and the *stipulatio alteri* (in the case of the *inter vivos* trust). In both these systems, therefore, legislation played no role in the initial introduction of the trust. In other mixed jurisdictions, such as Louisiana and Quebec, legislation played a central role in this regard. The specific legislative histories fall outside the scope of this contribution but the final result is, in the case of Louisiana, a specific Trust Code and, in the case of Quebec, a number of chapters in its Civil Code (Yiannopoulos, 1999; Cantin-Cumyn, 1994).

4 Trust-like institutions in Continental Europe

With the exception of Liechtenstein, a proper trust law has not developed in Continental Europe. However, it has already been noted that it would be wrong to assert that the 'trust idea' is completely foreign to Continental legal thinking. There are indeed many examples of Continental 'trust-like' institutions to illustrate the point. For purposes of this contribution a few examples from Dutch and German law will have to suffice.

The Dutch legal institution that perhaps comes closest to the express inter vivos trust is the *fiducia cum amico* (Kortmann and Verhagen, 1999, p. 196). Assets are transferred to a manager (*fiduciarius*) who must manage these assets for the benefit of one or more beneficiaries. Like the trustee, the manager becomes owner of the assets. However, unlike the beneficiary under the common law trust, the beneficiary under the *fiducia* has no real right ('equitable interest') to the assets. Another legal institution used under Dutch law to create a trust-like relationship is the *bewind*. Under the *bewind* the *bewindvoerder* manages assets for the benefit of a beneficiary or beneficiaries. Unlike the trustee, the *bewindvoerder* is not the owner of the assets. Ownership vests in the beneficiary. In other words, the *bewindvoerder* only acts as the agent of the beneficiary (*ibid.*, 1999, p. 199). A third example that can be given from Dutch law is the *stichting*, an institution that fulfils a function much like that of the charitable trust. However, the obvious difference between a *stichting* and a trust is the fact that, unlike the trust, the *stichting* is a juristic person (i.e., an entity with legal personality) (*ibid.*, p. 202).

In German law, a testator may provide in his will that his estate must pass to a particular person as 'first heir' (*Vorerbe*) and, at this person's death or upon fulfilment of a specified condition, to another person as 'second heir' (*Nacherbe*). The testator can, however, exclude the first heir's limited power to dispose of the assets by appointing a testamentary executor (*Testamentsvollstrecker*) who will get the exclusive power to dispose of estate assets in accordance with the testator's instructions. The combination of *Nacherbfolge* and the appointment of a *Testamentsvollstrecker* will achieve practical results quite similar to those achieved by the common law testamentary trust (Kötz, 1999, p. 87). Note the similarity between this institution and the Dutch *bewind*: neither the *Testamentsvollstrecker* nor the *bewindvoerder* is owner of the assets. Under both institutions ownership remains vested in the beneficiary. The German institution that corresponds more closely to the trust is the *Treuhand*. Assets are transferred to a *Treuhänder*, coupled with a contractual agreement in terms of which he undertakes to manage the assets for the benefit of the beneficiary. Similarities between the common law trustee and the *Treuhänder* are that the last-mentioned becomes owner of the assets, that he fills a fiduciary

position and that he must keep the assets separate from his personal estate. On the other hand, real subrogation does not operate as in the case of the trust (*ibid.*, p. 91). Thirdly, the German counterpart of the Dutch *stichting* is the *Stiftung*. The *Stiftung* is also a juristic person and usually (but not necessarily) fulfils a charitable purpose.

Regarding the position of the trust in Continental Europe, interesting developments have taken place in Italy and the Netherlands. These developments can only be properly understood against the background of the Hague Convention on the Law Applicable to Trusts and on their Recognition (1985) (De Waal, 2001, p. 71). The aim of this Convention is not to introduce the trust into the domestic law of states that do not already have the trust, but rather to establish a set of common conflict of law rules on the law applicable to trusts (Hayton, 1987, p. 260; Gaillard and Trautman, 1987, p. 307). Italy and the Netherlands are the only Continental countries that have thus far actually ratified the Convention. In each case, ratification has actually set a process in motion that, on the face of it, could eventually lead to acceptance of the trust as an institution (De Waal, 2001, pp. 71–4).

Lupoi especially (1998, p. 496; 1999, p. 980) strongly argues that the Convention allows citizens of member states (such as Italy) to establish trusts governed by a foreign law. For example, a trust can be established in Italy by an Italian founder with an Italian trustee and beneficiary and with the trust property situated in Italy, but with English law governing the trust (if this was the founder's choice of law). Although there are those who disagree with Lupoi's technical interpretation of the Convention (Gambaro, 1997, p. 780), there are apparently numerous examples of this 'domestic trust' (*trust interno*) to be seen in Italian practice (Lupoi and Arrigo, 1999, p. 129). In the Netherlands, the ratification of the Convention was accompanied by special legislation. This statute, the *Wet Conflictenrecht Trusts* (1995), was thought necessary to reconcile some rules of Dutch domestic law with the obligations under articles 11 and 15 of the Convention (Koppenol-Laforce, 1998, p. 38). One of the main aims of the statute was to ensure, beyond any doubt, that 'the trust fund is regarded as a separate protected fund . . . and not part of the trustee's patrimony available to satisfy his creditor's claims' (Hayton, 1996, p. 58). This recognition of the concept of a separate trust estate can be seen as an important step on the way to a proper Dutch trust (De Waal, 2001, p. 74).

