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Expert Opinions on Foreign Law in Court: Applied Comparative Law in the Munich Institute for East European Law

- **ABSTRACT:** *Comparative law has many facets. It often consists of basic research for academic purposes, but it may have a practical side as well. A genuine combination of basic and applied comparative legal research are expert opinions on foreign law for a domestic court. The expert researcher has to fully comprehend the foreign law on the books as well as in action, and has to be able to translate this foreign law into the legal background of the domestic court and into the procedural setting of the law-suit at hand. Taking the 'Munich Institute for East European Law' as an example, this essay describes the continuous basic research as a prerequisite for expertise on foreign law, as well as the practice of writing expert opinions for courts of law and authorities with regard to the law of the formerly socialist countries in Europe.*
- **KEYWORDS:** basic comparative research, applied comparative research, expert opinions on foreign law, country expert system vs. field of law expert system, Ostrecht, Munich Institute for East European law, Max Planck Institutes on foreign and comparative law.

A lawyer specialising in comparative law is often challenged by the more domestic colleagues about the justification of this work or at least of its public funding. Naturally, there are ample reasons to compare laws. First, there is of course the fact that science in its pure form is free of any instrumental sense: to increase human knowledge is justification in itself. More mundane reasons for comparative law include that the study of foreign law deepens the understanding for one's own law, that the study of foreign legal solutions may yield inspiration for the development of one's own law, that political and economic decision-makers as well as the domestic legal profession may wish to have knowledge on the law of a partner (or, as the case may be, competitor or enemy)

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country.² However, a hard-boiled domestic lawyer will hardly be convinced by these reasons because they remain in the realm of academic studies.

However, comparative law may serve very practical purposes, sufficiently practical to convince even our hard-boiled domestic lawyer. Every country in the world has political, economic and other relations with the outside world. As a consequence, the domestic legal system comes into contact with foreign law, and questions arise which can only be answered with a precision sufficient for practical needs if both parties possess knowledge about the other legal system. This is especially true in the continent of Europe where countries are small, the next state border is nearby, and national economies have never been autarkic but have always complemented each other, where the European Union integrates economies on a supranational level and where one of the centres of the globalisation lies. Today, it is not unusual that the London branch of a German company buys goods in Papua New Guinea and has them shipped to a factory in Spain or China, or that a Serbian company with Hungarian owners sells services to a Singapore-based branch of the Norwegian state fund. A French national residing in Monaco may hire a car in the Czech Republic and suffer an accident in Poland from a car insured in Denmark. And not to forget the human factor: A child of a Liechtenstein and a Luxemburg nationals may find himself in trouble in Moldova and addresses the local Hungarian embassy because neither Liechtenstein nor Luxemburg maintain a diplomatic representation in Chişinău; at the same time, his parents file a divorce in Jersey. What appears like text-book constellations is real life in Europe's integrating legal space. If and when disputes arise in such human or business contacts, they usually concern more than one legal system. Here, comparative law finds a practical application.

In this paper I describe the structure and the work of the Munich Institute for East European Law³ as a German research institution for comparative law specialising in the legal systems of the formerly socialist countries in Eastern Europe.

1. From the interwar period through the Cold War to the present day: What is, and why do we have, 'Ostrecht'?⁴

Research on the legal systems in the Eastern half of our continent has always been a forte of the German science of comparative law. The first comprehensive description of Russian law in German language, including a translation of the central corpus of law, dates back to 1722. Until WWI, research on Eastern Europe's legal systems was not systematic but incidental. This changed after 1918. The demise of the Ottoman, the Tsarist and the Habsburg empires had created a wide variety of new states east of the lands of Swedish, German and Italian language, and the Soviet Union was building a very new political, social, economic and legal system. Research on this region required

2 On the *raison d'être* of comparative law cf. Kischel, 2015, pp. 47–91.

3 Institut für Ostrecht München; for more information see www.ostrecht.eu.

special knowledge of 'exotic' languages, of history, culture etc, in the case of the Soviet Union of its official ideology as well. It was felt in Germany that such knowledge was necessary because of the proximity of that region. At the same time, it was obvious that such a specialised knowledge needs to be concentrated and nursed in a specialised institution. For this reason, in 1920 the 'Osteuropa Institut' (Institute on Eastern Europe) was founded in Breslau as an extra-universitarian, interdisciplinary research institution on the region from Finland in the north to Greece in the South and from Yugoslavia and Czechoslovakia in the West to the Soviet Union in the East. In 1922, this institute founded a department for legal studies.

