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A Multilateral and Case-Oriented Approach to the Teaching and Studying of Comparative Law: A Proposal

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Abstract: Comparative law is a well-established discipline today. However, there remain uncertainties amongst teachers of the discipline regarding the teaching method as well as the content of the comparative law course. The following article first sets out the practical tasks, requirements, and challenges comparatists are facing today. On this basis, the author makes a proposal on how to prepare students for these challenges. He suggests teaching a multilateral and supra-national comparative method, using case scenarios and an approach of learning by doing. The author finally summarizes the numerous benefits and advantages that the proposed method of teaching, studying, and learning comparative law offers.

Résumé: Le droit comparé est aujourd'hui une discipline bien établie. Cependant, parmi les enseignants, persistent des incertitudes concernant le contenu du cours de droit comparé ainsi que la méthode d'enseignement. La contribution suivante analyse d'abord les exigences pratiques pour les comparatistes d'aujourd'hui, afin d'en déduire ensuite des conséquences pour l'enseignement de la matière. L'auteur expose l'enseignement d'une méthode multilatérale et supranationale de droit comparé. Il propose d'enseigner cette méthode à l'aide de cas pratiques et d'une approche de *learning by doing*. Finalement, les atouts et les multiples avantages de cette méthode d'enseignement pour les étudiants seront soulignés.

Zusammenfassung: Rechtsvergleichung zählt heute zu den etablierten rechtswissenschaftlichen Disziplinen. Was Gegenstand und Methode des vergleichenden Unterrichts betrifft, herrschen jedoch nach wie vor Unsicherheiten. Der folgende Beitrag untersucht zunächst, welche praktischen Herausforderungen sich heute für den Rechtsvergleicher stellen. Auf dieser Grundlage wird ein Vorschlag unterbreitet, wie die Studierenden im rechtsvergleichenden Unterricht auf diese Herausforderungen vorbereitet werden können. Es wird eine multilaterale Rechtsvergleichung aus supranationaler Perspektive vorgeschlagen. Gelehrt und erlernt wird diese Methode anhand der Arbeit mit konkreten Fällen (d.h. im Wege des *learning by doing*). Abschliessend fasst der Autor die zahlreichen Vorteile zusammen, die eine solche Methode für die Studierenden bietet.

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1. Introduction

Comparative law is a well-established discipline today.¹ For the readers of the *European Review of Private Law (ERPL)*, comparing goes without saying. However, uncertainties remain regarding the *teaching method* as well as the *content* of courses on comparative law and on comparative methodology. Matthias Reimann, comparatist of the University of Michigan at Ann Arbor, wrote a few years ago that '[w]hile comparative law has been a considerable success in terms of producing a wealth of knowledge, it has [...] failed to mature into an up-to-date, well-defined, and coherent discipline'.² '[C]omparatists still have no overall theoretical framework explaining, *what* kind of "law" to compare for what purpose, what to prove or disprove through comparison, and, most embarrassingly, *how* exactly to go about it'.³ In the 1980s, Karl H. Neumayer had already written that '[i]n no other discipline [...] does such uncertainty reign as in comparative law regarding the teaching method and the content of the courses'.⁴ Other authors have noticed a lack of manuals and casebooks intended for a

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- 1 For the situation in Europe, see E. HONDIUS, 'Comparative Law in the Court-Room: Europe and America Compared', in *Festschrift für Schwenger*, Vol. 1 (Bern 2011), p 759: 'The increasing legal co-operation within Europe has led to a growing awareness of foreign law'; p 765: 'From an esoteric elective course, Comparative Law has developed into a mainstream subject'; M. REIMANN, 'The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century', 50. *Am. J. Comp. L.* 2002, p (671) 691-692; R. MICHAELS, 'Im Westen nichts Neues? 100 Jahre Pariser Kongress für Rechtsvergleichung - Gedanken anlässlich einer Jubiläumskonferenz in New Orleans', *RabelsZ (Rabels Zeitschrift für Ausländisches und Internationales Privatrecht)* 2002, p (97) 112: 'Rechtsvergleichung ist *en vogue*. [...] Auch in der Praxis ist die Rechtsvergleichung wichtig geworden; sie wird von Gesetzgebern (etwa in den osteuropäischen Transformationsstaaten) und Richtern in zunehmendem Masse genutzt. Schliesslich ist auch die Rechtsangleichung und -vereinheitlichung wesentlich von der Rechtsvergleichung inspiriert worden'; see already R. BUXBAUM, 'Die Rechtsvergleichung zwischen nationalem Staat und internationaler Wirtschaft', *RabelsZ* 1996, p 201: 'Europa [erlebt] eine Blüte der Rechtsvergleichung, die in diesem Jahrhundert ihresgleichen sucht'.
 - 2 REIMANN *supra* n. 1 at p 686. He continues: 'Witness, for example, the structure and content of our standard books. They usually begin by talking about the character, history, goals, benefits, and tools of comparative law; almost suddenly, they lay these matters completely aside and launch into descriptions of legal families and traditions; then they add discussions of particular substance topics, and, along the way, they provide a fair amount of information about foreign law. The unifying theme in all this is hard to see'. 'When comparatists reiterate their standard lists of their subject's necessity, purposes, tools, and benefits, these mantras are too imprecise and long as to be virtually all-inclusive. The only agreement, it seems, is that anything goes, a few basic prohibitions aside'. See also MICHAELS *supra* n. 1 at p 106.
 - 3 REIMANN *supra* n. 1 at p 689.
 - 4 Translated from German: 'An den deutschen Universitäten wird kein Lehrgebiet durch eine so große Divergenz in den Methoden des Unterrichts und der Auswahl des Vortragsstoffes verunsichert wie die Rechtsvergleichung', 'Rechtsvergleichung als Unterrichtsfach an deutschen Universitäten', in *Festschrift für Konrad Zweigert zum siebzigsten Geburtstag* (Tübingen 1981), p (501) 507.

