AN INTRODUCTION TO THE COMPARATIVE STUDY OF PRIVATE LAW

READINGS, CASES, MATERIALS

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Foreword

In his foreword to the second edition of Arthur von Mehren and James Gordley, *The Civil Law System* (1977), André Tunc commented on a sentence written by Roscoe Pound in the foreword to the first edition of that work (1957). Pound had stated categorically that the methods of the jurists "must have a basis in comparison." To what extent, Tunc asked, have we heeded that injunction? His answer was gloomy. He described the story of our efforts aimed at legal unification as sad; and most attempts to improve our domestic laws were also not based on comparative study. Today, nearly thirty years later, we have reason to be more optimistic. Of course, the picture is very different in different areas of the world. But at least in Europe the scene has changed dramatically.

Private law in Europe is in the process of acquiring, once again, a genuinely European character. The Council and the Parliament of the European Communities have enacted a string of directives deeply affecting core areas of the national legal systems. Increasingly, therefore, rules of German, French, or English law have to be interpreted from the point of view of the relevant community legislation underpinning it. The case law of the European Court of Justice, too, acquires an ever greater significance for the development of German private law. The prospect of a codification of European private law is starting to be seriously considered; and as a precursor various "restatements" of specific areas of European private law have been published or are in the process of preparation. The internationalization of private law is also vigorously promoted by the uniform private law based on international conventions which cover significant areas of commercial law. The United Nations Convention on Contracts for the International Sale of Goods, in particular, has been adopted by more than 60 states. It has started to generate a significant amount of case law, and it has shaped national law reform initiatives. The Sales Convention has been elaborated by Uncitral, and it aims at the global harmonization of a core area of private law. But Uncitral is not the only international organization active in this field. Unidroit, too, continues to produce ambitious instruments such as the Principles of International Commercial Contracts which have been widely noted, internationally, and which enjoy increasing recognition as a manifestation of a contemporary lex mercatoria. Every year, thousands of students spend a period of one or two semesters at a law faculty in another Member State of the European Union under the auspices of the immensely successful Erasmus/Socrates programme. Alternatively, or in addition, many students acquire additional, post-graduate qualifications in other countries. More and more law faculties attempt to obtain a "Euro"-profile by offering a broad range of language courses, by establishing international summer schools, or integrated programmes on an undergraduate

and post-graduate level, by setting up chairs for, or research centres in, European private law. Legal periodicals have been created that pursue the objective of promoting the development of a European private law. Interest has been rekindled in the "old" ius commune, and legal historians are busy rediscovering the common historical foundations of the modern law and restoring the intellectual contact with comparative law and modern legal doctrine. New approaches to legal scholarship, often emanating from the United States, have gained ground in Europe; the economic analysis of law is probably the most prominent example. Legal practice, at the top level, has been all but revolutionized. A wave of mergers has swept over the legal profession and reflects its ever-growing international orientation.

It is widely accepted today that the Europeanization, or more broadly, the internationalization of private law decisively depends on an internationalization of the legal training provided in the various universities throughout Europe. For if students in their domestic law courses continue to be taught the niceties of their national legal systems without being made to appreciate the extent to which the relevant doctrines, or case law, constitute idiosyncracies explicable only as a matter of historical accident, or misunderstanding, rather than rational design, and without being made to consider how else a legal problem may be solved, a national particularization that takes the abracadabra of conditions, warranties, and intermediate terms, or of the doctrine of consideration, for granted, threatens to imprint itself also on the next generation of lawyers. Thus, what André Tunc said in 1977 remains true today: the law schools must ask themselves whether they cannot do more to broaden the frame of mind of their students. Courses on comparative law and on legal history play a key role in this context; at the same time, however, the comparative and historical approaches should permeate the ordinary courses in the various substantive areas of private law. This makes it necessary to develop teaching materials which make the most important sources and the most influential texts readily available. James Gordley's and Arthur von Mehren's *Introduction to the Comparative Study of Private Law* meets this need. In contrast to its predecessor on *The Civil Law System* (first edition by Arthur von Mehren, second edition by Arthur von Mehren and James Gordley) it also covers the common law; that makes it a most attractive teaching tool for comparative law courses not only in the Anglo-American world but also in countries such as France and Germany. In addition, it provides texts and materials on the historical development of modern legal doctrine and thus demonstrates the close relationship between legal history and comparative law. And so it can now be said with even greater justification than in 1977 that, for students who read English, this book constitutes "an excellent tool enabling them to view law not parochially but from a wider perspective." For a lawyer in the twenty-first century this kind of intellectual horizon is not only desirable but indispensable.

