

Hybridization: A study in Comparative Constitutional Law

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Overview

Viewing constitutional law from a global perspective informs us about trends and concurrences that might otherwise go unnoticed. The main focus for this paper is how a new European legal tradition is being forged from two of the most influential Western traditions, the common and civil law. The term hybridization is used to refer to this phenomenon whereby there is convergence between different legal systems. In the first instance this hybridization was driven by private law. This has now given way to a European Administrative Law with important constitutional consequences, particularly for the role of courts and institutions. The hybridisation process in the European Union provides an important example for comparative law. It holds lessons for the study of constitutional law and its analysis in a broader global environment

Historical Beginnings: Convergence and Divergence in Comparative Law

It has already happened in European legal history that diffusion and convergence has led to the hybridisation of ideas that later formed basic legal doctrines. Assimilation and merger were significant influences in the transformation of the law of contract. James Gordley's, *The Philosophical Foundations of Modern Contract Doctrine*¹ shows how underlying the common law and civil law systems are many similarities in terms of legal concepts and doctrinal structures.

Contract law is a good example because it transposes national boundaries and is primarily driven by economic forces that in turn may influence legal rules. David Ibbetson² traces the emergence of the law of restitution by noting how trade in the modern world was largely through the contract of sale. In the early medieval European world while sales were important, the transfer of reciprocal gifts by both parties was more significant. The mark of a relatively undeveloped economic system, gifts became a simple trading device that spread throughout the trading world and eventually found source in the early written laws in Norway and Sweden. Finding legal form took time. The use of oaths became common place and various forms of pledges or tangible objects allowing the debtor and creditor to rely on promises took root. Sharing common obligations or experiences was also frequently used in creating a bond or reliability. Writing down such agreements took time but may be traced back to the middle of

¹ James Gordley, *The Philosophical Foundations of Modern Contract Doctrine* Oxford: Oxford University Press, 1991

² David Ibbetson, *An Historical Introduction to the Law of Obligations* Oxford: Oxford University Press, 2001

the second century AD. The law distinguished between obligations that arose of some wrongdoing (delict) as distinct from contract (as it then became). Justinian's *Institutes* catalogued various wrongs and also various contractual obligations. As the English common law took shape it fell under many influences – specifically borrowing from Roman law and at time assimilating ideas and writings – filling in gaps and fitting changes in the rules to modern circumstances. Adaptation and change; removing anomalies and inconsistencies; responding to new ideas and recognising changing economic circumstance were all at work. One remarkable part of changing circumstances was the codification movement in evidence from the 18th and 19th centuries in England. This ambition is still to be realised in the present century but it is evidence of the influence of continental and codified systems³ on the common law.

In the last century the Uniform Commercial Code composed of restatements, model codes and co-operation through uniformity of practice took shape in the United States “to provide an orderly statement of the general common law of the United States”. In effect the Commercial Code created harmonisation and simplification that overrides many local exceptions and practices. In Europe, it is through the European Union that many private law ideas embracing unification and harmonisation have taken shape.

There are some countries that have created hybrid legal systems – Japan is one example where early Chinese influences that created a Japanese common law have given way to late 19th century codes drawn from France and Germany. After the Second- World War Japan's constitution drew on many Anglo-American values that are accompanied by Western attitudes to law and legal issues.

The European Union and a common European Legal Culture

The European Union offers an example of how idealism and ideas may be transposed into operating doctrines and principles. Hybridisation is at the heart of this endeavour. Underlying this are certain assumptions including that there is a common set of principles and concepts that are genuinely on offer to all Member States; that ultimate codification or assimilation is desirable and achievable and finally that despite national and cultural differences, a common European legal culture will dominate. This has led to an intense debate between euro-sceptics and pro-euro enthusiasts. In terms of the future direction and debate the pros and cons of Europe under a unified legal system are being challenged and discussed. Yet the evidence suggests that much has already taken place to bring into existence a European private law⁴. There is currently a movement in favour of a European Civil Code or more precisely a Code of Contract law. The Common Frame of Reference currently being developed is an example of the methodology used to bring together different sets of assumptions and create general rules and principles in a single document. The idea is to provide some general restatement of the law containing legal principles, rules and guidance for interpretation and supplementary notes. This is largely juridical in form and is practical rather than theoretical or academic. The unity of the European Union may not be taken for granted and despite differences in perspectives

³ See Oreste Pollicino, “The New Emerging Judicial Dynamics of the Relationship between National and the European Courts after the Enlargement of Europe” *Jean Monnet Working Papers* (2008).

⁴ Jan M. Smits, “Convergence of Private law in Europe: Towards a new *ius commune*?” in Orucu and Nelken ed., *Comparative Law: A Handbook* Oxford: Hart 2007.

considerable progress has been made spanning different sectors from government led initiatives to private sector input and from non-governmental institutions or private individuals. There is a long historical legacy that goes back to the codification movement which has met with varying degrees of success. There are many examples where the EU has addressed issues common to its' Member States. In the development of the financial service industry there is the Lamfalussy Process permitting the EU Parliament and Council to adopt legislation containing core values and guidelines that allow specific regulators to coordinate and enforce common rules and procedures in each of the Member States. Another example is the development of EU administrative law⁵, also with common procedures and principles. There is also a Social Justice Study Group intent on advancing common rules and procedures. The aim in all these projects is to provide an inclusive method of agreeing common principles even though in many Member States there is resistance to replacing too much national legislation with EU law. Taken together this represents a varied and diverse approach in competition and consumer law particularly, which may ultimately form a common law of Europe. As Zweigert and Kötz recognise:

Comparative law must go beyond national systems and provide a comparative basis on which to develop a system of law for all Europe; it can do this by taking particular areas of law such as contract, tort, credit arrangements, company law and family law and showing what rules are generally acceptable throughout Europe and whether they are developing on convergent or divergent lines⁶.