modern and interactive⁵ teaching of comparative law. Edith Friedler has written on the situation in the United States that ‘recent efforts to give comparative law a facelift are directed more towards scholars than classroom teachers. They bring to mind Roscoe Pound’s insistence that this is a discipline for academics and legislators, not for law school class’.⁶ Antoine Bullier, comparatist at the University Paris 1, Panthéon Sorbonne, has recently observed that, for students and future lawyers and judges, it often is not evident that using the comparative methodology can lead to immediate and tangible results or that comparative law knowledge can really be useful for the students’ future careers.⁷

To these uncertainties add up new challenges stemming from greater mobility of persons and the internationalization of trade and law. Michael Waxman has noticed on this matter in the *Journal of Legal Education* that ‘the inexorable shift to transnational and global legal practice demands a comparable shift in our methods of teaching Comparative Law’.⁸

There is thus a need for discussion as to the subject and the method of comparative law teaching. In fact, apart from a few basic data,⁹ in comparative law there is no predefined knowledge that each student is supposed to have

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- 5 It seems that an *active* and *case-oriented work* of the students with the comparative method is often limited to specialized courses while large parts of the traditional comparative law courses are, in many countries, often still taught *ex cathedra*. It appears that courses on *comparative methodology* are still rare.
- 6 ‘Shakespeare’s Contribution to the Teaching of Comparative Law – Some Reflections on *The Merchant of Venice*’, 60. *Louisiana Law Review*, 1087. She continues: Proposals for ‘new approaches to comparative law [...] contain exciting ideas about new ways to look at comparative law, but a case book or other teaching tool has yet to materialize as a result of these efforts’. – See, however, the *Ius Commune Casebooks for the Common Law of Europe*, edited by Walter van Gerven, destined for the use of advanced students of comparative law, or the books of the author of these lines (n. 32).
- 7 A. BULLIER, ‘Le droit comparé dans l’enseignement – Le droit comparé est-il un passe-temps inutile?’, *RDIC* 2008, p (163) 164: ‘cette matière souffre d’un déficit d’image [...] Les juristes sont avant tout des internistes. Ils veulent donner des solutions immédiates et tangibles à leurs étudiants ou clients. La spéculation intellectuelle, si elle est appréciée, ne correspond plus à un monde où l’efficacité et le rendement sont considérés comme essentiels et aller voir ailleurs relève de la curiosité intellectuelle comme pour les digressions élégantes et stimulantes de la philosophie ou de la théorie générale du droit’.
- 8 M. WAXMAN, ‘Teaching Comparative Law in the 21st Century: Beyond the Civil/Common Law Dichotomy’, 51. *J. Leg. Ed. (Journal of Legal Education)* 2001, p (305) 305.
- 9 In particular, the different legal cultures and traditions and their historical origins and particularities are part of this data at the level of macro-comparison, see K. ZWIGERT & H. KÖTZ, *An Introduction to Comparative Law*, translated by T. WEIR, 3rd edn (Oxford: Clarendon Press 1998); R. DAVID & C. JAUFFRET-SPINOSI, *Les grands systèmes de droit contemporains*, 11th edn (Paris 2002); A. GAMBARO & R. SACCO, *Sistemi Giuridici Comparati*, 3rd edn (Torino 2008); A. GAMBARO, R. SACCO & L. VOGEL, *Le droit de l’occident et d’ailleurs* (Paris 2011); G. CUNIBERTI, *Grands systèmes de droit contemporains*, 3rd edn (Paris 2015); P. GLENN, *Legal Traditions in the World – Sustainable Diversity in the Law*, 4th edn (Oxford: Oxford University Press 2010).

acquired at the end of his or her studies. The content of the comparative law course, as well as the methodology, is left to the appreciation of the teacher who, on the one hand, benefits, in that regard, from a large educational freedom. On the other hand, he or she faces the challenge of making, among the vast amount of foreign and comparative materials, a selection that is manageable for the students and of using a teaching method that meets the needs of students and that adequately prepares them for their future professional practice.

With regard to the question of how to teach comparative law, it appears appropriate to first analyse the *practical requirements* and *challenges* comparatists are facing today (ss 2 and 3). On this basis, it is then considered how students can be prepared for these practical challenges and what consequences might be drawn for the teaching of the subject (ss 4 and 5).

2. Practical Requirements: From a National and Bilateral Method to a Multilateral Comparative Law Methodology

Comparative law has always been employed for the study of different legal cultures, to gain further knowledge and broaden one's own horizons, as a means for the better understanding of one's own law, to relativize the solutions in force in one's own jurisdiction, and as a tool for identifying notions of justice existing across borders (comparative law in its capacity as *école de vérité*).¹⁰ During large parts of the twentieth century, when jurists used comparative methodology, their *starting point* was often *one single jurisdiction* or *one single system of law*, usually the one in which they were trained, which then served as the *point of reference* for the comparison. In practice, the purpose of comparison was often to fill in gaps in national law, to improve it, or to reform it. The jurisdiction(s) for comparison was (or were) traditionally chosen amongst the main representatives of the ancient 'legal families', namely French law, German law, and Common Law (in particular English or American law), occasionally also Swiss law. One could call this traditional method a *national*¹¹ and, often, *bilateral* approach to comparative law. It is still used in numerous comparative law doctoral theses published today.

