# INTRODUCTION TO COMPARATIVE LAW

BY

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# A. GENERAL CONSIDERATIONS

## I

## The Concept of Comparative Law


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## I

BEFORE we try to discover the essence, function, and aims of comparative law, let us first say what 'comparative law' means. The words suggest an intellectual activity with law as its object and comparison as its process. Now comparisons can be made between different rules in a single legal system, as, for example, between different paragraphs of the German Civil Code. If this were all that was meant by comparative law, it would be hard to see how it differed from what lawyers normally do: lawyers constantly have to juxtapose and harmonize the rules of their own system, that is, compare them, before they can reach any practical decision or theoretical conclusion. Since this is characteristic of every national system of law, 'comparative law' must mean more than appears on the surface. The extra dimension is that of internationalism. Thus 'comparative law' is the comparison of the different legal systems of the world.

Comparative law as we know it started in Paris in 1900, the year of the World Exhibition. At this brilliant panorama of human achievement there were naturally innumerable congresses, and the great French scholars ÉDOUARD LAMBERT and RAYMOND SALEILLES took the opportunity to found an International Congress for Comparative Law. The science of comparative law, or at any rate its method, was greatly advanced by the occurrence of this Congress, and the views expressed at it have led to a wealth of productive research in this branch of legal study, young though it is.

The temper of the Congress was in tune with the times, whose increasing wealth and splendour had given everyone, scholars included, an imperturbable faith in progress. Sure of his existence, certain of its point and convinced of its success, man was trying to break out of his local confines and peaceably to master the world and all that was in it. Naturally enough, lawyers were affected by this spirit; merely to interpret and elaborate their own system no longer satisfied them. This outgoing spirit permeates all the Congress papers; the whole Congress was dominated by a disarming belief in progress. What LAMBERT and SALEILLES had in mind was the development of nothing less than a common law of mankind (*droit commun de l'humanite*). A world law must be created—not today, perhaps not even tomorrow—but created it must be, and comparative law must create it. As LAMBERT put it (above p. 1, pp. 26 ff.), comparative law must resolve the accidental and divisive differences in the laws of peoples at similar stages of cultural and economic development, and reduce the number of divergencies in law, attributable not to the political, moral, or social qualities of the different nations but to historical accident or to temporary or contingent circumstances.



Comparative law has developed continuously since then, despite great changes in man's attitude towards existence. The belief in progress, so characteristic of 1900, has died. World wars have weakened, if not destroyed, faith in world law. Yet despite a more sceptical way of looking at the world, the development and enrichment of comparative law has been steady. Comparative lawyers have come to know their field better, they have refined their methods and set their sights a little lower, but they remain convinced that comparative law is both useful and necessary. Scholars are more resistant to fashionable pessimism than people in other walks of life; they have no immediate aim, only the ultimate goal of discovering the truth. This is true also of research in comparative law; it has no immediate aim. But if one did want to adduce arguments of utility, comparative law must be at least as useful as it was, especially as technological developments since 1900 have made the world ever smaller and, to all appearances, national isolationism is on the wane. Furthermore, by the international exchanges which it requires, comparative law procures the gradual approximation of viewpoints, the abandonment of deadly complacency, and the relaxation of fixed dogma. It affords us a glimpse into the form and formation of legal institutions which develop in parallel, possibly in accordance with laws yet to be determined, and permits us to catch sight, through the differences in detail, of the grand similarities and so to deepen our belief in the existence of a unitary sense of justice.

Despite all this, comparative law still occupies a rather modest position in academic curricula (see further Ch. 2 IV below). Though LAMBERT's great claims in this respect, as developed in his report of 1900 (above p. 1, pp. 53 ff.) were much more realistic than his dream of a 'droit commun de l'humanité', they have not yet been realized anywhere in the world. He thought that it would be greatly to the good of society if pride of place in academic studies were accorded to comparative private law, the heartland of all comparative law. For if clear and consistent general principles of law were established, this would promote international trade and advance the general

standard of living, and if lawyers were induced to look beyond their borders, international exchanges would increase. Future lawyers would have to be exposed to 'comparative common legislation' and comparative law while still at university. This would refresh and enrich the study of their native law, which was increasingly confining itself to interpreting the actual texts and neglecting principle for doctrinal detail.

It may indeed be that the mere interpretation of positive rules of law in the way traditionally practised by lawyers does not deserve to be called a science at all, whether intellectual or social. Perhaps legal studies only become truly scientific when they rise above the actual rules of any national system, as happens in legal philosophy, legal history, the sociology of law, and comparative law.

Now it is precisely the broad principles which comparative law lets one see; it can help the economist by discovering the social preconditions of particular rules of law, and by the comparisons it makes across time it can assist the legal historian. Students today are often put off by textual disputes, arid logomachies, and logical demonstrations, which prevent their seeing the living problems which lurk behind these technical facades. For this reason LAMBERT claimed for comparative law a place in the curriculum equal to that of the home system: four lectures a week should be given in comparative law for each of three semesters. Everything he said is as valid today as when he said it in 1900, but though much has improved in many countries in the ensuing century, the radical restructuring of the curriculum which he showed to be necessary has yet to take place.

## II

Comparative lawyers compare the legal systems of different nations. This can be done on a large scale or on a smaller scale. To compare the spirit and style of different legal systems, the methods of thought and procedures they use, is sometimes called *macrocomparison*. Here, instead of concentrating on individual concrete problems and their solutions, research is done into methods of handling legal materials, procedures for resolving and deciding disputes, or the roles of those engaged in the law. For example, one can compare different techniques of legislation, styles of codification, and methods of statutory interpretation, and discuss the authority of precedents, the contribution made by academics to the development of law, and the diverse styles of judicial opinion. Here too one could study the different ways of resolving conflicts adopted by different legal systems, and ask how effective they actually are. Attention may be focused on the official state courts: how is the business of proving the facts and establishing the law divided between attorneys and judges? What role do lay judges have in civil or criminal proceedings? What special arrangements, if any, are made for small claims? But one



should not confine one's study to the state courts and judges: one should take account of all actual methods of settling disputes. Studying the various *people* engaged in the life of the law, asking what they do, how, and why, is a very promising field of work for comparative lawyers. First of all one would look at the judges and the lawyers, the people, whatever they are called, who apply or advise on the law in any system. But it can also be profitable to compare other persons involved in the law, such as the lawyers in Ministries and Parliaments who work on forthcoming legislation, notaries, the experts who appear in court, the claims adjusters of insurance companies and, last but not least, those who teach law in universities.

*Microcomparison*, by contrast, has to do with specific legal institutions or problems, that is, with the rules used to solve actual problems or particular conflicts of interests. When is a manufacturer liable for the harm caused to a consumer by defective goods? What rules determine the allocation of loss in the case of traffic accidents? What factors are relevant for determining the custody of children in divorce cases? If an illegitimate child is disinherited by his father or mother, what rights does he have? The list of possible examples is endless.

The dividing line between macrocomparison and microcomparison is admittedly flexible. Indeed, one must often do both at the same time, for often one has to study the *procedures* by which the rules are in fact applied in order to understand why a foreign system solves a particular problem in the way it does.