This may result in a European Civil Code, though this will depend on the political and practical considerations of its application. It is inevitable that constitutional questions will arise – for example different forms of accountability; good decision making and how Member States and the EU are best able to make decisions. At the heart of such questions lies the fundamental role of the European Court of Justice and how judges are able to engage within an adequate constitutional framework.

Human Rights as a dominant force

It is unsurprising that human rights have become a dominant influence in shaping hybridization⁷. There is a universal sense that the theory and practice of human rights is an important basis for development. The Universal Declaration of Human Rights and various related international conventions are fundamental. Human rights and principles of democracy have provided enormous influence in post-independence constitutional developments in many countries. In the United Kingdom, the Human Rights Act 1998 has become a pivotal part of the common law. In the European Union, the European Court of Justice (ECJ) in Luxembourg has had to consider how within the EU human rights are best considered. Most Member States follow the European Convention on Human Rights and the European Court of Human Rights at

⁵ Paul Craig, *EU Administrative Law* Academy of European Law: 2006.

⁶ K.Z. Zweigert and H. Kötz, *An Introduction to Comparative Law* Oxford: Oxford University Press, 1998 3rd edition p.29-30.

⁷ A.W. Brian Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* Oxford: Oxford University Press, 2001

Strasbourg. There is a potential for the two courts to integrate and come to a common understanding on rights.

Initially the EC institutions did not address human rights directly. Gradually, however, the ECJ began to develop its own strategy despite initial resistance to using human rights to interpret Treaty provisions⁸. This has gradually given way to a more liberal recognition of rights that are common to the various Member States⁹. Rights are considered consistent with the overall objectives raised by the European Community. In this approach there is a degree of deference to national courts. In *Bosphorus v Ireland*¹⁰ the ECJ accepted that adequate protection had been afforded through the Irish Supreme Court and it was unnecessary to go beyond the protections within the Member State provided that they were adequate. What has been less clear is the extent to which Treaty making arrangements within the EU will advance human rights. The Maastricht Treaty failed to settle this matter. The Treaty of European Union provided that human rights (Article 6(2) EU) were a fundamental principle of EU law and that within the fields of Justice and home affairs there should be a human rights dimension. Nevertheless within the interpretation of Community law, the ECJ developed principles have a human rights resonance. Proportionality, equality and fairness were interpreted as part of the nature of the Communities. The Treaty of Nice moved the agenda to the next stage by providing a Charter of Fundamental Rights of the European Union, drafted in June 1999. The result was a common commitment as a Declaration of 15 personal representatives of the Heads of State or Government of the Member States and 16 members of the European Parliament and 30 members of national parliaments. The Charter containing 53 articles makes fundamental rights and freedom central to the EU citizen. In March 2007 the EU Agency for Fundamental Rights was established as an Agency of the EU. This is to provide advice and assistance to EU institutions and to support human rights.

Taken together these steps represent important and significant stages in the development of EU law catalysed by the recognition of human rights. The hybridization process is continuous and likely to provide greater integration of legal rights into the different legal cultures in Europe

Conclusions

Sharing analytical ideas that may be used in a global setting is a dominant influence in approaching legal problems. Particularly suited to this approach are issues associated with climate change, the application of sustainable development and more recently issues connected with financial regulation. War and economic emergencies are also part of an on-going debate on accountability and measures to prevent or deter corruption. Systems of regulation and criteria of effectiveness need to be considered for achievable objectives within the constitutional framework. Comparative law faces many challenges when confronted by such issues. It must be rooted in an understanding of different legal techniques and analysis; it must be capable of comparing and analysing different procedures and legal cultures and it must be capable of providing a critical analysis of what works best and why. Evaluating constitutional

⁸ See Case 4/73 Nold [1974] ECR 491

⁹ Case C-94/00 *Roquette Frères* [2002] ECR I-9011 also see *Chappel v UK* (1990) 12 EHRR 1 and *Casey v UK* (1991) 13 EHRR 189 also Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125.

¹⁰ *Bosphorus v Ireland* (2006) 42 EHRR 1

strengths and weaknesses requires an understanding of what accountability means. Distinctions between legal, economic and political forms of accountability need to be distilled in a way that reflects the changing dynamics of legal understanding of the comparative law of human rights. Hybridization – a process of operating convergent and even divergent ideas is commonly at work. The European Union affords a glimpse of how different processes combine to bring hybridization to reality. While policy is central to the work of the European Commission, implementation is devolved to many agencies, institutions, networks and contracting parties within Member States. There is no single overriding method; different layers of administration and structures have to be adapted in the process. There are, however, common themes that emerge. In many instances the main operating influences have come from the judiciary. In the United Kingdom the values of the rule of law are often called in aid of an analytical approach to rights. It is striking how within the European Union civil and common law methodologies are increasingly intertwined. In the United Kingdom the traditional oral approach to presenting cases has been carefully incorporated into a case management system for civil and criminal courts that pays increasing attention to affidavits and written skeleton arguments. Conversely in many civil law countries, particularly France there is an increasing recognition of the values of oral argument and presentational issues and as enlargement of the European Union takes place Eastern and Western European legal systems come together. There is a “judicial dialogue “ at work between the differing judicial values of the new entry countries and the common identity found in the European Courts in Luxembourg and Strasbourg. This encompasses the scope of EU law and also the increasing role of human rights.