Quite from the beginning, the research on Eastern Europe's legal systems was called 'Ostrecht'. Literally, this means 'Eastern law' but in German it is quite clear that this does not mean the entire East but Eastern Europe. When the term 'Ostrecht' was coined in the early 1920s it did not intend to insinuate that so diverse legal systems as Estonia, Bulgaria, Hungary, the Free City of Danzig, or the Soviet Union had anything in common. It was merely a pragmatic term to denote legal studies on countries east of the German (and Swedish and Italian) speaking lands. In this sense, the journal 'Ostrecht' (founded in 1925, closed in 1934 because the publishers were not considered 'Aryans') used this term, too. During the Nazi time, the Institute on Eastern Europe, including its legal studies department, continued its work on a reduced scale and without any intellectual ambitions, and it stopped functioning towards the end of the war.

In 1957, the last director of the legal studies department of the Institute on Eastern Europe, Reinhard Maurach, managed to re-found studies on East European law as a separate extra-universitarian research institute: the 'Institut für Ostrecht München' was born. Naturally, in those days it was a child of the Cold War and contributed to the research on the ideological enemy through the lens of the law. In the light of the Cold War, the meaning of 'Eastern Europe' narrowed down to the socialist countries, the 'Eastern Bloc'. This was reflected in the meaning of 'Ostrecht': non-socialist countries such as Finland and Greece stopped being an object of 'Ostrecht' research. Instead, 'Eastern European studies' in general and 'Ostrecht' in particular dealt with the entirety of the socialist world, including East and South East Asia and, eventually, Cuba, which is, seen from Germany, unequivocally in the West. Therefore, 'Ostrecht' ceased to be a pragmatic term based on geography, and became a political term instead. Studying the law of the socialist countries no more meant comparative research with the traditional methodology but meant, *inter alia* due to the ideological character of the socialist law, 'system studies'. 'Ostrecht' abandoned its academic roots in comparative law and became a part of the overarching '[anti-]communist' studies. One effect of this change was that it became customary to analyse all (or at least a larger number of) socialist countries. Where 'Ostrecht' had been, in the period during the wars, a collection of various country studies, it adopted a more overarching regional perspective during the Cold War.

During the Cold War, the work of the 'Institut für Ostrecht' in Munich was not limited to theoretical, academic studies. The institute gave its expertise to

decision-makers in politics and the economy. Whenever a West German court had to apply the law of a socialist state, the institute wrote the expert opinion. Due to the limited and highly politicised economic contacts between East and West the cases where socialist law had to be applied were not too frequent. In numerically highest demand was Yugoslav law because of the large number of Yugoslav citizens living and working in Germany: They usually did not adopt German citizenship, and as a consequence their family and succession cases were to be handled according to Yugoslav law including the laws of the various federal states and provinces of Yugoslavia.

The end of the socialist world and thus of the Cold War put a question mark to the entire Western research infrastructure on Eastern Europe. Suddenly, Eastern Europe was no longer the enemy, and public funding could no longer be justified with the competition between the systems in East and West. As a result, a considerable amount of the research infrastructure on Eastern Europe was closed down, including several university institutes on East European law.

The Munich Institute for East European law, not belonging to a university but to the Federal Ministry of Justice, could prove the justification of its existence partly with the excellence of its research and partly with the practical significance of its work. In this institute there were specialists who knew the languages and the countries, who had the time and the capacity to follow all the quick changes in the politics and the law of the post-socialist transition, and who quite often had personal contacts in the formerly socialist countries. This was a valuable asset to political and economic decision-makers as well as for the courts where the number of cases with an East European element grew.

As a result, the Munich Institute for East European Law survived the reorganisation of the research infrastructure on Eastern Europe. Nowadays its *raison d'être* as well as its work resemble more the interwar period than the era of the Cold War. The de-ideologization of the law in the Eastern European countries opened the avenue for the 'Ostrecht' to return to the classical comparative law and its methods. The formerly socialist countries are no longer forced into one bloc but have become sovereign states that decide freely about their respective legal development. As a result, less and less common factors unite the legal systems of, e.g., Latvia, Slovenia, Romania, Armenia, and Mongolia. The universal bloc perspective of the Cold War 'Ostrecht' has atomized again into the study of Russian, Ukrainian, Belarusian, Hungarian, Polish, Montenegrin, Albanian, Turkmen, or Tajik law.

This gives rise to the question whether we need today an 'Ostrecht' with its separate institutions. The answer is the same as during the interwar period: a pragmatic 'yes'. The languages of Eastern Europe – even Russian – are not commonly known in Germany. German pupils, when they leave school, know more about the history of France than of Bohemia, despite the fact that the Czech lands were an integral part of the German Empire for many centuries. Therefore, research on Eastern Europe requires specialist knowledge, and specialist knowledge can flourish grow if fostered in specialised institutions. Furthermore, in Germany there is the political will to have

knowledge on Eastern Europe, due to the geographic vicinity, political and economic interests, as well as historical and cultural links. This is why a certain research infrastructure on Eastern Europe is maintained, and this is why the Federal Ministry of Justice decided to continue to fund the Munich Institute for East European Law.

