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EUROPEAN PRIVATE LAW: POSTMODERN DILEMMAS AND CHOICES - Towards a Method of Adequate Comparative Legal Analysis

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Inaugural lecture held on 25 September 1998 at Maastricht University. This is a slightly revised version of the original Dutch text. English translation by Peter Kell, LL.B., Solicitor.

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"Abstract

Postmodern death of comparative law?

In this inaugural lecture held on 25 September 1998 at Maastricht University, the leading question is how comparative lawyers should proceed, how they actually proceed and in which way this tension between the ideal and reality might be solved in both a theoretically and a practically acceptable way." (p. 1)

"…3. **Comparative law from the perspective of a modern (abstract methodological) ideal**

…A standard work of foreign origin that cannot be overlooked here is the well-known book of Zweigert and Kötz, *Einführung in die Rechtsvergleichung*.[1] In their book, the authors indicate with great precision the importance of a good comparative-law method:

> Schließlich ist die Methode nicht nur *Denkmethode* - die Summe der Kriterien, die ein richtiges Ergebnis gewährleisten sollen S, sondern auch *Arbeitsmethode*: Wie fängt man ein rechtsvergleichendes Unternehmen praktisch an? Dies zumindest muß eine Einführung wie diese dem Anfänger bieten; sie muß zeigen, was hier an Erfahrung schon vorliegt, damit der Neuling nicht ins Blaue hinein arbeite oder unnütze Umwege mache.[2]

From the way in which Zweigert and Kötz describe their ideal method it is evident that they advocate a functional approach to the process of comparative law. They are struck by the fact that, **although law may differ considerably from one country to another, for example in terms of its dogmatic structure, the same solutions are often found to similar problems, particularly in private law.** This similarity is so strong that they even speak of a *praesumptio similitudinis*: a >Vermutung für die Ähnlichkeit von praktischen Lösungen=,[3] which - as appears a few pages later - could lead to an >Universalrechtswissenschaft=.[4] Nonetheless, as they admit, this method too should be used

with caution.[5] **In evaluating the results of comparative studies, comparative lawyers often encounter what are termed** >Wertungsaporien= **(tensions caused by the need to assess), which make it impossible for them to decide whether a given solution is better or worse than another.**[6]" pp. 3-4)

"…4. **Comparative law from the perspective of a postmodern ideal**

4.1 Postmodernism

Various authors, both in Europe and in the United States, have endeavoured, especially in the last ten years, to rethink the comparative-law method from the perspective of a **postmodernist philosophy of life**. What is striking in this connection is that **these authors treat the person of the researcher and above all his or her identity and self-knowledge as central. Each of them reiterates how closely law is connected with the culture of a given community. This community may be determined nationally, but it may also be, say, of an ethnic or religious nature**. The urgent question that arises in the context of comparative law is **whether the identity of researchers does not make it impossible for them to understand foreign law (i.e. law that applies outside the community from which they derive their identity)**.

…In a lucid introduction to **postmodernism** Van Peursen describes this philosophy of life by reference to the following characteristics: the exposition (vocabulary) and, closely related to this, the polemical and narrative style are central features. **Law is thus seen as a narrative of reality, like other narratives such as those found in sociology and economics**. This means, for example, that a lawyer is not required to be able to think simultaneously like an economist or a sociologist. Law is not sociology or economics, but an independent approach to human relations. Clearly in keeping with the role thus attributed to the narrative, the text is the focus of thought in postmodernism. **The text (which leads me, as a lawyer, immediately to think of statutes, judgments and professional literature) is a document independent of the author of the text (for example the legislator) and the recipient of the text (for example the judge who reads it) and must be understood from within itself.** Searching for a deeper meaning is pointless, since this would be tantamount to speculating about the meaning." (p. 5)

"In postmodernist thinking, plurality too is very important: as there is no deeper meaning, every text is equally valuable." (pp. 5-6)

Furthermore, continuity is denied. **Only fragmented knowledge is possible. Once again, any search for a deeper unity between texts, for developments in thinking or for universal truths is without meaning, because it is impossible**. It follows that **postmodernists take an ironical view of others (and of themselves): nothing is certain, a smile alone is sufficient to wave aside objections**. Applied to

the law this means in the words of the American lawyer Minda: >**While modernists seek to solve and overcome paradox and predicament, postmodernists embrace paradox and predicament as an unescapable condition of contemporary intellectual thought**.=

In Europe, the influence of postmodernism on comparative-law thinking has been raised in particular, as I have already said, by Jayme and (implicitly) by Legrand. I shall now briefly describe the positions of the two writers and then explain my own approach.

