

INTRODUCTION

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This book is the first volume of the newly founded “Hanse Law School Series”. It gathers 14 articles of which eleven (partly co-authored) evolved from overall 24 single oral presentations at the Workshop “Hanse Law School in Perspective – Legal Teaching and Cross Border Research under Lisbon” in Oldenburg on 27 May 2010,¹ celebrating 10 years of Hanse Law School.² The conference papers are complemented by three additional contributions of close friends of the Hanse Law School who were prevented to participate in the actual workshop for various reasons. Languages are non-discriminatorily English, French and German.

The workshop aimed at a picture of the status quo of a ten years' time Hanse Law School cooperation,³ and was set up to serve as a springboard for future scientific co-operations in this framework at a historical turning point. Both directors in Bremen and Oldenburg had recently changed. The concept has turned out to be successful. Since then, several mutual funding proposals have been submitted, various co-teaching lessons have been taught. The Hanse Law School has expanded successfully and now includes the University of LeHavre.

The leading idea was to bring together scholars with shared scientific interests in the wide ambit of the Hanse Law School.⁴ Therefore, we included scholars both as oral presenters and as authors with written contributions with who we share mutual interests even if they are not employed by one of the institutional Hanse Law School partners. All are joined by the mutual interest in a comparative reflection about the topic each contribution is dealing with. And yet, the contributions to the five chapters span the wide universe of legal disciplines from

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1 The Conference Proceedings are printed in the annex.

2 The Hanse Law School is a collaborative project of the currently three (soon four) Universities of Bremen, Oldenburg and Groningen [soon Le Havre] to educate lawyers based on a comparative and European method, offering them a Bachelor- and a double Master-degree, and providing the option to directly enter the Dutch legal profession.

3 This volume thus complements the special issue of the Hanse Law Review, Vol. 7 (Dec. 2010), download: www.HanseLawReview.org.

4 Several speakers requested to be discharged from submitting a contribution to the conference proceedings for personal reasons, M. Evanson (Birbeck, University of London), L. Gormley (University of Groningen), A. Haan-Kamminga (University of Groningen), A. Keller (Carl von Ossietzky University Oldenburg), A. Tolleenaar (University of Groningen), J. Falke (University Bremen, Centre of European Law and Politics), K. de Graaf (University of Groningen), F. Herzog & M. Frommann (both University of Bremen).

comparative legal theory over core private law issues towards specific areas of public law along which this volume is organised.⁵

Chapter 1 encompasses three articles reflecting about Comparative Law and legal teaching in general. Franz Werro, University of Fribourg (CH) and Georgetown University (US), develops an “ideal model of comparative legal analysis”. He starts by reflecting on the basic questions of comparative legal teaching (integrated vs. separate; from scratch or as privilege for advanced students; comparative law as foundational education or “add-on”). The core of his contribution is a discussion of the recently re-surfaced debate about functionalism in comparative law, namely the contested question whether legal comparisons are *ex priori* prone to harmonisation. He takes a strong stance against the *presumptio similitudinis* and advocates the scientific analysis of differences (rather than impute similarities: “[...] *la pensee unique* has become a global threat” [*infra* page 20]). Franz Werro rejects positivistic comparisons, and opts for an interdisciplinary approach to comparative studies which renders attention to the contextual information. After identifying these categories for evaluation, it comes to no surprise that he cherishes the Hanse Law School model.

Gert Brüggemeier, University of Bremen, comments on Franz Werro by picking up the idea that an international “add-on” experience abroad *after* the legal studies have been finished does not add substance to a multicultural education of young lawyers. The centre of his contribution is his quest for a re-scientification of legal education by means of comparative analysis.

Aurelia Colombi Ciacchi, University of Bremen, now University of Groningen, departs from the idea that the need for comparative legal studies has dramatically changed: Instead of being a pure academic endeavour, comparative analysis has become required in all European legislative processes, judicial activities and legal practice. Setting the process of Europeanization into the forefront, she identifies six problems which require a novel comparative reflection. I shall here only hint to her first quest: Academic comparatists shall pay more attention to the jurisdictions of smaller countries in order not to aggravate the existing power structures between big and small countries. Instead, the ingenuity and problem solving capacity of jurists from “outside”, their different perspective and overview should be more acknowledged. Eventually she comes up with three suggestions which will facilitate more ambitious comparative research.

Chapter 2 gathers three contributions dealing with Private Law. Two of them concern property law, a field of law which for long was supposed to be “too

⁵ One central discipline is sorely missing in these proceedings: European law. This field of law was prominently represented at the conference by Laurence Gormley (University of Groningen) and Michelle Everson (Birbeck, University of London). Their contributions were conference highlights being at the same time articulate opposed and mutually supportive, presented with engagement and on cordial terms. Both reflected upon the institutional changes brought about by the Lisbon Treaty. Their controversial assessment invigorated a lively conference debate.

different to be compared”. Braam Ackermans article (Maastricht University) sets out to convince us of the contrary. His argument is that European influence already permeates national jurisdictions, consequently resulting in the adjustment of property laws on the national level. His focus is on nine EU-directives resp. regulatory proposals which directly and indirectly effect property relations. He brilliantly unearths how much these stipulations already made foreign property considerations penetrate national property laws. In order to be simply able to recognize the meaning and source of these rules, a comparative base knowledge, also in property, becomes cogent.