REINHARD ZIMMERMANN
December 2005

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Foreword

To Arthur Taylor von Mehren, *The Civil Law System Cases and Materials for the Comparative Study of Law* (1st ed. 1957)

Writing in a time in which methodology in the social sciences has become the prevailing approach, Professor von Mehren speaks of comparative study of law rather than of study of comparative law. That is, he would make the study of the legal order and of the body of authoritative precepts and authoritative technique of applying them to the adjustment of relations and ordering of conduct more effective for promoting and establishing an ideal order among men by comparison of significant features of the two matured systems of law in the modern world.

Study of the civil law system, of the Roman law and the codes of the Continental countries and lands in the New World settled by them had much vogue in America in the eighteenth and fore part of the nineteenth century. Kent and Story, who were the leaders in the development of our law in the formative era and along with Blackstone and Coke were its oracles, were learned civilians, and the exigencies of commercial law, for which Blackstone and Kent furnished no useful material, led to increasing use of civilian materials by text writers and courts. From commercial law a tendency to cite and rely upon the civilians spread to the private law generally. As late as 1860 the Court of Appeals in New York cited French authority upon a question of the law of fixtures. As late as 1880 Langdell, trained under Parsons in the fifties, included a discussion by Merlin in a summary of the law of contracts. To the Middle Ages the academic ideal of all Europe as the empire for which Justinian had been the law-giver, made Roman law was taken to be declaratory of the law of nature. But the great civilian treatises did not deal with the general run of questions which had to be decided by American courts in the formative era. In the end we developed treatises of our own on the basis of the English common law. The dominant historical school in the nineteenth century gave up the eighteenth-century law-of-nature idea and so Roman law could no longer be held declaratory. Moreover, the latter part of that century developed a cult of local law. For a time comparative law was in decadence.

With the passing of the hegemony of historical jurisprudence at the close of the last century there came a revival of comparative law. An idea of a comparative science of law got currency in America through Lord Bryce's *Studies in History and Jurisprudence*. In fact all methods of jurisprudence must be comparative. But the use of civilian treatises by English and American analytical and historical jurists had led to attempts to force

common-law institutions and doctrines into civilian molds which retarded their effective development. What has called for comparative method throughout the world is general economic unification and new means and methods of transportation and communication which have been making the whole world one neighborhood.

Jhering, emphasizing the effect of trade and commerce in liberalizing the strict law, vouched the introducing of Greek mercantile custom into the law of the old city of Rome. In the same way the law merchant, a characteristic product of the medieval faith in a universal law, was taken over into the common law in an era of general commercial development. In America increasing economic unification has put an end to the cult of local law. Today worldwide economic unification is challenging the self-sufficiency of systems of law.

Conditions of transportation and communication today make every locality all but the next door neighbor of every other. What happens anywhere is news in the next morning's paper everywhere. The world has become economically unified and law transcending local political limits is an economic necessity. Moreover, since the First World War we have been seeing attempts at political unification of the world and setting up of a world legal order.

Even more the worldwide development of industry, carried on with instrumentalities and under conditions increasingly dangerous to life and limb, and the mechanizing of every activity of life likewise threatening injury to every one, have been creating new legal problems calling for revision of old doctrines and finding of new means of promoting and maintaining the general security. Experience, which is no longer merely local, must be subjected to the scrutiny of reason and developed by reason, and reason, which in its very nature transcends locality, must be tested by experience. The wider the experience, the better is the test. Thus the science of law must increasingly be comparative. Whether we are dreaming of a world law or thinking of the further development of our own law, to suit it to the worldwide problem of the general security in the present and immediate future, the methods of the jurist must have a basis in comparison.

Not the least problem of legal education today is what to leave out of the regular curriculum. Above all the fundamentals of the lawyer's technique and the basic principles by which he must weigh the everyday controversies in which he is to assist clients in maintaining their rights and realizing their just claims, must be thoroughly mastered. Nothing should be allowed to detract from this minimum. But the many difficult and complicated problems confronting the law, the lawmaker, the judge, and the practising lawyer of today call for a science of law beyond what was required of the simpler jurisprudence of the past, and, it must be repeated, the method of that science, whether primarily analytical, historical, philosophical, or sociological, must use comparative law as its main instrument. For jurist, law teacher, and judge it is becoming more than a part of his general culture. As to the practising lawyer, in our polity he is potentially law-writer, law teacher, legislator, or judge. Moreover, law is or ought to be a learned profession and at least an awareness of the technique, institutions,

and organization of the legal systems of the other half of the legal world is part of what should make a learned lawyer.