…4.2 **Jayme=s view**…The - provisional - definition of postmodernism, as employed by **Jayme** in his speech is as follows (I quote from the German text): >Die postmoderne Rechtsvergleichung forscht nach Unterschieden der Rechtsordnungen und zwar insbesondere im Hinblick auf die verschiedene Haltung zu zeitgenössischen Ausdrucksformen, Denkstilen und Werten.= In this connection he mentions the four following aspects of postmodernism which characterise the present era: pluralism, communication, the narrative and the return of feelings. Pluralism means that one refrains from treating one=s own views as absolute. Communication - or, rather, the need for contact - is evident from the explosive growth of communication networks such as the Internet, with all the opportunities created, for example, by e-mail. This need is also evident from the extremely rapid growth of networks in the field of mobile telecommunication. **The narrative as a characteristic of postmodernism is intended to convey the fact that abstract notions are no longer appealing; there is a growing need for concrete ideas. The return of feelings expresses the importance that is once again attached to the irrational and to emotions**. Jayme also refers to postmodernism as leading to fragmentation of knowledge and hence to confusion." (p. 6)

"…In summary, **Jayme=s approach amounts above all to** an analysis of what might be termed a >**sense of justice**=, as this exists in today=s society. It is only with some hesitancy and caution that he draws conclusions from this - entirely in keeping with the sense of justice described by him - regarding for example European legal integration. Jayme points out above all that **everyone=s cultural identity should be respected. In so far as legal integration does not affect this identity, unification of law is certainly possible**." (p. 7)

"…4.3 **Legrand=s view**… **In Legrand=s opinion, modern comparative law is characterised by a focus on formal rules that are compared independently of the culture that constitutes and surrounds them**. According to Legrand, it is only through these formalistic thought processes that comparative lawyers have been able to conclude that legal systems are converging. In doing so, they have **created an illusion** not only for one another but above all for other people. An illusion **that also**

conceals the fact that comparative lawyers from a given culture in essence impose their own cultural outlook on other people…**Central to his approach is the distinction between continental (European) law and English law**, as reflected for example in Canada in the difference between the French law of Francophone Quebec and the Anglo-Canadian law of the remaining Anglophone provinces of Canada. An example is contained in his review of B. Großfeld=s book *Kernfragen der Rechtsvergleichung*.[7] Here Legrand observes at a certain point:

> . . . **not only does a civilian not think like a common law lawyer, but he cannot understand how a common law lawyer thinks**. One is again unaccountably reminded of Nietzsche: >Nie verstand ein Nachbar den andern=.[8]

Even if they wish to understand one another, they simply cannot. **This inability to comprehend one another is, in Legrand=s opinion, very closely bound up with the differences in legal culture and legal language between civil law and common law."** (pp. 7-8)

"…Legrand has recorded his views on the method of comparative-law study in numerous writings. He has in particular - as will have become clear from what I said previously - vehemently opposed a European civil code. Basically he is against the unification of law because this amounts to the production of uniform formal rules without taking account of the local legal cultures in the different Member States of the European Union, and also because **unification does not do justice to the intrinsic value of the legal systems now existing within Europe. This is a clear expression of postmodernism: the emphasis on the importance of what evolves locally and diversely and has its own >narrative=."** (p. 8)

"…**Legrand is ostensibly correct in emphasising that law may not be viewed separately from the culture, in particular the legal culture, in which it exists**. But is this denied by modern comparative lawyers? I know of no comparative lawyers today who would still defend the notion that what is compared is limited exclusively to the rules, although it is naturally the law in the sense of the entire body of rules that determines the subject of comparative law. **A comparative lawyer who is aware of the cultural, social, economic and ideological ties of the law knows sufficient to be able to practise comparative law responsibly. The extent of the awareness that can be expected of comparative lawyers and that must be reflected in their research depends among other things on whether the legal systems that are to be compared are closely related to one another or, on the contrary, belong to markedly different cultures. In the latter case comparative lawyers should have a deeper awareness of cultural differences than in the former case… In other words, the crux of the matter is that the law should not be regarded by the comparative lawyer as an autonomous world in which efforts are made to reach sound conclusions exclusively by logical reasoning**

through comparison of formal rules (whether laid down by statute, developed by the courts or included in standard contracts).” (p. 9)

“…5.3 Application of the above: Dilemmas and choices in the development of European private law