One of the objectives of the Principles of International Trust Law (Hayton, Kortmann and Verhagen, 1999), prepared by an international working group, is to assist countries interested in implementing the Convention (Hayton, 2001, p. 5). This whole project has the further purpose of meeting 'the needs of those who have observed the usages to

which the trust concept is put . . . but who find themselves puzzling over what exactly are the basic elements of the trust, and in particular of the common law trust' (*ibid.*, p. 11).

5 Some basic elements of the trust

Some of the basic elements of the common law trust (of which the English trust will be used as the main example here) have already been highlighted. Perhaps the main feature of this trust is the concept of a divided ownership: the trustee has legal ownership and the beneficiary equitable (or beneficial) ownership. In the common law trust this divided title, in particular the trust beneficiary's equitable ownership, is seen as fundamental for the protection of the trust beneficiary in a variety of situations, such as the insolvency of the trustee and the appropriation or sale of trust property in breach of trust. Riddall (2002, p. 433) explains this as follows:

Where beneficiaries are able to point to a piece of property purchased with trust money and show that this has become trust property, where they are entitled to trace, then we say that the beneficiaries have an action *in rem*; against the 'thing', ie against the property purchased. The beneficiaries' action is thus not against the trustee personally, it is not a claim (along with other creditors) for a share of the trustee's property, it is a claim in which the beneficiaries say 'that thing is ours: that thing is trust property'.

The trust beneficiary's equitable title therefore allows him the robust remedy of tracing trust property, a remedy that can become quite complex in certain situations.

The most common (but by no means the only) structure of the trust in civil law and mixed jurisdictions is that the trustee is owner of the trust property and the trust beneficiary has a personal right against the trustee. However, the important point that has been stressed in recent trust scholarship (see references in section 3 above) is that the absence of a divided title does not mean that the trust beneficiary should be insufficiently protected against, for example, the trustee's insolvency or breach of trust. The 'core elements' in the civil law and mixed jurisdictions are there for exactly this purpose, albeit in a different manner (De Waal, 2001, p. 67). The fiduciary position of the trustee obliges him to act in a very specific manner with regard to the trust property and *vis-à-vis* the trust beneficiary. The concept of separate trust and private estates entails that the trust beneficiary will enjoy effective protection in the case of, for example, the trustee's insolvency. The operation of real subrogation provides protection should the trustee commit a breach of trust (by, e.g., unlawfully alienating or replacing trust assets). And, finally, the acceptance of trusteeship as an office means that a measure of state control over trustees is employed. Therefore, if these

elements are present in a trust and they are combined with the normal civilian remedies of the law of delict, enrichment law and the doctrine of notice, the aim of sufficient protection for the trust beneficiary can indeed be realized. Moreover, other more specific methods of protection can be added to this. For example, in South Africa, the Master of the High Court exercises a supervisory function over trustees and the trustee is required to provide security upon acceptance of his office; and, in Panama and Liechtenstein, the trust beneficiary has a limited real right in the trust property.

In English textbooks on trust law one often finds emphasis on the possible methods of classifying trusts. Quite a common method of classification is between trusts arising by a conscious act of the parties (express trusts), implied trusts (e.g., resulting trusts) and trusts arising by operation of law (constructive trusts). This is also the method of classification one finds in, for example, Australian trust law (Meagher and Gummow, 1997, pp. 62–5; Ong, 1999, p. 3). However, other classifications are also used. Examples are classification into simple and special trusts; completely and incompletely constituted trusts; fixed and discretionary trusts; and private and public trusts (Oakley, 2003, pp. 37–42). The constructive trust plays a very important role in the protection of trust beneficiaries. A constructive trust ‘is imposed by the court as a result of the conduct of the trustee and therefore arises quite independently of the intention of any of the parties’ (Oakley, 2003, p. 39). The constructive trust is not generally found outside of the common law. For example, South African law certainly does not recognize the constructive trust (Cameron *et al.*, 2002, p. 131) and its existence in Scots law is controversial (Gretton, 1997a, 1997b).

To create a valid express trust in English law, it is said that the courts essentially require three forms of certainty: (a) certainty of the intention to create a trust; (b) certainty of the identity of the subject matter comprising the trust fund (i.e., the trust property); and (c) certainty of the beneficiaries (or ‘objects’) of the trust (Hayton, 2001, p. 130; Hudson, 2003, p. 63; Oakley, 2003, p. 46). In another common law system, Australia, reference is made to the four ‘essential elements’ that must be present in every trust, namely (a) the trustee; (b) the trust property; (c) the beneficiary; and (d) an obligation attached to the property (Meagher and Gummow, 1997, pp. 4–6). These requirements broadly correspond to those set for the South African trust (as an example of a trust from a mixed jurisdiction). The requirements as usually formulated for South African law are (a) the founder must intend to create a trust; (b) the founder’s intention must be expressed in a mode appropriate to create an obligation; (c) the trust property must be defined with reasonable certainty; (d) the trust object must be defined with reasonable certainty; and (e) the trust object must be lawful (Cameron *et al.*, 2002, p. 117). An interesting feature regarding the creation

of trusts is the fact that, generally speaking, specific formalities are not required. Of course, when a trust is created in a will (a testamentary trust) the will must comply with the required formalities of the particular system and, in English law, a trust of land (Riddall, 2002, p. 143) must comply with certain statutory formalities. Apart from this, English law (*ibid.*, p. 144), Scots law (Reid, 1999, p. 75) and South African law (Cameron *et al.*, 2002, p. 139) – to name but a few examples – all recognize oral trusts.

