

The Civil Law's Common Law

Abstract

Continental legicism can no longer convincingly explain the growing importance of precedent. Today's Civil Law systems need to modernise their understanding of what counts as a source of law. They, too, need the notion of common law.

Keywords: common law, civil law, customary law, sources of the law, binding precedents, methodology, comparative law, *culpa in contrahendo*.

I Two German classics in connection with *culpa in contrahendo*

I would not dare to start a lecture with such an old chestnut in front of such a learned audience if I had not recently come across two classics of German legal history in connection with a methodological study. It was about *culpa in contrahendo*. As you know, this remained unregulated by statute in Germany for a whole century.¹ Nevertheless, its 'time of origin' can be dated with astonishing precision, namely to 7 December 1911, the day on which the German Imperial Court of Justice – albeit more *en passant* and in a very unspectacular subordinate clause – spoke of 'a legal relationship preparatory to the purchase' in the context of a department store accident, 'which has a contract-like character'.² The court did not deem it necessary to say any more. Almost seventy years later and after a long series of interim decisions, the German Federal Court of Justice wrote: 'The commencement of contractual negotiations [...] established a legal obligation between the parties, which is now recognised as "customary law" (*Gewohnheitsrecht*)'.³ It would be another forty years before *culpa in contrahendo* in § 311(2)] made it into the German Civil Code. Today, it appears to be a legal

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¹ In contrast to the Prussian Allgemeines Landrecht (ALR I §§ 284 and 285), the German Civil Code was silent on *culpa in contrahendo*. This only changed in 2010.

² RG 7.12.1911, RGZ 78 p. 239, 240 (the so-called *Linoleumrollenfall*).

³ BGH 11.5.1979, NJW 1979 p. 1983.

institution recognised throughout the European Union and can also be found in a large number of other civil codes.⁴

II Customary law (Gewohnheitsrecht)?

a. I did not mention the two decisions because the first refers to a ‘contract-like’ obligation and the second to a ‘statutory’ obligation. I will let this aspect rest. I am concerned with another point, which I must confess I have only just realised: *Culpa in contrahendo*, long before its career in statutory law, is said to have been a piece of ‘customary law’ (*Gewohnheitsrecht*) according to the Federal Court of Justice. The Court was and is not even alone in this. This is also how things are seen in Austria. *Barta*, for example, assumed as early as 2004 that not even the courts that once created *culpa in contrahendo* could remove it now.⁵

b. But is this correct: *customary law (Gewohnheitsrecht)*? The qualification is surprising. This is because we are dealing here with nothing other than the result of a line of case law (albeit a long one), the foundation of which (at least in Austria: § 7 ABGB) can probably be traced back to a legal analogy. In any case, it was the courts, in Germany, even a single court that gave birth to *culpa in contrahendo*. In other words, the corresponding ‘law’ was not something that the Imperial Court of Justice would have already identified in actual legal practice when it began to rule in this direction. And it was obviously not open to proof either. What the court did have were, at best, a few literary sources, which remained uncited in the background. It was therefore not about the perception of a traditional practice to which certain circles of traders had submitted themselves concerning certain objects (eg the trade in horses in a rural region of northern Germany) in the conviction that they were legally bound by this practice – ie, only a handshake seals the purchase. It was about something completely different. For the necessary *opinio juris ac necessitatis* was created (i) by state courts, (ii) with a claim to apply to the whole of Germany and (iii) for all kinds of circumstances, provided that they only occur in the preliminary stages of a contract of some kind. Until the end, ie until the codification of *culpa in contrahendo*, the final point of reference always remained previous decisions. This was not a law that arose spontaneously from a non-state root. And it was never just a matter of local law. The qualification as ‘customary law’ was probably solely due to the fact that German legicentrism does not seem to allow any other ‘sources of law’ than statutes and customary law (Article 2 EGBGB). In Poland, the corresponding idea is even directly part of the constitution, with

⁴ After the Second World War (1950), it was initially Article 12 of the Bulgarian Law on Obligations and Contracts that codified the liability for damages arising from the breach of pre-contractual obligations. This was preceded by Article 1337 of the Italian Civil Code, later followed by Article 227 of the Portuguese Civil Code. Since the French reform of contract law in 2016, *culpa in contrahendo* has also been incorporated into the French Civil Code with Article 1104 and 1112 to 1112-2 CC.