A research theme which I hope to concentrate upon in the years ahead is European property law. **Traditionally, the law of property is regarded as one of the most difficult areas in which to achieve harmonisation, let alone unification. Various reasons can be given for this. The law of property is concerned directly with the distribution and transfer of property within a society and therefore directly affects the ideological principles underlying this society, in particular the economic order. For example, there was and is a fundamental difference between the concept of ownership as recognised in Western Europe, Australia, North and South America, African countries such as South Africa and Asian countries such as Indonesia and the so-called >socialist= concept of ownership that existed in Eastern Europe and the former Soviet Union and still exists in countries such as China and Cuba. But the law of property also affects directly the history of the division and transfer of property. The concept of ownership recognised in continental Europe is unitary and part of a codified list of absolute rights. As such, it contrasts with the Anglo-American approach, which is the product of literally centuries of case law and is based on ownership fragmented at various levels**. Each of these two approaches has its own merits, and it is not possible to say that one is better than the other. **The dilemmas to which this gives rise in the course of research designed to bring about a single European property law are obvious.**

The ideological differences have clearly diminished in importance, although they have certainly not disappeared. By contrast, **the conceptual differences within Western property law have, if anything, increased**. Questions that arise in this connection include **whether the fragmented ownership known to Anglo-American law - with its own specific approach to the relationship between the law of property and the law of obligations - can be fitted into continental European law and whether, as a consequence of the creation of a European internal market, a uniform law on security**

rights is possible. Other issues that certainly need our consideration go beyond the distinction between common law and civil law and concern matters such as **whether rights of ownership can be claimed in relation to information and if so by whom.** An example is information possessed by an employer about an employee (or vice versa) or by an insurer about an insured (for example DNA data), and another involves the information that is transmitted in the free (or not so free?) space of the Internet.

Let me now apply the foregoing to **the relationship between common law and civil law**. Do the differences that exist between them obstruct the conduct of research that focuses on the development of a European law of property? How can worthwhile comparative research be carried out in practice in the field of property law? Suppose that one takes the former question as a research theme: Do the legal systems of the Member States of the European Union (or possibly of the European Economic Area) provide sufficient common ground on which to base a >European= law of property? First of all, I should say that this question - like so many others relating to European private law - is couched in terms that are far too general and should therefore be subdivided, at least for the time being, into separate questions. Only by a process of answering the subquestions will it become clear what the more general questions are and how they can best be approached." (pp. 12-13)

"…If there were a real desire to use the results of a comparative-law study to draft, say, a European directive, I believe it would be better to start by ascertaining in what areas there is a need for a European law of property and then design the study accordingly. One area in which such a need is perceived is the law on security rights. This is true of security both in relation to movables and rights of action and in relation to registered property… Given the increasing volume of commerce within the European Union, including the financial services provided by the banks, there is a danger that it will become a matter of chance what law governs, say, the security provided by a buyer to a seller. In such a situation, it is worthwhile ascertaining whether the law on security rights in the various Member States can be coordinated in such a way that the business community is no longer obliged to spend time and money seeking advice on the question of what law governs a relationship and ascertaining the nature of the applicable law. The study could be narrowed a stage further by confining it to the law on security rights in relation to movables and rights of action, disregarding security rights relating to registered property. Within the framework of such a narrowed study, more general questions could be raised. Take, for example, **the English law on security rights relating to immovables. This is so closely related to the English law of real property that it would be necessary to consider whether our concept of an >absolute right= is not so closely tied up with our law of hypothec that there is no common ground with English law (which is based on the concepts of estate and tenure under common law and equity and has no fixed**

number of absolute rights). To answer this question, a comparative lawyer must not only make a detailed study of the legal systems in force but also consider both the direction in which Europe is to evolve (as a federation or as an >Europe des Nations=) and how these differences came about." (p. 14)

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1. K. Zweigert and H. Kötz, *Einführung in die Rechtsvergleichung* (Tübingen: J.C.B. Mohr (Paul Siebeck), 1996).

2. Ibid., pp. 32 and 33.

3. Ibid., p. 39.

4. Ibid., p. 45.

5. See also H. Kötz, >Abschied von der Rechtskreiselehre?= 6 *Z Eu P* (1998), 493-505, p. 504, where he warns against an >allzu absolut gesetztes Funktionalitätsprinzip=.

6. Zweigert and Kötz, *Einführung*, p. 39.

7. Published in 62 *RabelsZ* (1998), 314-324.

8. Ibid., p. 317.