A topic central to all trust systems is the so-called ‘administration of the trust’. Apart from a number of other peripheral matters, trust administration basically deals with the powers and duties of the trustee in his dealing with the trust assets. Considerable emphasis is put on this topic in all standard trust texts in different systems. A comparison between these texts yields many common features regarding general trust administration. One such feature is the vital importance of the trust deed in setting the parameters of the trustee’s powers and duties.

6 Challenges and trends in trust law

Moffat (1992, p. 139) has pointed out that it is possible that those who retain an interest in the law of trusts will, at some or other time, be faced with a choice between advocating ‘an expansive approach’ or ‘accepting a retreat of the subject into an ever more excessive concentration on the minutiae of the family express trust’. Under ‘an expansive approach’ he understands, first, the ‘introduction of some external perspective in an attempt to relate the law of trusts to social reality’ (p. 125) and, secondly, that proper cognizance is taken of ‘contemporary developments’ in the law of trusts (p. 126). A firm grasp of the ‘minutiae’ of the trust will, of course, always be vitally important for a proper understanding of the trust institution. It is therefore essential that conventional topics such as the creation of the trust, the legal position of the trust beneficiary, trust administration, the variation of trusts and the termination of trusts are still fully dealt with in trust texts.

However, it is noticeable that the ‘expansive approach’ propagated by Moffat is indeed apparent from more recent trust scholarship. Examples of such themes that have been receiving attention, with a brief sample of references from the literature, are the following: (a) the importance of comparative research in the law of trusts (see especially, apart from other references in sections 2 and 3 above, Lupoi, 2000, who analyses different ‘trust models’ such as the English model, the international model and the trust in civilian and mixed jurisdictions; he also provides numerous examples from specific legal systems); (b) the growing use of trusts in the commercial context as well as for investment purposes (Langbein, 1997; Hayton, 1999a); (c) exploiting the flexibility of trusts (Hayton, 1999b);

(d) trusts and the pension fund business (Moffat, 1993); (e) fiduciary standards with relation to trustees' duties and beneficiaries' rights (Halbach, 1999); (f) the whole issue of 'off-shore' trusts, also in the context of tax planning (Duckworth, 1999; Jennings *et al.*, 2002); (g) trusts in the recovery of misapplied assets (Birks, 1992); and (h) the future of the trust in a broader international context (Waters, 2002).

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70 Unjustified enrichment

Daniel Visser

1 Introduction

The law of unjustified enrichment is in many legal systems the least settled area of obligations, and therefore most countries, in developing this area of law, can benefit from engaging in comparative analysis. It should be said that, historically, civilian and common law jurisdictions approached unjustified enrichment so differently that meaningful comparison seemed an impossibly difficult task; and within each of these legal traditions, too, there has been very little uniformity. However, lately the conviction has begun to assert itself that, despite obvious differences, the two legal families have as much to learn from each other as do the individual legal systems within each tradition.

The common law, which gave the name of ‘restitution’ to the area of law that roughly coincided with what civilian systems designated as being concerned with unjustified enrichment, has never exhibited a clear (let alone uniform) picture of what lay at its core, or of how it should be approached. In the first half of the 20th century the United States took the lead with the Restatement of the Law of Restitution (1937) and the work of authors such as Dawson (1951) and Palmer (1995) made important contributions. By the end of the century, however, interest had so declined that the opening words of a review article of a book on enrichment lamented: ‘Whatever happened to restitution?’ (Heller and Serkin, 1999, p. 1385). The Restatement of the Law of Unjust Enrichment and Restitution (Third) currently being undertaken by the American Law Institute is evidence of renewed interest, but these words of the Reporter of that project remain largely true: ‘Few American lawyers, judges, or law professors are familiar with even the standard positions of the doctrine’ (Kull, 1995, p. 1191). In England, on the other hand, the reverse happened. Until 1990, English law did not even recognize that a claim could be instituted under the heading of unjust enrichment, but once the House of Lords (building on the work of Goff and Jones, 2002, and Birks, 1985) ruled that it could, this area began to develop rapidly (Beatson, 1991; Burrows, 2002; Virgo, 1999; Hedley, 2001; Birks, 2004). Although similar developments are discernable elsewhere in the Commonwealth, they are not uniform. For instance, in an important jurisdiction such as Australia the courts have doubted whether unjustified enrichment is a necessary category in the law at all (Kremer, 2003).

In the civilian systems, on the other hand, the Roman adage that no one should be unjustifiably enriched at the expense of another had much earlier crystallized into a source of obligation, albeit at different times and within differing structures. Thus there are marked differences in the organization and the relative importance of the law of unjustified enrichment in, on the one hand, France and those legal systems influenced by the Code civil, and, on the other hand, Germany and those countries whose legal systems have close connections to the *Bürgerliches Gesetzbuch*.

To complete the varied picture, it is also important not to lose sight of the fact that yet other approaches emerge from, respectively, the uncodified 'mixed' legal systems, such as those of Scotland, South Africa, Louisiana and Sri Lanka (Whitty and Visser, 2004, pp. 400ff.; Nicholas, 1962; Peiris, 1972), the 'mixed' codified systems, such as those of the countries that were formerly part of Yugoslavia (Schlechtriem, 2000, pp. 42ff.) and the Nordic systems of Sweden, Denmark, Norway and Finland (*ibid.*, pp. 49ff.).