For example, no picture of the rules which apply when a patient is suing a doctor for damages can be complete or accurate unless it describes how malpractice is established in court and tells us whether the experts are appointed by the court or are chosen by the parties themselves to battle it out in the courtroom, as happens in Common Law countries.—Nor could one give a true picture of the American law regarding the strict liability of the manufacturer just by listing the elements of a successful claim at law. One must also say that the claim will be decided in a trial by jury and show what roles the judge, lawyers, and jury play in such proceedings and how this influences the substantive law, by noting, for example, that in such a claim the plaintiff's attorney normally stipulates for a fee of 30–50 per cent of the damages awarded and that the jury takes account of this fact when fixing the damages. Indeed, one must cast one's net wider still. Tort liability is just one of the ways of improving the quality of products and reducing the risks to the public: administrative and criminal law may have a contribution to make, and if product liability law seems to play a different and more important role in the United States than in Europe (see below Ch. 42 V), this may perhaps be because Americans take a less sanguine view than Europeans of the efficacy or cost of administrative controls and criminal sanctions. These examples must suffice to show that 'microcomparison' may not work at all unless one takes into account the general institutional contexts in which the rules under comparison have evolved and are actually applied.

## III

In order to understand what comparative law really is, it is as well to distinguish it from related areas of legal science, that is, to show what comparative law is *not*.

Since comparative law necessarily has to deal with foreign law, it must be distinguished from those other branches of legal science which have to do mainly or occasionally with other legal systems. As has often been observed, the mere study of foreign law falls short of being comparative law. For example, in 1937 the League of Nations produced a study of The Status of Women in the World, consisting merely of reports from different countries on their own solution of the problem. There was no real comparison of the solutions presented, and so at most one could call it descriptive comparative law. One can speak of comparative law only if there are specific comparative reflections on the problem to which the work is devoted. Experience shows that this is best done if the author first lays out the essentials of the relevant foreign law, country by country, and then uses this material as a basis for critical comparison, ending up with conclusions about the proper policy for the law to adopt, which may involve a reinterpretation of his own system.

The neighbouring areas of legal science which also deal with foreign law, and from which comparative law must be distinguished, are private international law, public international law, legal history, legal ethnology, and finally sociology of law.

### 1. *Comparative Law and Private International Law*

These two areas are, on the face of it, entirely distinct, but they interact. Private international law, or conflict of laws, is a part of the positive national law, while comparative law seems to present itself as a *science pure*. Private international law tells us which of several possible systems of law should be applied in a particular case which has foreign connections; it contains rules of competence which determine which specific national law is to be applied and which lead to its application. One could therefore say that private international law is basically more selective than comparative. Comparative law, on the other hand, deals with several legal orders at the same time, and does so without having any practical aim in view.

Yet comparative law is enormously valuable for private international law, indeed so indispensable for its development that the methods of private international law today are essentially those of comparative law.

The most striking example is the well-known theory of *qualification* or *characterization*, which tells us how to understand those concepts, such as marriage, contract, and tort, which figure as connecting factors in the national rules of private international law. On one view (qualification according to the *lex fori*) these concepts



are to be given the same meaning as they have in the substantive national law; according to the theory of qualification developed by ERNST RABEL (see RABEL, 'Das Problem der Qualifikation', *RabelsZ* 5 (1931) 241), they are to be understood in the light of comparative law, independently of the *lex fori*. Comparative law also has to be used in the *application of the foreign law* indicated by the conflict rules of the home system. Suppose that in a will which is governed by English law the widow is made 'life-tenant' or a third party is appointed 'trustee'. These terms must somehow be converted into the language of the legal system which is controlling the disposal of the estate. The only way of doing this is to compare the English institutions with the nearest thing in the legal system involved: the German lawyer would therefore consider *Vorerbschaft*, *Nießbrauch*, and *Testamentsvollstrecker*. Now in English law the estate does not vest directly in the 'heirs', but goes to a 'personal representative', that is, a person who must administer the estate on behalf of those entitled to it, and divide the estate between them after paying off its debts. In Germany, these English rules cause difficulties in drafting the certificate of entitlement (*Erbschein*) which persons with rights of succession may demand, and these difficulties can only be resolved by intensive researches of comparative law. 'For example, if a person dies intestate, leaving a widow and several adult children, the certificate must indicate that the moveables in the estate pass under English law to the administrator appointed by the English probate court, who must manage the property in trust (*zu treuen Händen*) for the beneficiaries and use the net proceeds of the estate, after payment of its debts, to provide the widow with the personal chattels and the sum of [£125,000] after which one half of the rest is divided between the children in equal portions, and the other half is administered in trust (*zu treuen Händen*) for the widow, the children being entitled to equal parts of it on her death' (see the instructive treatment of this question by GOTTHEINER, 'Zur Anwendung englischen Erbrechts auf Nachlässe in Deutschland', *RabelsZ* 21 (1956) 33 ff., 71). Comparative law is also essential for the proper treatment of the concept of *ordre public* in private international law. Sometimes a foreign rule which is indicated by the conflict rules of the forum is so shocking to the *ordre public* of the forum that it cannot be applied, but in order to discover whether this is so one must make a comparison between the foreign rule and the closest analogue in the home system. Finally, there is the question of *renvoi*, whether consistency of decision—the principal aim of private international law—is best advanced by applying or not applying the conflicts rule of a foreign system which remits the matter back to the forum. This also can only be solved by the comparative method, and it was ERNST RABEL'S comparative work on 'Conflict of Laws' which conclusively showed how absurd it was to carry on applying national tests in an area like conflicts law which is devoted to international intercourse (see especially vol. I (2nd edn., 1958), 3 ff., 103 f.).

### 2. *Comparative Law and Public International Law*

At first sight there is little in common between comparative law and *public international law*, for public international law, or the law of nations, is essentially a supranational and global system of law. Yet comparative law is essential to the understanding of 'the general principles of law recognized

by civilized nations' which are laid down as being one of the sources of public international law by art. 38 (1) (*c*) of the Statute of the International Court of Justice—whether this means principles of law accepted by all nations without exception, which would include only a few trivial truisms, or rather the principles of law accepted by a large majority of nations. The recognition of such general principles is rendered more difficult by the basic differences of attitude between the developed industrial nations and those in process of development. Now one of the aims of comparative law is to discover which solution of a problem is the best, and perhaps one could include as a 'general principle of law' the solution of a particular problem which emerges from a proper evaluation of the material under comparison as being the best. To do this would avoid reducing the valuable notion of 'general principles of law' to a mere minimum standard, and could gradually lead us to accept progressive solutions as being examples of such general principles.

The methods of comparative law can also be extremely useful in interpreting treaties, and in helping to understand some of the concepts and institutions of customary international law. The rule *pacta sunt servanda*, the idea behind the *clausula rebus sic stantibus*, and the theory of *abus de droit* in international law all have their roots in institutions of municipal private law, and it is only through comparative law that they can be made to yield their full potential.

### 3. *Comparative Law, Legal History, and Legal Ethnology*

The relationship between comparative law and legal history is surprisingly complex. At first sight one is tempted to say that while comparative law studies legal systems coexistent in space, legal history studies systems consecutive in time. But there is more to it than that. For one thing, all legal history involves a comparative element: the legal historian cannot help bringing to the study of his chosen system, say Roman law, the various preconceptions of the modern system he is familiar with; thus he is bound to make comparisons, consciously if he is alert, unconsciously if he is not. Again, unless the comparatist is content merely to record the actual state of play, he really has to take account of the historical circumstances in which the legal institutions and procedures under comparison evolved. How does historical research differ from comparative work? Where does one end and the other begin? At what point must the comparatist yield the floor to the legal historian? The questions admit of no rational answer. Legal history and comparative law are much of a muchness; views may differ on which of these twin sisters is the more comely, but there is no doubt that the legal historian must often use the comparative method and that if the comparatist is to make sense of the rules and the problems they are intended to solve he must often investigate their history.