10 ZWEIFERT & KÖTZ, *Comparative Law*, *supra* n. 9, p 15; DAVID & JAUFFRET-SPINOSI, *Grands systèmes*, *supra* n. 9, no. 3 ff.

11 See ZWEIFERT & KÖTZ, *Comparative Law*, *supra* n. 9, p 29: 'This presents comparative law with a challenge. No longer can it confine itself to making proposals for the reform of national law, valuable though that is, for as long as it does so, it will inevitably be tainted with nationalism, regarding national legal systems as given and fixed, and looking to divergences and convergences only to see what can be of use to them', H. KÖTZ, 'Alte und neue Aufgaben der Rechtsvergleichung', *JZ (Juristenzeitung)* 2002, p (257) 259; G.P. ROMANO speaks of a 'comparaison . . . nationaliste, puisqu'elle sert la cause du seul législateur national qui la pratique', 'Les justiciables face à la comparaison des droits: vers la démocratisation d'un droit savant', in *Legal Engineering and Comparative Law*, eds Cashin Ritaine, Franck & Lalani, Vol. 1 (Zurich et al., 2008), p (95) 101.

This approach may still be relevant for some comparative research. In recent years and decades, however, further challenges and tasks have been placed at the centre of attention, and the horizon for comparatists has widened accordingly.

2.1. *Range of Jurisdictions To Be Compared*

A first change concerns the jurisdictions to take into account when comparing – and this even when the comparison is made with the traditional purpose of improving a single domestic law.

The differences between the major codifications that have marked a whole ‘legal family’, such as the French *Code civil* or the German *BGB*, and the other members of those families have significantly increased in many respects over the last decades. Vlad Constantinesco already stated in the early 1970s of the twentieth century that ‘it is obvious that some derived legal systems may achieve a level of originality which requires taking them into consideration as well when comparing’.¹² In Europe, for example, this is true today for Belgian, Italian, Spanish, and Portuguese law, in their relation to French law, and since the reform of the Civil Code of the Netherlands, especially for Dutch law. The same is true for Swiss and Austrian law with respect to German law.

Many jurisdictions have recently modernized their codifications or even put entire new codifications into force, stemming from important comparative work, with provisions that are often more finely shaded than those of the main representatives of the traditional legal families.¹³ These new codifications contain new solutions and cover certain issues for the first time explicitly in black-letter rules. To give just one example: The problem of conflicting standard terms and conditions is regulated explicitly in none of the traditional codifications. The Dutch Civil Code, the Polish Civil Code, the Estonian Law of Obligations, the Lithuanian Civil Code, and the new Romanian Civil code, on the contrary, contain modern rules on that question; these rules differ significantly from each

12 Vlad CONSTANTINESCO, *Rechtsvergleichung, Bd. 2: Die rechtsvergleichende Methode* (Köln 1972), p 50: ‘Tatsächlich ist es offensichtlich, dass manche abgeleiteten Rechtsordnungen einen Stand der Originalität erreichen können, der den Vergleichler zu ihrer unmittelbaren Untersuchung verpflichtet’.

13 To mention just a few examples: the Dutch Civil Code (het Burgerlijk Wetboek) of 1992 or the recent codifications in the three Baltic States, see, e.g., REINER SCHULZE & FRYDERIK ZOLL (eds), *The Law of Obligations in Europe – A New Wave of Codifications* (München 2013), beyond Europe, see for example the Québec Civil Code of 1994, the Chinese Contract Act of 1999, which is widely inspired by the UNIDROIT Principles of International Commercial Contracts, or the Chinese Property Act of 2007, and the Chinese Tort Law Act of 2009.

other, hereby making them even more interesting for comparison.¹⁴ Case law in these countries has also gone its own ways in many aspects.

Limiting the comparison to the principal representatives of the traditional legal families disregards these developments. Today, restricting the comparison to, for example, French, German, and English law ultimately leaves it to pure chance whether the comparison actually produces the most stimulating or convincing solution with regard to the issue under examination.¹⁵

In addition, a number of internationally recognized sets of ‘principles’ (or restatements) of law of high quality have been developed over the last three decades on a comparative basis. To avoid having to reinvent the wheel again and again, there should be a large consensus that these principles are now also to be included in the comparison, alongside national or international legal provisions and case law.

Restricting comparison to a single or a few traditional jurisdictions is thus today hard to justify, and this even if the comparison, as traditionally, pursues the purpose of optimizing one single domestic law. When it comes to dealing with such a variety of jurisdictions, it is necessary to employ a *multilateral* comparative method that allows taking into consideration, and drawing conclusions from, the most recent and modern developments on an international and comparative scale and which allows benefitting from the considerable legal diversity existing today.

2.2. *Transnationalization or Even Globalization of Trade and Legal Practice*

A second change follows from the transnationalization or even the globalization of trade and legal practice. In numerous situations today,¹⁶ jurists are required, together with colleagues from other jurisdictions, to act in a context of legal diversity and to analyse legal issues in a European or even worldwide context, to compare a wide range of different solutions in force in different jurisdictions, to research international tendencies, to identify the most convincing solution on an international level, or to suggest solutions acceptable for actors with various legal

14 See Art. 6:225 para. 3 of the Dutch Burgerlijk Wetboek, §40 para. 1 of the Code of Obligations of Estonia, and Art. 6.179 of the Lithuanian Civil Code, the latter being strongly inspired by Art. 2.1.22 of the UNIDROIT-Principles on International Commercial Contracts; §385 of the Polish Civil Code; Art. 1202 of the Civil Code of Romania.