⁵ Heinz Barta, *Zivilrecht: Grundriss und Einführung in das Rechtsdenken* (WUV Universitätsverlag 2004, Vienna) 373.

the peculiarity that Article 87 of the Polish constitution does not even accept customary law as a source of law.⁶ But that only exacerbates the problem. If no statutory source can be found, the rule that is to be applied in its place must be something else. In this respect, Poland has even obstructed the German emergency solution of resorting to the category of 'customary law' (*Gewohnheitsrecht*).

III Common law

a. I would like to ask again: Is at least the binary approach correct? Do we in this part of Europe, if we have it at all, have at best statutory and customary law – and nothing else? That would be strange. Quite a few European civil codes also include the 'natural' or 'general principles of law', or at least the 'general principles of the state legal system',⁷ among the sources of law, and thus offer a third point of reference that is worth considering, even if it is rarely used. But we do not have it in Germany, at least not in the BGB. Should this really mean that we therefore have no other positivisation process for law and that everything that happens must therefore be stored in either the 'statute' or 'customary law' drawer? That does not convince me. Rather, it seems to me that in parts of our legal system, we have now returned to where we were in pre-codification times, namely the concept of common law or *jus commune*. We have tried to cover it up with thick layers of grey laws. But fresh greenery has long been growing through them. Common law has always remained 'there', so to speak, and the older a codification became, the more vigorously the former worked its way back through it.

b. I understand common law to be that part of the state legal system which is formed within its network of rules of law and therefore with effect for all subjects of private law from tradition, reason, intellectual permeation, commitment to values and precedents. These are indispensable components of all legal systems, regardless of the reason, the number and the claim to omnipresence with which a state legislates. In England and all its daughter and sister legal systems, the existence of such common law is a matter of course. Incidentally, it also governs questions of method. Not only are the rules on dealing with and being bound by precedents a piece of English *common law*, but also the rules on the interpretation of statutes.⁸ *Statutory law* includes only the numerous legal definitions, regardless of whether

⁶ Marek Henryk Safjan, *Prawo cywilne- część ogólna, System Prawa Prywatnego I* (2nd edn, C.H. Beck, Instytut Nauk Prawnych PAN 2012, Warsaw) 226 no. 60.

⁷ Thus eg § 7 Austrian Civil Code, Art. 12(2) Italian *preleggi*, Art. 10(3) Portuguese Civil Code and Art. 1(1) Spanish Civil Code.

⁸ Concerning this, impressively, Lord Burrows, *Statutory Interpretation in the Courts Today* (Sir Christopher Staughton Memorial Lecture 2022) (to my knowledge, only published on the website of the Supreme Court: <https://www.supremecourt.uk/docs/sir-christopher-staughton-memorial-lecture-2022.pdf>). See in the German language also Stefan Vogenauer, *Die Auslegung von Gesetzen in England und auf dem Kontinent* (unrevised e-book edition 2021, Tübingen).

they are found in the catalogue of terms preceding a statute or in the general (and very unwieldy to read) Interpretation Act of 1978.

