DIFFERENT DEGREES OF CONVERGENCE: A Comparison of Tort Law (Example: Fairchild v. Glenhaven Funeral Services) and Property Law

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Abstract

Comparative lawyers often argue that, upon close examination, technical differences between legal systems from a particular, e.g. Western, tradition are not as important as they might seem. From a functional viewpoint, these legal systems might in fact be converging. However, various degrees of convergence exist, depending upon the area of the law under examination. In tort law, sometimes a strong degree of convergence can be found, whereas in property law it is much more difficult to find even a limited degree of convergence. Still, also in the area of property law civil and common law show more resemblances than might seem at first glance.

I What is ‘convergence’?

The topic of convergence as such cannot even superficially be discussed within the limits given to me. What I intend to offer are some thoughts about convergence and apply these to tort law and the law of property in a broad sense (including personal and real property law).

In Europe the word ‘convergence’ is most frequently used when comparative lawyers discuss the coming together of European continental civil law and non-continental common law. The ‘civil law’ systems are those which are influenced by Roman legal thinking and comprise the French, German and Scandinavian legal traditions. When the ‘common law’ is referred to, usually English or American common law is meant. We tend to forget that the common law is not only the legal system of England, Wales and Northern Ireland, but also the legal system of the Irish Republic and that it constitutes a major part of the mixed legal system of Scotland. The main differences between civil law and common law have been described so often that there is no need to describe them again. The only difference relevant to what follows next is the role of the judge. In the common law, the judge leads developments in the law and thus has great authority, whereas academic writers are seen rather as those who follow the law. In civil law systems, their position is different. Of course

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1 This is a modified version of a lecture I gave at the Opening Congress of the Hanse Law School Programme in Oldenburg, 17 September 2002. The Hanse Law School is a joint (Dutch and German) law degree programme offered at the universities of Groningen (the Netherlands), Oldenburg and Bremen (Germany). The lecture will also be published as part of the conference papers.

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judges also have authority in civil law systems, but less than in common law systems, whereas academics are involved in developing the law and not only in commenting upon, e.g., individual cases. I do realise, of course, that in both civil law and common law, statutory law is of enormous importance. Nevertheless, the role of the judge is an important characteristic of the mentality or culture of a particular legal system.\(^3\)

What does the ‘coming together’ of legal systems mean? How does convergence take place? This question can be answered from two perspectives: top-down and bottom-up. Top-down convergence occurs as the result of the work done by groups of experts working on common principles, such as the famous (Lando) Principles of European Contract Law, or groups of experts who attempt to draft a European Civil Code.\(^4\) These efforts are based on comparative research aimed at finding common ground within the various legal systems. If this common ground cannot be found, the search is for the ‘better rule’. The question what is meant by the ‘coming together’ of legal systems can also be answered from a bottom-up perspective. This perspective was chosen by the Trento Common Core project (aimed at finding the common core of private law in Europe) and in the Leuven/Maastricht Ius Commune casebook series. These casebooks are intended to provide those who teach in a comparative law programme, such as the European Law School in Maastricht and now the Hanse Law School programme in Bremen, Groningen and Oldenburg, with a structured source book in a particular area of the law. So far, the volumes on tort law and contract law have been published. Other volumes are in preparation, including a volume on property law.\(^5\)

In his article ‘Ius Commune Casebooks for the Common Law of Europe: Presentation, Progress, Rationale’, Pierre Larouche offers an insight into some of the background problems which the drafters of the casebook on tort law faced.\(^6\) He discusses how the material was structured and selected, how space constraints were dealt with, why English was chosen as the language of the casebooks and the problems this creates in regard to translations of national legal terminology and why the casebooks take a functional approach. He ends his article by making some remarks concerning the role these casebooks may play in legal education:

Clearly, it is impossible to go into every detail of each system; instead, the materials and the notes must concentrate on the guiding principles and the policy choices that underlie each legal system. These constraints may actually prove to be a blessing. Indeed, it is submitted, the future of legal education may well lie in moving away from teaching the rules of law as they stand, towards teaching the principle and policy framework behind the law, so that students are better prepared to work in a


\(^5\) More information on the casebooks can be found on a special web site: <http://www.law.kuleuven.ac.be/casebook/index.htm>.

dynamic and multi-system environment.\(^7\)

This approach towards teaching the principle and policy framework behind the law, a method well known to law teachers in the United States,\(^8\) of course does not mean that students are no longer required to study the statutory law and case law of relevant major legal systems. Students still have to understand basic conceptual distinctions and must know important statutory (code) provisions and leading cases. Their training, however, is also aimed at understanding common thought patterns and - it seems almost paradoxical, but in fact it is not - the relativity of legal thinking within a particular legal system. National differences of legal technique might hide underlying common principles and policies. The use of this ‘principle and policy’ approach is not limited to the academic world; it has proven to be highly relevant for the development of the law in legal practice. A recent and striking example is a decision by the House of Lords in the case of \textit{Fairchild v. Glenhaven Funeral Services Ltd}.\(^9\) This is a case about questions of causation in tort law. It is a very lengthy, but very well-argued decision, which in my view every teacher of comparative law should read.