The founders of comparative legal ethnology, J. J. BACHOFEN (*Das Mutterrecht* (1861)) and Sir HENRY MAINE, had an aim rather different from that of true comparatists, namely to produce a general world history of law as part of a general history of civilization. At its outset legal ethnology rested on a specific belief, stemming from the teachings of AUGUSTE COMTE, the historical dialectic of HEGEL, and BASTIAN's theories of elementary and folk ideas. This belief, now regarded as invalid, was that mankind, with its common psyche, follows the same path of development in everything regardless of location or race. This belief led scholars to focus on the so-called primitive systems of law, if systems they can be called, still to be found among backward peoples. From the legal practices of these peoples they drew conclusions about the condition many ages ago, at a period from which we have no legal muniments or even evidence of any kind, of the legal systems which are now highly developed. Foremost among such scholars were H. H. POST in his *Einleitung in das Studium der ethnologischen Jurisprudenz* (1886) and JOSEPH KOHLER in his *Zeitschrift für vergleichende Rechtswissenschaft*. The basic tenet of ethnological legal studies, namely that all peoples develop as it were in parallel from a common original condition, was controverted principally by the so-called theory of cultural groups (*Kulturkreislehre*) according to which every cultural development of any group anywhere was, as a historical event, unique. The adherents of this theory could not deny the surprising similarities between the legal institutions of different peoples at the same stage of development, but sought to explain them as being the result of adoption or migration. Certainly such events did take place, but they cannot explain all the instances of parallel development. The more modern view, represented by KOSCHAKER, is that the development of a legal system is the product of factors, some of which are typical and occur everywhere, and some of which are atypical. According to KOSCHAKER the typical factors are not natural and inevitable, like BASTIAN's elementary ideas, but historical: a group of people in a particular geographical social and economic situation develops in a particular way with regard to law as well as other things. Such a typical development may be influenced by atypical factors, such as race, special aptitudes, or historical accident. The principal aim of legal ethnology, therefore, must be to distinguish the typical factors from the atypical aberrancies, for otherwise no safe conclusions could be drawn for our original law from the legal practices of surviving primitive peoples.

Nowadays we see legal ethnology not so much as a constituent of a general history but more as a branch of ethnology and comparative law which concentrates on the legal aspects of surviving societies, unhappily called 'primitive' because they are not yet equipped with all the apparatus of civilization. Its discipline is historical only in seeking to discover 'the origins and early stages of law in relation to particular cultural phenomena' (ADAM (above p. 1), 192). But the few older societies hitherto untouched are being increasingly exposed to the modernizing influence of the expanding

industrial revolution and being drawn into the community of mankind. Accordingly the task of modern legal ethnology is to study the changes suffered by societies already observed in adjusting to the intrusion of a higher civilization. Thus to a large extent legal ethnology has become a branch of modern comparative law, one of whose most pressing tasks it is to assist the legal systems of developing societies by giving them the benefits of its comparative researches. To this aim legal ethnology has its special contribution to make.

### 4. *Comparative Law and Sociology*

After the discussion in recent years of the relation between *sociology of law* and comparative law, it now seems to be generally agreed that the two disciplines not only have a great deal to learn from each other but also use much the same methods.

Sociology of law aims to discover the causal relationships between law and society. It seeks to discover patterns from which one can infer whether and under what circumstances law affects human behaviour and conversely how law is affected by social change, whether of a political, economic, psychological, or demographic nature. This is an area where it is very difficult to construct theories, but if one can support one's theory with comparative data from other nations and cultures, it will be much more persuasive.

Legal sociologists use a technique quite like the 'control group' of experimental natural scientists: if in a given sector of experience two systems have different rules and one can show that the relevant social facts in those countries are also different, this may point towards the hypothesis that the social facts and the rules are causally connected (see examples given below pp. 37 ff.). Likewise if one brings in the time dimension, one may be able to show that as the social development in different countries converges (or diverges) the rules in force there also converge (or diverge). If people behave the same way in similar situations despite a difference in the rules which purport to control their conduct, one may infer that the rules are ineffectual, and the same inference may be drawn when the rules are the same but people behave differently. On all this see MARTINY (above p. 1): he shows how the sociology of law can use the discoveries of comparative law, while making it clear that the practice of international and intercultural legal sociology is a very difficult matter indeed.

If comparative sociology of law can make use of the experience and discoveries of comparative law, comparative lawyers undoubtedly have a great deal to learn from legal sociologists. This is important, first, for what one can call the *definition of the problem*. Comparative lawyers have long known that only rules which perform the same function and address the same real problem or conflict of interests can profitably be compared. They also know that they must cut themselves loose from their own doctrinal and juridical preconceptions and liberate themselves from their own cultural context in order to discover 'neutral' concepts with which to describe such problems or conflicts of interests (on this see further Ch. 3 II). Legal sociologists not only



accept this but apply it with a rigour which the comparative lawyer finds stimulating, if also a bit worrying, for legal sociologists can sometimes show that concepts and features which the comparative lawyer regards as 'neutral' and therefore suitable for the definition of the problem are in fact nationally or culturally conditioned, or that they implicitly presuppose the existence of a particular social context which in reality exists in only one of the places under comparison and not in the other. Once the problem has been defined and it comes to the question of the *statement of the rules* which the systems under review use to resolve it, the situation is similar. Here too comparative lawyers agree that one must take account not only of legislative rules, judicial decisions, the 'law in the books', and also of general conditions of business, customs, and practices, but in fact of everything whatever which helps to mould human conduct in the situation under consideration (on this see below Ch. 3 II and III). Sociologists of law take this for granted, since they start out from the assumption that human behaviour is controlled by many factors other than law, but lawyers find it more difficult—and comparative lawyers are generally lawyers of some kind. They have to force themselves to be sufficiently receptive to the non-legal forces which control conduct, and here they have much to learn from the more open-minded sociologists of law. So also when the comparative lawyer comes to *explain his findings*, that is, to describe the causes of the legal similarities or differences which he has discovered. He knows, of course, that causal factors may exist anywhere throughout the fabric of social life, but often he will have to go to the sociology of law to learn just how far he must cast his net, so as to include, for example, the distribution of political power, the economic system, religious and ethical values, family structure, the basis of agriculture and the degree of industrialization, the organization of authorities and groups, and much else besides.

One must not forget that comparative law has several different goals. In its *theoretical-descriptive* form the principal aim is to say how and why certain legal systems are different or alike. In this respect it must, as we have shown, work on and profit from the theoretical models and empirical data produced by the sociology of law. But comparative law can also aim to provide advice on legal policy. In its *applied* version, comparative law suggests how a specific problem can most appropriately be solved under the given social and economic circumstances. In such cases the comparative lawyer often acts under considerable pressure: he may be pressed to say how the positive law should be altered on a particular point, how a perceived gap should be filled, or exactly what rules should be adopted in an international uniform law, and he may have to come up with detailed proposals in a very short time. In such circumstances he has to operate with assumptions which, plausible as they may be, would rightly be derided by the sociologist of law as simple working hypotheses. But this does not mean that they are necessarily false. Without

in the least suggesting that the comparative lawyer can ignore the insights and discoveries of the legal sociologist, he often cannot avoid adopting, however tentatively and provisionally, theses which the sociologist of law would regard as unproven, but which are nevertheless cogent enough to carry weight in discussions or decisions about changing the law.