15 Indeed, the ‘Principles of European Contract Law’ and the ‘Common Frame of Reference’ do often not follow the traditional solutions known of the main representatives of the ancient legal families but have chosen more differentiated solutions, which are inspired by those found in smaller jurisdictions. For examples, see T. KADNER GRAZIANO, *Comparative Contract Law* (Basingstoke and New York 2009), pp 7-30.

16 See the examples below, s. 3.

backgrounds. There is in fact an increasing ‘necessity of collaboration amongst jurists of all traditions in the resolution of many problems in the world’.¹⁷

With respect to these challenges, the traditional national and, often, bilateral comparison is an inadequate tool. To rise to this challenge and to manage coping with such a multitude of laws and information, it is necessary to replace the national and bilateral approach with a *multilateral* comparative method.

2.3. *Search for Common Principles of Law and Renewal of the ius commune Europaeum*

Last but not least, there are the projects of a variety of research groups, aimed at a renewal of the *ius commune Europaeum* or a search for even globally accepted (or acceptable) principles of law. In this work, from the outset the national law loses its role as a reference point for the comparison. On the contrary, these research groups operate a multilateral comparison par excellence. With respect to this research, MATTHIAS REIMANN has stated from a US-American perspective:

In Western Europe, comparative legal studies have [...] gained a momentum and a significance unprecedented in the last hundred years. [...] From an American perspective, one may [...] look across the Atlantic with envy these days. Comparative law in Europe is a hot topic. It is practically relevant, self-confident, and enjoys a high profile.¹⁸

In order to research common principles of law and establish a multilateral comparative overview, it is necessary that the comparatist adopts, from the beginning of the analysis, the view that the solution provided by each jurisdiction for a legal question has, in principle, the same value as the others. To reach this objectivity, one must abandon the national point of view and adopt a bird’s eye perspective of the compared objects, or, in other terms, one must adopt a supranational comparative law perspective while doing multilateral research.

2.4. *Objective: To Allow an Informed Choice While Being Fully Aware of All Possible Solutions and Their Pros and Cons*

The purpose of the use of a multilateral comparative method is not necessarily the harmonization or unification of law. Applying a multilateral methodology from a supranational perspective allows working with numerous laws in order to identify a convincing solution for the issue under examination. The outcome of the

17 GLENN *supra* n. 9, p xxvi, continuing: ‘[T]here now appears to be no area of law free of the possibility of extra-jurisdictional complication’.

18 *Supra* n. 1 at pp 691-692.

comparative research could, for example, be introduced in international legislation or case law,¹⁹ but it could as well be used as source of inspiration for national legislation or domestic court decisions²⁰ or for parties when drafting the terms of their transnational contract.

Whether the multilateral comparative research method is used by a judge, a legislator, or parties to a contract and whether it is used on a national or international level,²¹ the method is, and the benefits to be derived from it are, the same. To resolve a specific legal issue, this method reveals a diversity of possible solutions as well as their respective advantages and disadvantages, and it allows to discover developments and tendencies on an international and comparative scale. It thus allows making an informed choice while being fully aware of (ideally: all) possible solutions and their pros and cons for the legal issue under examination.

3. Three Examples from the International and Comparative Legal Practice

Multilateral comparison from a supranational perspective is not limited to the activity of a (national or international) legislator. The method can also be helpful, or even necessary, for the decision of a specific dispute. The range of situations that require a multilateral and supranational comparative method is vast: it extends from the armed conflicts of our time to situations raising fundamental private law issues. In the present chapter, three examples from the author's practice as comparative law expert will be presented. They all required a multilateral comparison from an international perspective.²² In the following chapter, it will then be possible to draw conclusions with respect to the teaching of comparative law.

The *first example* is related to the most important damages claim that was ever made: in breach of international law, a State invaded another and caused huge damage there. An international force intervened and compelled the first State to withdraw from the occupied territories. Once the war was over, the State that had been invaded as well as neighbouring States asked the occupying State for compensation for the damage suffered during the war.

This case concerned the invasion of Kuwait by Iraq and the subsequent Gulf war in 1990-1991. The case was brought before the United Nations Security Council, which instituted a subsidiary organ, the *United Nations Compensation Commission*, established in 1991 at the European headquarters of the United

19 See the first and second examples, below s 3.

20 See the example of the Australian case raising the issue of the 'loss of a chance', below s. 3 (third example).

21 The parties to a litigation can also benefit from this method, on this subject, see ROMANO *supra* n. 11.

22 The cases are reproduced with the consent of the parties concerned.

Nations in Geneva.²³ According to the regulation set-up for this procedure, the occupying State was held to compensate the neighbouring States and their nationals, in particular regarding health impairments. However, the regulation did not specify in detail the conditions under which the neighbouring States could claim compensation for the injuries and damage done at distance and suffered by their nationals (e.g., damage related to post-traumatic stress disorder, PTSD).

To resolve this issue, it was necessary to undertake a multilateral comparison from a supranational perspective. The aim was to research whether there existed common legal principles as to compensation of damage suffered at distance in the different tort law systems in the world. Such common principles could thereafter serve as sources of inspiration to guide the United Nations Compensation Commission when applying the regulation governing its decision.

The *second example* is also related to public international law: a State occupies neighbouring land. In breach of international law, colonies are built in the occupied territories and infrastructure is created. After several decades, the occupying State withdraws from these territories. The question then is what the rights and obligations of the occupying State are with respect to the colonies and the infrastructure created there.

The issue presented itself when Israel withdrew from the Gaza strip. It had to be resolved in application of the Hague Convention (IV) respecting the Laws and Customs of War on Land of 1907 and its annex²⁴ and the 1949 Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War.²⁵ According to Article 55 of the 1907 Hague Convention, the occupying State shall be regarded as *usufructuary* of the occupied territories.²⁶ There was no international case law specifying the notion of usufructuary and the usufructuary's rights and obligations. However, the national laws that had served as models for Article 55 of the 1907 Hague Convention have detailed provisions on usufructuary and a rich body of case law interpreting the rights and obligations of the usufructuary.

