JCL Studies in Comparative Law No. 4

Foundations of Comparative Law

✵

Methods and Typologies

EDITED BY

William E. Butler, O. V. Kresin
and Iu. S. Shemshuchenko

Wildy, Simmonds & Hill Publishing

JCL Studies in Comparative Law

Foundations of Comparative Law

Methods and Typologies

Edited by

W. E. Butler
O. V. Kresin
Iu. S. Shemshuchenko

Wildy, Simmonds & Hill Publishing

Foundations of Comparative Law: Methods and Typologies

British Library Cataloguing-in-Publication Data:
A catalogue record for this book is available from The British Library

ISBN 9780854900923

First published in 2011 by
Wildy, Simmonds & Hill Publishing
58 Carey Street, London WC2A 2JB
England

CONTENTS

Legal Theory and Comparison

On European Comparative Law

Legal Systems and Religion

Review Article

Bibliography

Introduction

O. V. KRESIN* AND IU. S. SHEMSHUCHENKO**

The present issue of *The Journal of Comparative Law* is devoted principally to articles based on public lectures and master classes given during the past four years (2007 to 2010 inclusive) at the international symposia styled "Comparative Law Days". These have been held in various cities of Ukraine under the auspices of the V. M. Koretskiy Institute of State and Law, National Academy of Sciences of Ukraine and the Ukrainian Association of Comparative Law, with other partners. The authors chosen for publication here originate in Russia or Ukraine or otherwise specialize in the legal systems of countries which are members of the Commonwealth of Independent States (CIS).

The organizers of the "Comparative Law Days" from the very outset assumed the ambitious task of drawing the attention of jurists, including law students, in the post-Soviet jurisdictions to comparative law as an instrument for better understanding their own and foreign legal traditions, in identifying the common, the special, and the unique in processes of legal development, and in pursuing law reform of national and other legal systems. It was also hoped that these Forums would bring comparative law specialists together on a professional and social basis, encourage a greater awareness of comparative law as an "interest group" in its own right, further the cause of comparative law in institutions of higher legal education and specialist publications, bring comparative law from its present marginal status in law faculties to the center of attention and concern, promote the formation of chairs of law specialized in comparative

* кандидат юридических наук, Docent. Senior Research Associate, V. M. Koretskiy Institute of State and Law, National Academy of Sciences of Ukraine; Learned Secretary, Ukrainian Association of Comparative Law: Associate, International Academy of Comparative Law.

** доктор юридических наук, Professor, Academician. Director, V. M. Koretskiy Institute of State and Law, National Academy of Sciences of Ukraine, Foreign Member, Russian Academy of Sciences; President, Ukrainian Association of Comparative Law; Associate, International Academy of Comparative Law.

legal studies, institutionalize comparative law as a recognized specialization for law students at postgraduate levels, and encourage the preparation of dissertations for lower and higher doctorates.

The "Comparative Law Days" are unique in post-Soviet legal space. There is nothing like them elsewhere in the countries who are members of the Commonwealth of Independent States nor, so far as we are aware, elsewhere in Europe or North America. The Forum, normally extending over a four-day period, consists of a variety of lectures, master classes, seminars, round tables, plenary meetings, specialist groups, and presentations.[1] Some amount to collective "brain storming" on a selected topic; others discuss approaches to teaching and research methodologies; others simply pursue new ideas.

The initial Forum was the occasion for establishing the Ukrainian Association of Comparative Law (UACL). The activities of the UACL are reported on the sole website in the CIS devoted to comparative law (www.comparativelaw.org.ua) in three languages: English, Russian, and Ukrainian. Documents of the UACL, programs of past and future seminars, announcements and press releases, photographs of Forums and other occasions, brief accounts of books, journals, and other publications presented at Forums appear there. Collected materials of each seminar have been published in book form. The Open Lectures appear in a special series of booklets called the "Academy of Comparative Law" (there are twenty-three to date) in either Ukrainian or Russian. Those whose primary language is English are translated into, as a rule, Ukrainian (W. E. Butler, Ugo Mattei, Akmal Saidov). A full Bibliography will be found herein below.