# 2

# The Functions and Aims of Comparative Law

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# I

IT is beyond dispute today that the scholarly pursuit of comparative law has several significant functions. This emerges from a very simple consideration, that no study deserves the name of a science if it limits itself to phenomena arising within its national boundaries. For a long time lawyers were content to be insular in this sense, and to some extent they are so still. But such a position is untenable, and comparative law offers the only way by which law can become international and consequently a science.

In the natural and medical sciences, and in sociology and economics as well, discoveries and opinions are exchanged internationally. This is so familiar a fact that it is easy to forget its significance. There is no such thing as 'German' physics or 'British' microbiology or 'Canadian' geology. These branches of science are international, and the most one can say is that the contributions of the various nations to the different departments of world knowledge have been outstanding, average, or modest. But the position in legal science is astonishingly different. So long as Roman law was the essential source of all law on the Continent of Europe, an international unity of law and legal science did exist, and a similar unity, the unity of the Common Law, can still be found, up to a point, in the English-speaking world. On the European continent, however, legal unity began to disappear in the eighteenth century as national codes were put in the place of traditional Roman law. The consequence was that lawyers concentrated exclusively on their own legislation, and stopped looking over the border. At a time of growing nationalism, this legal narcissism led to pride in the national system. Germans thought German law was the ark of the covenant, and the French thought the same of French law: national pride became the hallmark of juristic thought. Comparative law has started to put an end to such narrowmindedness.

The primary aim of comparative law, as of all sciences, is knowledge. If one accepts that legal science includes not only the techniques of interpreting the texts, principles, rules, and standards of a national system, but also the discovery of models for preventing or resolving social conflicts, then it is clear that the method of comparative law can provide a much richer range of model solutions than a legal science devoted to a single nation, simply because the different systems of the world can offer a greater variety of solutions than could be thought up in a lifetime by even the most imaginative jurist who was corralled in his own system. Comparative law is an 'école de vérité' which extends and enriches the 'supply of solutions' (ZITELMANN) and offers the scholar of critical capacity the opportunity of finding the 'better solution' for his time and place.

Like the lively international exchange on legal topics to which it gives rise, comparative law has other functions which can only be mentioned here in the briefest way. It dissolves unconsidered national prejudices, and helps us to fathom the different societies and cultures of the world and to further international understanding; it is extremely useful for law reform in developing countries; and for the development of one's own system the critical attitude it engenders does more than local doctrinal disputes.

But four particular practical benefits of comparative law call for closer attention: comparative law as an aid to the legislator (II); comparative law as a tool of construction (III); comparative law as a component of the curriculum of the universities (IV); and comparative law as a contribution to the systematic unification of law (V), and the development of a private law common to the whole of Europe (VI).

## II

Legislators all over the world have found that on many matters good laws cannot be produced without the assistance of comparative law, whether in the form of general studies or of reports specially prepared on the topic in question.

Ever since the second half of the nineteenth century legislation in *Germany* has been preceded by extensive comparative legal research. This was true when commercial law was unified, first in Prussia and then in the German Empire, and also, after the Empire had acquired the necessary legislative powers, of the unification of private law, law of civil procedure, law of bankruptcy, law of judicature (courts system), and criminal law. Account was taken not only of the different laws then in force in Germany, including the French law in force in the Rhineland, but also of Dutch, Swiss, and Austrian law (see COING and DÖLLE (above p. 13 and below)). As to the present, it can be said that no major legislation since the Second World War has been undertaken without more or less extensive research in comparative law. This is true not only of reforms in German and family law (see DROBNIG/DOPFFEL (above p. 13)), but also of numerous other laws, such as the law of commercial agents, company law, anti-trust law, the introduction of the dissenting opinion in the Federal Constitutional Court, the draft law of privacy (admittedly never enacted), the law for the compensation for victims of violent crime, the law regarding changes of sex, the law on legal advice for the indigent, and much more. Comparative legal studies also underlay the recent proposals of the Commission for the Reform of the Law of Obligations set up by the Federal Ministry of Just-ice: see, for instance, the submission of the Max Planck Institute for Foreign and International Law on 'Modern Development of Contract Law in Europe', published in *Gutachten und Vorschläge zur Überarbeitung des Schuldrechts* I (ed. Ministry of Justice, 1981) 1. Here one of the motive forces was a concern to bring German law closer to that of other European countries by importing the rules of the Vienna Convention on International Sales (CISG), itself based on comparative research.—In *Great Britain*, too, legislative proposals are grounded on comparative work. One example is the Pearson *Report on Civil Liability and Compensation for Personal Injury and Death* (see below p. 669), and though England has not yet felt able to follow the United States, France, and Germany in adopting a 'right of privacy', a 'droit au respect de la vie privée' or an 'allgemeines Persönlichkeitsrecht' (see below p. 704), foreign law has been consulted on the question of its introduction. The English Law Commission likewise refers to foreign law whenever appropriate, as it did when the question was whether to confer contractual rights on third parties (see below p. 469).



Comparative law has been proving extremely useful in the countries of Central and Eastern Europe where legislators face the need to reconstruct their legal systems after the collapse of the Soviet system. The experience of other European countries helps them choose the solution which best suits their own legal traditions, overshadowed for much of the century though they have been. Even outside Europe states which used to be 'Soviet republics' are finding that foreign laws can be of assistance in framing domestic legislation, as have the Republic of China and many of the developing nations in Africa.

Of course one must proceed with intelligence and caution. If comparative analysis suggests the adoption of a particular solution to a problem arrived at in another system one cannot reject the proposal simply because the solution is foreign and *ipso facto* unacceptable. To those who object to the 'foreignness' of importations, RUDOLPH V. JHERING has given the conclusive answer:

> 'The reception of foreign legal institutions is not a matter of nationality, but of usefulness and need. No one bothers to fetch a thing from afar when he has one as good or better at home, but only a fool would refuse quinine just because it didn't grow in his back garden.' (*Geist des römischen Rechts*, Part I (9th edn., 1955) 8 f.)

Whenever it is proposed to adopt a foreign solution which is said to be superior, two questions must be asked: first, whether it has proved satisfactory in its country of origin, and secondly, whether it will work in the country where it is proposed to adopt it. It may well prove impossible to adopt, at any rate without modification, a solution tried and tested abroad because of differences in court procedures, the powers of the various authorities, the working of the economy, or the general social context into which it would have to fit.

The 'reception' of foreign law and the question whether and under what circumstances it can succeed has provoked an interesting controversy between KAHN-FREUND and WATSON (above p. 14–15). (See also STEIN and HIRSCH (above p. 13–14), all with further references.)

