

Drafting (and Redrafting) Comparative Property Questionnaires

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1. Introduction

It must be with some temerity that one attempts an essay on comparative law in a Centre named after Michel de Montaigne.¹ For better or worse, this short essay is a distillation of lessons drawn from the author's experience in working on comparative questionnaires in various guises over the past fifteen years. As Montaigne himself wrote:

Glory and curiosity are the scourges of the soul; the last prompts us to thrust our noses into everything, the other forbids us to leave anything doubtful and undecided.²

A comparatist certainly needs curiosity but the message of this paper is the importance of getting right to the bottom of the matter in hand, leaving nothing to chance, not perhaps in pursuit of glory but rather from a sense of self-preservation against the ridicule that awaits the careless.

Lessons will be drawn from projects comparing the property laws and tenancy laws of EU-28 states, with the intention that specific examples should have a more general currency. The immediate context is property questionnaires but it is hoped that the lessons can be applied to questionnaires in other fields. Back in 2003, the European University Institute on the hills above Florence was a good place to sample the pleasures of comparative work, in this case Christoph Schmid's comparison of the law of 'real property' of EU Member States. The naming of this project will crystallise the chicken and egg regression inherent in many questionnaire led comparisons.³ Then to Turin, current home of the 'Trento' project, the Common Core of European Private Law; the author helped Sonia Martín Santisteban to bring to fruition a common core project on actions for the *Protection of Immovables* with a team of reporters representing fourteen European states, and much the same team is currently preparing a comparison of the *Nature of Immovables*.⁴ In terms of EU funded work, TENLAW offered a comparison of residential tenancy laws across the then EU-27 (the present author being team leader for the group investigating England, Scotland and Ireland). Other projects considered include the Commission study of Homelessness, a report to the European Parliament on the problems arising from cross border residential purchases,⁵ and a study being

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1 An edited version of a presentation at a conference on 'Improving Research Methodology' given at the Montaigne Centre for Judicial Administration and Conflict Resolution, Utrecht University (the Netherlands), 17 February 2017.

2 Michel de Montaigne 'That it is Folly to Measure Truth and Error by Our Own Capacity' concluding words; there are many published versions and translations of his *Essays*.

3 C. Schmid & C. Hertel, *Real Property Law and Procedure in the European Union* (2005).

4 S. Martín Santisteban & P. Sparkes, *Protection of Immovables in European Legal Systems* (2015); *Nature of Immovables* is being edited by the author with Prof. Matti Niemi and Dr Michael Milo.

5 C. Schmid, *Tenancy Law and Housing Policy in a Multi-level Europe* (2012-2015), <www.tenlaw.uni-bremen.de/>, last visited 11 January 2018; S. Nasarre Aznar et al., *Promoting Protection of the Right to Housing – Homelessness Preventing in the Context of Evictions* (2014-15); P. Sparkes et al., *Problems EU Citizens Encounter in Cross-Border Acquisitions* (2016).

co-ordinated at Barcelona of the implementation of the Mortgage Credit Directive;⁶ the present author was 'expert', lead author and summariser respectively.

This diverse body of work poses general questions in three broad categories:

1. Choice of jurisdictions and reporters. EU funded projects often need to be comprehensive, in which case the difficulty is to spread funding sufficiently thinly whilst maintaining comprehensive cover of 28 jurisdictions. Otherwise, funding realities and publication formats dictate a selection, a difficult process in which preconceived criteria often have to be waived in the interests of practicality. Selection is likely to prove even more taxing in the wake of the decision of the people of the United Kingdom in the referendum of June 2016 to leave the EU and to initiate the process of Brexit, which will prove to be a pivotal moment in legal epistemology. The key lesson is that it is difficult to select participants without knowing the content of the contributions that the questionnaire will generate.
2. Terminology. The choice of language is the key issue in drafting questionnaires since proper comparison must proceed from overarching concepts that are susceptible of comparison and this necessarily creates a disjunction between a project's sense of the concept used in the comparison and its meaning to a native speaking lawyer. For reporters writing in non-native languages there are naturally challenges of translation. In both contexts, the real trap consists of false friends, the more obvious the apparent meaning the falser the friend may prove to be, a notable example being 'contract'. The key lesson is that it is almost impossible to draft a satisfactory questionnaire until one knows all the answers. A comparator who is equipped to draft a fool proof questionnaire does not, in fact, need to carry out a comparison. If a comparison can use a misleading questionnaire, how much worse is it to work with an inaccurate title, a course sometimes dictated by the constraints of the funding process? Just as students should leave their title fluid until their thesis is complete, so comparative teams should grope slowly towards a correct description of their field.
3. Methodological differences. Questionnaire answers given by national reporters often reflect their national traditions of methodology when determining what is an appropriate answer to a particular legal question, so it becomes necessary to smooth out their differences to create a fair comparison, not to mention a readable narrative. Usually the process of answering questionnaires will throw up false compassions – either apparent similarities or apparent differences, which a fuller understanding shows do not exist –, which are often unintended consequences of the mode of expression chosen by a particular reporter. So, reporters need to see the finished questionnaires of all other participants before being confident in their own answers to particular questions.