2 An overview of recent comparative studies

Since 1990, a number of comparative studies of unjustified enrichment have emerged in the USA, in Europe and in the mixed legal systems. These comparative analyses have mainly been in the functionalist tradition, which, in its most basic form, attempts to identify problems that are common to different systems and seeks solutions that transcend system-specific concepts and doctrine (Zweigert and Kötz, 1998, pp. 33ff.). Typical problems encountered in enrichment law can mostly be stated in a system-neutral way and are thus peculiarly suited to this approach. The great strength of functionalism is that it seeks to break through the obfuscation that domestic categories tend to produce, without (as some, who portray it in a reductionist way, claim that it does) ignoring the fact that different socioeconomic conditions and value systems have an influence on the creation, interpretation and effect of rules (see generally Graziadei, 2003, pp. 101, 108ff.).

An important feature of the writing on unjustified enrichment in the last decade of the 20th century is that it has produced a meaningful dialogue between common law, civil law and mixed jurisdictions. In this context one should mention, first, the updated work of Zweigert and Kötz (1998, pp. 537–94), as well as the following general studies: Gallo (1992) and Verhagen (1996), both of which are general comparisons of unjustified enrichment in common law and civilian systems; Johnston and Zimmermann (2002), in which current issues are dealt with in 11 sets of paired contributions – one author being from a civilian jurisdiction and the other from a common law jurisdiction; Krebs (2001), which presents an incisive comparison of the position in England and Germany; Schlechtriem

(2000), which contains an analysis that is impressively comprehensive (from the point of the topics covered) and varied (from the perspective of number of countries compared); Schrage (2001), in which authors from different countries deal with a range of important topics in the law of enrichment, making the position in their own country transparent to outsiders and often comparing this position with that in other countries; and Schrage (1995) in which the history of unjustified enrichment in the common law and the civil law is examined comparatively. The latest comparative analysis of enrichment law is contained in the thoughtful and thought-provoking contributions in Zimmermann (2005). A further interesting development is a growing number of studies in Dutch and German in which specific topics are subjected to rigorous comparative analysis, such as Scheltema (1997), Meier (1999a), van Kooten (2002), Schäfer (2001), Rusch (2003) and Hellwege (2004). Also important here are those contributions which seek to make the law of enrichment in one country accessible to lawyers in other countries: Zimmermann and Du Plessis (1994); Zimmermann (1995) and Markesinis, Lorenz and Dannemann (1997).

In spite of what was said above about the openness of the functionalist method to wider issues, it is true that not very many studies have specifically investigated how extralegal forces and cultural imperatives affect the law of unjustified enrichment. An example of someone who has done that is Dagan, who considers how the underlying values in a society (such as altruism or the relative importance placed on property) find expression in its law of unjustified enrichment (see, e.g., Dagan, 1997, 2004). He analyses the influence of concepts such as autonomy and efficiency on enrichment liability, and argues that the law of unjustified enrichment is not solely about corrective justice, but also in important measure about distributive justice (but cf. also Weinrib, 1995, and, in response, McInnes, 2001). It is imperative that the future comparative analysis of enrichment law build on this work, for without a discussion of the relevant theoretical concepts and social values the full extent to which legal systems can learn from each other will never be realized.

3 Generalizing tendencies

An important question for the law of unjustified enrichment is whether it can (and should) be based on a general principle, which not only functions as an explanation of certain instances of liability, but is a direct source of obligation.

The Roman jurist Pomponius' famous statement (recorded in D 50, 17, 206), namely that it 'is equitable according to the law of nature that no one should be enriched to the detriment of another', was much too broad to be taken as a literal description of Roman law. Roman law redressed instances

that we today classify under the rubric of unjustified enrichment only within the parameters of very specific remedies – and even then not necessarily consciously. Nevertheless, at least since the Middle Ages, this adage has encouraged scholars to investigate the viability of a general principle of liability based on unjustified enrichment, which could function alongside those underlying the law contract and delict, as well as the question whether a general action should give effect to the principle (Hallebeek, 2001, pp. 59ff.). However, it was only in the 17th century that Grotius, inspired by the medieval debate and the work of the Spanish moral theologians, for the first time formulated a general enrichment action to give the fullest possible effect to Pomponius' principle (Feenstra, 1995).

Come the period of codification, the influential Code civil did not contain a general principle of liability based on unjustified enrichment, but towards the end of the 19th century the Cour de Cassation developed a general action in the celebrated *Boudier* decision of 1892, utilizing the *actio de in rem verso*. The Dutch codification was based on the Code civil, but there the courts did not develop a general action and ironically (in the light of the Grotian analysis) the Netherlands had to wait for it until 1996, when their new codification came into operation. However, in Italy (which represents yet another jurisdiction influenced by French law), the *Boudier* decision did inspire the introduction of a general enrichment action in arts 2041–2 of the 1942 re-written Codice civile. In Spain, even though its Código civil was also influenced by the French Code civil and thus did not contain a general principle of enrichment liability, such a principle had long been recognized by the courts, as befits the country of Covarruvias and De Soto, whose writings inspired Grotius to formulate the first general enrichment action in the 17th century. Germany, having been in the position to survey a century of development since the enactment of the Code civil, immediately incorporated a general enrichment action in their BGB of 1900 (s.812 BGB). It is clear, then, that in the codified civilian systems there was, over time, a general movement towards the recognition of a general principle of liability based on unjustified enrichment. The same trend has been discernible in the uncoded mixed systems: in Sri Lanka, there has been support for a general enrichment action (on which see Peiris, 1972, pp. 401–2), while Scotland and South Africa are very near to recognizing a general principle of enrichment liability (Whitty and Visser, 2004, p. 406).