## III

Another practical use of comparative law lies in the interpretation of national rules of law. On this matter the standard textbooks say nothing, dealing only with the old question whether a law should be given the meaning attributed to it by the legislator at the time of enactment, or whether the statute, treated as leading a kind of independent life of its own, may not be interpreted in the light of changing social conditions. Our present question is whether the interpreter of national rules is able or entitled to invoke a superior foreign solution. It is clear that such foreign material cannot be used in order to bypass unequivocal national rules: the principle of respect for an unambiguous enactment must not be infringed in any legal system. But the question may be raised when the construction of a rule is doubtful, or where there is a lacuna in the system which the judge must fill. The purely logical techniques at our disposal are insufficient, and it is unconvincing to play with analogy or the *argumentum e contrario*. The rule applied all over the Continent which determines how a judge must find the law when all else fails is formulated in the Swiss Civil Code, art. 1 pars. 2 and 3, as follows:

'If no statutory provisions can be found, the judge must apply customary law, failing which he must decide according to the rule he would, were he a legislator, decide to adopt. In so doing the judge must follow accepted doctrine and tradition.'

The principal thought underlying this provision is that gaps in the Swiss Civil Code are to be filled in the spirit of the national, that is, the Swiss, law. But will this do? If the judge is to decide in the way he would have decided had he been a legislator, must we not ask: how does a modern legislator reach his decisions? Now we have already seen that, to a great degree, the modern legislator takes his solutions from comparative law. Thus, thanks to the greater breadth of vision which we obtain from comparative law, we must include the comparative method among the criteria traditionally applied to the interpretation of national rules. There may still be questions about how far this can and should be done. For example, should one, in using the comparative law method of interpretation, consult only related systems like those of Switzerland and France, or also systems that are quite different in style, such as the Common Law? Can the judge choose whichever of the foreign solutions seems to him the best, or can he choose only a solution which is common to a number of other systems? May we, with the help of comparative law, reach an interpretation of our legal rules which is independent of, perhaps even at odds with, the conceptual structure of our own system? These questions, with the possible exception of the last one, should receive a bold rather than a timid answer (see further in ZWEIGERT (above p. 15)).



As may be seen from the law reports, comparative law has often helped the courts to clarify and amplify *German* law, though it is true that comparative law arguments are usually deployed in conjunction with normal methods of interpretation, and thus serve to confirm and support a result reached by a traditional route. One excellent example is the development by the Bundesgerichtshof of the principle that the victim of an invasion of the 'general right of personality' may claim damages at large (see Ch. 43 below), a principle which the Bundesgerichtshof sought to defend against criticism by saying that

'In almost all the legal systems which, like ours, put a prime value on the individual, damages for pain and suffering are regarded as the proper private law sanction for invasions of the personality. The availability of such damages does not adversely affect the freedom of the press, which those systems also treat as of fundamental importance, so the objection that the award of such damages in cases of invasions of personality improperly invades or unduly imperils the constitutionally guaranteed freedom of the press is clearly without substance' (BGHZ 39, 124, 132). In another decision the Bundesgerichtshof held that the claim for such damages was limited to cases where the invasion of the right of personality had been particularly serious; the Court observed that such a limitation 'is also to be found in Swiss law, which is more concerned with legal protection of the personality than the BGB (see art. 49 I OR)' (BGHZ 35, 363, 369). In another case a seriously disabled child who would never have been born at all but for the negligence of its mother's doctor in failing to detect its probable condition sued the doctor for 'wrongful life'. In dismissing the child's claim the Bundesgerichtshof referred to *McKay* v. *Essex HA* [1982] QB 1166 and comparable American decisions (BGHZ 86, 240, 250 f.). Further examples from German courts are analysed by DROBNIG (above p. 13).

In general it must be said that comparative law has a much greater role to play in the application and development of law than the German courts yet allow. The situation is rather better in other European countries such as Greece and Portugal, and above all in Switzerland, where the decisions of the Bundesgericht are replete with comparative law (see BGE 114 II 131 and UYTERHOVEN, above p. 14). The French Cour de Cassation is certainly deaf to any such arguments, but this is because it has adopted a style of judgment which precludes any reference to considerations of sociology, legal history, policy or comparative law (see below p. 123). It is different in the Common Law countries. Courts in England, Australia, Canada, and other commonwealth countries have long made reciprocal reference to each other's decisions and are now invoking continental law to a remarkable degree.

In *White* v. *Jones* [1995] 2 AC 207 the question was whether a lawyer had to pay for the harm suffered by a third party as a result of his incompetence in following the instructions of his client. The opinion of LORD GOFF contains a marvellous comparative treatment of the problem, with reference to the German doctrine of

contracts with protective effect for third parties. (See, too, the opinion of STEYN LJ in the Court of Appeal ibid. at 236). In the event the House of Lords, like the Bundesgerichtshof (see BGH *JZ* 1966, 141, noted by LORENZ and BGH *NJW* 1977, 2073), granted the claim of the third party, but in tort rather than contract (see below p. 614). See also LORD GOFF in *Woolwich Building Soc'y* v. *Inland Revenue Comm'rs* [1993] AC 70, 174 (claim for restitution of taxes illegally exacted, see below p. 574); BINGHAM MR in *Interfoto Picture Library* v. *Stiletto Visual Programmes* [1988] 1 All ER 348, 352 ff. (good faith in negotiations); LORD GOFF in *Henderson* v. *Merrett Syndicates* [1994] 3 All ER 506, 523 ff. (concurrence of claims in contract and tort, see below p. 618); BINGHAM MR in *Kaye* v. *Robertson* [1991] FSR 62 (invasion of privacy, see below p. 704). See also the decision of the Supreme Court of Canada in *Norsk Pacific Steamship Co.* v. *Canadian National Ry.* [1992] 1 SCR 1021, which referred to numerous foreign decisions on the question of liability in tort for pure economic loss. In a note on this decision MARKESINIS makes a telling plea for courts to make more use of arguments from comparative law (109 *LQ Rev.* 5 (1993)). So, too, von BAR says: 'What a step forward it would be if the supreme courts of the states of the European Union accepted the idea of *persuasive authority*, if they felt bound to inquire whether the case before them had not already been decided somewhere else in the Union, and if, supposing there were a sort of "dominant European view" on the matter, they had to say why they were prevented from adopting it by the present state of their own law! If our courts were imbued with a European spirit, their reasoning would be greatly enlivened, and if the law, like other disciplines worthy of the name, were open to the world, its prospect of recapturing the intellectual elite of the country would be much enhanced.' ('Vereinheitlichung und Angleichung von Deliktsrecht in der Europäischen Union', *ZfRV* 35 (1994) 221, 231.)

When judges of a superior court are faced with a difficult problem of principle it is surely wrong for them to disregard solutions and arguments which have been proposed or adopted elsewhere just because they happen to emanate from foreign courts and writers. President ODERSKY of the Bundesgerichtshof was quite right to say:

> 'in giving his opinion the national judge is not only entitled to engage with the views of other courts and legal systems; he is also entitled, when applying his own law and naturally giving full weight to its proper construction and development, to take note of the fact that a particular solution conduces to the harmonisation of European law. In appropriate cases this argument enables him at the end of the day to adopt the solutions of other legal systems, and it is an argument he should use with increasing frequency as the integration of Europe proceeds.' ('Harmonisierende Auslegung und europäische Rechtskultur', *ZEuP* 1994, 1, 2.)

Taking comparative arguments into account certainly means more work for the judge, but nowadays, thanks to the researches of comparatists, there are many areas in which foreign material is much more accessible; in any case, even on the continent where the principle *iura novit curia* obtains, the court can look to the parties to proffer such material and if necessary insist that they do so.