The UACL publishes its own journal in Russian, Ukrainian, and Greek twice yearly entitled "Comparative Law Studies" (October 2005-) and is issuing a series of substantial books under the general title "Encyclopedia of Comparative Law". Five volumes have appeared to date, as well as extra-series titles.

The "Comparative Law Days" have been held in various cities of Ukraine: Kiev, Simferopol, Odessa, Ivano-Frankivsk. The UACL has been fortunate to involve a number of co-organizers and co-sponsors of the Forums. They may vary from one year to the next, depending upon where the Forum is held. Collaborators in the Forums have included: the Institute of State and Law, National Academy of Sciences of Ukraine; Tauride National University, Kiev University of Law, Kiev National University,

[1] "Presentations" are literally that: an author or editor makes a brief presentation about his new book or new journal, replies to questions from the audience (some of whom may make public remarks supportive or critical of the new publication), distributes publicity material, and otherwise generates interest in the publication.

Ukrainian legal newspapers and law publishers, the National OSCE Projects Coordinator, the American Bar Association Rule-of-Law Initiative in Ukraine, the CMS Reich-Rohrwig Hainz TOV law firm, among others. Attendance from throughout the world in 2010 reached over 300.

The authors collectively express their gratitude to Academician W. E. Butler, who has translated all of the articles herein.

The Place of Ukraine on the Legal Map of the World

W. E. BUTLER*

This article serves the dual function of introducing the materials which follow and sharing some of my own observations concerning the development of comparative legal studies in Ukraine, Russia, and other countries of the CIS. So far as the present writer is aware, the present collection of materials is the first and most comprehensive of its kind[1] in the English language for more than a quarter century, when the Direct Link between University College London and the Institute of State and Law of the then USSR Academy of Sciences produced a series of bilateral comparative law seminars and colloquia that flourished for nearly a decade. Those seminars included participants from throughout the United Kingdom and several of the union republics of the USSR, including Ukraine.

For a time it appeared that comparative law proper would find its footing in Central Asia, particularly Tashkent. Ultimately, in the post-Soviet era Ukraine has proved to be the catalyst for the renaissance of comparative law in the former Soviet Union. A rare combination of energy, organizational skills, broad intellectual horizons, handsome support from colleagues throughout Ukraine, and a thirst for new intellectual adventures have made Ukraine the most active center for comparative legal activities in Europe, with nothing known to me in the western hemisphere, Asia, Africa, or the Near East to rival it.

* John Edward Fowler Distinguished Professor of Law, Pennsylvania State University: Emeritus Professor of Comparative Law, University College London; Foreign Member, National Academy of Sciences of Ukraine, Associate Member, International Academy of Comparative Law

[1] W. E. Butler and V. N. Kudriavtsev (eds.), *Comparative Law and Legal System: Historical and Socio-Legal Perspectives* (1985). On the reaction at the time to the papers delivered at this colloquium, see J. Henderson, "The Problems of Comparative Law", *Russian Law: Theory and Practice*, no. 2 (2010), p. 112.

It will become immediately evident from these materials that the concept of "families of legal systems" has acquired an exceptional foothold in the countries of the Commonwealth of Independent States. René David's thesis apparently struck an immediate chord in the former Soviet Union. Whether this is because he identified socialist law as an autonomous family of legal systems, or because he personally knew many of the senior generation of Soviet comparatists (French academic relations with Soviet institutions of higher education were closer during the 1960-70s than elsewhere in Europe), or partly reflected the contacts made in Strasbourg at the Academy of Comparative Law, or otherwise, remains to be determined. His *Les Grands Systèmes de droit contemporain* (1964; 11th ed.; 2002) was translated into the Russian language in the 1970s and has gone through several editions, each reprinted several times, and sold tens of thousands of copies. At least three generations of Ukrainian and Russian law students have been, and continue to be, brought up on David. Zweigert and Kötz came along later, but the Russian translation of their treatise has been no less popular than David's and attracted Ukrainian and Russian comparatists with its treatment of "legal style".