2. Choice of jurisdictions and reporters

2.1 Jurisdictions

Comparison across the diverse European systems can only proceed at a functional level. Consider, for example, how one might set out to compare national tenancy laws. Should we begin in property law as an English lawyer would expect, or should we focus on the tenancy contract, that is on obligation? This conceptual chasm obscures the fact that functionally the common law estate of the tenant works in almost exactly the same way as the quasi-proprietary tenancy contract of civilian Europe. It is perfectly easy to compare the two, as the TENLAW project shows,⁷ even when (or perhaps especially when) the question is the effect of the tenant's interest as against a purchaser. Posing a simple question about the effect of a sale on the tenancy will unearth the truth much more quickly than a doctrinal analysis.⁸ Comparative work needs to be bold. There may be an attraction in microcomparison of the almost indiscernible shades of meaning about a specific topic within a common family (just as some botanists choose to concentrate on distinguishing the 400 microspecies of brambles known to grow in Britain) but one cannot help feeling that

6 M. Anderson & E. Arrogo Avaguelas, *Implementation of the Mortgage Credit Directive* (2017).

7 Schmid, *supra* note 5.

8 Sales no longer break leases.

in the present state of knowledge, comparative law should focus on the big issues, and especially on cases where different areas of law are deployed to fulfil the same function.

In one sense, any random selection of jurisdictions to compare may be as fruitful as any other. The Common Core operates on the premise that all legal systems are of equal value, but they make sure to include England, France, Germany and the Netherlands, jurisdictions which are generally more influential than, say, Andorra. Some sort of criterion is needed to select the participants and this criterion needs to be rational. However, this is above all an area where the golden rule is in operation, one cannot know which jurisdictions to pick until one knows what the outcome of the comparison will be. One either has to be comprehensive or else trust to luck. The decision may be made easier if the object of the study dictates the choice of states. It would be perfectly possible, for example, to conduct a microcomparison of the tenancy laws of the Baltic statelets, with some end in mind such as alignment of regional laws. Comparison is an expensive business, and very often the intention is to pursue the policy objectives of the EU institutions. Such work tended (pre-Brexit) to require coverage of EU-28 in its entirety,⁹ and, as a result, costs quickly become unmanageable. An example was the TENLAW project, where division of the maximum permissible grant between all the necessary states led to funding of researchers on a part time basis, which was unrealistic in the UK and elsewhere.¹⁰ There is also a serious problem of research management with a project on this scale. Where the object is commercial publication, projects structured in this way also run into the reluctance of publishers to produce books consisting of national questionnaires.¹¹ One reason for this is that questionnaire answers on a 'one state – one questionnaire' basis involve an enormous amount of repetition. It is altogether better to treat the questionnaires as a source of information from which a narrative can be formed later, not least in the interests of marketability.

An alternative is to study families. England, France and Germany must obviously be included, but recognition must also be given to the eccentricities of the Nordic states. (In most of Europe the response to a trespasser is to sue for a possession order, but all one needs to do in Scandinavia is to make a report to the police who will lock up the trespasser.¹²) More generally Nordic law seems to be formulated in a way that defies facile comparison, thus rendering the comparison infinitely more valuable. Book publication is necessarily limited in length and a selection of say 14-15 states is both manageable and incomplete. One can only hope it is enlightening rather than appearing random.

2.2 Brexit from comparative projects

Brexit is creating a crisis in comparative law in Europe, and specifically in the context of EU funding. The referendum which took place in June 2016 led to a clear margin in favour of the United Kingdom leaving the EU. Nine months later the British Government implemented the people's decision by giving an Article 50 notice to leave, which will probably lead to a final severance of relations in March 2019. This has inevitably led to a cooling towards British editors and reporters of comparative projects. Academics from the Republic of Ireland can represent the common law, but the whole brand is badly diluted.