The situation is different when *uniform laws* are being interpreted. Such laws normally result from international conventions, governmental cooperation, or supranational or international legislation, and since the underlying aim is to unify the law, their construction and development must be geared to this goal. This means that when a national judge is faced with a uniform law, he must not simply deploy his trusty old national rules of construction but modify them so as to arrive at an internationally acceptable result which promotes legal uniformity. This often calls for a *comparative law interpretation*: the judge must look to the foreign rules which formed the basis of the provision to be applied, he must take account of how courts and writers abroad interpret it, and he must make good any gaps in it with general principles of law which he has educed from the relevant national legal systems.

For details see LUTTER (above p. 14), especially at p. 604, and KROPHOLLER (above p. 14) 258 ff., 278 ff., 298 ff.—This is undoubtedly a hard and demanding task, and it may be beyond the powers of national judges who have to apply uniform law only very seldom. The only sure way to avoid national divergences in the construction and development of a uniform law is to grant jurisdiction to an international court. For the member states of the Common Market the Court of Justice of the European Communities is the leading example: it has already used the method of comparative legal interpretation in a large number of decisions with great success. On this see BLECKMANN, DAIG, PESCATORE, and MARTINY (above pp. 13–14).

## IV

1. Comparative law also has an important function in legal education. In legal education as in legal science generally it is too limiting smugly to study only one's national law, and for universities and law schools so to act at a time when world society is becoming increasingly mobile is appallingly unprogressive. Comparative law offers the law student a whole new dimension; from it he can learn to respect the special legal cultures of other peoples, he will understand his own law better, he can develop the critical standards which might lead to its improvement, and he will learn how rules of law are conditioned by social facts and what different forms they can take. What he learns in this science, as in others, will prove useful in practice too. Here we need only mention how useful comparative law is in conflict of laws, for the interpretation of treaties, for those who are involved in international adjudication, arbitration, or administration, or concerned with the unification of law. The younger generation of lawyers, and probably their successors as well, will be faced with an unparalleled 'internationalization' of legal life. But it is the general educational value of comparative law which is most important: it shows that the rule currently operative is only one of

should master the comparative method so as to obtain the necessary information for themselves.

As early as 1934 ROSCOE POUND expressed, more precisely and tersely, the view here put forward:

'What is aimed at by such a course [sc. in comparative law] may be done more effectively by a group of teachers who are conscious of the possibilities of comparative law in their daily teaching and know how to realise those possibilities. Hence I suggest that the law teacher of the future should ground himself in comparative law and should bring out continually other modes of treatment of the questions he takes up from the standpoint of our law, as shown by the civil law and the modern codes, just as he canvasses the modes of treatment in different English-speaking jurisdictions. I suggest that he continually seek to lead the student by concrete examples to appreciate that there is no one doctrine or rule or institution or conception for every case in every land in every time. In other words, I believe comparative law will best be taught, for the purposes of our professional instruction, in the course of teaching the law of the land, except as graduate students are able, after due training in the civil law, to go deeply into some of its particular problems' (above p. 14, p. 168). Such 'integrated' law teaching has been opposed by SCHLESINGER and NEUMAYER (*Festschrift Zweigert* 507 f.) and defended afresh by KÖTZ (*RabelsZ* 36 (1972) 570 ff.).

## V

### 1. *Unification of Law—Concept and Function*

The final function of comparative law to be dealt with here is its significant role in the preparation of projects for the international unification of law. The political aim behind such unification is to reduce or eliminate, so far as desirable and possible, the discrepancies between the national legal systems by inducing them to adopt common principles of law. The method used in the past and still often practised today is to draw up a uniform law on the basis of work by experts in comparative law and to incorporate it in a multipartite treaty which obliges the signatories, as a matter of international law, to adopt and apply the uniform law as their municipal law. For states which are members of the European Union, the harmonization of law by supranational means (Community guidelines and directives) is of ever-increasing significance.

Unification cannot be achieved by simply conjuring up an ideal law on any topic and hoping to have it adopted. One must first find what is common to the jurisdictions concerned and incorporate that in the uniform law. Where there are areas of difference, one must reconcile them either by adopting the best existing variant or by finding, through comparative methods, a new solution which is better and more easily applied than any of the existing ones. Preparatory studies in comparative law are absolutely essential here;



without them one cannot discover the points of agreement or disagreement in the different legal systems of the world, let alone decide which solution is the best. A model of such a preparatory study is ERNST RABEL, *Das Recht des Warenkaufs* I (1936: reprinted 1957); II (1958), which was of vital importance for the unification of international sales law.

The advantage of unified law is that it makes international legal business easier. In the area they cover, unified laws avoid the hazards of applying private international law and foreign substantive law. Unified law thus reduces the legal risks of international business, and thereby gives relief both to the businessman who plans the venture and to the judge who has to resolve the disputes to which it gives rise. Thus unified law promotes greater legal predictability and security. International treaties for the unification of law often try to obtain the accession of all the states in the world, but none has yet succeeded. All unification of law so far has been limited in its geographical area of application, by force of circumstance rather than by design. Sometimes, however, schemes for the unification of law are designed to apply only within a limited area (regional unification of law, for example, in Scandinavia or the Benelux countries; here one can include also the *rapprochement* or harmonization of laws envisaged by the Treaty of the European Economic Community).

Multilateral treaties are very difficult to achieve and rather clumsy in operation; furthermore, their results in the field of unification of law are not very satisfactory (see 3 below). Accordingly, one must think of alternative means of achieving the goal. One way would be to produce model laws, a method which has been used for the internal unification of law within the British Commonwealth and especially in the United States. This method is less heavy-handed since the adoption of such laws by the different countries is a matter of recommendation rather than of obligation.

Other methods have been proposed by RENÉ DAVID in his encyclopedia article: for example, the creation of a new and universal *ius commune*, applicable to international relationships to which national systems of law may be insufficiently adapted.—DAVID also urges a more widespread and international use of the device of *Restatements of the Law*, as practised in the United States. Every several state in the United States has its own private and commercial law, and the legislative competence of the Congress in Washington is rather limited. Nevertheless the laws of the several states have a great deal in common, thanks to the Common Law tradition. This common law in each principal area of law is set out in a series of books, called *Restatements*, with additional volumes which give the deviations in each state (see below pp. 251 f.).

Welcome though any idea is which tends to the greater harmonization of laws, overall the most suitable method for the immediate future seems to be that of *model laws*, provided that they are carefully drafted on the foundations of comparative law.

Running parallel with uniform enacted laws there may arise a kind of universal contract law, since in certain spheres of activity (such as wholesale trade in primary commodities, banking, insurance, and transport) there are general conditions or customs of business which are the same or similar in many countries. Here one might instance the Conditions of Business of the London Corn Trade Association, the General Conditions for the Supply of Plant and Machinery for Export, produced by the UN Economic Commission for Europe, and the so-called Incoterms (such as fob and cif clauses) and the Uniform Customs and Practices on Documentary Credits drawn up by the International Chamber of Commerce in Paris. Many observers think of these rules as forming a nascent, perhaps actual, *lex mercatoria* of a new and autonomous variety (on the whole question see SPICKHOFF, *RabelsZ* 56 (1992) 116 and KROPHOLLER, *Internationales Privatrecht* (2nd edn. 1994) §11 I 3, both with references to the extensive literature).