David and Zweigert/Kötz offered an intellectual oasis where thirst was chronic and the intellectual tradition of "classification" deeply rooted. The most influential Ukrainian, Russian, and Uzbek figures in modern comparative legal studies all continue the David and Zweigert/Kötz approach with their own emendations, as most of the essays herein will demonstrate. Interest exists among the rising generation of Ukrainian and Russian comparatists in other methodologies being discussed in western circles – as the essays herein likewise demonstrate – but these are still little known and have no larger audience through the teaching of comparative law.

If Ukraine for the moment has become the venue of choice for comparative law dialogue, Russia remains the principal actor in the production of detailed studies of individual foreign legal systems or aspects thereof. Most of the leading specialists in English, Islamic, Japanese, Chinese, Hindu, Latin American, African, Australian, United States, Canadian, European Union, German, French, Italian, Spanish, Scandinavian, Roman, and canon law are to be found in Russia and, within Russia, the great majority are associated with Moscow institutions. The reasons lie primarily in the Soviet era and the allocation of resources, including financial and personnel, for the development of legal specialists. The imbalances that resulted in personnel distribution will require substantial efforts from Ukraine to match the formidable resources of the Russian Federation in foreign law.

* * *

Comparative legal studies are these days a domain in which many methodologies are being used or explored in addition to the comparative method itself. Some go far beyond the agenda of comparative law which preoccupied the interwar and early postwar generations of comparatists.[2] For some comparatists the utility of classifying legal systems by types, genres, classifications, geography, traditions, and the like is passé. Apart from pedagogical purposes, where such classifications can raise instructive questions and produce useful insights about how to analyze differences and similarities between legal systems and to identify the factors that one considers to be helpful or even decisive in determining their essential features, what objective truth does such a discussion produce? Whatever light doctrinal comparative legal writings may shed on these matters, what practical value or implications do any conclusions drawn actually have other than being intellectually stimulating? Does it actually matter to which "family"[3] or families[4] one ascribes a legal system?

In international treaties or arbitration clauses, of course, from time to time one finds references to the "principal legal systems of the world" as a criterion for representation on international judicial tribunals[5] or even arbitral tribunals. Where such criteria exist, it is not clear that they are rigorously adhered to; for example, if it is correct to say that the Russian and other CIS legal systems are part of the Romano-Germanic legal tradition, should it follow that these countries should compete for electing individuals to the International Court of Justice together with other continental European jurisdictions, or even those of Latin America, China, and Japan? Or does "principal legal systems" have reference in practice to a combination of geographical representation and status as a great or influential power?[6] The public record, so far as the present writer can

[2] H. C. Gutteridge, *Comparative Law: An Introduction to the Comparative Method of Legal Study and Research* (2d ed.; 1949).

[3] O. F. Skakun, Общее сравнительное правоведение [General Comparative Law] (Kiev, 2008).

[4] See V. I. Lafitskii, Сравнительное правоведение в образах права [Comparative Jurisprudence in Images of Law] (2010), I, p. 274. Lafitskii observes that there is no reason why one legal system cannot belong to two or more families of legal systems.

[5] The Statute of the International Court of Justice requires (Article 9) that persons elected to the Court should individually possess the qualifications required and that in the "... body as a whole the representation of the main forms of civilization and of the principal legal systems of the world should be assured". The Statute of the International Tribunal for the Law of the Sea (Article 2[2]) provides that "In the Tribunal as a whole the representation of the principal legal systems of the world and equitable geographical distribution shall be assured".

[6] In the case of the International Tribunal for the Law of the Sea the Statute plainly draws a distinction between equitable geographical distribution and the principal legal systems of

determine, does not begin to suggest that countries in exercising their right to choose, by election or appointment, representatives for international tribunals or organizations have evidenced the slightest interest in the writings or classifications of comparative lawyers in this respect.