The European Union was, from its inception, a civilian club. It is true that the signatories to the Treaty of Rome in 1957 combined the Latin and Germanic legal traditions, but only the Netherlands was in the least out of the mainstream Roman tradition. The inherent civilian assumption can be seen, for example, in the forum regime created by the Brussels Convention, which accepts the *seisin* of the first forum, however inconvenient, and even when, for example, the dispute arises out of a contract to buy and sell an immovable

9 The numbering system contains the innate assumption that the EU will expand; one issue to be agreed in the light of Brexit is how to describe the remaining 27 members in a way that is distinction from the pre-Croatian EU.

10 There has been a *de facto* recognition that the common law in England and Wales is so different from the mixed civilian system in Scotland that different reporters are needed, This presents problems in regionalised states such as Spain where, for example, Catalonia has its own Civil Code.

11 Internet publication may be a partial solution.

12 S. Martín Santisteban & P. Sparkes, *Protection of Immovables in European Legal Systems* (2015), Case 1.

in a different Member State.¹³ Accession by Britain and Ireland in 1978 has done nothing to dilute the inconvenience of the rules, even when the Convention became a Regulation and one that has already been recast.¹⁴ Later conflicts regimes abandoned the pretence of being comprehensive and fell into a pattern of civilian coverage for civilian states with British and Irish opt outs.¹⁵ This experience suggests strongly that Europe will draw back from any embrace of a comparative input from the common law after Brexit and will forge ahead to become a civilian state. Withdrawal of Britain will leave Ireland insufficiently weighty to provide a counterweight to the civilian hegemony. Without British editors and reporters, future European comparisons will see civilian academics lauding their codes for want of any meaningful comparators.

Many modern states combine discrete regions with different legal traditions; countries tend to have a single legal code for current transactions since codification is a mark of modern statehood. Many European states retain distinctive traces of earlier systems, historical persistence being strongest in property law. Divergences may be wider and more recent in areas of devolved competence (such as building controls), but these are often in areas so far little explored by comparatists.

The westernised world is dominated by two legal systems, the common law and the civil law. Within the EU, the common law is represented by two of the 28 Member States, the United Kingdom and (the Republic of) Ireland. The United Kingdom is however, splintered between the common law states of England, Wales (which has partly devolved government) and Northern Ireland and on the other hand the civilian inspired Scotland. Scottish law is uncodified and instead relies heavily on the works of institutional writers and retains a very distinctive terminology, but it is also strongly influenced by English law – though without equity and the trust. Persistence of Scots law is guaranteed by the Treaty of Union.¹⁶ Scottish law is so distinctive that special treatment is required. The Real Property and TENLAW projects both treated Scotland as a separate country. Had it been essential to stick to one questionnaire per Member State, the property systems of England and Scotland are so different that it would have been necessary to give more weighting to the United Kingdom in terms of funding and length of responses. It must be recognised that this creates a bias in favour of the British systems, which may appear hard to justify in a Spain divided between the (civilian) Civil Codes of Castile and Catalonia.

There is a real risk that Brexit will provide a retreat into parochialism or, in the legal world, a reassertion of our familial grouping with American and Commonwealth states and a clubbing together of civilian states across the continent. Possible effects include:

- a retreat to compartmentalism of notarial markets;
- a retreat from English as the legal language of the EU;
- a retreat from Anglo-American concepts such as the trust;
- a steady advance towards a single Civil Code.

Although law functions very much the same in all EU states, the presence of England made it impossible to construct a workable code. Now that major roadblock is removed, it remains only to shunt Ireland aside before work on a code can recommence; circumstances now look propitious for this project to succeed.

13 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, OJ L 299, 31.12.1972, p. 32; Convention of Accession of 9 October 1978 of the Kingdom of Denmark, of Ireland and of the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and enforcement of judgements in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice, OJ L 304, 30.10.1978, p. 36; OJ C 27, 26.1.1998, p. 1 (consolidated version).

14 Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 12, 16.1.2001, p. 1; Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Recast), OJ L 351, 20.12.2012, p. 1.

15 E.g. the Succession Regulation (EU) No 650/2012, OJ L 201, 27.7.2012, p. 107.

16 Treaty of Union 1707 Art. XVIII.

As for the United Kingdom we can anticipate some flashpoints whilst Eurosceptics are in the ascendancy, notably,

- the principle of proportionality;
- outside supervision of human rights compliance;
- a reversion to the autonomy of contracting parties and a reaction against the consumer bias of EU law;
- convenience-based conflicts regimes;
- increased resistance to codification;
- a resurgence of judicial discretion; and
- repeal of much EU sourced law.