2. *Areas and Agencies*

Since the end of the nineteenth century the unification of law has produced its main results in private law, commercial law, trade and labour law, in copyright and industrial property law, and in the law of transport by rail, sea, and air, as well as in parts of procedural law, especially in connection with the recognition of foreign judgments and awards. Even where the substantive private law should not, or cannot, be unified, it may be possible to achieve a harmony of outcome by unifying the rules of conflicts of law, and thereby avoid differences attributable to the accident of the forum.

It is in private law in the widest sense that the world forces tending towards the integration of law are at their strongest.

The results already achieved by way of unification of law are too numerous to be listed here (compare ZWEIGERT/KROPHOLLER, *Quellen des Internationalen Einheitsrechts*, 3 vols. (1971 ff.)). The League of Nations and the United Nations Organization have done much for the law of negotiable instruments and of arbitration, the Rome Institute for the Unification of Private Law (UNIDROIT, founded in 1926) has worked on the law of sale of goods, the Hague Conferences have helped in private international law, and various international organizations have advanced the unification of the law of transport, copyright, and labour. In 1966 the United Nations Organization resolved to set up a Commission for International and Commercial Law (UNCITRAL) charged with promoting the harmonization and unification of international trade law. Its greatest achievement so far is the Convention on Contracts for the International Sale of Goods (CISG) concluded in Vienna in April 1980 (see VON CAEMMERER/SCHLECHTRIEM, *Kommentar zum Einheitlichen UN-Kaufrecht* (2nd edn. 1995)).



3. *Experience*

In the past, enthusiasts have planned to unify the law of the whole world; people now realize that only the specific needs of international legal business can justify the vast amount of energy which is required to carry through any project for the unification of law. These needs are most pressing in the fields of law mentioned above (less, for example, in land law, family law, and the law of inheritance), and even there only for particular topics or specific institutions.

One must not underestimate the difficulties involved in the preparation and adoption of uniform laws. Some of these have psychological causes, such as dislike of novelty or pride in the national law, others are technical (differences in legal concepts or presuppositions, which only intensive preparatory studies in comparative law can overcome) or political: national parliaments are reluctant to adopt in their entirety the agreed drafts of international conferences. These difficulties are lessened somewhat if the uniform law is made applicable only to international transactions. Then each state has two concurrent sets of rules in the same area. This is what happens in the sale of goods, for example: internal transactions are covered by municipal law, while CISG, if adopted in the state whose courts are seised of the matter, applies to 'international' sales, that is, contracts of sale between parties with places of business in different states.

When uniform laws are applied by national courts, there is always the risk that the uniformity of law apparently achieved in that area will be eroded by its being differently construed and applied in the different member states. This risk cannot be wholly excluded by even the most careful drafting. Just as in any country a Supreme Court of Cassation or Appeal is needed to procure that the law is uniformly applied, so in the long run an international court is necessary to ensure the uniform application of uniform laws. The uniform construction of the law of the European Economic Union is guaranteed by the Court of the European Communities (arts. 164 ff., Treaty of Rome), and it is to be welcomed that the member states have also entrusted to this court the power to interpret legal concepts used in certain treaties made pursuant to art. 220, Treaty of Rome. But apart from a few minor exceptions, this is the only court so far with power to give a uniform construction to uniform law. Until an international court is set up, the best that can be done is to procure that at least the highest courts of the member nations know what their opposite numbers have decided (see above p. 20). If a uniform law is being differently construed in the different member states, it is impermissible to have recourse to the rules of conflicts law in order to determine whether in a particular case it is the law as applied, for example, in France or as applied in Germany which is to control (*aliter* the French Court of Cassation in *Hocke*, Rev. crit. 53 (1964) 264, and the Federal German Supreme Court,

IPRspr. 1962–1963 no. 44). If the substantive law has been unified, it is the substantive law which must control, and not the rules of conflicts law. In brief: unification of substantive law excludes the application of private international law. Until we have an international court for the construction of uniform laws, the highest municipal courts should adopt as their own whichever construction, proposed or actually adopted elsewhere, seems to them the best and proper one.

## VI

If barriers to trade within the European Union are to be overcome, legislation in the form of ratification of international treaties or Regulations and Directives is clearly indispensable in certain areas. Even so, it is increasingly being questioned whether legislation is really the best way to unify the whole of European law. Unification hitherto has been sporadic, impinging on specific points only, so that in some areas the result is a patchwork of overlapping scraps of national and unified law with ill-defined areas of operation and different animating principles; far from simplifying the application of the law, unification of this kind has made it much more difficult. It is now clear that unified legislation can deprive member states and their courts of the freedom to alter and develop their law and introduce a barrier to change which thwarts the adoption of much needed adjustments at the national level. True, a state can always seek to have the unified law changed, but it would take years of negotiation to obtain the agreement of all the other states involved even if it were possible at all.

The point is developed in KÖTZ, 'Rechtsvereinheitlichung—Nutzen, Kosten, Methoden, Ziele', *RabelsZ* 50 (1986) 1; BEHRENS, 'Voraussetzungen und Grenzen der Rechtsfortbildung durch Rechtsvereinheitlichung', *RabelsZ* 50 (1986) 19.

Accordingly people are now beginning to see that legislation is not necessarily the ideal way to unify the law; it has costs as well as gains, and they must be soberly calculated and weighed against each other. The law of Europe cannot be unified by sporadic texts. What we need is to 'Europeanize' the way lawyers think, write, and learn. Legal history and comparative law teach us as much, and people are now readier to accept it. The idea that legislation is the only possible source of law is an error from the Age of Enlightenment which should have had its quietus long ago. German and French law today do not turn exclusively on the wording of legislative texts, and European law cannot turn exclusively on European unifying legislation. Years ago COING was quite right to say that

'unification of law cannot come about simply by laying down uniform rules, as was sometimes thought in the nineteenth century. In many cases it may be necessary, but



it is also essential that it be accompanied by progressive legal scholarship on which the courts in different countries can rely. . . . Our mission must be to reinduce in our jurists an attitude of mind and a common way of thought which will enable them to do justice to the unified rules and apply them in a consistent manner' ('Jus commune, nationale Kodifikation und internationale Abkommen, drei historische Formen der Rechtsvereinheitlichung', in *Le nuove frontiere del diritto* (Atti del Congreso di Bari) I, 171, 192 (1979)).

It is significant that the herald of this mission was a *legal historian*. COING was not writing on a *tabula rasa* or proposing anything novel when he referred to a common European outlook on law: he was reminding us of something we have tended to forget, namely that right up to the eighteenth century, when the idea of codification took root, Europe actually did enjoy a unity of legal outlook under the *ius commune*. Codification then made its triumphal progress through the nascent nation states with the deplorable result that lawyers stopped looking beyond their national borders. But two centuries of legal nationalism have not destroyed the fundamental unity of European private law, as research in legal history has demonstrated; it has also shown us that even the Common Law of England was affected by its contacts with continental legal culture.