However, from time to time classifications of legal systems have been deployed in judicial or arbitral adjudication to influence or determine the outcome of a proceeding. In one recent proceeding whose results remain confidential to the parties it was maintained that an alleged "gap" in Ukrainian law could be filled from another legal system of the Romano-Germanic "family" on the basis of the analogy of law [аналогия права].

The parameters of the considerations here differ from the debate about whether judges in national legal systems should have recourse to foreign law for guidance when domestic authority points towards an outcome that would be inappropriate or unjust or where domestic authority seems to offer no clear answer.[7] Here a post-socialist legal system (Ukraine) with a new Civil Code and professed intention to effect a transition to a market economy while retaining in the interim a major State sector in industrial production deliberately avoids legislative formulas or judicial practice which would extent the liability of entrepreneurs to what in Anglo-American law are known as "economic torts". The resistance takes the form of doctrinal gloss on the Civil Code which confines the general provisions on delicts to situations where physical harm or damage is caused and the absence of any judicial practice to the contrary. There exists, in other words, overwhelming opposition to extending the general provisions on delict to economic torts, although the wording of the relevant legislation, on its face, would not appear to compel such a reading.

When matters of this nature arise in foreign courts, especially Anglo-American courts where there is a developed body of legislation and precedent that supports the existence of economic torts, there is a natural inclination for British and American counsel to read Ukrainian legislation as though it did extend to economic torts and to assume that fact situations brought to them by Ukrainian or other CIS clients fit neatly into this category. Their task is to formulate the allegations of delict in Anglo-American style, place them within the language of Ukrainian legislation, and when they discover that Ukrainian legislation is understood differently, to persuade the court or arbitral tribunal to find a way to "introduce" economic delicts by way of interpretation into Ukrainian law. The court or arbitral tribunal is, in effect, being invited to "make" Ukrainian law.

---

the world. See note 5 above.

[7] See Thomas H. Bingham, *Widening Horizons: The Influence of Comparative Law and International Law on Domestic Law* (2010), p. 8.

One approach ventured in this direction draws upon the classifications of legal families. Whether Ukraine is now, or always has been, or never will be, a member of the Romano-Germanic family of legal systems is a source of considerable debate within Ukrainian legal circles. Opinions are divided, not surprisingly. But that debate is being conducted on both sides at a high level of abstraction, neither side appreciating that the conclusions reached may have implications for the outcome of matters in litigation.

The details of the arguments on both sides are of considerable interest for comparative lawyers. We set out one example below, but certain distinctive features of the matter should be noted at the outset. First, in this case counsel for the Plaintiff is initiating and advancing the argument that the arbitrators or judges should reach out for relevant foreign experience and precedent. The arbitrators or judges are not themselves looking to non-Ukrainian sources in what otherwise is concededly a matter for Ukrainian law because they confront a situation where the outcome would be unjust or where domestic authority offers no answer. Ukrainian jurisprudence and practice do offer an answer and an outcome: there is no case for recovering damages as a result of economic delicts. That, for the moment, is the preferred outcome in Ukraine when such situations arise. The proposition that recourse to a foreign court or arbitral tribunal with non-Ukrainian judges and arbitrators may produce a result under applicable Ukrainian law that is antithetical to Ukrainian law and practice by applying "comparative law" analysis will understandably not be welcomed in Ukraine.