England, perhaps because it came late to the enrichment party, is uncertainly placed. Even though Goff and Jones had called for a generalized right to be recognized in the first edition of their book, it is omitted in the later editions. Birks, too, argues against a 'general right' which would give the principle against unjust enrichment equal status to that of the neighbour principle in the law of negligence. However, Burrows, who had also

opposed the notion in the first edition of his book, has excised this argument from the second edition, and so we must conclude that the jury is still out on what the predominant view in England is (see Burrows, 2002).

The ubiquitous obstacle to recognition of a generalized right against unjustified enrichment has been the fear that it would be difficult to contain within manageable bounds. The fact is, however, that, while it certainly is difficult to contain, it is not impossible to contain. In this regard, the collective experience of those countries that have already recognized a general principle of liability is crucial, especially to countries newly approaching the recognition of a general right, because the definition of the boundaries of enrichment is a delicate and continuing task.

Clearly the question about how enrichment liability should properly be contained must be a central area of concern for comparative research in this area. And it is certain, too, that the containment of a general principle of liability in any jurisdiction is inevitably tied up with (a) the approach to subsidiarity that that jurisdiction adopts and (b) how it defines the elements of liability.

4 Subsidiarity

The notion of subsidiarity has been employed by the legislature or the courts in a variety of countries as a device to limit the ambit of enrichment liability. It is a complex notion and it could encompass several different questions, namely (a) whether a claim based on a general principle against unjustified enrichment should be subsidiary to specific existing actions (in systems where a general action is introduced alongside existing remedies); (b) whether, in the case of a concurrence of actions, an enrichment claim must be seen as a last resort, or one which may be chosen as an alternative to, say, a contractual claim (provided of course that the elements of both types of claim have been shown to be present); and lastly (c) to what extent, if the nature of the concurrence takes the form of the claimant having a claim in contract against his contractual partner and a claim in enrichment against a third party, the claimant should be allowed to choose whom to sue.

The first question is only relevant in jurisdictions where a general enrichment action exists alongside more specifically defined enrichment actions. To recognize an action which is subsidiary to the currently existing actions is probably the safest route for any jurisdiction newly introducing a general action. Such jurisdictions have much to learn from, *inter alia*, the German experience with the relationship between the general principle and the more specific instances enumerated in the BGB (Beatson and Schrage, 2003, pp. 440ff.; Verse, 1999, pp. 13ff.). It should also be noted that, when the late Detlef König suggested a draft recodification of German enrichment law

(a translation of which is given by Zimmermann, 1995, pp. 425–9) he made the general action subsidiary to specifically delineated enrichment actions.

The second question relates to the most commonly used sense of ‘subsidiarity’ and is relevant to all jurisdictions, but especially where a general action has been recognized. Both Italian law and French law adhere to some degree to the principle of subsidiarity in this second sense. In terms of art. 2024 of the Italian Civil Code, an enrichment action is not available where the claimant is able to bring a contractual action to make good his or her loss. French law adopts the same view, but more weakly than Italian law – so much so that some opine that the principle is in the process of being abandoned, or has already been abandoned (Schlechtriem, 2000, p. 8; Beatson and Schrage, 2003, p. 438). In the Netherlands opinions are divided (Schrage, 2001, p. 17), but the better approach seems to be that Dutch law does not subscribe to the non-cumulation principle as enunciated in French law (Beatson and Schrage, 2003, pp. 455–9). German law, too, does not subscribe to the notion of subsidiarity in this sense, but the precisely defined German law of enrichment does have an internal subsidiarity rule: when a claim emanates from a transfer (*Leistung*) only the so-called *Leistungskondiktion* (about which more below) can be instituted and, if this remedy cannot provide relief, a claim cannot in the alternative be instituted under the other enrichment action (Schlechtriem, 2000, p. 33). The debate around subsidiarity is really about the role that a legal system wants to give to unjustified enrichment. However, subsidiarity may very well not be the most appropriate way to delineate the scope of enrichment liability, as the predominant trend in the world seems to indicate. Whatever the right answer, it is clearly an important project for comparative lawyers to devote attention to the reasons given by systems for either employing or rejecting this concept – and to identify possible alternative measures for the role of keeping enrichment liability within manageable bounds.

The situation outlined in the third question can be approached in various ways: if in a particular system the rule is that, once the claimant has exhausted the possibility of getting satisfaction from his contractual partner, he may institute an enrichment action against a third party on the basis of unjustified enrichment (as is the case in certain jurisdictions in the USA), one has a situation of true subsidiarity. If, however, a jurisdiction allows only one of the actions, that action is not subsidiary to the other possible action, but alternative. This is the province of multi-party enrichment (discussed in section 9 below).

5 The core elements of enrichment liability

Despite the sharp differences between common lawyers and their counterparts in civilian systems, there is a large measure of agreement on the basic

building blocks of enrichment liability. That is not to say that each of these basic elements is present in every enrichment situation in every system – nor that the substance of the individual elements are always the same across different systems (including the various civilian systems) – but there is sufficient commonality to make comparison a realistic endeavour. The elements most often attributed (expressly or impliedly) to enrichment liability across jurisdictional divides are (a) enrichment of the claimant, which (b) is not justified and (c) is at the expense of the claimant.