There again a multilateral comparison of as many jurisdictions as possible, which recognize the notion of usufructus, offered an interesting perspective to the research of an appropriate solution. In this second example regarding interpretation of international law, it was ruled out from the start to take only one single jurisdiction as a point of reference for comparison. When interpreting

23 *www.uncc.ch* (last accessed: 07 Sep. 2015).

24 In particular Arts 42-56 of the Hague Convention.

25 In particular s. III of the Geneva Convention.

26 Article 55 states: 'The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct'.

international law, the comparative perspective is necessarily multilateral and supranational.

The *third example* raises a fundamental issue of contract and/or tort law. A six-year-old girl is admitted to hospital. Through negligence, the doctors delay the necessary exams. When the exams are finally carried out, a brain tumour is diagnosed. The girl is operated but suffers severe permanent brain damage. She claims damages from the doctors. The question is whether the doctors' negligence was the cause of her irreversible brain damage.

According to the applicable law, the girl had to establish that it was *more probable than not* that the damage could have been avoided but for the doctors' negligence. The girl couldn't fulfil this requirement so that, according to the traditional rules, the claim could not succeed. The doctors' fault nevertheless had prevented her from having a *chance* to avoid the damage.

This case was brought before the Australian courts. It raised, for the first time in Australian law, the issue of whether it is possible to claim damages for the 'loss of a chance'.²⁷ This question had already been discussed, and decided, in a number of foreign jurisdictions. During the procedure before the *High Court of Australia*, the judges invited the lawyers to present the solutions to the problem found in other jurisdictions, in particular in the United States, the United Kingdom, Canada, and jurisdictions on the European continent.

In this third example, comparison was used with a *traditional purpose*, which is to find inspiration to deal with and solve an issue raised in a national legal framework. However, to realize the research required by the Court, the lawyers and comparative law experts had to analyse and compare not only one, two, or three but a large number of laws on a worldwide scale. To manage such a multitude of information and solutions with the greatest possible objectivity, it was necessary to master a multilateral method and adopt, when comparing, a supranational vision of comparative law.²⁸

Such extensive multilateral comparison is not restricted to the court practice in Australia. In the case law of the UK *House of Lords* (or, since 2009, the *Supreme Court*), approximately one quarter to one third of rulings since 1995

27 High Court of Australia 21 Apr. 2010, *Tabet v. Gett*, [2010] HCA 12 = www.austlii.edu.au/au/cases/cth/HCA/2010/12.html (last accessed: 07 Sep. 2015).

28 For comparative information on this subject, see, with many further references, the author of these lines, 'Loss of a Chance in European Private Law - "All or Nothing" or Partial Liability in Cases of Uncertain Causation', *ERPL (European Review of Private Law)* 2008, pp 1009-1042; *id.*, 'Alles oder nichts' oder anteilige Haftung bei Verursachungszweifeln - Zur Haftung für 'perte d'une chance' und eine Alternative. Urteile des schweizerischen Bundesgerichts vom 13.6.2007, des belgischen Hof van Cassatie vom 5.6.2008, des Supreme Judicial Court of Massachusetts vom 28.7.2008 und des High Court of Australia vom 21.4.2010 mit Anmerkung und einem Lösungsvorschlag', *ZEuP (Zeitschrift für Europäisches Privatrecht)* 2011, pp 171-200; G. MÄSCH, *Chance und Schaden* (Tübingen 2004); CH. MÜLLER, *La perte d'une chance* (Bern 2002).

resort to the comparative method.²⁹ As in the *High Court of Australia* ruling, English case law rarely confines its comparison to only one foreign jurisdiction; quite the contrary, courts look for inspiration in as large a number of foreign jurisdictions as possible. Since about 1995, the *House of Lords* compares not only with jurisdictions belonging to the Common Law tradition but frequently also with continental laws.

This research is made in particular in order to discover and demonstrate the diversity of solutions from which the courts may choose; another purpose is to know if there exist common principles on the international level, which could afterwards serve as source of inspiration for the solution of the issue in the domestic law. If a solution found abroad is adopted or domestic case law overruled, reference to foreign law provides further legal support for the judgment by the court. If, on the other hand, a solution applied abroad is eventually rejected, this is done in full awareness of all options and their respective pros and cons, that is, on a higher level of knowledge.³⁰

Numerous other situations require a multilateral comparison from a supranational perspective: in the European Union, during the preparation of every substantive legislation project, the European Commission asks for comparative work taking into account the laws of all twenty-eight EU Member States. For the Court of Justice of the European Union and the European Court of Human Rights, multilateral comparison is daily work.

One could also mention the work of the International Institute for the Unification of Private Law (UNIDROIT), the work of the diverse groups researching European or even worldwide common principles of law or a number of national legislation projects which were preceded by vast multilateral comparative research. Finally, on a smaller scale: any choice of law in an international context could lead to the need for a multilateral and supranational comparison to identify the most appropriate system for the issue at hand.

4. Case-Oriented Comparative Law Teaching: A Proposal

These practical requirements on the national as well as international levels should have repercussions on the teaching and studying of comparative law. The question is how to prepare today's students, who are tomorrow's lawyers, judges, and jurists, to face the challenges posed by these situations and by the

29 See M. NOUNCKELE, 'Aux frontières de la comparaison', *RDIC (Revue de droit international et de droit comparé)* 2012, pp 393-420.

