COMPARATIVE LEGAL INFORMATION AND OBSTACLES ACHIEVING IT: MASTERING (SURVIVING) THE JUNGLE OF FOREIGN RULES IN FINNISH COURTS

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Abstract: *Law crosses borders and comparative legal information has entered permanently into legal life. There are numerous problems, thus, which acquiring reliable comparative legal knowledge can entail. In this paper it is suggested that to be practically useful as well as intellectually valuable comparative law has to compare more than just rules. Understanding specific legal rules presupposes a conception of what law is in that particular legal system. Each legal system should be considered from the perspective of its normative, conceptual and methodological elements and one should shake off subjective perspectives concerning systematic structures of legal institutions and rules. This scope makes the study of comparative law particularly engaging as well as challenging.*

1. General

Comparative law is not just an academic *Glasperlenspiel* («Glass bead game») done in an academic ivory tower, as its relevance has sometimes been described. It is something we need every day. It is beyond dispute that globalization and migration have served to make societies multicultural to an unprecedented extent and this has increasingly brought multicultural aspects into the legal life. There is no escape – not even on the northern fringe of Europe.[1]

It is a well-known fact that comparative law has many important functions. It can be used as a tool of construction and in order to interpret ambiguous national law. Sometimes legislator draws inspiration from foreign law and uses other legal systems as laboratories for searching new and workable solutions to our legal system. In many cases, though, comparative law is something very practical: something one needs to utilize in order to solve a case where two or more legal systems collide.[2] In cross-border cases the point of departure is not found, thus, in comparison itself. Instead, it can be found in the rules of private international law (PIL). It is also the point of departure when one asks what kind of information is required – in terms of quantity and quality – in order to apply foreign law.

Private international law deals with private-law relationships and civil proceedings having international implications. It answers questions of jurisdiction, applicable law and enforcement. PIL rules are technical by

[1] According to Statistics Finland, some 35'000 persons moved to Finland in 2016, which was approximately 20 per cent more than one year earlier. Emigration also increased from the previous year, but clearly less than immigration. See Official Statistics of Finland, Migration (http://www.stat.fi/til/muutl/index_en.html [all websites last accessed in January 2018]). Statistics Finland collects the official statistics for Finland.

[2] For the functions and aims of comparative law, see i.e Konrad Zweigert/Hein Kötz, Introduction to Comparative Law. Clarendon Press, Oxford 1987, p. 13–27.

nature; signs that identify applicable rules. They are rules about rules. PIL is a field of law that is essentially linked with comparative law and comparative information of laws. Even though PIL can nowadays – at least partly – be viewed in terms of EU law, problems concerning the role of the court and the parties with regard to the application of foreign law (such questions as who is obliged to plead to foreign law and the proof and methods of ascertaining that law) are of a procedural nature and therefore usually subject to the laws of the forum. Thus, according to my own experience a closer look reveals that in practice even the seemingly unified and identical rules of private international law often function in different ways in member states depending on the varying national approaches to general problems of PIL. This does not produce cross-border justice and differences enhance uncertainty for citizens. Different procedural traditions make it necessary to view and to be aware of varying domestic solutions also within Europe.

Divergences in procedural traditions create divergences concerning the treatment and interpretation of foreign law in national courts. Naturally, difficulty concerning uniform interpretation of foreign legal texts is linked to differences in legal language and in legal structures and conceptions of law in general. Even though we are living in the era of network society,[3] the easiness of locating information should not fade away the fact that there are usually (always?) numerous problems which getting reliable knowledge can entail and accordingly, problems of facing foreign legal texts should be discussed in terms of comparative law, as suggested in many occasions by Wolfgang Mincke.[4] From this it follows that the level of difficulty of a legal translation does not primarily depend on linguistically determined differences but rather on structural differences between legal systems.[5]

In this paper I focus on comparative law in a Finnish court process and ask whether the comparative method is being taken seriously.[6] I am interested in such questions as how much and what kind of information of foreign law is considered to be enough and how the interpretations of foreign rules are justified. If the jurisprudence shows an ignorant attitude toward foreign legal norms, it can be suspected that the principles of PIL – such as public policy/ordre public[7] – are not applied in an acceptable way.