Some systems adhere to the rule that an enrichment action can only be successful up to the amount of the defendant's impoverishment. Mirror loss is a powerful limiting device, but the price it exacts is that systems which insist on it are invariably less developed in the area of enrichment resulting from encroachment on the rights of others (as in, say, enrichment resulting from the wrongful use of another's image in an advertisement) where often the defendant is enriched without the defendant suffering any loss. (See section 7 below on the borderline between enrichment and tort/delict.)

All systems allow certain instances of imposed enrichment to be 'rejected' by the defendant if the circumstances are such that it cannot be returned. Here the central contribution that comparative law can make lies in uncovering the policy factors that determine when a defendant should not be liable in respect of so-called 'imposed' enrichment, that is to say, enrichment which objectively exists, but is subjectively of no value to the defendant.

6 Taxonomic variations

For many centuries the civilian tradition dealt with unjustified enrichment as a source of obligation within the framework of the Roman *condictiones*, the basis of which had always been the fact that the defendant retained something *sine causa* (without legal ground). However, a classification according to actions has obvious limitations as an explanatory mechanism, and different taxonomies have over time been superimposed on the *condictiones*.

The first taxonomy that deserves mention is the classification that originated in French law (but which also found an echo in Italian, Spanish and Dutch law), according to which a fundamental distinction is drawn between (a) an undue payment and (b) unjustified enrichment. This distinction resulted from only the *condictio indebiti* having been captured in the Code civil, while the general enrichment action was created, as we have seen, by the courts. The emphasis in the case of a *répétition de l'indu* is not so much on erasing enrichment (that is to say on adjusting the patrimony of the defendant) but on reversing the transfer (that is to say on the defendant giving back what has been received). A similar emphasis exists in Italian law

between the reclamation of a pagamento dell'indebito and a claim in terms of the azione generale di arricchimento, and, in an even more extreme form, in Dutch law between the action based on onverschuldigde betaling and the action based on ongerechtvaardigde verrijking (Scheltema, 1997, pp. 138ff.). There is much to be said for the basic distinction made in the Francophone codifications: when you transfer something which is not due to another it matters not whether the recipient's overall patrimony has increased: the first obligation must be, as it was in Roman law under the *condictio indebiti*, to return that which you received. If I have mistakenly transferred a painting to the defendant, the fact that its market value is not sufficient to increase the overall patrimony of the defendant should not prevent me from claiming back that very painting.

To a certain extent, this basic distinction is also reflected in the influential classificatory model of the German-speaking legal world, namely the Wilburg/Von Caemmerer taxonomy (on which see Zimmermann and Du Plessis, 1994, pp. 24 ff.). The classification as contained in s.812 BGB is also according to actions (namely a general enrichment action followed by what seems to be an exact rendition of the various Roman *condictiones*) but the wording of the general clause allowed Wilburg to put forward the following typology: for him the *summa divisio* is between (a) enrichment based on a performance or transfer (a transfer being described in modern jurisprudence as the intentional and purpose-oriented increase of the patrimony of the defendant by the plaintiff), and (b) enrichment 'in any other way'. The remedy in the first instance is known as the *Leistungskondiktion* (claim based on a performance/transfer), while the remedies available to redress the second category were divided by von Caemmerer into (i) the *Eingriffskondiktion* (claim based on encroachment, i.e., where the defendant has been enriched as a result of his or her unauthorized interference with the rights of the plaintiff), (ii) the *Verwendungskondiktion* (claim based on unauthorized expenditure on the property of another) and (iii) the *Rückgriffskondiktion* (claim based on the discharge of another's debt).

This classification has several important characteristics. First, in its main division, it supports the classical distinction between a claim for an undue payment and other forms of enrichment inspired in many different legal systems by French law, for the *Leistungskondiktion* broadly speaking mirrors the *répétition de l'indu*. Secondly, it maps out the main ways in which enrichment can occur, highlighting that the law of enrichment functions in three different modes, with (a) enrichment due to transfer supplementing the law of contract, (b) enrichment due to unauthorized expenditure chiefly supplementing the law of property, and (c) enrichment due to encroachment mainly supplementing the law of delict or tort. This division

is clearly one which is true for civilian systems generally. Thirdly, the *Leistungskondiktion* reaches back to the original basis of the *condictiones* with its notion that the essence of restitution in this kind of situation lies in the failure of the object or purpose of the performance or transfer (by 'purpose of the performance' is meant the objective purpose of that performance as it appears from all the surrounding circumstances). For instance, the purpose of a payment is usually to discharge a debt; if such a debt in fact exists, the purpose of the payment is fulfilled by that payment and that fact creates for the recipient a *causa retinendi*; if, on the other hand, the debt does not exist, the purpose cannot be fulfilled, with the result that the recipient has no cause for the retention of what he or she has received and it can therefore be reclaimed by the payer (Reuter and Martinek, 1983, p. 125; Zimmermann and Du Plessis, 1994, pp. 26–102).