30 For the purposes and the benefits of judicial comparison, see the author of these lines, 'Is It Legitimate and Beneficial for Judges to Compare?' *ERPL* 2013, pp 687-716; extended version in: D. FAIRGRIEVE & M. ANDENAS (eds), *Courts and Comparative Law* (Oxford: Oxford University Press 2015), pp 25-53.

internationalization of law and the legal practitioner's work. How can they be prepared to use a multilateral approach to comparative law?

Such an approach to comparative law requires that future comparatists have specific methodological abilities and experiences (s. 4.1), that they have some basic knowledge of the different legal cultures and their historical development and particularities (s. 4.2), and - ideally - that they have good language skills (s. 4.3).

4.1. *Methodological Abilities*

The multilateral method requires the ability to research, to work with, and to benefit from information and materials from many jurisdictions at the same time. One does not learn such a method with a purely theoretical approach, or, as Denis Tallon has stated: '*il est difficile d'enseigner une méthode dans l'abstrait*'.³¹ On the contrary, it is probably only by way of *learning by doing* that these abilities can be acquired, that is, through the students' active work with foreign legal materials on *practical case scenarios*.

To teach the multilateral and supranational comparative method, contract law and tort law are particularly appropriate, given the number of materials that these fields offer for comparison, namely:

31 Translation: 'It is difficult to teach a method in the abstract'. In: 'Quel droit comparé pour le XXIème siècle?', *RDU (Revue de Droit Uniforme)* 1998, p 703; see also A. FLESSNER, Die Bedeutung der Rechtsvergleichung im Kollisionsrecht: 'Die *Rechtsvergleichung* muss zunehmend der internationalen Rechtsberatung und Rechtsgestaltung dienen; sie muss deshalb auch die rechtsberatenden Praktiker erreichen. [...] Insgesamt muss der akademische Unterricht vom Erzählen und Staunen über die juristischen Weltwunder mehr auf das Üben, die [...] Eigenarbeit mit ausländischen Quellen und Texten umgestellt werden', in *Rechtsvergleichung als juristische Auslegungsmethode*, eds A. Gamber & B. Verschragen (Wien 2013), p (1) 20; see already V. CONSTANTINESCO, *Rechtsvergleichung*, Bd. 2, p 29: 'Nur wer selbst eine sich auf fremdes Recht erstreckende Untersuchung durchgeführt hat, wer sich selbst darum bemüht hat, die Geheimnisse fremder Rechte und ihrer Rechtsterminologie zu enträtseln, kann etwas Gütiges über die rechtsvergleichende Methode aussagen. Alle, die Rechtsvergleichung ohne Fremdsprachenkenntnisse und ohne die Kenntnis des fremden Rechts, d.h. ohne eigene rechtsvergleichende Studien betreiben und die sich nur auf rechtsvergleichende Monographien stützen, die andere Autoren in ihrer eigenen Sprache geschrieben haben, improvisieren lediglich über eine Sache, die sie nicht kennen. [...] Einzig und allein die persönliche Erfahrung in der Anwendung der rechtsvergleichenden Methode kann die wirklichen methodologischen Probleme aufdecken. Vorstellungskraft und Spekulation sind hier keine Hilfe. Die methodologischen Erkenntnisse, die durch persönliche Erfahrung erworben werden, sind eine Sache; die Vergleichung durch eine Zwischenperson ist eine andere'. See also MICHAELS, *RabelsZ* 2002, p (97) 111: 'Über Nutzen und Berechtigung all dieser [theoretischen] Ansätze mag man geteilter Meinung sein. Vor allem fehlt bei allem theoretischen Niveau dieser neuen Ansätze häufig die Rückbindung an praktische Rechtsvergleichung. Kritiker herkömmlicher und Proponenten neuer Methoden verzichten viel zu häufig darauf zu zeigen, wie ihre Methoden praktisch angewandt werden können und zu welchen - vielleicht neuen - Ergebnissen sie führen'.

- national laws;
- international or interregional law (with respect to sales: the United Nations Convention on Contracts for the International Sale of Goods (CISG) and possibly soon: the Common European Sales Law (CESL));
- international non-State rules and principles (in particular the ‘Principles of European Contract Law’, the ‘UNIDROIT Principles of International Commercial Contracts’, and the ‘Principles of European Tort Law’); and
- the ‘Draft Common Frame of Reference’ (DCFR).

The materials used in the basic courses on comparative law and on (multilateral) comparative methodology may thus be drawn from contract or tort law, but they may very well be drawn also from any other field of law, including administrative or criminal law. In a case-oriented comparative law course, each exercise could start with a case scenario taken from, for example, European case law and raising a topical, fundamental issue of comparative law in the respective field. For example, the exercises in contract law³² could relate to the issues:

- whether the exposure of a good or an advertisement constitutes an offer or only an invitation to treat (*invitatio ad offerendum*);
- whether the contract is formed or can be modified by simple will of the parties or if other requirements exist (such as a ‘cause’ or ‘consideration’);
- or whether there is an obligation to maintain an offer or if the offerer is free to revoke his offer.

Other exercises could cover:

- the question whether and under which conditions the creditor can demand performance of the contract or whether breach of the contract results in the payment of damages only (in other words: if and under which condition is there a right to require ‘specific performance’);

32 See the approach used in the book of the author of these lines: *Comparative Contract Law – Cases, Materials and Exercises* (Basingstoke/New York 2009); reviewed by Ole LANDO, *ERPL* 2013, pp 1133–1138. Also available in French, German, and Hungarian: *Le contrat en droit privé européen – Exercices de comparaison* (2^e édn, Basel/Bruxelles/Paris 2010); *Europäisches Vertragsrecht – Übungen zur Rechtsvergleichung und Harmonisierung des Rechts* (Basel/Genève/München 2008); *Összehasonlító szerződési jog* (with JANOS BOKA) (Budapest 2010). - And, alternatively: *Comparative Tort Law – Cases, Materials and Exercises* (forthcoming).