c. I would like to invite you to accompany me a little further in my search for the ‘common law of civil law’. Of course, this is a language game. But the question remains: How should we qualify those countless judicial legal developments that are constantly taking place in the systems of civil law? Further development of the law is our daily bread. It takes place not only through legislation, ie through ‘statute-making’, but also through the art of judging, the object of which is the determination of the law. Courts concretise the current legal situation. In the rarer, but therefore more spectacular cases, courts even create new bases for claims and/or defences in this way. Both are manifestations of the further development of the law. At the latest, when one of these two approaches has become established, is no longer questioned by any reasonable person and has become basic knowledge in legal examinations, it has all the characteristics of common law. There are so many examples that it must suffice to recall the French judicial decisions on the liability of the *gardien*, the Spanish decisions on the reversal of the burden of proof for fault (in Hungary, on the other hand, it is defined in statutory law), the Italian decisions on the concept of *danno evento* and the German decisions on liability related to the violation of the so-called ‘general right of personality’.

d. Courts are, of course, bound by the ‘law’, and *only* by the law – and not by political influence. What must happen when politicians enact a law that is contrary to the law in the sense of justice is another question. Such transgressions still occur. The Hungarian concept of unchangeable birth sex, for example, quite deliberately negates the judicial decisions of the European Court of Human Rights and therefore violates the European Convention on Human Rights. The fact that the ‘birth sex’ was also secured under constitutional law does not make things any better. Nevertheless, the threshold at which injustice turns into non-law has probably not yet been crossed here.

e. Binding the judge ‘to the law’ does not, however, mean binding the judge strictly to the *wording* of a law. For that would amount to the abolition of our entire set of instruments of legal methodology. It would be the end of any teleological interpretation, which in turn should be one of the building blocks of the general principle of the rule of law. In addition, no European court may refrain from ruling on the grounds that there is no statute or that its wording is so ambiguous that no result can be achieved with it. Not to decide would be a denial of justice, and a denial of justice is generally even a criminal offence. Courts are therefore not only allowed to develop the law, they *must* actually do so. This is particularly evident when a state entrusts entire parts of its private law to its judges. There is no statutory property law in Denmark and no statutory enrichment law in Sweden. However, the task of developing the law is no less important when a statute that is not sufficiently clearly formulated needs to be interpreted or when it must be decided whether a certain reference rule can be replaced in favour of another to give it priority. This is not only done by analogy. Constitutional and European law-led interpretation also follows this basic pattern. And they also produce common law.

IV Civil law and common law (*gemeines Recht*)

a. However, the notion of 'common law' must be used with caution. For there are not only different statutory laws, but there are also different common laws. Common law, which is characterised by English law, is only one common law among many. It derives its peculiarity primarily from the instruments that stabilise it. However, it is a completely different question whether this also shifts the doctrine of the sources of law. For it is by no means certain that the decisions of the Royal Courts of Justice can be said to create law themselves. Although the details are disputed, there is much to be said in favour of the thesis that only common law is the source of law, whereas the courts, like everywhere else, are limited to 'recognising' it.⁹ From this perspective, common law develops itself to a certain extent;¹⁰ there is no 'active' development (from the outside).

b. 'Common law' is predominantly 'common' because it is the law which is *common to the whole of England*. In this (but only in this) sense, you can therefore also refer to statute law as 'common law'. What is different here from the continent is only the amount of *legal material* that has not been placed on a statutory basis. The number of *statutes* in some areas of private law, on the other hand, is far greater than on the continent. This is due to the often very narrow scope of application of English statutes. In tort law, for example, England is the country with the highest number of statutes in Europe. And the crossovers are even increasing. English land law has long been predominantly laid down in statutes, whereas Danish property law has not. What is 'common' law in Denmark can be 'statutory' law in England. 'Common law' is an iridescent term whose meaning is only revealed through pairs of opposites.