The forthcoming legislative *Bonfire of the Vanities* is likely to strike out those parts of the European acquis which have had direct effect or which have been copied out directly into statutory instruments. The future for our legislation is bleak. Codification is generally considered undesirable, but the legislative corpus will be left in very poor shape by piecemeal repeals of European schemes. The ideal solution is a codification followed by periodic reviews of the kind promoted by the EU Commission, with changes based on careful scientific research. Britain risks a reversion to legislation by guesswork.

2.3 Reporters

Once jurisdictions are selected for comparison, the problem then comes down to the selection of reporters. There is no difficulty (in the author's limited experience) in finding keen and enthusiastic reporters from many states, notably Germany, Italy, the Netherlands, Nordic states, Spain and Poland. France is more problematic as there seems to be a marked reluctance to engage with projects in the English language, or even to write in French for translation into English. In choosing reporters one has a careful balance to draw between language competence and subject competence. One approach is to seek out people from target states who have a track record of publication in English language journals, even those slightly off subject area. Selection of national experts with relevant expertise but inadequate language skills can lead to severe problems of translation. However, caution is needed because the rest of the team rely upon each national reporter to know their own national law (at least once they have had a chance to look it up) and if a system is reported inaccurately this can throw the entire comparison out of kilter. Many continental academics know only substantive law, and the practical steps set out in the Code of Civil Procedure are viewed as operating on a different planet. Serious comparison needs to compare the law in its practical operation. An undoubted strength of the Common Code is the insistence on analysis of meta levels beyond the formal statement of the norms of the system.¹⁷ The practice/procedure divide is much less marked in the Anglo-American tradition. Thus the law of domestic repossessions has been formulated by statute law but moulded by adaptations of the procedural rules about adjourning and suspending possession orders.

The choice of people of a suitable level is a nightmare. Practitioners tend to disappear once a fee has been paid over, even if much work remains in getting reports into a coherent shape fit for publication. Academics are a better bet to stay the course, since they are more concerned with the quality of the output. Senior academics are often too busy and basic reports may be best written by doctoral or post-doctoral researchers. Here there is a problem in that little credit accrues from responding to a questionnaire. Certainly this work is not valued by the Research Excellence Framework, so finding British reporters may be a problem – and this may even be true of editing. The practical value of the exercise is the networking and the opportunities which open up for work with greater research clout. On a personal note, it was a great achievement (with my co-editor) to pilot *Protection of Immovables* through to publication. Yes, it took years longer than it should have done, but we stuck at it while many other projects fell by the wayside.

Undoubtedly the major problem in comparative work is to coordinate progress so that all reporters are in step. Reporters from some states will stick rigidly to time limits whereas others will start some drafts a

¹⁷ 'How to Answer Questionnaires', <www.common-core.org/node/10>, last visited 11 January 2018.

couple of years after the deadline – often conforming to, but sometimes confounding, national stereotypes. Once it reaches the stage where reporters who have kept to the project timetable have to provide updates while waiting for the slower reporters to catch up, there is a real problem.

3. Terminology

3.1 'Real property': a case study in title selection

Funding had already been secured for a project on 'Real Property and Conveyancing in Europe', before an English lawyer's eye was brought to bear on the subject. Unfortunately, real property is a redundant category, no longer operational anywhere within the European Union. Historically (i.e. before the property legislation of 1925) English land could be held for various durations (or estates) differentiated into uncertain periods (freehold estates) or a term of years that was certain (leasehold estates). Freehold land passed on death intestate to an heir (the eldest son applying male primogeniture) whereas leasehold land was divided between the next of kin (all children equally). Sir Arthur Underhill thought it absurd that title to his own house, which had been built on a plot divided between the two tenures, would be divided if he was careless enough to die without making a will.¹⁸ (In parentheses, it should be observed that it is amazing how many great lawyers do not leave their own affairs in order when they die). When Underhill came to draft the 1925 legislation, he abandoned the category of real property¹⁹ in favour of a uniform system of succession which treated all children equally. Modern English law does not recognise the concept of an heir. The problem could be worked around, and the report begins by pointing out that the title of the project is inaccurate.²⁰

There are one or two obvious lessons:

- there was no way for a continental academic to understand any of the above until pointed out by an academic well versed in English law, and conversely of course any English academic working alone would have made egregious decisions about German law; questionnaire making is above all a collaborative task;
- all terminology has to be agreed and adhered to rigorously;
- 'real property' had meaning neither for Anglo-Irish lawyers²¹ nor civilians, but to find a title that resonated with both was difficult since common lawyers would want a reference to 'land' whereas civilians would only understand 'immovables'.

Less obviously, there is a golden rule of comparative work:

- it is not possible to draft a satisfactory questionnaire until you know all the answers.