- the question whether the seller's fault should play any role, and if so which one, in the case of delivery of non-conforming goods that cause damage to the buyer's property or that cause him pure economic loss;
- the question whether and under which conditions there may be a right to a revision of the contract in case of a change of circumstances;
- the question under which conditions the ownership of a sold good is transferred and under which conditions there may be a good faith acquisition of movables.³³

With regard to all these issues, the laws differ considerably from one jurisdiction to the other.

In a case-oriented approach to comparative law, the *starting point* for the analysis is a *case scenario* that raises a legal question for research and then guides the students through their work with the legal materials. The students are thus placed in a situation that is as close to practical comparative work as possible.

The first question in each exercise may invite the students to *look for the legal materials* that would be applied to the case scenario in the different national and international legal systems and in the soft law principles and then *resolve the case under the diverse sources*.

In the manuals used for this approach to comparative law teaching in Geneva,³⁴ students find for each case information on the current state of law in about ten jurisdictions, on uniform law in the matter (where such uniform law exists), and on the relevant non-State (or soft-law) rules. The material provided is composed of legal provisions as well as extracts from rulings and academic writings, which allow resolving the case for the different systems of law.³⁵ The material gives no priority or preference to any particular jurisdiction.³⁶ On the contrary, the diversity of legal provisions and case law as well as the layout of the materials invite the student to take distance from the law of his or her own country and to adopt a supranational view instead.

The second question in each exercise invites the students to *regroup* the solutions they have found in the materials and that fundamentally differ from each other and to *systematize them accordingly*. Hereby the complexity of the task to

33 Other exercises give an overview on the choice of law for transborder contracts or raise the question of the future of European contract law.

34 *Supra* n. 32.

35 It goes without saying that it is the responsibility of the authors of the relevant literature to ensure that all information that is necessary in the respective jurisdictions to address the issue under examination is provided.

36 One of the consequences of this approach is that the manuals used for teaching can easily be used in many different countries.

work with ten or even fifteen systems of law is reduced, or focused, in each exercise on three or four solutions that fundamentally differ from each other.³⁷

The students are thereafter invited to *compare these solutions* and to identify possible common principles for the issue under examination. In cases where the national solutions diverge, the students are invited to *weigh up their respective advantages and disadvantages* and to finally *suggest a solution* that seems most appropriate to them.

The material provided (extracts from civil codes and statutes, extracts of court decisions, extracts of academic literature from different countries, and provisions of soft law principles) may set out the law as it applies in England and Wales, France, Germany, Italy, the United States, and – depending on the topic addressed – a selection of other countries, such as the Netherlands, Belgium, Switzerland, Austria, Spain, Greece, Poland, Lithuania, Estonia, Serbia, Russia, China, and the Canadian province of Quebec.

When resolving the cases, students familiarize themselves, for example, with rulings of the English High Court and the House of Lords (since 2009: Supreme Court), the French Court of Cassation, the Belgian Court of Cassation, the German Federal Supreme Court of Justice, the Swiss Federal Supreme Court, and with US-American or Canadian case law. Students work with legislation of these countries or, for instance, Italian, Spanish, Canadian or Chinese legal provisions, with the CISG, and finally with the soft-law provisions such as the ‘Principles of European Contract Law’, the ‘UNIDROIT Principles’, the ‘Principles of European Tort Law’, the ‘DCFR’, and the US-American Restatements.

Regarding the fundamental contract law topics mentioned above, students who have received their legal education in the UK, the USA, or Germany learn, when applying a multilateral comparative method, for example, that – contrary to the rules in force, or the case law applied, in their respective countries – it is indeed possible to regard the exposure of goods in shops or even advertisements as binding offers, and that some (arguably good) arguments may speak in favour of this solution. Students having studied in Belgium, Switzerland, or Germany are invited to ask themselves whether the obligation of the seller of goods to pay damages shall really depend on the seller’s fault in case that the goods are not conform to the contract; they learn that, contrary to the legal provisions and case law applied in their respective countries, the seller’s liability is strict in France, England, the USA and China, and that arguably very good reasons speak in favour of this solution. Students having studied in Germany, Greece, or South Africa learn that, with respect to the transfer of property of movables, the abstraction principle, deeply rooted in these jurisdictions, is a rare exception from a

37 Experience shows that, for a single question of law, rarely more than three or four fundamentally different solutions are applied.

comparative perspective, and that a different approach, found in other jurisdictions, may be less complicated and may possibly lead to more convincing outcomes; etc., etc.

4.2. *Acquiring a Basic Knowledge of the Fundamental Characteristics of Different Legal Cultures: Combining Micro- and Macro-comparison*³⁸

When working with the case scenarios, students are introduced to identifying, applying, and then comparing the approaches and solutions provided by different jurisdictions to one same specific case and legal problem. They are also invited to analyse and compare the rules, principles, and reasoning on which these solutions rely (*micro-comparison*).

Each time that two or three cases have been addressed and worked with, an *ex-cathedra* lecture might be offered where the students receive basic information on the different legal cultures. This helps them in understanding the materials provided and grasping the reasons for the diversity of the laws, statutes, and case law they are working with. In those parts of the course, information and explanations can be provided on the different legal cultures and traditions, on their historical origins and particularities, as well as on different styles in legislation and case law (*macro-comparison*). In those more theoretical parts of the course, students will benefit from the experience they have already gained when actively working with the case scenarios and with foreign law.³⁹

4.3. *Challenges Due to the Diversity of Languages*

The multilateral method *ideally* requires good knowledge of foreign languages. The command of English, French, and German allows, for example, accessing the materials of nine European jurisdictions as well as the law of the United States, many other Common Law jurisdictions, and the laws of many members of the ancient French legal family. Adding Spanish gives access to one more European and numerous South and Central American jurisdictions.