2. Foreign law in a Finnish court

In Finland the guidelines concerning the duty to ascertain the content of foreign law can be found in the Code of Judicial Procedure (CJP, 4/1734). According to it, the principle of *iura novit curia* applies only with regard to Finnish law. Therefore, a party or parties of the dispute should bring information (evidence) of the foreign law to the court. In this respect parties are allowed to use whatever means they consider appropriate. A court is also permitted to complete the information of foreign law but it is not obliged to do so. The court may even decide that foreign law is not proven, and accordingly apply national law instead of foreign law.[8]

If both parties present conflicting information, the court may and has to decide which is correct and what is *the true content* of a foreign legal norm. Since there are no law provisions on the burden of proof, the court has a wide discretion to decide whether or not the standard of proof has been exceeded. In this respect a yardstick

3 About the concept of network society, see Ahti Saarenpää, E-government and Good Government: An Impossible Equation in the new Network Society? Scandinavian Studies in Law 47/2004, p. 245.

4 Wolfgang Mincke, Eine vergleichende Rechtswissenschaft. Zeitschrift für vergleichende Rechtswissenschaft 83/1984, p. 315.

5 Marcus Galdia, Comparative Law and Legal Translation. The European Legal Forum 1-2003, p. 2.

6 My definition of comparative law does not require comparison of two or more legal systems on equal footing. But of course, mere discriptions of foreign legal texts are not worthy to be called comparative law, either. See more closely chapter 3.

7 For ordre public as a fundamental principle of private international law, see Otto-Kahn Freund, General Problems of Private International Law. Sijthoff & Noordhoff 1980, p. 282–287. Also Michael Bogdan, Private International Law as Component of the Law of the Forum. Hague Academy of International Law 2012, p. 214–253 and Tuulikki Mikkola, Vieraan valtion oikeuden soveltamisen torjuminen ja ordre public. Edilex 2016 (https://www.edilex.fi/artikkelit/16587).

8 This rule is not yet desuetude in Finland even though infrequently applied. See Risto Koulu, Kansainvälinen prosessioikeus pääpiirteittäin, Helsinki 2003, p. 388.

should be a loyalty principle; under private international law doctrine one should be able to apply the foreign law in a loyal way. This means that foreign law has to be interpreted, not just translated.

In Finnish judicial practice, PIL and foreign law aspects are still quite uncommon. [9] Moreover, in cases where *lex causae* (applicable substantive law) is foreign law, the court's arguments seem to emphasize the process of choosing the law. Accordingly, the process of proving its content has not been seen as problematic and therefore in court practise the pitfalls of achieving correct foreign legal information are not discussed. This can be found very worrying. When one takes a look at the Supreme Court precedents, problems concerning the use of comparative method are immediately visible.

In a Supreme Court case KKO 1999:98 – that handled recovery to a bankrupt's estate – two expert opinions on Spanish property law were presented. The opinions were drafted years before the contestable conveyance. The experts were bank officials, one from a Finnish bank and the other from a Spanish bank. The opinion drafted by the Finnish bank official had no references to Spanish law, Spanish case law or legal literature. The other expert had based his/her conclusions on one article of the Spanish Civil Code and the opinion ended with a following statement: «… comments are based on solely opinions of scholars that are contested (not-unanimous) in our legal science.» Surprisingly though, the Supreme Court considered the proof sufficient and applied Spanish law. In my opinion, thus, the standard of proof was too low. In addition, the burden of proof was divided between the parties involved. The plaintiff had the primary obligation for proof, whereas the corresponding obligation of the defendant was secondary, according to which the defendant should have provided information of possible exceptions to the main principles of Spanish law. It is apparent in my mind that this kind of procedural model does not guarantee that the proof is of good quality. The court should concentrate on the quality of the evidence provided, rather than making conclusions on the amount of proof on the basis of actions taken by the parties. Unfortunately, thus, this model of divided burden of proof of foreign law has been used in our courts also in later cases.

The latest Supreme Court decision concerning the application of foreign law handled the payment of maintenance to a spouse after divorce (KKO 2011:97). The applicable law was Swiss. The case is special since the amount of comparative legal information collected is remarkable. The District Court acquired information of Swiss law and legal literature by means of executive assistance. Both parties had also acquired legal opinions from Swiss attorneys. Accordingly, a wide range of Swiss case law and legal literature was provided in the case. But again one can ask, did the Supreme Court reason how to read Swiss legal information in order to justify choosing the interpretative end-result? The answer is, shamefully, no it didn´t. The reasoning of the majority does not touch the problematic questions of the standard of proof and the basics of comparative law, such as the reliability of the sources of foreign law and their relative «ranking» order. The reasoning lacks pro and contra-arguments, even though the Swiss legislation, case law and the literature do not offer any clear answer to the question of a spouse's right to maintenance. In other words, even though a lot of comparative information about the contents of foreign law was exceptionally provided in this case, the basic doctrines of comparative law were not utilized or, at least, they are do not appear from the reasoning of the majority. The dissenting opinion can be defined as being more comparative by nature as the dissenting judge would have wanted to clarify further what are the applicable legal norms according to foreign court practise; this might indicate that the dissenting judge considered that separating a legal norm from case law does not happen in the same way in different legal systems. This is, of course, the correct approach in comparison of laws.