This has enormous implications for the planning and progress of work.

3.2 Translating concepts

The problem of translation is to match language translation with the alignment necessary between disparate legal concepts, a question sufficiently raised by considering the single word 'ownership', as a proxy for many others. Civilians often think that English law does not recognise ownership and from this draw the faulty conclusion that a comparison of European land laws is impossible. This is implausible. Misconceptions about ownership are very common among lawyers educated in the civilian tradition, who have been hoodwinked by common lawyers into believing that the English law is profound and unfathomable.

It is possible to conceive many different forms of 'owning' things, but in fact the two great families of law have very similar conceptions. Civilians know of the Roman *dominium* and see it translated into

18 A. Underhill, *A Concise Explanation of Lord Birkenhead's Act* (1922), p. 46.

19 Administration of Estates Act 1925 ss. 1-3. The same reform took place rather later in the Republic of Ireland.

20 Schmid & Hertel, *supra* note 3.

21 The term would be readily comprehensible in the United States of America with its very backward system(s) of property law; a continental author referring to 'real estate' is invariably American educated.

the vernacular as *propriété* (*Code civil* Article 544) or *Eigentum* (*Bürgerliches Gesetzbuch* Article 903) or *eigendom* (*Burgerlijk Wetboek* Article 5:1). This consists essentially of three elements: the right to use; the right to exclude; and the right to transfer; these are subject in varying degrees to controls in the public interest. Some differentiation exists certainly in the extent of the right to abuse but no one could doubt that these concepts of ownership were sufficiently similar to be susceptible of comparison.

The primary reason for this is that the civil law (meaning here private law whether in England or on the continent) operates as an amoral, abstract system, this strength being drawn from the rigorous public/private divide of civilian law. One cannot tell how owning a house differs from owning in Berlin or Amsterdam, because all the interesting things are contained in tort laws or building laws or planning regimes. This leaves all property laws to do uninteresting things in broadly similar ways. For this reason the *Bürgerliches Gesetzbuch* worked perfectly well in the *Deutsche Demokratische Republik* for many years. The origin of the 'absolute' ownership of the Roman citizen was the practice of the Emperors of raising taxes from non-Romans, and from imposing these on cities rather than individual land holdings. This led to a similarity in the concept of ownership in France, Germany and the Netherlands, which is so great as to defy comparison. Even if a project is widened to include the sale of land, hypothecs, servitudes and other aspects of land law, a comparative project across EU-civilian-26 risks ending up in mindless repetition.

Turning to England and Ireland, we find the same law articulated in a very different way. Superficially the law is feudal (just as continental law was feudal before the revolutions of 1789-1848) but actually it is post-feudal. Abolition was achieved by Oliver Cromwell during the Commonwealth and it was not restored when Charles II recovered the throne in 1660. Legal writers at work under the Stuart and Hanoverian monarchies were constrained from mentioning the Protector's legislation favourably, so England remained a notionally feudal monarchy for fear of upsetting the kings.²² The only theoretical mark of feudalism is the theory of estates (that one owns not land but an interest in land of a particular duration), a system very similar to the pre-Code laws of most continental states. It is amazing how codification has wiped away a knowledge of legal history in the code states. A freehold estate enables one to use, to abuse and to transact, leading Honoré to conclude that all western liberal states had the same conception of ownership.²³ Just as on the continent, public rules hedge round the 'owner' with restrictions, but in Britain and Ireland public and private can be woven together to form a single legal narrative – in the absence of any public/private divide of jurisdiction.

It is, then, easy to translate ownership. The words are different but the concept is the same. Such similarities can create a false sense of security. Major differences emerge when you consider what is a 'thing' that is susceptible of ownership, as should eventually emerge from a new core volume on the *Nature of Immovables*. This is just a taster of the many false friends. Lay language is littered with traps; a student of Spanish, for example, soon learns to avoid the English sense of *constipado* and men do not describe themselves as *embarazada*.²⁴ Legal language has many traps, too, the word 'contract' being particularly fraught with difficulty.

3.3 Effecting comparisons

How would one proceed from an agreed vocabulary to a comparison? Again, ownership is the current touchstone, but is representing a much more general issue. The first matter is to understand why one is making a comparison. If the object is to understand similarities and differences in conveyancing systems it may be sufficient to contrast the transactional powers, but if one wants to understand how ownership works it is not sufficient to stick to the formal content of the Code. That understood, any comparative analysis of ownership must be functional. Very often, rules with the same function can be found in very different parts of the law – an obvious example being that leases would be seen as contractual in civilian codes (but more realistically as quasi-property) whereas they are (fully) proprietary in England.