\section*{II Tort law: \textit{Fairchild v. Glenhaven Funeral Services Ltd.}}

In the \textit{Fairchild} case, three appeals were heard together. In all three cases, employees had developed mesothelioma caused by asbestos dust, to which they had been exposed during their work for various successive employers. The Court of Appeal decided that, as the employees could not prove, on a balance of probabilities, during which period of exposure the inhalation of asbestos fibres had led to the disease, they had not proven that a particular employer was to be held liable. It was clear from medical evidence that medical science could not give an answer to the question what had been the relevant period of inhalation. The House of Lords was confronted with a dilemma. The employers had admitted that they had committed a breach of their duty to protect their employees against the danger of inhaling asbestos fibres. The employees, however, would never be able - giving the state of medical science - to prove in which period the relevant inhalation leading to mesothelioma had taken place. It meant that the employees would suffer a loss because of lack of evidence, which could not be attributed to them given the state of medical science. It would also lead to the result that none of the employers, although they all admitted their breach of duty, could be held liable. If, however, the rules of causation would be reformulated in such a way that in a case like this all the employers could be held liable, this could lead to an unfair result for the employers. They would all be liable for an act which was, from a medical point of view, caused by only one of them. Still, the final result might be fair from the viewpoint of the employees, who were innocent victims.

\footnote{Larouche, ‘Ius Commune Casebooks’, pp. 108 f.}


\footnote{[2002] 3 WLR 89. The case can also be found on the Internet: \texttt{<http://www.parliament.the-stationery-office.co.uk/pa/ld199697/ldjudgmt/ldjudgmt.htm>}.}
It is the type of dilemma which can also be found in the case of *White v. Jones*.\(^\text{10}\) A testator had instructed his solicitor to change a will, but he died before the solicitor had acted. The result was that those who would have benefited under the new will did not benefit. Because the testator had died, he no longer could lodge a claim under the contract he had concluded with the solicitor. The disappointed beneficiaries, who had not been a party to the contract and therefore could only claim damages in tort, had to face the problem whether, in such a situation, a claim on the grounds of pure economic loss could be awarded. The dilemma is clear: this, no doubt, was a case of malpractice, but who - if anyone - could claim damages? In order to escape from this dilemma, the House of Lords also analysed foreign law, focusing on considerations of policy. The same approach can be found in *Fairchild*.

In this case, the barristers had discussed several American and Commonwealth cases, but the House of Lords explicitly suggested that foreign legal materials describing the position in European legal systems would also be discussed.\(^\text{11}\) The House of Lords - speeches by Lord Bingham of Cornhill and Lord Rodger of Earlsferry - referred to several foreign legal materials for further information. References were made to the laws of Australia, Canada, France, Germany, Greece, Italy, the Netherlands, Norway, South Africa, Switzerland and the United States. Writings by Christian von Bahr, Walter van Gerven, Markesinis & Unberath, Palandt (*Bürgerliches Gesetzbuch: 2002 edition!*), Fleming, Robertson, Jaap Spier, Hart & Honoré and Jeroen Kortmann were also mentioned. The Van Gerven casebook on tort law was mentioned several times. Furthermore, Lord Rodger of Earlsferry discussed Roman law. In regard to Dutch law, a leading case decided by the *Hoge Raad* (Netherlands Supreme Court) was discussed in connection with the drug DES and in regard to German law a reference was even made to the *Motive zu dem Entwurfe eines Bürgerlichen Gesetzbuches für das Deutsche Reich*.\(^\text{12}\)

It seems that in cases where the House of Lords is faced with a true dilemma, and the decision could go either way, not only traditional legal arguments, but also arguments based on comparative legal analysis are used. Especially relevant, so it seems, are decisions by foreign courts faced with the same dilemma. In the end, in *Fairchild* the House of Lords overruled the decisions by the Court of Appeals and awarded the claims.

