EUROPEAN REVIEW OF PRIVATE LAW

Wolters Kluwer
Law & Business

Published by Kluwer Law International
P.O. Box 316
2400 AH Alphen aan den Rijn
The Netherlands

Sold and distributed in North, Central and South America by Aspen Publishers, Inc.
7201 McKinney Circle
Frederick, MD 21704
United States of America

Sold and distributed in all other countries by Turpin Distribution
Pegasus Drive
Stratton Business Park, Biggleswade
Bedfordshire SG18 8TQ
United Kingdom

ISSN 0928-9801

This journal should be cited as (2014) 22 ERPL 2

The *European review of Private Law* is published six times per year.
Subscription prices for 2014 [Volume 22, Numbers 1 through 6] including postage and handling:
Print subscription prices: EUR 718/USD 956/GBP 527
Online subscription prices: EUR 664/USD 886/GBP 488

This journal is also available online at www.kluwerlawonline.com.
Sample copies and other information are available at www.kluwerlaw.com.
For further information at please contact our sales department at +31 (0) 172 641562 or at sales@kluwerlaw.com.

For Marketing Opportunities please contact marketing@kluwerlaw.com.

The *European Review of Private Law* is indexed/abstracted in the *European Legal Journals Index.*
Printed on acid-free paper

EUROPEAN REVIEW OF PRIVATE LAW
REVUE EUROPÉENNE DE DROIT PRIVÉ
EUROPÄISCHE ZEITSCHRIFT FÜR PRIVATRECHT

Contact
Jessy Emaus, *e-mail: J.M.Emaus@uu.nl*

Founded in 1992 by Ewoud Hondius and Marcel Storme

ISSN 0928-9801

Typeface ITC Bodoni Twelve
Design Dingoj | Peter Oosterhout, Diemen-Amsterdam
Printed and Bound by CPI Group (UK) Ltd, Croydon, CR0 4YY.

European Review of Private Law 2-2014 [317–320] © Kluwer Law International BV. Printed in Great Britain.

Thomas Lundmark, Charting the Divide Between Common and Civil Law*

Basel/Switzerland

Despite its undeniable practical importance, comparative law in many if not most countries has still to reach the gods of academic legal disciplines. Although with all the endeavours in Europe to harmonize and unify private law and most prominently contract law one might expect otherwise, true comparative research that goes to the roots of different legal solutions can be found less and less. Instead we face a shallow comparison that hardly reaches beyond the surface of specific legal solutions. This book is different! It is not about comparison at the level of specific doctrines of private law such as contract or tort law. Instead, it reaches out to the structural level and touches the very core of the different approaches that we can discern between common law and civil law. Lundmark's book offers new and fascinating deeper insights even to a reader who has been engaged in comparative law from an academic as well as from a practical aspect for decades.

Unlike many other books on comparative law, Lundmark neither offers to give a global overview of legal systems and their classification nor does he follow the traditional common law–civil law divide. Rather he scrutinizes in depth four legal systems with which he could familiarize himself personally during the last decades: England and Wales, the United States, Germany, and Sweden. One might regret that the French legal system was not incorporated, but given the aspiration of the author and the profoundness of his analysis, such an expansion indeed would have been impossible.

According to its own introduction, the book is primarily intended for use as a classroom text. The first chapter therefore provides an overview of the discipline of comparative law, including its aims and objectives as well as the different methodological approaches. In and of itself, this chapter is an excellent introduction for anyone interested in comparative law. The second chapter is devoted to the recently hotly debated topic of comparative legal linguistics. The author finds, however, that conceptualism (*Begriffsjurisprudenz*) that still prevails in German law is rather due to the viewing of law as being independent of other

* ISBN 978-0-19-973882-3 (hardback), Oxford University Press 2012, xv and 465 p., EUR 70.70, UK price GBP 62.00

factors, including politics. This is strongly supported by the author's own field research on how lawyers in the four jurisdictions conceive of the law. Whereas German lawyers tend to consider their legal system rather as being autonomous and content-neutral, American lawyers take the opposite view. His excellent command of legal philosophy and its development allow Lundmark to convincingly explain these differences.