[9] One can – when browsing Finlex-database – find 22 Supreme Court precedents using private international law as a keyword, and 19 if one uses international jurisdiction as a keyword. See also Tuulikki Mikkola, Pleading and Proof of Foreign Law in Finland. In: Yearbook of Private International Law 2013, p. 465.

3. How it should be done?

In Finland jurisprudence of the Supreme Court is not a primary source of law, but still in practice followed. Therefore it is unfortunate that the Supreme Court cases have not given any justifiable guidelines what kind of information – in terms of quality as well as quantity – is required when evidence of the foreign legal norms are brought to the Finnish court. However, as legal information is easier available on the internet. the pitfalls in acquiring knowledge should be discussed openly and to assess how to find the path from the unknown to the known.

In my opinion, the trouble is that the Supreme Court does not reflect the idea that a collection of foreign legal data is not comparative law in the real sense. This reminds me of what my teacher Ahti Saarenpää has written: «*Systematics plays a key role in legal life. The general taxonomic location of a law in the legal system, along with the legal principles, theories and concepts that inform the law, tell us what is right in any given situation*.»[10] Every legal system – either domestic or foreign – should be considered from the perspective of its normative, conceptual and methodological elements. Words are only a tip of the iceberg and pieces of information should be seen as a part of a larger system. The lawyers must establish the terms of a legal norm and put forward justifiable conceptions of what the intended norms are in each specific legal system.[11] In this respect, the term comparative law is in fact a misnomer, as Ugo Mattei has noted. It would be more accurate to speak of comparison of laws and legal systems.[12]

I believe that what we need is an enhanced dialogue between national courts and academia and a stronger focus on the education of private international and comparative law. At the moment the place occupied by comparative law in the university curriculum is modest in Finland and the lawyers turn out not adequately equipped to cope with foreign conceptions of law. Yet we know that studying comparative law would offer the law student a whole new dimension; he/she would understand his/her own law better and learn how rules of law are conditioned by social facts and what different forms they can take. Comparative law would open the student's perspective and the student would learn to respect other legal cultures.[13] This would also change the current attitude according to which cross-border cases are inferior compared to purely domestic cases. This was said to me by a judge of the Court of Appeal a while ago. Funny justice if delimited by a border. Obviously, there cannot exist more important and less important cases to be solved in a court. Instead, there could and should be different internal perspectives and accordingly different paths of justification depending on whether the surroundings of an applicable norm is domestic or foreign. The theory of legal interpretation is a theory of justification concerning the choice between different alternatives.[14] Only justified decisions are acceptable from the point of view of legal certainty and equality in a constitutional state such as ours.

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10 Saarenpää 2004.

11 On legal meaning as a developing entity, dependent on cultural and societal elements, see Heikki E.S. Mattila, Comparative Legal Linguistics. Language of Law, Latin and Modern Lingua Francas. Ashgate Publishing Limited 2013, p. 137.

12 Ugo Mattei, An Opportunity not to be Missed. The future of comparative law in the United States. American Journal of Comparative Law 46/1998, updated version in: Schlesinger´s Comparative Law. Foundation Press 2009, p. 2.

13 Zweigert/Kötz 1987 p. 20. See also Geoffrey Samuel, Comparative Law as a Core Subject. Legal Studies 21/2001, p. 444, who argues that comparative law should become a core subject in the law degree curriculum. The idea is based on the role of comparative law in the formulation of epistemology of law.

14 See more closely Aulis Aarnio, The Rational as Reasonable. D.Reidel Publishing Company, Dordrecht 1987, p. 47. Also Aulis Aarnio, Essays on the Doctrinal Study of Law. Springer Science + Business Media 2011, p. 19, where the author explains shortly the relation of doctrinal studies and comparative studies of law.