22 A tradition continued to this day, though Scottish writers seem more willing to refer to the Cromwellian abolition.

23 A. Honoré, 'Ownership', in A.G. Guest, *Oxford Essays in Jurisprudence* (1961), ch. 5.

24 The former means having a cold, and the second being pregnant.

One way to seek out likenesses and differences is to draft a narrative questionnaire in which the potential ambiguities have been ironed out by experts from the systems under study. However skilful the compiler this will carry his preconceptions and errors. Another is to adopt the Schlesinger methodology (as used on the Common Core) and to focus on purely factual questions stripped of conceptual overlay, so that answers have to focus on the functional issue signalled by the facts; Schlesinger wanted answers at three levels, the operative rules, the determinants (i.e. the sources of these rules) and a meta level, talking about non-legal pressures affecting the actual operation of the rules.²⁵ All in all though there is no substitute for knowing the answers when one drafts the questionnaire.

Schlesinger's idea had been to find the functional similarities between systems by posing purely factual questions, stripped of all concepts and all value judgements. This worked well enough in contract and tort where issues can be stated in simple factual questions, and, as it happened, actions to protect land was well suited to the Schlesinger technique, which explains why our volume on *Protection of Immovables* is the first substantive volume completed on core property law. In much of property law it is difficult to eliminate all conceptual baggage from the questions, and easy to commit Schlesinger solecisms like referring to a property's 'owner' or using adjectives such as 'his' and 'hers', prejudgements which have to be cast out to achieve comparative neutrality. Ultimately, however, one cannot pose issues about property without first knowing who is the owner. A world without any possessive pronouns is a multiverse indeed.

So, comparison has to concentrate on function and the techniques to achieve this are rather crude.

4. Smoothing methodological differences

Experts schooled in national legal traditions across Europe will produce answers to questionnaires that differ widely in their methodologies. These have to be finessed away in order to create a readable comparison. A very curt answer to a question may be just as accurate as a lengthy literary composition, but the two are not readily compatible. A reader needs a helping hand, and this in turn requires careful guidance to the reporters. The snag, as ever, is that it is difficult to draft this guidance without the benefit of hindsight, that is that one needs the completed answers to see how the questionnaire should have been completed.

4.1 Facts

The approach of an English lawyer can be summarised in Mr Gradgrind's words,

Now, what I want is, Facts (...) Facts alone are wanted in life.²⁶

This perception can degenerate into an obsession with minute factual differences, often masking a want of analysis and understanding, but better this than the lack of content which renders so much continental legal literature lifeless. Facts bring a narrative alive. One of the most famous phrases in English law is contained in a case which all lawyers will have studied, though they will have forgotten its name, the point of law in issue and the decision. The headnote read thus:²⁷

A car, driven by the defendant, which was out of control, came along and crashed into a van where the plaintiff's husband was making tea. Hearing the crash, the plaintiff turned round and saw the disaster. Her husband was so seriously injured that he died a few hours later. Prior to the accident the plaintiff had been happy and robust. (...) The shock of witnessing the tragedy caused her to suffer prolonged morbid depression.

O'Connor J. awarded the plaintiff £4,000 damages in respect of her personal claim for damages for nervous shock. Held, dismissing the appeal, that (...) in the exceptional circumstances the judge's award could not be said to be wholly erroneous.

25 <www.common-core.org/node/38>, last visited 11 January 2018.

26 Charles Dickens, *Hard Times* (1854).

27 *Hinz v Berry* [1970] 2 QB 40, CA.

Lord Denning MR brought these events to life in these words:

It happened on April 19 1964. *It was bluebell time in Kent.* Mr and Mrs Hinz had been married some 10 years and they had four children, all aged nine and under. (...)

On this day they drove out in a Bedford Dormobile van from Tonbridge to Canvey Island. (...) As they were coming back they turned into a lay-by at Thurnham to have a picnic tea.

The husband, Mr Hinz, was at the back of the Dormobile making the tea. Mrs Hinz had taken Stephanie, her third child, aged three, *across the road to pick bluebells on the opposite side.* There came along a Jaguar car driven by Mr Berry, out of control. A tyre had burst. (...)

This is so famous that typing 'bluebell' into Google generates an autosuggestion of 'bluebell time in Kent'. A mundane case was made to live and in the same way a legal text can be made to live with a judicious sprinkling of facts in a way that it can be brought alive from a concatenation of French cassations. The Courts in Luxembourg and Strasbourg follow English legal technique in a more formulaic way, but judgments in civilian states vary widely, and so do the techniques of their academics. The temptation is to draft all questionnaires from the facts of English cases, which may itself give misleading results.