In Chapters 4 to 6, the author examines the legal profession, its historical development, and the ongoing influence on modern legal education, judges, and the judiciary as well as the role of lay judges and juries. Legal training certainly accounts for most of the differences that can still be found between Germany on the one hand and England and Wales, and the United States as well as – to a lesser extent – Sweden on the other. Legal education in Germany – as well as in many other Germanic legal systems such as Switzerland, but also Japan, China, and Korea – is extremely rule-orientated, whereas it is much more practice-orientated, socio-political, and critical in common law legal systems. This approach in turn is reflected in the attitude of many members of the legal profession throughout their professional lives. Major differences exist between the judiciaries. In England and Wales, and in Sweden the judiciary developed as early as in the twelfth and thirteenth centuries; in Germany, however, absolutism played an important role in the development of the judiciary, a fact that can be felt to this very day. Selection and training of judges as well as whether lay judges are employed in the judiciary still reveal more differences between the legal systems. This is a fact that also makes up for major differences between Germany and Switzerland, although other features are comparable.

Chapters 7 to 9 deal with legal rules, legal reasoning, statutes and their construction, and the relevance of judicial precedents. Lundmark convincingly demonstrates that the process of finding the law does not really differ in the four legal systems – contrary to what is advocated by some authors who describe common law reasoning as being analogical and civil law legal thinking as being deductive. However, major differences still exist when it comes to the perception and understanding of statute law. German jurists regard the codification as being exclusive, complete, and enduring. The author explains this phenomenon with the Reception of Roman law that took place in Germany. With law being historically an expression of the will of the absolute monarch, judges still nowadays remain subservient to the will of the legislature. This attitude continues as regards judicial precedents. Although judicial precedents play an important role in all four jurisdictions, their handling differs considerably especially between Germany and England and Wales, and the United States, whereas the Swedish approach seems to be in between.

All in all, Lundmark is able to draw a picture that is far more nuanced than the traditional view of legal families and most of all the supposed divide between Common and civil law. Due to his deep historical, philosophical, and sociological

knowledge he succeeds in drawing links and conclusions that go far beyond anything that has been written in comparative law before. This book is a must not only for students but for any lawyer who is interested in reflecting critically on the different legal systems, their origins, and their possible future development.

Ingeborg Schwenzer
Professor of Private Law
Universität, Basel

European Review of Private Law 2-2014 [339–340] © Kluwer Law International BV. Printed in Great Britain.

List of Contributors

EWOUD HONDIUS
Professor of European Private Law
Utrecht University
Molengraaff Instituut voor Privaatrecht
Janskerkhof 12
NL-3512 BL Utrecht
E-mail: E.H.Hondius@uu.nl

PAUL VERBRUGGEN
Assistant Professor of Private Law,
Business and Law Research Centre,
Radboud University Nijmegen
Postbus 9049
6500 KK Nijmegen
The Netherlands
Tel.: +31 243612147
E-mail: paul.verbruggen@jur.ru.nl

DOROTHY GRUYAERT
PhD Researcher, Institute of Property
Law, KU Leuven
KU Leuven
Institute of Property Law
Tiensestraat 41 – box 3454
3000 Leuven
Belgium
Tel.: + 32 16 32 52 15
E-mail:
Dorothy.Gruyaert@law.kuleuven.be

SANDER VAN LOOCK
PhD Researcher of the Agency for
Innovation by Science and Technology
in Flanders (IWT), Institute for the
Law of Obligations, KU Leuven
KU Leuven
Institute for the Law of Obligations
Tiensestraat 41 - box 3445
3000 Leuven
Belgium
Tel.: + 32 16 37 38 15
E-mail:
sander.vanloock@law.kuleuven.be

ILSE SAMOY
Professor of Private Law, KU Leuven,
UHasselt
KU Leuven
Institute for the Law of Obligations
Tiensestraat 41 - box 3445
3000 Leuven
Belgium
Tel.: +32 16 325389/+32 16 325204
E-mail: ilse.samoy@law.kuleuven.be

BENEDICTE FAUVARQUE-COSSON
Professeur, Université Panthéon-Assas
12 place du
Panthéon
75231 Paris CEDEX 05
France
Tel.: +33 1 44 41 57 00
E-mail: b.fauvarquecosson@wanadoo.fr

TÂM DANG VU
PhD researcher and teaching
assistant, Institute for the
Law of Obligations, KU Leuven
Institute for the Law of Obligations
Tiensestraat 41 - box 3445
3000 Leuven
Belgium
Tel.: +32 16 32 53 88
E-mail: Tam.dangvu@law.kuleuven.be