The co-authored paper by Alison Clarke, University of Surrey, and Christine Godt, University of Oldenburg, focusses on the *common* challenges of common and civil property law which become unearthed by the pressures of globalisation. Their point of departure is the common ground of Western individual property as opposed to other collective ownership forms. They distinguish them from access rights which both jurisdictions are familiar with (esp. UK-Commons Act of 2006). Its focus, however, is on collective rights to use and control natural resources, and indigenous and minority rights in land which are common in Africa and Asia. A final section on the Chinese Property Act of 2007 rounds the article off by identifying persisting collective and state institutions in a mixed structure of a German-type concept with English “property rights” language.

In the third article of Chapter 2, Christoph Schmid, University of Bremen, gives an overview of the three traditions of notarial systems in Europe. Prompted by a recent ECJ-case about the justification of the nationality requirement for notaries, he thoroughly compares the Dutch and the German system which both belong to the Latin notarial tradition.⁶ Not only for reasons grounded in the European fundamental freedoms, his careful analysis reveals substantial advantages of a system without fixed fees and *numerus clausus* - like the Dutch one.

Chapter 3 brings together three distinguished Constitutional Law articles. The co-authored paper of Gilles Lebreton, University of LeHavre, and Götz Frank, University of Oldenburg, compare [in French] the German and French constitutional protection of fundamental rights which evolved at quite different paces.⁷ Whereas the German system was essentially imposed and modeled on the US-Supreme Court in 1949, in France, the Conseil constitutionnel usurped the judicial review of basic freedoms only in 1971. Although the historic

⁶ At the conference, the lecture of Prof. Dr. Schmid was complemented by Prof. dr. Leon Verstappen (University of Groningen) who enriched the Workshop with a double presentation. First, he portrayed the notarial system in the Netherlands, and voiced his critique of the Dutch and German system. In addition, he presented his research project on the global collection of land laws (accessible under: www.ialtanetwork.org). Prof. Verstappen requested not to put his contribution into writing for personnel (reasons?) reasons.

⁷ This article demarks the historical beginning of the enlargement of Hanse Law School by a fourth, French partner, le Université du Havre. The German-French exchange starts in October 2013.

constitutional texts of 1789 and 1946 did not plan for a judicial review of human rights [honoring the supremacy of democratic laws and governmental decisions], the decision was immediately welcomed by the public opinion. The article revolves around a most recent decision of the Conseil constitutionnel in 2008, which establishes a direct control of legislative acts based on the proposition of a human rights violation – very close to the German “Verfassungsbeschwerde”. However, the comparative analysis of the case law makes the article a most thoughtful reflection of legitimacy concerns with regard to a now quite popular institution in both countries.

The second contribution to this chapter is the article by Gerhard Hoogers,⁸ University of Groningen, which focusses on recent constitutional reforms to the Federal state systems in Germany and the Netherlands. Whereas in Germany, legislative competences were returned vertically from the Federal level to the *Länder*, the Dutch reform centred on the horizontal territorial integration of the Caribbean territories⁹ into a federal state. The *tertium comparationis* is the augmented complexity in state relations. Hoogers’ centre piece is the analysis of the Dutch instrument of the remarkably flexible Reichs-consensual laws, which he commends to the German legislator.

Diane de Bellescize, University of LeHavre, submitted a very fine paper on the influence of the European Court of Human Rights on France press law, considering both the way how the various instance courts have responded to the judicial supervision from Strasbourg, and how the legislative adjusted. Whereas the German ECHR-press cases centre on the protection of privacy of celebrities, the French ECHR-press cases focus on regulatory restrictions to the political press. The article stands out for its political engagement, and its language subtleness. It sensitively traces how a country as state centred (inclined towards state reason) as France gradually changes under the influence of an international court and slowly opens up towards a more discursive public debate sustaining controversial arguments.

Chapter 4 embraces two articles on Administrative Law.¹⁰ Friedhelm Hase, University of Bremen, submits a thought-provoking article arguing that the public financed health care system is neither cost-sustainable nor necessary. He puts his focus on the German type of a public, mainly mandatory, insurance. The system was designed as a social security for those who cannot afford a private insurance – a prerequisite which demands restrictions to the scope of care. Except

⁸ He has been co-teaching Comparative Constitutional Law together with Prof. Dr. Götz Frank for years. For his engagement, he has been attributed the title “Honorary Professor” by the University of Oldenburg in May 2012.

⁹ Aruba, Curaçao, Sint Maarten, and the three islands Bonaire, Sint Eustatius and Saba.