See ZIMMERMANN, 'Das römisch-kanonische ius commune als Grundlage europäischer Rechtseinheit', *JZ* 1992, 8; SCHMIDLIN, 'Gibt es ein gemeineuropäisches System des Privatrechts?' in SCHMIDLIN (ed.), *Vers un droit européen commun/Skizzen zum gemeineuropäischen Privatrecht* (1994) 33; SCHULZE, 'Allgemeine Rechtsgrundsätze und europäisches Privatrecht', *ZEuP* 1993, 442; KNÜTEL, 'Rechtseinheit in Europa und römisches Recht', *ZEuP* 1994, 244; ZIMMERMANN, 'Der europäische Charakter des englischen Rechts, Historische Verbindungen zwischen civil law und common law', *ZEuP* 1993, 4; GORLA/MOCCIA, 'A "Revisiting" of the Comparison between Continental Law and English Law (16th–19th Century)', 2 *J Leg. Hist.* 143 (1981); MOCCIA, 'English Law Attitudes to the Civil Law', 2 *J Leg. Hist.* 157 (1981); HELMHOLZ, 'Continental Law and Common Law: Historical Strangers or Companions?' [1990] *Duke LJ* 1207; NÖRR, 'The European Side of the English Law. A Few Comments from a Continental Historian', in COING/NÖRR (eds.), *Englische und kontinentale Rechtsgeschichte: Eine Forschungsprojekt* (1985) 15; GORDLEY, 'Common Law and Civil Law: Eine überholte Unterscheidung', *ZEuP* 1993, 498; GLENN, 'La civilisation de la common law', *Rev. int. dr. comp.* 45 (1993) 559.

This presents comparative law with a challenge. No longer can it confine itself to making proposals for the reform of national law, valuable though that is, for as long as it does so, it will inevitably be tainted with nationalism, regarding national legal systems as given and fixed, and looking to divergences and convergences only to see what can be of use to them. Comparative law must now go beyond national systems and provide a comparative basis on which to develop a system of law for all Europe; it can do this by

taking particular areas of law such as contract, tort, credit arrangements, company law, and family law and showing what rules are generally accepted throughout Europe and whether they are developing on convergent or divergent lines. What is needed is a body of legal literature which presents the different areas of law from a European perspective, not focusing on any particular legal system or its systematics and not addressed to readers of any particular nation. Of course such works must take account of rules of French, German, and English law, but they should treat them as local variations on a theme, a theme common to all Europe. They must take account of the powerful social policies which have influenced private law throughout Europe, such as the protection of the consumer and the environment, and social security provision in the event of accident, illness, and unemployment. They must not confine themselves to the substance of the law, they must also portray the way it is created and applied, and study the legislative processes in the different countries, their method of applying the law, the style of their judgments, and the training and professional activities of their legal practitioners. The principal aim of the enterprise is not to ascertain the rules, or even compare them with a view to improving the national law: it is to make people conscious of European private law as a subject for research and teaching, common to all the countries of Europe.

These issues have been much discussed in recent years. See, for example, the articles by COING, DAVID, and SACCO in CAPPELLETTI (ed.), *New Perspectives for a Common Law of Europe* (1978); KÖTZ, 'Gemeineuropäisches Zivilrecht', *Festschrift Zweigert* (1981) 481; KRAMER, 'Europäische Privatrechtsvereinheitlichung', *JBl.* 1988, 477; COING, 'Europäisierung der Rechtswissenschaft', *NJW* 1990, 937; HONDIUS, 'Naar een Europese rechtenstudie', *Ned. Jur. (Speciaal)* 1991, 517; FLESSNER, 'Rechtsvereinheitlichung durch Rechtswissenschaft und Juristenausbildung', *RabelsZ* 56 (1992) 243; REMIEN, 'Illusion und Realität eines europäischen Privatrechts', *JZ* 1992, 277; REMIEN, 'Ansätze für ein Europäisches Privatrecht?', *ZVglRWiss* (1988) 105; ULMER, 'Vom deutschen zum europäischen Privatrecht?', *JZ* 1992, 1; MÜLLER-GRAFF, 'Europäisches Gemeinschaftsrecht und Privatrecht', *NJW* 1993, 13; MÜLLER-GRAFF, *Privatrecht und europäisches Gemeinschaftsrecht* (2nd edn. 1991); see also KÖTZ, 'A Common Private Law for Europe', in DE WITTE/FORDER (eds.), *The Common Law of Europe and the Future of Legal Education* (1992) 31; KOOPMANS, 'Toward a New "Ius Commune"', ibid.; KRAMER, 'Vielfalt und Einheit der Wertungen im Europäischen Privatrecht', *Festschrift Koller* (1993) 729; GOODE, 'The European Law School', 13 *LS* 1 (1994).—Two periodicals started in 1993 proclaim on their masthead their devotion to the development of European private law (*Zeitschrift für europäisches Privatrecht* and *European Review of Private Law*).—A 'Commission of European Contract Law' under the presidency of OLE LANDO has been occupied since 1980 with the production of 'Principles of European Contract Law': see LANDO, 'Principles of European Contract Law, An Alternative or a Precursor of European Legislation', *RabelsZ* 56 (1992) 261; DROBNIG, 'Ein Vertragsrecht für Europa', *Festschrift Steindorff* (1990) 1149. The first volume of the Commission's conclusions has been published: LANDO/BEALE (ed.), *The Principles of European Contract Law, Part I: Performance, Non-performance and Remedies* (1995).



In 1989 the European Parliament in Strasbourg passed a resolution (OJ EC No. C 158/400) requesting 'that a start be made on the necessary preparatory work on drawing up a common European Code of Private Law', but it is very far from certain that the necessary political will exists at present; nor is it clear that any actual need for it has been demonstrated or that it falls within the competence of the European Union.

On this see TILMANN, 'Zur Entwicklung eines europäischen Zivilrechts', *Festschrift Oppenhoff* (1985) 495; TILMANN, *ZEuP* 1995, 534; GANDOLFI, 'Pour un code européen des contrats', *Rev. int. dr. comp.* 91 (1992) 70; LANDO, 'Is Codification Needed in Europe?', *Eur. Rev. P. L.* 1 (1993) 157; MENGONI, *L'Europa dei codici o un codice per l'Europa* (1993); see also the articles in HARTKAMP and others (eds.), *Towards a European Civil Code* (1994).

One thing is certain, however. One cannot even begin to contemplate a European Civil Code until the way has been prepared by thoroughgoing research. History tells us as much. For example, the law in pre-revolutionary France used to be very diverse, with customary laws in the North and received Roman Law in the South, until in the sixteenth and seventeenth centuries a series of famous writers, including DUMOULIN, COQUILLE, and DOMAT, gradually elicited out of them a 'droit commun français'. It never actually existed as strict law anywhere, but was so successful in providing a doctrinal basis for the unification of French law that the eventual Code civil could be finalized in four months (see below p. 82). Again, when EUGEN HUBER published his work on *System und Geschichte des Schweizerischen Privatrechts* in 1893 there was really no such thing as Swiss private law, only a great diversity of private laws in the cantons. Greatly to his credit, HUBER based his presentation of the cantonal laws on the concept of a Swiss private law, more ideal than real, and when the Confederation finally opted for the unification of Swiss private law it was his research that provided the basis that was needed. Legal scholars today are faced with a similar challenge. They too must use the comparative method, though their material is not just the customary laws of France or the cantonal laws of Switzerland but the positive private law of all the countries in Europe. This is some task! But if we succeed in it, we will have produced the indispensable intellectual groundwork for a European Civil Code against the day when political and practical considerations enable it to be put on the agenda.