SANNE VAN DONGEN
Researcher in the Business and Law Research Centre of Radboud University Nijmegen, the Netherlands
postal address:
Radboud University Nijmegen
PO Box 9049
6500 KK Nijmegen
The Netherlands
Tel.: + 31 243613011
E-mail: s.vandongen@jur.ru.nl

FRIEDERIKE DORN
Akademische Mitarbeiterin und Doktorandin am Institut für Bürgerliches Recht, Arbeitsrecht und Insolvenzrecht, Ruprecht-Karls-Universität Heidelberg
Juristische Fakultät
Universität Heidelberg
Lehrstuhl für Bürgerliches Recht und Insolvenzrecht
Friedrich-Ebert-Anlage 6-10
D-69117
Heidelberg
Germany
Tel.: +49 6221 / 54 74 25
E-mail: friederike.dorn@jurs.uni-heidelberg.de

VIOLA HEUTGER
Lektor Europäische Rechtsgeschichte
Türkisch-Deutsche Universität
Şahinkaya Cad. 86
34820 Beykoz
İSTANBUL
Tel.: + 31 64 2229417
E-mail: viola.heutger@gmail.com
Web: http://www.tau.edu.tr

INGEBORG SCHWENZER
Professor of Private Law, Universität Basel
Universität Basel Juristische Fakultät
Büro: 4.44 Peter Merian-Weg 8
Postfach 4002 Basel
Switzerland
Tel.: + 41 61 267 25 40
E-mail: ingeborg.schwenzer@unibas.ch

ALLARD RINGNALDA
Phd Candidate, Utrecht University
Utrecht University
Achter Sint Pieter 200
3512 HT Utrecht
The Netherlands
Tel.: + 31 30 2537153
E-mail: a.ringnalda@uu.nl

EUROPEAN REVIEW OF PRIVATE LAW
REVUE EUROPÉENNE DE DROIT PRIVÉ
EUROPÄISCHE ZEITSCHRIFT FÜR PRIVATRECHT

Guidelines for authors

The European Review of Private Law aims to provide a forum which facilitates the development of European Private Law. It publishes work of interest to academics and practitioners across European boundaries. Comparative work in any field of private law is welcomed. The journal deals especially with comparative case law. Work focusing on one jurisdiction alone is accepted, provided it has a strong cross-border interest.
The Review requires the submission of manuscripts by e-mail attachment, preferably in Word. Please do not forget to add your complete mailing address, telephone number, fax number and/or e-mail address when you submit your manuscript.
Manuscripts should be written in standard English, French or German.

Directives pour les Auteurs

La Revue européenne de droit privé a pour objectif de faciliter, par la constitution d'un forum, la mise au point d'un Droit Privé Européen. Elle publie des articles susceptibles d'intéresser aussi bien l'universitaire que le praticien, sur un plan européen. Nous serons heureux d'ouvrir nos pages aux travaux comparatifs dans tout domaine du droit privé. La Revue est consacrée en particulier á l'étude comparée de la jurisprudence. Les travaux concentrés sur une seule juridiction sont admissibles, à condition de présenter un intérêt dépassant les frontières.
Nous souhaitons recevoir les textes par courrier électronique, de préférence en Word. Ajoutez l'adresse postale compléte et le numéro de téléphone de l'auteur, un numéro de télécopie et l'adresse électronique.
Les textes doivent être rédigés en langue anglaise, française ou allemande standard.

Leitfaden für Autoren

Die Europäische Zeitschrift für Privatrecht will ein Forum bieten, um die Entwicklung des europäischen Zivilrechts zu fördern. Sie veröffentlicht Arbeiten, die für Akademiker und Juristen in ganz Europa grenzüberschreitend von Interesse sind. Vergleichende Untersuchungen aus jedem Bereich des Zivilrechts sind willkommen. Die Zeitschrift befasst sich insbesondere mit vergleichender Rechtsprechung. Artikel, die sich auf ein einziges Hoheitsgebiet konzentrieren, können angenommen werden, wenn sie von besonderem grenzüberschreitenden Interesse sind.
Wir möchten ihre Beiträge per E-Mail erhalten und bevorzugen Dateien in Word. Bitte geben Sie ihre Anschrift, Telefonnummer, Telefaxnummer und/oder E-Mailadresse an.
Manuskripte sind in korrektem Englisch, Französisch oder Deutsch zu verfassen.

Style guide

A style guide for contributors can be found in online at http://www.kluwerlawonline.com/europeanreviewofprivatelaw.

Index

An annual index will be published in issue No. 6 of each volume.