It remains to note that Professor von Mehren gives us, not a setting side by side of detailed rules of law for comparison presumably to enable us to determine which is "the right rule." It was this sort of thing which brought comparative law into disrepute in the last century. He gives us instead material for comparison of the Continental codes with our system of judicially established and developed law, of comparing the administering method of the Continent with our own, and finally what is crucial for the development of our Anglo-American law to meet the conditions of maintaining the general security in the society of our time, materials for comparing with our own the reaction of the civil-law jurisdictions to social and economic change.

ROSCOE POUND

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Foreword

To Arthur Taylor von Mehren and James Russell Gordley,
***The Civil Law System An Introduction to the Comparative Study of Law* (2d ed. 1977)**

In the masterly foreword that, as a token of esteem and friendship for the author, Dean Roscoe Pound gave to the first edition of this book, one sentence deserves our special attention and, indeed, should give us some concern: "Whether we are dreaming of a world law or thinking of the further development of our own law, to suit it to the worldwide problem of the general security in the present and immediate future, the methods of the jurists must have a basis in comparison."

They "*must* have a basis in comparison." To what extent in the last twenty years did we heed this injunction?

The story of the efforts to create a "world law" is sad; only disappointingly meager results have been achieved. In the field of civil liberties, jurists have no other weapons than hearts, mouths, and pens with which to oppose the frightening machines which crush bodies and minds. But there are other fields, such as trade law, where a "world law" is needed and does not encounter political obstacles. In these fields, parochialism is the impediment to unification of the law. This has proved, by itself, an often insuperable roadblock.

Have we then, at least, based on comparative study our efforts to improve our domestic laws to make them more responsive to the legitimate expectations of our citizens and to the needs of the future?

A totally negative answer would be unfair. In some special fields of law—securities regulation, for instance, under the influence of United States law—and even in more general fields such as torts or family law, juristic thinking has become increasingly international. For many countries, furthermore, encouraging examples could be given of valuable and sometimes systematic studies of foreign laws or institutions and of careful research on the lessons to be derived from such studies.

It remains true, however, that jurists use a comparative approach very little when one considers the importance that, rationally, such an approach should have. Of course, a deliberate effort is required to overcome the psychological difficulties, the language barriers, and the logistic problems that such an approach implies. But, just as no individual can claim to be wise by himself, no legal system can be regarded as so advanced that it has little to gain from the study of foreign schools of thought.

Logistic problems have just been mentioned. They are, of course, very important. However, the *International Encyclopedia of Comparative Law*,

when it is completed, will give to every English-speaking jurist easy access, not only to the laws, but to the trends of the laws of a great many countries. As the logistic difficulties are overcome in this and other ways, the law schools must ask themselves whether they cannot do more to broaden the frame of mind of their students and to equip them for a world where, as Dean Roscoe Pound had foreseen, international affairs occupy an increasingly large place.

The answer seems clear: much more is desirable. Much more could and should be done to cross-fertilize our legal systems and, above all, the minds of our students.

The first edition of this book has done a great deal to enlighten students trained in the common law about the civil-law system, as typified by the French and German legal orders. The author, Professor Arthur T. von Mehren, has performed the same task in his teaching. He deserves the gratitude of both common lawyers and civilians. In the preface of the first edition, he explained the way he had conceived the book. Very wisely, the second edition remains basically faithful to the original conception. For the second edition, Professor von Mehren has been joined by Dr. James R. Gordley, a young scholar with particular interest in comparative law. They have not merely brought the first edition up to date—which is already a rather formidable task—but have expanded the treatment of some subjects and treated some others for the first time. This has required the condensation or omission of certain topics handled in the first edition. Of greater interest and importance is the fact that at many points the authors have replaced quoted material by their own discussion of the matter in question. Due to such improvements, the book is, even more than in its first edition, a fortunate combination of technical, historical, and functional approaches.

Let us hope that an awakening to what is needed to prepare our students for the approaching 21st century will everywhere broaden the place given to the comparative study of law. For students who read English, this book will be an excellent tool enabling them to view law not parochially but from a wider perspective.

ANDRÉ TUNC

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Preface

Arthur von Mehren wrote, in the Preface to his 1957 work on *The Civil Law System* that "[t]his book had its beginning almost ten years ago" when he left the United States to study law at Zurich, Berlin, and Paris. Its "fundamental purpose was to give a student, having some common law training, an insight into the workings of the civil law system as typified by the French and German legal systems." He and I produced a second edition in 1977. This is not a third edition. It now covers only private law. It has been expanded to give an overview of private law rather than a deeper view of selected topics. It includes materials on law in the United States and England. It may therefore be of use in teaching comparative law in continental countries. It may also raise questions about to what extent one can oppose the "common law" of England and the United States to the "civil law" of France and Germany.