In the Anglophonic world we find a very different approach. When England at last recognized unjust enrichment as a cause of action in its own right (having long been trapped in the medieval forms of action and the implied contract theory – on which see Ibbetson, 1999), it was the taxonomy put forward by the late Peter Birks which quickly became widely accepted in academic writing on the law of enrichment (Birks, 1985, pp. 1ff.). In terms of this classification the English law of restitution quadrated with the law of unjust enrichment: whenever the law ordered restitution, so the thesis went, it was responding to an instance of unjust enrichment. Birks' structure divided unjust enrichment into (a) 'autonomous unjust enrichment' and restitution for wrongs (or so-called 'remedial unjust enrichment'), while (b) it emphasized that English law requires a specific unjust factor to found an unjust enrichment claim. Unlike civilian legal systems, therefore, English law did not work with the concept that enrichment was unjustified principally because it was *sine causa*: rather it was interested in a positive reason that makes the enrichment unjustified. Despite this principled difference, the division between 'autonomous unjust enrichment' and 'restitution for wrongs' to a large degree corresponded to the civilian categories of enrichment resulting from a transfer and enrichment resulting from encroachment. However, Birks then recanted the quadrature thesis. Restitution for wrongs, he said, was not part of the law of enrichment at all, but part of the wider law of wrongs (Birks, 1998, pp. 1ff.). While this move away from the civilian approach was still being debated, he moved closer to the civil law in another, more important, respect by renouncing the unjust factor approach and arguing that English law must also be based on the 'without legal basis' approach (Birks, 2004, pp. 1ff.). The direction that English law will take is uncertain (Burrows, 2004, p. 260), but it is clear that this will be one of the most important areas of comparative scholarship for the immediate future

(see McKendrick and Whitty, respectively, in Johnston and Zimmermann, 2002, pp. 627ff., 658ff.; Du Plessis in Zimmermann, 2005, pp. 175ff.).

7 The borderline between enrichment and the other areas of private law

7.1 Enrichment and property

A fundamental distinction between civilian and common law systems is that, in the former, enrichment remedies are invariably personal claims, while in the latter they may be of either a personal or a proprietary nature. Where ownership has not passed, the position in all civilian systems is that a *rei vindicatio* (or its equivalent) provides the appropriate remedy. In common law systems, too, a claim for the recovery of property in which the claimant has never lost title is classified as a 'pure proprietary claim' and, like a *rei vindicatio*, it is not an enrichment claim (Goff and Jones, 2002, para. 1-011). Where ownership has passed, the remedy to recover that which had so been transferred, in both civilian and common law systems, is normally a personal claim. However, in certain circumstances the common law also creates proprietary rights in response to unjustified enrichment (e.g. when the law creates a constructive trust in favour of someone who had been the victim of a breach of a fiduciary duty, thereby vesting a proprietary right on the part of the victim in the gain flowing from the breach) (Burrows, 2002, p. 62.). Although certain commentators do not regard the latter claims as enrichment claims (cf. Virgo, 1999, pp. 8ff.), the orthodox position is that they are. The creation of proprietary rights to combat unjustified enrichment places very powerful remedies in the hands of a claimant, and to work out when exactly it is appropriate to do this is an important challenge to those engaged in the comparative analysis of different common law systems. A related task for these comparatists is the determination of the nature and parameters of the technique of 'tracing', which plays an important supportive role in proprietary claims (see generally Smith, 1997).

7.2 Enrichment and contract

The most sensitive demarcation within the law of obligations is probably that between enrichment and contract. Each legal system experiences the problem differently, but every system has to deal with it. A characteristic of all legal systems (whether part of the common law or the civil law family) in winding up failed contracts is that they tend to offer different solutions for the different situations in which contracts fail (that is to say where they are (i) void *ab initio*, (ii) voidable, (iii) frustrated by supervening impossibility or (iv) cancelled owing to breach of contract). In every legal system (as well as in international instruments such as the Principles of European Contract Law) the winding-up remedy – we are not concerned here with

any claim for damages that might in addition be available in the case of breach of contract – is different in each of the four situations and is variously classified as based either on enrichment or on contract. The question that arises is whether there is any justification to treat them differently. Many have argued that the winding up of such failed contracts should indeed be given the same treatment and in each case be seen as a remedy based on unjustified enrichment (Visser, 1992; MacQueen, 1994). Hellwege (2004), in an exhaustive treatment of the problem in Germany, England and Scotland, has argued that they should all be treated in the same way, but that it does not matter whether one places it under the law of contract or under the law of enrichment. Miller (2004, p. 437), however, considers that differential treatment is appropriate. This debate has only just begun, and determining the border between enrichment and contract constitutes one of the great tasks of comparative law for the immediate future.

7.3 Enrichment and delict/tort

In both English and German law the notion of enrichment flowing from ‘doing wrong’ (used in a very general sense) has found a foothold (although we have to keep in mind that it is a matter of debate in England whether restitution flowing from wrongs should be regarded as part of the law of unjustified enrichment at all). Unlike enrichment resulting from a transfer by the claimant, this area of enrichment deals with enrichment that flows from the act of the defendant. By his own conscious act the defendant arrogates a benefit to himself, the retention of which the law regards as unjustified and decrees should be disgorged to the claimant. For instance, the defendant makes a profit by invading the claimant’s right, such as by making unauthorized use of his patent. In some systems (such as that of England) there is a strong overlap between this kind of liability and tort. Here the enrichment remedy is in certain circumstances an alternative to a claim for damages, but cannot be contemplated where no tort (or equitable wrong) has been committed by the defendant. In Germany, on the other hand, the range of encroachments that can trigger this remedy goes beyond acts that are considered to be delicts. So this area of liability goes further than mere ‘wrongs’ in the classical sense of the term and the challenge for comparative law is to identify the principles on which liability arising from the act of the enriched party should be recognized. Legal systems that have insisted on mirror loss before an enrichment claim can lie (such as the Netherlands, France, Scotland and South Africa) have an extra hurdle to overcome. Only when they recognize that a fully developed system of enrichment liability must make allowance for certain instances of enrichment without mirror loss can they progress to a comprehensive theory of unjustified enrichment liability.

