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Editorial

On the Use of Foreign Law

Our readers will again find in this 'normal' issue a variety of themes and arguments, especially in contract and consumer law, property and intellectual property law, and insolvency law. I will take the liberty to develop myself some thoughts on the topic of foreign law, extensively dealt with in the article by Professor Kadner Graziano. The debate on the use of foreign law seems much less present in Europe than outside but may become more important again now that questions of legitimacy of especially judicial lawmaking are rising again.

For comparative lawyers, there is first of all the empirical question: do judges use foreign law, and how do they use it? The question is very difficult to answer, because in most cases the only materials we have are the texts of the judicial decisions themselves; only rarely have judges published books on 'How judges think' (to cite Posner). Whether decisions contain references to materials other than binding sources of law differs to a great extent from country to country and from court to court; the absence of references in the decisions themselves is sometimes compensated by the publication of conclusions of an advocate general – however not expressing necessarily the same arguments as those who did convince the judges. Sometimes, it is possible to guess which doctrine has effectively influenced case law and to find the influence of foreign law in the literature on that doctrine. Even where we find traces of foreign law, it is difficult to know whether it played a role in finding ideas (heuristics) or in justifying outcomes (legitimation). Although there may be a hermeneutical circle between both, that does not exclude that judges may either hide the fact that foreign influence did matter or justify a decision by reference to foreign law that did not matter in reaching the decision but only serves to strengthen the justification of the outcome. That may also depend on the addressees judges have in mind: the parties, their peers, or the public opinion. The reference to foreign law may translate a real influence on the making of the decision and/or try to make a decision more acceptable for the audience. Sometimes it is purely ornamental, to enhance the image of the judge. Further, the influence of foreign law may be based on anecdotal knowledge or on serious comparative examination. The latter would often require an examination of not only the foreign arguments and materials in favour of the proposed solution but also those *contra*, which is rarely done – cherry-picking seems to be the more common case.It is often not clear how dominant or contested the solution is in the country of origin. Sometimes we do read about the beneficial effects the proposed solution has had or the damage caused elsewhere by the solution to be rejected; the value of such claims is difficult to evaluate, as the effect of a specific rule of law in society will

also depend, to a large extent, on other aspects of law and society in that country (such as the relationship between the role of tort law and social security). As Professor M. Tushnet wrote in 1999 (Yale LJ), the use of foreign law can be functional, expressive, or mere *bricolage*.

Taking into account foreign case law is, on the other hand, an obligation where a judge has to apply uniform law; ratification of a uniform law convention such as the United Nations Convention on Contracts for the International Sale of Goods (CISG) implies such an obligation of best efforts. Digests may be very useful to facilitate its performance. The same obligation is not present where a convention imposes minimum standards, such as the European Convention on Human Rights (ECHR). This does not prevent many lawyers to argue that a so-called higher protection found in some convention state must lead to impose the same rule in the other states, an argument often erroneously called progressive interpretation (see *infra*). On the other hand, the Court of Justice of the European Union (CJEU) is, in some matters, bound to apply principles common to the laws of the Member States, which has not prevented the Court to invent general principles not at all common to those laws in order to impose them upon all the Member States (as, e.g., in the *Mangold* case). Such obligations to follow foreign law, directly or in the guise of supranational law, are often at odds with democratic legitimacy. This requires in my view that we distinguish the use of foreign law in constitutional matters from its use in matters where constitutional choices are not at stake.

What are the main arguments found in favour or against aligning national law with foreign law? In some cases, there is a rather strong historical argument: The rule has historically the same origin as the foreign rule or has deliberately been borrowed from foreign law by the legislator itself; insofar as the historic argument is appropriate, foreign law has then a legitimate place in it. The most common and most general argument in favour of using foreign law is *imperiirationis*; this evidently brings us to one of the basic questions of philosophy law: to what extent is law wisdom and to what extent is it political choice. The answer varies according to the question and how political that question is perceived in society. But even where it is accepted that a certain question is more a matter of experience than choice, it is not always clear where to look for that wisdom – and why there and not elsewhere; the wind of foreign law has often changed for reasons that have much more to do with politics than with wisdom. A third argument is the progressive argument: the example set by some other countries must be followed because it is the inevitable progressive choice; not following it would maintain one's law in backwardness. However, the claim that there is only one direction in which good-hearted (or ideologically correct) men and women can possibly march is an example of 'leftist kitsch', wrote Michael Walzer (*Thick and Thin*) with a reference to Milan Kundera (*The Unbearable Lightness of Being*, ed. 1984, p. 257). A fourth argument is the economic argument; it is often used in favour of harmonization. But absent harmonization,

it is used to argue in favour of a solution in accordance with that of business partners or economically powerful countries: One would lose business by sticking to idiosyncratic rules (such as refusing sales contracts without a fixed price or contracts for the benefit of a third party). As said, foreign law may also be used as a negative argument, an argument against a solution proposed that, it is argued, has caused mischief elsewhere. But whatever the strength of all these arguments and their counterarguments, we are glad to offer our readers so many critical contributions on national or comparative law, creating the possibility to use them as either positive or negative examples for development or interpretation of the law.

Matthias E. Storme
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