4.2 Size of the law

The same questionnaire sent to reporters from different European states will, if they are left to their own devices, receive very different answers, even for states with the same substantive law. This reflects national perceptions of proper methodology. It can to some extent be overcome by careful guidance.

One problem that is not susceptible to easy solutions is the imbalance in size between civilian and common law narratives. Length in legal terms is in inverse correlation to the length of translated texts. When translated text has to be fitted into the same page sequence, a French text will be significantly longer than its English rendering, but a full English answer to a questionnaire question will tend to be longer than a full French answer. The common law relies on very diverse sources and generally requires more room to give answers to questions that rise above the superficial. Part of this is the volume of case law to be included, an area in which England is facing a crisis, though it also has a problem with legislation. An example can be drawn from the TENLAW project: one Baltic state was complaining that its tenancy code extended to as many as 90 articles; a comparable statement of English statute law confined to *residential* tenancies requires a volume of almost two thousand pages.²⁸ Even to differentiate the public and private sectors is complex, since this is no longer just a reflection of the character of the landlord.²⁹ More word count is needed as compared to a country which applies the same tenancy law to both sectors.

Another issue is the lack of a public/private divide in England, which means that it is almost always necessary to cover human rights aspects. Reporters from civilian states often feel unqualified to write on public law, since this is seen as such a different legal subject. Common law reporters must, perforce, create a single narrative out of the public and private aspects of any subject, and so are required to discuss innumerable reports of human rights decisions. Some national tenancy laws can be stated without any reference to human rights principles, though the Netherlands is an honourable exception here. In England there are perhaps fifty human rights decisions reported each month, in Spain a handful of cases in total.

4.3 Fluidity

Flexibility is a good thing, the key to survival in a changing world, but flexibility also needs to be reined in to achieve a measure of certainty. Code-based methodology is much too static, whereas case-based reasoning is excessively fluid.

28 J. Driscoll, *Butterworths' Residential Landlord and Tenant Handbook* (2012).

29 Housing and Regeneration Act 2008, ss. 68-77.

It is remarkable, looking back, to see how much a static subject such as land law has changed over the course of a single academic career. As compared to the year when I started teaching, the year that Mrs Thatcher was elected in 1979, no more than 5% of the 1979 syllabus is taught now. To give just one example, a fundamental principle is that a right claimed by someone in occupation of land can override the registered title. Once covered in 20 lines of text by Megarry & Wade,³⁰ the first major case was decided in the Court of Appeal that same year, 1979,³¹ and since then the overriding interest has reached the highest appellate level on five occasions.³² It now forms a substantial part of any undergraduate course. This may not be a pure illustration of the dynamism of case law because the development is based on a statutory rule that came to the fore as titles were increasingly registered. The prevalence of case law makes it very likely that one can predict the outcome of a later case because it is likely to be covered by authority, but it may be difficult to tell whether the rule established is truly authoritative so as to survive scrutiny at the highest appellate level.

Churn is great enough to overturn fundamental principles or even the complete realignment of a subject. Sometimes this can be very beneficial; English law can cope relatively easily with the collapse of marriage, couples shacking up together, and two men (or two women) marrying. On other occasions, it can be very irritating when, for example, restitutionary principles were imported to deal with matters such as building a house on the land of another already handled better by equity. More often though the churn of the case law merely unsettles basic principles as the judges strive to do justice in a particular case. Just to give one recent example, a man who was charged a hefty 'fine' for overstaying in a shopping centre car park quite reasonably challenged the charge on the basis of appellate decisions which showed clearly that a charge exceeding the loss to the shopping centre was a penalty, only to see the Supreme Court alter the law to deny him a remedy.³³

If we contrast the experience of, say, a German student, a large part of the property course in 2017 would be familiar to a student who studied in 1979, and there would in fact have been little change since 1900.³⁴ The same would be true, with varying dates, for students elsewhere in Europe. French property law has demonstrated the greatest persistence. Even in England the last legislative consolidation dates from 1925.³⁵ So in large parts of Europe (apart from the Netherlands) we have a property system that has been settled since the 'Great' War – give or take a few years. As Thomas Picketty has demonstrated, with a superfluity of statistics, this is almost precisely when wealth in agricultural land collapsed to be replaced by the value of houses, a phenomenon common to all western states.³⁶ Codified systems therefore demonstrate too much rigidity as does English legislation, whereas common law case law shows too much churn.