While it is not a third edition, it is a continuation of the spirit of the original work. Although it contains some introductory readings, the core of the book is still the statutes, codes and judicial decisions of the jurisdictions it covers. The inspiration is that of von Mehren's original book: that in these materials, law and the differences among laws are to be found, not in easy generalities about what the law of a particular jurisdiction may be or how "common law" and "civil law" may differ.

I am grateful to Christian Beinecke, Ole Lando, and Reinhard Zimmermann for their valuable suggestions and to Eva Vogt for her help in research.

JAMES GORDLEY

This book has many differences from the two earlier volumes than the discussions in the first, and more particularly the second editions of the civil law system contained. Professor Gordley's approach to the subject matter is somewhat different and reflects more recent developments in areas that were touched upon in the earlier volumes. There are, obviously, important differences in the coverage and analysis of the several volumes. Professor Gordley has provided an insightful and cosmopolitan view of the problems and institutions he described. Time and circumstances make it impossible for me to analyze the new materials; suffice it to say that Professor Gordley's work will be very useful for scholars and practitioners of international law.

ARTHUR T. VON MEHREN

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In memoriam

Less than a month after writing this preface, Arthur von Mehren died at the age of eighty-three. It was privilege to have worked with him. If one could dedicate a book to a co-author, I would dedicate this one to him and to the spirit of his work.

JAMES GORDLEY

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Table of Abbreviations

A.	Atlantic Reporter
All E.R.	All England Law Reports
Am. Dec.	American Decisions
App.	Appellate Court
App. Div.	Appellate Division
BB	Betriebs-Berater
B. & C.	Barnewell and Creswell's Reports
Barn. & Adl.	Barnewell and Adophus' Reports
Best & S.	Best and Smith's Reports
BGHSt.	Entscheidungen des Bundesgerichtshof in Strafsachen
BGHZ	Entscheidungen des Bundesgerichtshof in Zivilsachen
Bull. civ.	Bulletin des arrêts de la Cour de cassation, chambres civiles
Burr.	Burrow's Reports
BVerfG	Entscheidungen des Bundesverfussungsgericht
C.A.	Court of Appeal
Cai.	Caines' Reports
Cal. App.	California Appellate Reports
Cal. Rptr.	California Reporter
Ch.	Chancery
ch. civ.	chambre civile
ch. Crim	chambre criminelle
ch. req.	chambre des requêtes
ch. soc.	chambre sociale
CLR	Commonwealth Law Reports
COM	Commission Proposal
D.	Recueil Dalloz
D.A.	Recueil Dalloz Analytique
D.C.	Recueil Dalloz Critique
D.H.	Recueil Dalloz Hebdomadaire de Jurisprudence
Dig.	Digest of Justinian
DLR	Dominion Law Reports
D.P.	Recueil Dalloz Périodique et Critique
DR	Deutsches Recht
D.S.	Recueil Dalloz Sirey
EBVerfG	Entscheidungen des Bundesverfassungsgerichts
Eng. Rep	English Reports
Ex.	Exchequer
F.	Federal Reporter

Fed. Cas.	Federal Cases
F.R.D.	Federal Rules Decisions
F. Supp.	Federal Supplement
Gaz. Pal.	Gazette du Palais
Gray	Gray's Reports
H.L.	House of Lords
Inst.	Institutes of Justinian
IR	Informations rapides
J	Jurisprudence
JCP	Juris Classeur Périodique
JR	Juristische Rundschau
JZ	Juristen-Zeitung
K.B.	King's Bench
L.R.	Law Reports
Met.	Metcalf's Reports
Mun. Ct.	Municipal Court
N.E.	Northeastern Reporter
NI	Northern Ireland Law Reports
NJW	Neue Juristische Wochenschrift
NJW-RR	Neue Juristische Wochenschrift-Rechtsprechungs-Report Zivilrecht
N.W.	Northwestern Reporter
N.Y.S.	New York Supplement
O.J.	Official Journal of the European Union
P.	Pacific Reporter
pan.	panorama de jurisprudence
P.C.	Judicial Committee of the Privy Council
Q.B	Queen's Bench
Rev. trim. dr. civ	Revue trimestrielle du droit civil
RGSt	Entscheidungen des Reichsgerichts in Strafsachen
RGZ	Entscheidungen des Reichsgerichts in Zivilsachen
S.	Recueil Sirey
S.C.	Session Cases
So.	Southern Reporter
S.E.	Southeastern Reporter
Super.	Superior Court
S.W.	Southwestern Reporter
Strange	Strange's Reports
T.L.R.	Times Law Reports
U.S.	United States Reports
VersR	Versicherungs Recht
W.L.R.	Weekly Law Reports

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Table of Cases

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