¹⁰ A third paper on Energy law, cross-boarder, interdisciplinary and co-authored on Carbon Capture and Storage by the conference participants A. Haan-Kamminga (University of Groningen, Groningen Centre of Energy Law) and A. Keller (Carl von Ossietzky University Oldenburg) eventually did not materialize for personal reasons.

for the elderly, he considers the system outdated as a full insurance for the gainfully employed.¹¹

Herman Bröring¹², University of Groningen, contributes a fine paper on the relation of EU's soft law and the process of European integration,¹³ focusing on tertiary law with regulatory implications (in contrast to preparatory documents). After positioning tertiary law in the framework of Art. 289 and Art. 290 TFEU, he depicts the various ways how tertiary EU-law may be implemented by member states, and sensitively depicts the different national traditions in interpreting vague tertiary rules. He departs from the settled categorical distinction between interpretation rules and discretion rules. Not only is the difference quite often difficult to catch. Diverging national concepts about the division of power determine the answer how vague terms are interpreted. Whereas in the Netherlands courts tend to qualify terms as "discretionary" which are not to be decided by courts, under the French and German traditions, vague terms tend more often to be qualified as "non-discretionary" ("unbestimmte Rechtsbegriffe", "juridique des faits"), legitimately interpreted by the judicial power. Thus, European soft law might be treated in different ways across Europe. In his subsequent report about Dutch administrative law he includes the example of standardization norms of the Dutch Standardisation Institute, which shows that dogmatic implications require much more legal scrutiny (accessibility, publicitation of norms). The implications for the integration process, he argues, are contingent.

Chapter 5 embraces three articles concerning the special focus of Marine and Coastal Law. Till Markus¹⁴ introduces the EU's Marine Strategy Framework Directive which aims to integrate environmental marine concerns in sector marine policies like fisheries, agriculture, energy production and traffic. The article, focusing on the Common Fisheries Policy, is about the limitations of this initiative. The Court continues to sharply distinguish the EU competence for environmental policy with regard to water with prejudice from other competences (thus re-enforcing the different objectives), the enforcement power

¹¹ Prof. Dr. F. Hase's oral presentation on 27 May 2010 was complemented by a lecture by Dr. A. Tollenaar (University of Groningen) about the consequences of privatization to public health care in the Welfare State.

¹² Prof. Dr. J. Falke (University of Bremen, Centre of European Law and Politics) served as commentator to Prof. H. Bröring's conference presentation, but asked for discharge of publication duty.

¹³ The contribution was submitted immediately after the conference in 2010. Thus, some more recent articles with regard to the topic have been published.

¹⁴ T. Markus' oral presentation was supplemented by K. de Graaf (University of Groningen) who essentially presented his paper K. de Graaf, "Balancing Exploitation and Protection of the Dutch North Sea – The Dutch Struggle with the Need for Wind Energy at Sea and a Legal Framework for the Protection of the Marine Environment", in: H. C. Bugge and C. Voigt (eds) *Sustainable Development in International and National Law. What did the Brundtland Report do to Legal Thinking and Legal Development, and Where can we go from here?* The Avosetta series No. 8, Groningen: Europa Law Publishing 2008, pp. 573-589.

rests with the member states, the institutional set up for multi-level decision making, the comitology procedures, differ thus sustaining inconsistencies. Considering that the directive refrains from clear cut use restrictions, it remains to be seen if it exerts a beneficial effect on member state policies, with again repercussions on sectoral EU policies.

Thomas Heinicke reflects upon the tensions about the gradually accessible mineral resources under the melting Arctic Shelf and raises the question if there is a need for a special Arctic regime. At the centre are conflicting economic and non-economic interests since the arctic functions as a gigantic water pump for the ocean conveyor belt which controls the world's climate, and various indigenous peoples live there. He explores the existing regime under the UN-Convention on the Law of the Seas (UNCLOS), and the submitted claims to its Commission on the Limits of the Continental Shelf. The core of the article is a thorough analysis of the institutional shortcomings which account for why the Commission will not meet the expectations to serve as a moderator and decision-taker. Heinicke advises against a simple revision of the Commission's set-up and advocates an inclusive re-start of negotiations based on modern principles of international law like precaution and sustainability.

The third article of the Chapter by Wabbe de Vries and Ulrich Meyerholt redeems the conference spirit of cross boarder co-authorship and worthily concludes the volume. It complements the earlier contributions by a paper on planning law, focusing on the integration of use and protection conflicts in the Wadden Area. It takes up a historical stance, looking on coastal protection by dykes and dwelling mounds for human constructions (and remnants thereof), thus including cultural-historical alongside of environmental protection. Echoing the concerns of Heinicke for the Arctic, de Vries and Meyerholt identify a lack of a proper legal regime which is geared towards a balance of conflicting interests. Consecutively, they devise a set of procedural and substantive criteria, including a coordinative authority for the Wadden Sea, which should form the centre of a future Wadden Area regime.

Cross Border Research and Transnational Teaching under the Treaty of Lisbon

Hanse Law School in Perspective

Christine Godt (ed.)



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