V Stare decisis

a. *Common law* (like *equity*) can therefore also be described as a legal system that not only binds the courts of first and second instance to the decisions of courts of the respective higher instance, but also the chambers of the same instance. The Court of Appeal may only deviate from an earlier decision of the same court in very exceptional cases, and even the Supreme Court very rarely uses its privilege to revise one of its previously expressed legal opinions. It is therefore appropriate to say that 'common law is precedent'. But where do we continental Europeans stand when it comes to being bound by precedents? I will spare you and myself the general comment that no European supreme court could fulfil its task

⁹ If one follows the leading speech of Lord Goff of Chieveley in *Kleinwort Benson Ltd. v Lincoln City Council* [1999] 2 AC 349, then English decisions of the higher courts are also not among the actual sources of law, but among the sources of legal knowledge. However, the doctrine of *binding precedent* then again ensures that the distinction is practically irrelevant in the vast majority of cases.

¹⁰ Thus Jane Stapleton, 'Legal Scholarship and the Changing Common Law' (Gray 136, Hilary 2023) 13–14.

of ensuring the uniform application of the law if the lower courts, for whatever reason, did not naturally base their own decisions on the decisions of ‘their’ supreme court. Much more interesting is the observation that some continental European legal systems have now begun to transform this traditionally purely factual habit into a legal obligation. The result is *common law ‘light’*. And this is now also happening in the opposite direction, a kind of *civil law ‘light’*. A striking example of this is the referral procedure that allows the English High Court to submit a *preliminary question* to the Court of Appeal in an endeavour to reduce the almost unbelievable post-Brexit chaos.¹¹

b. In terms of legal policy, this is tantamount to rolling backwards. The procedure is not only reminiscent of the referral procedure to the ECJ that the former British government hated so much at the time. It is also reminiscent of the much older interpretative decisions of a Supreme Court that Bulgaria¹² and Poland¹³ have been working with for decades. Sweden does not have such procedures, but operates with a special form of restriction on the admissibility of appeals to the Supreme Court. It decides for itself whether the matter belongs to the group of legal issues for which its leading function is required. However, it was only after the turn of the millennium that common law techniques were consciously adopted, and that was in Italy. Here, too, it refers to the question of limiting admissibility, but specifically of being able to reject a cassation as inadmissible (and not merely unfounded) if the Court of Cassation has already ruled on the relevant legal issue and the Court of Appeal has taken this into account. A consolidated judicial decision of the Italian Supreme Court can no longer be challenged with any prospect of success in accordance with Article 360-*bis* Italian Code of Civil Procedure.

c. Hungary, I do not need to tell you, has recently even established the formal binding effect of the decisions of the Kúria.¹⁴ In this country, since the reform, it is therefore not only possible to contest a lower court decision on the ground that it violates the law, but also on the ground that it deviates from the Kúria’s assessment of a point of law. The Kúria’s decisions are thus given parity of treatment to objective law. This goes a significant step further than the Italian system, but still lags behind the English system. However, I have not yet understood all the details. For example, I am not sure what the reform means for judicial training. After all, the number of legal sources has increased enormously. I once heard that

¹¹ Sec. 6A(1)–(8) Retained EU Law (Revocation and Reform) Act 2023.

¹² According to Art. 130(1) Bulgarian Act on Judicial Power, interpretative decisions are binding on the bodies of the judiciary and the executive, the bodies of the municipal authorities and all other authorities that issue administrative acts.

¹³ Under Art. 87 and 88 of the Polish Act on the Supreme Court, the corresponding decisions are formally binding only on the other senates of the Supreme Court, but are in fact consistently followed by all other courts as well, Krzysztof Szczucki, *Ustawa o Sądzie Najwyższym. Komentarz* (2nd edn, Wolters Kluwer Polska 2021, Warsaw) Art. 87 no. 2.