A CASE IN POINT

Facts. The essential facts, appropriately disguised to protect the identity of the parties, were as follows. A Ukrainian company had for several years sold its entire output of a highly specialized product exclusively through a European middleman, which in turn sold the entire output to a British company. After several years of doing business in this manner, the Ukrainian company approached the British company about doing business directly and eliminating the role of the middleman, thereby avoiding the cost of the middleman and increasing its profits. Negotiations were entered into by the Ukrainian and British companies in full knowledge that the Ukrainian company was bound by its contract with the middleman. After negotiations, the Ukrainian and British companies concluded a contract between themselves, whereupon the middleman filed suit in arbitration against the British company, alleging that the British company had committed economic delicts and should pay compensation. It was agreed that Ukrainian law was the applicable law since all negotiations and the

conclusion of the contract between the Ukrainian company and the British company occurred on the territory of Ukraine. The middleman did not bring suit against the Ukrainian company, although there was little doubt that the Ukrainian company had breached its contract with the middleman to supply the specialized product to the foreign market solely through the middleman.

The middleman brought suit on the basis of the Civil Code of Ukraine (Article 1166), which provided that "Property harm caused by the unlawful decisions, actions, or failure to act to personal nonproperty rights of a natural or juridical person, and also harm caused to the property of a natural or juridical person, shall be compensated in full by the person who caused it".

It was common ground between the parties to the arbitration that no physical damage had been caused to any property of the middleman and that a delict, if committed, occurred on the territory of Ukraine.

Claimant Arguments. The claimant argued that the respondent British company had committed what under English law were classified as "economic torts" (unfair competition, interference in contractual relations, conspiracy to interfere in contractual relations) and that Article 1166 of the Civil Code of Ukraine should be understood to extend to such situations.

The respondent British company argued that Article 1166 of the Civil Code of Ukraine was virtually identical to the equivalent provision of the 1963 Civil Code of the Ukrainian SSR and did not encompass "economic delicts" as understood by English law. No Ukrainian doctrinal writings could be found which supported the application of Article 1166 to cases of economic harm analogous to the circumstances here, nor any relevant Ukrainian judicial or arbitral practice. "Economic torts" in the meaning of Anglo-American legal systems did not exist in Ukraine. The activity engaged in by the Ukrainian and British companies was entirely legal under Ukrainian law, merely an attempt by the Ukrainian company in a competitive situation to get the best possible price for its products. While there might be liability of the Ukrainian company to the middleman for breach of their contract, this did not affect the British company, which had no relation to that contract and was ignorant of its precise terms, although it was aware that such a contract did exist.

The claimant argued that Ukrainian law cannot be treated in isolation from other civil law systems to which it is related. The position of the respondent emphasized "form and structure" only, whereas when comparing different legal systems it is essential to look beyond formal differences and to concentrate upon the actual functions of the different institutions, concepts, principles, and techniques being compared. The claimant in effect argued that the arbitrators should apply the doctrine of

"functional equivalence" as elaborated by K. Zweigert and H. Kötz in the English-language version of their treatise.[8]

In denying that Ukrainian law recognizes "individual torts" and the torts of inducement and conspiracy in civil law, counsel for the British company was comparing only the organization and form of civil law delictual regimes. All civil law systems structure their delictual regimes under a general principle of responsibility or obligation to compensate harm caused. In contrast, the Anglo-American legal tradition organizes its tort regime along the lines of individual torts with specific regimes. From this observation the middleman believes that precisely because there is no "individualization" of torts in civil law, there is no limitation at all on the types of harmful conduct that may give rise to an obligation not to compensate unless this is limited by legislation, and in Ukraine there is no such specific legislation.

Quoting Zweigert and Kötz again, counsel for the middleman noted:

> If we leave the history and attend to the particularities of the law of tort, we quickly see that underneath the doctrinal variations, the groups and types of case which appear problematical owing to the exigencies of actual life, are much the same in all legal orders under consideration even if they are dealt with in different portions of the legal system and even, occasionally, with different results ... To give an example, every legal system is familiar with cases where one person induces another to break his contract with a third party. Here the Common Law has the special tort of inducing breach of contract. For the German lawyer, such a case falls under the general clause of Art 826 BGB, but when he goes to the commentaries on this section, he immediately looks under the key word "Inducement of breach of Contract" (Verleitung zum Vertragsbruch) to find a careful collection of all the judicial decision and asks whether the case before him satisfies the conditions laid down in those decisions. The French lawyers and judges operate in exactly the same way (p. 39).