38 *Macro-comparison* is about general issues of comparative law such as classification of the different jurisdictions, their historical developments and particularities, the organization of their respective judicial process, different legislative technique and styles of codification, etc., see for instance, ZWEIFERT & KÖTZ, *Comparative Law*, *supra* n. 9, p 4. *Micro-comparison*, on the contrary, deals with rules and principles of law allowing to solve specific issues and problems, and the comparison of the solution of these problems under different laws, see, for example, ZWEIFERT & KÖTZ, *supra* n. 9, p 5.

39 It is in these parts of the course, given *ex cathedra*, that micro- and macro-comparison will merge. See also E. ÖRÜCÜ, 'Developing Comparative Law', in *Comparative Law - A Handbook*, eds Örücü & Nelken (Oxford 2007), p 57: 'Ideally macro-comparison and micro-comparison should merge, since the micro-comparative topic must be placed within the entire legal system'. For more information, it will be recommended to students that they read or consult an introduction to comparative law (*supra* n. 9).

In the manual used in Geneva, information on the laws of Common Law jurisdictions is provided in the original version only, whereas materials from other countries (codal or statutory provisions, court rulings, extracts of academic writings) are accompanied by a translation. To better grasp and understand the particularities of the different legal systems, students are invited to read the materials, whenever possible, in the original language version. Doing comparative law thus offers them, at the same time, the opportunity to improve their knowledge of foreign legal language.⁴⁰

5. Benefits of the Presented Approach⁴¹

The proposed method of teaching, studying, and learning comparative law offers several benefits and advantages:⁴²

- Students study comparative law with a learning-by-doing approach and actively train using the comparative methodology. They hereby overcome their discomfort to approach foreign materials and to work with materials from jurisdiction unknown to them until then.
- When solving case scenarios under different laws, students learn to take a step back from the jurisdiction in which they are rooted and they learn to favour a critical view, putting the solution in force in their country into perspective. They make the experience that the rule provided in their own jurisdiction for a specific legal issue is not the only reasonable rule to follow, but just one of several ways to address and solve the specific legal problem.⁴³
- Students get familiar with many different jurisdictions and with different styles of legal reasoning. This enables them to better understand their foreign colleagues, to better exchange with

40 See also A. BULLIER, *RDIC* 2008, p (163) 166: ‘Le droit comparé ne peut, en aucun cas, faire l’impasse sur le problème de la langue qui véhicule concepts, traditions, réflexes et façons de dire et de comprendre les choses. Le cours de droit comparé sait-il initier les étudiants à la traduction juridique?’.

41 For more information on the suggested method, see the author of these lines (*supra*, n. 32), p 7-32.

42 Experience shows that this approach works not only in seminars with a small number of participants, but also in larger classes. In Geneva, between 60 and 160 students take the comparative law course, which is taught with this method; at the KU Leuven some 120 follow the course.

43 Students hereby obtain a ‘vaccination [...] against the error that the dogmatic figures of their own law are identical with “natural law”’, H. KÖTZ, *JZ* 2001, p (257) 262 (translated from German: ‘Die Studierenden erhalten so eine Schutzimpfung [...], die [sie] gegen den Irrtum feilt, es seien die dogmatischen Figuren ihrer Rechtsordnung mit dem Naturrecht identisch’).

colleagues trained in a number of other jurisdictions,⁴⁴ and to have a discussion on legal issues in an international context (e.g., European or even worldwide). In fact, the proposed methodology teaches a comparative legal science which is detached from the contingencies related to one or the other local law.

- By the end of the course, students should have acquired the ability and skill to work with materials from many jurisdictions at the same time and to look for, and bring to light, ideally, a range of possible solutions to any issue under examination or, as the case may be, to possibly discover common principles of law regarding this issue that exist throughout Europe or other parts of the world.
- During the work with the case scenarios and the discussions about the pros and cons of the approaches and solutions found in the materials, they will learn to benefit from the experience made in other jurisdictions. And they will learn to make an informed choice amongst several available options, when required to solve a specific legal issue.
- The proposed method thus emphasizes the practical benefits that may be associated with the use of the comparative method. It shows that the use of this method can generate immediate and tangible results and that comparative law can be truly efficient.
- Last but not least, the students will be prepared and will dispose of the necessary methodological tools to handle scenarios such as the two public international law cases or the civil liability case described above⁴⁵ as well as many other transnational scenarios.

Mastering a multilateral and supranational comparative method should thus facilitate the students' future work in a multi-jurisdictional world, peopled with very diverse legal thinkers - be it in their work as lawyers, judges, or jurists in a national framework or institution or in an international organization and context. James Gordley, comparatist at Tulane University in New Orleans, has written: 'A student confronted with only one solution to a legal problem has a tendency to assume it is the right one. When he is confronted with two, he is encouraged to think'.⁴⁶ One could add: When he has acquired the capacity to compare the solutions of three, four, or even more jurisdictions and to give these jurisdictions equal weight in his analysis, he is enabled to *think internationally*.

44 'Comparative law gives [them] a tool of communication', ÖRÜCÜ, *supra* n. 39, pp 43 and 45.

45 *Supra*, s 3.

46 J. GORDLEY, 'Comparative Law and Legal Education', 75. *Tul. L. Rev.* (2000-2001) p (1003) 1008.