¹⁴ Act CXXVII of 2019 on the Amendment of Certain Acts Related to the Establishment of One-level District Office Procedures; § 406(1) Hungarian Code of Civil Procedure. See further Gárdos (in this issue).

in England an English student must have read and know about 800 decisions (but I cannot verify this). Will something similar perhaps soon apply in Hungary – but here alongside and in addition to the study of codification? Have clear criteria for the distinction between *rationes decidendi* and *obiter dicta* already emerged, without which, I suspect, it will not be possible to concretise the binding effect? Legislation and the application of law take place everywhere within the framework of a highly complex communication process. Therefore, if they are treated as a legal source, it is not only necessary to have access to the text of all decisions of the Kúria. A sophisticated reporting system and highly developed search engines are also required to enable the courts of first instance to access the legal situation in a reasonable time. An alternative would be to partially privatise the determination of the legal situation, as is the case in England. *Da mihi facta, dabo tibi jus* does not apply there. I do not even exclude the possibility that the standards for providing correct reasons for a judgement could shift, for example, in the sense that a court of first instance must state that it has researched the decisions of the Kúria but has not found anything relevant.

VI Methodological law and comparative law

a. Be that as it may. I think I can at least say that continental European private law is preparing to revitalise its common law in a variety of ways. This, in turn, could be the key to better understanding even more recent developments. I would therefore like to conclude by briefly addressing two further points: the foundation of our law governing methodology law, and the concept of a *jus commune europaeum*.

b. The notion of a 'law governing methodology' will raise eyebrows here and there. In Germany, for example, it has long been doubted that the rules of interpretation are legal norms at all.¹⁵ This had to do with the fact that the German Civil Code (as well as the French Civil Code and the Polish Civil Code) does not contain a single reference to questions of its interpretation and the filling of its gaps. It thus represents a sharp contrast to the vast majority of other codifications, such as the Italian, Portuguese and Spanish, but also the Romanian and Czech codifications, which continue the tradition established by the Austrian Civil Code in a modernised form. In terms of content, however, it makes virtually no difference whether methodological issues have been regulated by statute or not. Spain may be somewhat more progressive;¹⁶ overall, however, the European rules of interpretation differ at most in their nuances. This also applies to filling gaps by analogy. Whether its requirements are derived from statute or exclusively from consistent judicial decisions is

¹⁵ In particular Karl Larenz, *Methodenlehre der Rechtswissenschaft* (6th edn, Springer 1991, Munich, Heidelberg) 248.

¹⁶ According to Art. 3(1) span. CC '[r]ules shall be construed according to the proper meaning of their wording and in connection with the context, with their historical and legislative background and with the social reality of the time in which they are to be applied, mainly attending to their spirit and purpose'.

irrelevant to the outcome. ‘General’ (*allgemeines*) and ‘common’ law (*gemeines Recht*) show no differences in this field; so why should only the former belong to the sources of law? Methodological rules apply regardless of whether they can be derived from a Code or not. The phrase that methodological questions are ‘constitutional questions’, which has recently been frequently propagated in Germany to save the honour of statutory law, does not hold water, if only because it does not go beyond a reformulation of the general prohibition of arbitrariness. And the fact that ordinary law may not be interpreted against the constitution simply follows from its hierarchical status.

c. It would perhaps be more promising to investigate why one country has a statute on certain legal issues and another does not. I do not rule out the possibility that one of the reasons for the varying degrees of utilisation of statutes is the different levels of trust the population has in their judiciary, and another is the varying degrees of ability to deal with uncertainty from culture to culture.

d. The concept of common law could, and this brings me to my last point, also serve to prevent the further marginalisation of comparative law within Europe on the grounds that ‘the’ law by which a judge is bound is exclusively his or her national law. I have never liked the term ‘comparative law’ because, in essence, it is completely irrelevant which nationality is assigned to a rule of private law. It is not a question of comparing national laws, but rather of gaining a deeper understanding of the legal matter that is to be analysed. The superimposition of European legal systems produces a wealth of common convictions, which, since legislators have not coordinated, must have a deeper reason than politically organised law-making. Private law largely follows an internal logic. This, in turn, generates not only the law that is common to us, but also our common law. Some national codifications, such as Article 1(1) of the Spanish Civil Code, already include ‘the general principles of law’ among the sources of law alongside statute and customary law. I would like to see something similar for Europe.