4.4 Formulary system

If one single decision has to be chosen for its deleterious impact on English legal science, it must be the decision that the forms of action should be abolished outright in 1875³⁷ rather than being reformed. Until that date an action had to be formulated in such a way as to fall within a cause of action established by a form of writ. These were so archaic that they were long since twisted by fictions in order to be adapted to modern conditions. Soon after the reform, Maitland's lectures at Cambridge suggested that the forms of action 'continue to rule us from their graves',³⁸ but 140 years on this is no longer even remotely true. The tendency has been to remove the intellectual discipline which requires, for example, a differentiation between obligations that are agreed (contract) and those that are imposed (tort and unjustified enrichment) or a differentiation between enforcement of personal rights between contracting parties (obligation) and of real rights between

30 R.E. Megarry & H.R.W. Wade, *The Law of Real Property* (1966), pp. 1055-1056.

31 *Williams & Glyns v Boland* [1979] Ch 312, CA.

32 *Williams & Glyns v Boland* [1981] AC 487, HL; *City of London BS v Flegg* [1988] AC 54, HL; *Lloyds Bank v Rosset* [1991] 1 AC 109, HL; *Abbey National BS v Cann* [1991] 1 AC 56, HL; *Scott v Southern Pacific Mortgages* [2014] UKSC 52.

33 *ParkingEye v Beavis* [2015] UKSC 67.

34 When the *Bürgerliches Gesetzbuch* came into force.

35 The Birkenhead legislation, including particularly the Law of Property Act 1925.

36 T. Picketty, *Capital in the Twenty First Century* (2014), figure 3.1, p. 116.

37 Common Law Procedure Act 1852; Supreme Court of Judicature Act 1873.

38 F.W. Maitland, *Forms of Action at Common Law* (1909), Lecture 1.

successors (property). Over time this laxity has eroded the equipment which enables cases to be solved from first principles leaving cases which can be argued from too many angles at greater and greater length.

Civilian systems do formulate actions in set ways, a requirement imposed by the structure of the procedural codes and the need to tie an action to a specific article within the code. A German lawyer considering how to evict a tenant would need to consider a vindication and a tort action before settling for a possession action, each one based on widely separate articles in the *Bürgerliches Gesetzbuch*.³⁹ English law blurs these distinctions and focuses on the substance of the action. Inability to handle overlap in a time efficient manner is most evident in the case law of the European Convention on Human Rights, where any single fact situation may require analysis under five or six separate articles, and each one has to be teased out even though the issue (say the public interest justification) is the same in each case.

In addition the Codes (succeeding in this regard the institutional structure) set out basic definitions, such as the content of ownership and fix by the structures many relationships between associated concepts, for example between:

- ownership and the thing that is owned;
- ownership and lesser rights in land; and
- property and obligation.

The structure is over-rigid, but basic concepts can be stated simply. Total abandonment of the discipline of formulating actions into causes of action has led to a decay of legal methodology and this has blurred basic principles. English law can solve difficult problems, but may not be able to give a straight answer to a straight question.

The common law system was more flexible because of the existence of equity as a separate system; through the institution of the trust, equity was able to fashion proprietary protection for things that would not be regarded as objects of property at common law. The overall effect was a more liberal conception of ‘things’ than in other property systems, especially in Germany. If mortgage lending is funded by borrowing against mortgage securities, the German way is to lend money over fixed terms and to create a very rigid market for borrowers. An English bank can bundle together some partly paid mortgages and treat them as an asset against which borrowing can be secured. German property law is too rigid to be moulded to practical needs.

Flexibility in England is a counterpoint of a failure to pin down the basics. Since English law does not define what it is to own a thing, it is easy to modify the concept of ownership or to generate intermediate tenures. We can glide easily from things in action to things not in action and hence to recognise the ownership of a bitcoin.⁴⁰

5. Closing remarks

Now you have completed your project, having cajoled your reporters into reporting at the same time with answers of the same length to questions shorn of all value laden baggage. Now you are beginning to understand your chosen subject. Recall now the golden rule:

- it is not possible to draft a satisfactory questionnaire until you know all the answers.

Now is the moment to tear up your questionnaire and start again from the beginning. This time, probably, you will abandon the questionnaire and move to a single narrative, flexible enough to meld together the lessons from the various legal traditions into a single enlightening text. Several more years of work await. Happy comparisons. ■

³⁹ *Bürgerliches Gesetzbuch* Arts. 985, 823, 861.

⁴⁰ N. McGrath, ‘Transactions in a Vacuum of Property Law’, part V, <<http://ssrn.com/abstract=2786206>>, last visited 11 January 2018.