[8] K. Zweigert and H. Kötz, *An Introduction to Comparative Law*, transl. T. Weir (3d rev. ed.; 1998). The claimant quoted the following passage: "The beginner often jumps to the conclusion that a foreign system has 'nothing to report' on a particular problem. The principle of functionality applies here. Even experienced comparatists sometimes look for the rule they want only in the particular place in the foreign system where their experience of their own system leads them to expect it; they are unconsciously looking at the problem with the eyes of their own system" (p. 34).

Counsel for the British company replied that absolutely no Ukrainian commentaries and judicial practice had been identified that would be analogous to the German or French resources mentioned by Zweigert and Kötz. There is no positive support whatsoever in Ukrainian doctrine for such an application of Article 1166 of the Civil Code of Ukraine, but neither, it must be observed, is there any mention whatsoever of the point. In other words, Ukrainian silence is being construed to reject the possible application of Article 1166 to "economic torts" as understood in English law.

It was further objected by Counsel for the respondent that foreign legal practice, in this instance German and French practice with regard to an inducement to breach a contract as evidenced in commentaries and judicial practice, is not a source of Ukrainian law. There is no Ukrainian legislation that would authorize a Ukrainian court or arbitrator to turn to foreign legal systems for evidence of how to construe Ukrainian legislation. Claimant's response was that Ukraine was unquestionably within the civil law tradition, even if the law of Ukraine was part of a "socialist" or "post-socialist" sub-group of the civil law family.

Counsel for the claimant disagreed that recourse to German and French commentaries for assistance in understanding the Civil Code of Ukraine meant that foreign law was being used as a "source of Ukrainian law". This is merely the "practical use" of comparative law for the purpose of interpreting national rules of law. It has been observed that courts in Anglo-American and civil-law jurisdictions "make use of comparative law and make open use of it to an unprecedented extent", quoting the First President of the Cour de cassation in this connection:

> Citizens and judges of States which share more or less similar cultures and enjoy an identical level of economic development are less and less prone to accept that situations which raise the same issues of fact will yield different results because of the difference in the rules of law to be applied. This is true in the field of bioethics, in that of economic law and liability. In all these cases, there is a trend, one might even say a strong demand, that compatible solutions are reached regardless of the differences in the underlying applicable rules of law.[9]

[9] Guy Canivet, quoted in Mads Andenas and Duncan Fairgrieve, "Finding A Common Language for Open Legal Systems", in G. Canivet, M. Andenas, and D. Fairgrieve (eds.), *Comparative Law Before the Courts* (2004), p. xxxi. Also see Cees van Dam, *European Tort Law* (2006), pp. 169-171, and generally, B. Markesinis and J. Fedtke, *Judicial Recourse to Foreign Law: A New Source of Inspiration?* (2006).

CONCLUSION

Whether one considers the above example to be a justified use or an abuse of comparative law may depend upon a variety of factors. So far as the present writer can determine, Ukrainian civil law has resisted extending the application of Article 1166 of the Civil Code (and its predecessor) to economic torts such as inducement or conspiracy to breach a contract, including for reasons inherent in a planned economy. The silence of Ukrainian legislation and doctrine here is to be construed as rejection of this type of economic delict, not indifference, not ignorance. If this perception is correct, whether it is in the interests of Ukraine to continue to reject economic delicts while continuing to aspire to achieve a market economy is another matter.

On the other hand, it is apparent that in this particular case Counsel for the claimant was suggesting that Ukraine already is required to understand Article 1166 in this light precisely because (a) Ukraine is part of the European civil law family and (b) other members of the European civil law family recognize economic torts, including conspiracy or inducement to breach a contract. In effect, the affiliation to the civil law family of legal systems should predetermine the Ukrainian position on this matter.

To paraphrase the well-known expression of the late Professor Otto Kahn-Freund at Oxford University, is that a "use or misuse" of comparative law?