It is very interesting to see how the comparative legal arguments were used, which authority they have *vis-à-vis* traditional arguments based on an analysis of previous cases. The law lords first of all argue on the basis of a thorough examination of previous cases. At this stage, one can find aphorisms such as:

\[\ldots\] it has often been said that the legal concept of causation is not based on logics or philosophy. It is based on the practical way in which the ordinary man’s mind works in everyday affairs of life.\(^\text{13}\)


\(^{11}\) *Per* Lord Rodger of Earlsferry, [2002] 3 WLR 169 (D).


\(^{13}\) *Per* Lord Hutton [2002] 3 WLR 133 (C), referring to Lord Reid in [1973] 1 WLR 1, McGhee v. National Coal Board.
The role of comparative legal analysis is seen as a ‘cross-check’. In the words of Lord Rodger of Earlsferry:

At the very least, the cross-check with these systems suggests that it is not necessarily the hallmark of a civilised and sophisticated legal system that it treats cases where strict proof of causation is impossible in exactly the same way as cases where such proof is possible. As I have tried to show, there are obvious policy reasons why, in certain cases at least, a different approach is preferable in English law too. The present are among such cases.\(^\text{14}\)

In other words, comparative legal analysis can only be a supporting, not a decisive argument. Generally speaking, the House of Lords shows a desire to preserve the internal consistency of the English legal system. If, however, a problem arises, such as in this case, which could be decided either way, this desire to preserve internal consistency no longer is relevant. The court is in this, marginal, situation free to look for comparative legal arguments to support the final decision.

I hope to have made clear that convergence in tort law no longer is an abstract notion, or even an ideology, but has become a matter of legal practice. In the area of property law, based upon a first impression, the situation seems to be different. However, underneath the historical differences between common law and civil law and hidden behind their wholly different legal techniques there is more common ground than one might think.

### III Property law

Property law, as far as I can see, is considered to be a fairly complex system of highly technical legal rules in almost any legal system. In this area of the law, common law and civil law show fundamental differences in approach. This is for the most part due to historical developments. On the continent of Europe, the French Revolution led to an abolishment of the feudal system by the National Assembly in the night of 4 August 1789. As one historian wrote:

> When the deputies awoke on the morning of 5 August, they found that they had abolished most of the central social institutions of France. At a blow, these things had become the Ancien Régime. It was to be the work of the Revolution to decide how to replace them.\(^\text{15}\)

The feudal system not only was one of the central social institutions, it was also the basis of property relationships relating to land. When the French Civil Code was enacted, the ensuing vacuum was filled and the foundations were laid for the modern law of property as it can now be found in continental legal systems. A unitary system of property law was created. The summa divisio of property law no longer was the distinction between real property law and personal property law, but was replaced by a summa divisio of relative rights and absolute rights, in other words, the law of obligations and the law of property as such. The number of absolute rights was limited to the so-called numeros clausus of absolute rights. Ownership

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\(^{14}\) [2002] WLR 170 (D).

became the most absolute right one could have; all other absolute rights were inferior rights. The rules of property law applied, as a matter of principle, irrespective of the object concerned. Some differences remained, e.g. in regard to the way delivery takes place. The transfer of an immovable demands a different way of delivery than transfer of a movable or a claim. These developments did not take place in England, nor, until recently, in the mixed legal system of Scotland.\textsuperscript{16} English land law remains, at least on a technical level, rooted in the old feudal system. The concepts of tenure and estate have survived. Especially the concept of estate is a pivotal concept in English land law. From a continental perspective it can be described as a relative (or fragmented) form of ownership of which the content (including the duration) depends upon the relationship with other people who also claim to have rights in the same piece of land. Furthermore, estates can exist at common law and in equity. This does not mean that in English law none of the continental developments can be found. To give an example, after the Law of Property Act 1925, which in Section 1 limits the estates, interests and charges at common law, it could be argued that in regard to estates at common law there is now a \textit{numerus clausus}. I will come back to this below.