7.4 *Enrichment and negotiorum gestio*

Common law differs fundamentally from civilian systems in regard to the treatment of the Good Samaritan's right to recover expenses from the recipient of his good deed. The civil law tends to be sympathetic to allowing the unauthorized administrator of another's affairs a claim for his expenses, while the common law is inclined to view such persons as 'officious intermeddlers' with little or no entitlement to compensation. This area of law is closely related to unjustified enrichment, but it is not unjustified enrichment in the ordinary sense, in that normally the recovery of the expenses of the claimant is not limited to the amount of the defendant's enrichment (Whitty and Van Zyl, 2004, p. 369). To grapple with the demarcation of unjustified enrichment in this and in other areas of real or apparent overlap (see, e.g., the study of Dieckmann, 2003, discussing the relationship between enrichment and subrogation) is an important task of modern comparative analysis.

8 Enrichment in a public law context

The idea that economic benefits retained without legal ground by someone may be stripped away can, in addition to its traditional private law application, also have a public law dimension. For example, if legislation permits the government to decontaminate, without permission, privately owned land, and it does so, causing the value of the property to rise, should the government have an enrichment action against the owner? Or if someone receives value as a result of an administrative act which is later undone with retrospective effect, can the government reclaim the value so received? In the Netherlands, enrichment liability arising in the first situation is well developed, while Germany presents a good example of a country that has worked out what the appropriate approach in the second situation should be.

The restitution of property expropriated by inequitable past regimes is another area of public law enrichment liability that has manifested itself in various places, such as Eastern Europe and South Africa. The countries involved (actually or potentially) in such acts of restitution have much to learn from one another (see, e.g., the discussion of Heller and Serkin, 1999; also Visser and Roux, 1996).

9 The problems of enrichment in situations involving more than two parties

When more than two parties are involved, unjustified enrichment becomes a minefield. Typical instances are a bank wrongly paying on the basis of an instruction that had been rescinded; someone paying the debt of another; a garage fixing a car on the instruction of someone who is not the owner; or a subcontractor performing in terms of a contract with the main contractor,

who subsequently disappears (see generally Whitty, 1994, who, even though he concentrates on Scots law only, brings out the essence of these problems). There are hugely varying approaches in different countries. In Germany, for instance, a detailed set of rules have been developed to deal with instances of multi-party enrichment, while common law countries, on the other hand, have only just begun to take note of the problem (contrast the contributions of Birks and Visser in Johnston and Zimmermann, 2002, pp. 493ff., 526ff.). Further important studies are Meier (1999a), Whittaker and MacQueen, respectively, in Johnston and Zimmermann (2002, pp. 433, 458) and Schall (2003).

10 The measure of enrichment

What exactly should be recovered with an enrichment action? Is the object of such an action to recover the net amount by which the defendant's total estate has increased as a result of the enriching fact? Or should it be focused more narrowly, that is to say, should it be aimed at the return of exactly what had been received (where this is possible)? Or could it sometimes be the one and sometimes the other, depending on the circumstances? And to what extent should a defendant be able to rely on changed circumstances, or on the fact that the benefit is of no value to him personally, to avoid the enrichment claim? Different legal systems give different answers to these questions. In the Romanistic tradition, the split between the *condictio indebiti* and the general enrichment action is a remnant of a dichotomy resulting from the fact that the *condictio* was originally aimed at retrieving that which had been transferred with no conscious appeal to the enrichment of the defendant, while the general enrichment action which developed over time tended to measure the overall improvement in the patrimony of the defendant (Schermaier, in Beatson and Schrage, 2003, pp. 123–4). In other words, there was a gradual movement in the law, away from being concerned with the 'value received' to being aimed at securing a disgorgement of the 'value remaining' (Flume, 1953, p. 103). In English law there is a similarly bifurcated approach in regard to specific property transferred to another (where the claim is for the return of the property itself) and a benefit sounding in money (where the claim is for the value) (Burrows, 2002, p. 16). The Study Group on a European Civil Code, on the other hand, wants to get rid of 'net enrichment' and favours an 'itemized . . . concept of enrichment' (Swann, in Zimmermann, 2005, p. 279).

In those instances where 'value remaining' is the accepted measure of enrichment, it implies that there must be a defence of 'change of position' (as it is designated in common law countries, or 'loss of enrichment' in civil law countries). Determining the parameters of this defence is one of the important present-day challenges of comparative law and thus studies such

as that of Hellwege (1999) and that of Gordley and Hellwege, respectively, in Johnston and Zimmermann (2002, pp. 227, 243) are enormously helpful. A corollary of this defence, the existence and extent of which presents yet a further modern task for comparative scholarship, is that of ‘passing on’, that is to say, a defence which draws attention to the fact that the claimant has not been impoverished by virtue of having passed on the loss to a third party such as an insurer or consumers generally.

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