Of course it has to be said that the above summary of differences between the civil and common law of property is superficial. Yet, it gives some indication of the differences between the two legal systems. To what degree, however, are these differences so deep and so fundamental that convergence might be impossible? Although, from a technical point of view, there seems to be an enormous gap, at the level of principles and policies the gap is narrower than it might seem. Far more comparative research will have to be done than has been done so far.\textsuperscript{17} Let me submit some points which show that the gap certainly is not a great divide.

\begin{itemize}
\item In spite of the non-existence in the common law of the distinction between relative and absolute rights, a distinction is made between contractual rights and property rights (rights against the world). In both civil law and common law, a leading principle is that a contract cannot bind third parties (the doctrine of privity of contract). Exceptions apply when the contract relates to land or goods, but legal systems will still be extremely careful in regard to accepting that third parties can be burdened by a contract that they did not agree to. From a civil law viewpoint, a remarkable exception to the privity of contract doctrine can be found in English common law. When a contract concerns a lease and so-called 'privity of estate' exists, the new lessee is bound by the terms of the lease concluded by his predecessor. This exception to the privity of contract doctrine could also be explained not to be an exception at all by arguing that the privity of estate doctrine implies that a lease, in essence, is a right against the world. In property law, a further general distinction in regard to the passing of legal burdens can be found. Negative burdens (duties not to do something) pass more easily than positive burdens (duties to act). In both civil and common law, two leading maxims are applied: \textit{nemo plus juris ad alium transforet potest quam ipse habet} and \textit{qui prior est tempore potior est jure}. Civil as well as common law attaches great importance to the principle of publicity, both in regard to movables and in regard to immovables. Absolute rights or rights
\end{itemize}

\textsuperscript{16} See the Abolition of Feudal Tenure etc. (Scotland) Act 2000, to be found at: \texttt{<http://www.scotland.gov.uk/landreform/feudal.asp>}.  

\textsuperscript{17} As to the method to be followed I refer to my inaugural lecture at Maastricht University ‘European Private Law: Postmodern Dilemmas and Choices. Towards a Method of Adequate Comparative Analysis’, published in the \textit{Electronic Journal of Comparative Law}: \texttt{<http://www.ejcl.org/31/abs31-1.html>}. 
against the world should be transparent to protect third parties. It is also significant that in the two legal families ‘false wealth’ (i.e. the appearance of wealth, which in reality does not exist) should be avoided. In part this is done by demanding public notice of the creation of limited real rights, especially security interests such as mortgages. Civil and common law share the principle of specificity: rights against the whole world can only exist in regard to specific objects. Here too the common law has a major exception: the floating charge. This is a charge on all of a debtor’s property - immovable, movable and claims. It should not be forgotten, however, that in the civil law the use of sophisticated legal drafting techniques can create results which may come, from a functional viewpoint, very close to a floating charge.\textsuperscript{18} As a final point I would like to mention that systems of transfer can be classified in a general manner irrespective of the legal family concerned. A general classification is possible based upon the distinction between, on the one hand, traditional systems and consensual systems and, on the other hand, causal and abstract systems.

The above may make clear that even in the area of property law civil and common law share more principles and underlying policies than meets the eye at first glance. This is particularly true in the area of security interests, especially personal property security interests. The conclusion, therefore, must be that here too convergence can be found. A good example that convergence goes further than shared principles and policies can be found in the Cape Town Convention on interests in mobile equipment. This Convention provides an overall universal security interest for mobile equipment of great value such as planes and railway rolling stock.\textsuperscript{19} It should therefore come as no surprise that the European Parliament in its latest resolution on European private law also asked for unification efforts in the area of personal property law\textsuperscript{20} and that the European Commission recently published a call for tenders to do research in this area.\textsuperscript{21}

\section*{IV Concluding remarks}

Convergence is a very broad theme indeed. The approach I took was intended to make clear that convergence has reached an advanced stage in tort law, but can also be found in property law, an area where comparative lawyers traditionally have felt that the differences were too great to be bridged.

Convergence has become the starting point for teaching comparative law (especially private law) in Europe. This does not mean that only converging tendencies should be (and in

\textsuperscript{18} Cf. Article 18, General conditions Securities Services ABN-AMRO (March 2002).

\textsuperscript{19} For more information see the UNIDROIT web site: \texttt{<http://www.unidroit.org/english/internationalinterests/main.htm>}.  

\textsuperscript{20} To be found at \texttt{<http://www2.europarl.eu.int/omk/OM-Europarl?PROG=REPORT1&L=EN&PUBREF--=/EP/TEXT+REPORT+A5-2001-0384+0 NOT+SGML+V0/EN>}.  

\textsuperscript{21} Study on property law and non-contractual liability law as they relate to contract law. The Call for Tenders can be found on the following URL: \texttt{<http://europa.eu.int/comm/dgs/health_conSUMER/library/tenders/index_en.htm>}.  

fact are) discussed. On the contrary, convergence and divergence are both typical for the development of the law in Europe. Law students who wish to become European lawyers must first and foremost develop a European attitude of mutual understanding and comprehension of the various legal traditions in Europe. Only then can they truly value the development of European private law.