The term ‘Ostrecht’ has changed as well. It has turned from the political-systemic expression it was during the Cold War back into a pragmatic, geography-based word. It no longer denotes the idea that the various countries of research have much in common. The common factor is the geographic position east of Germany, not more. Therefore, in German it is not a contradiction in terms to accept countries like Hungary, the Czech Republic, Slovakia, Poland or Slovenia as part of Central Europe and, at the same time, naming the legal research on these countries ‘Ostrecht’.

2. The Munich Institute for East European Law

■ 2.1. *Institutional and structural aspects*

As was mentioned before, the Munich Institute of East European Law is an extra-universitarian research institution funded by the Federal Ministry of Justice. According to German tradition, the federal state of its seat, Bavaria, stands a certain portion of its budget.⁵ Its legal form is an association in private law which for federal reasons is the common legal frame for German research institutions in the public sphere. In order to guarantee an interdisciplinary framework, the Institute for East European Law, together with other research institutions on Eastern Europe, maintains as a forum for co-operation the Research Centre for Eastern and South Eastern Europe in Regensburg.⁶

The Institute for East European Law is organised in country departments.⁷ Since law exists by the state and in states, organising comparative legal research in country departments makes sense. The advantage of the country department is that every researcher can concentrate on one or two language(s) and culture(s), can concentrate on one or two legal systems and therefore has the chance to oversee the foreign legal system in its entirety. This specialisation allows them to establish extensive

5 Since the re-unification it has become common in Germany that federal scientific institutions in the Western states are co-financed by up to 50% by the state of its seat, whereas federal scientific institutions in the Eastern states often have an exclusive federal financing. The Munich Institute for East European Law receives, for historical reasons, a quota of 25% from Bavaria, and the federal financing amounts to 75%.

6 More information on this research centre is available on its web site: <http://www.wios-regensburg.de>.

7 The country departments are: Belarusian law; Bosnian law; Bulgarian law; Croatian law; Czech law; Hungarian law; Kosovar law; Moldovan law; Montenegrinian law; North Macedonian law; Polish law; Romanian law; Serbian law; Slovakian law; Slovenian law; Russian law; Ukrainian law; law of the other CIS countries. From among the East European countries this leaves only Albania, Estonia, Latvia, and Lithuania without a country department; for the research on the law of these states the Institute fosters co-operations with external researchers.

professional networks in their area of research. Since the researchers of the Institute for East European Law are country experts, they do not specialise in one or two fields of law but deal with all fields of law of “their” country/countries. The only exception is tax law: this field of law follows its own, very special rules and therefore requires specialised legal and methodological expertise, and tax legislation practically everywhere in Eastern Europe is extremely volatile so that reliable research is only possible on the spot, but not from abroad. For these reasons tax law is not an object of regular comparative research in the Institute for East European Law.

This country expert system has, next to the advantages mentioned before, some disadvantages, too. The researchers risk being isolated in the research of “their” individual country/countries and work parallelly, but not together with the other country experts. This isolation has the danger that common traits of several or all East European countries are easily ignored. This danger is minimised by the academic director who oversees global trends in the legal developments of Eastern Europe, and by regular work meetings where the entire research staff assembles to discuss actual as well as structural questions, problems and observations.

With its country expert system, the Institute for East European Law follows an organisational pattern opposed to that of the Max Planck institutes that conduct comparative research only for one field of law each. There are different Max Planck institutes for foreign civil, public, criminal, labour, social and intellectual property law as well as for legal history. The Max Planck institutes have specialists for the various fields of law who are not, in turn, specialists for one or two countries. On the other hand, the country specialists of Institute for East European Law may lack their Max Planck colleagues’ in-depth structural knowledge in the chosen field of law, instead they are in the position to adopt a holistic perspective of the entire legal system of the country or countries they specialise on. Both systems have their advantages and disadvantages, and in their combination the Max Planck institutes and the Munich Institute for East European Law neutralise each other’s weak spots.

The academic staff of the Institute for East European Law comprises six lawyers. These six researchers serve all country departments with the exception of Bulgaria which is dealt with by an external researcher. Most researchers specialise on more than one country, usually kin countries: Russia, Ukraine, Belarus and CIS are in the hands of one colleague, so are the Czech Republic and Slovakia, Romania and Moldova, and the Yugoslav successor states minus Kosovo. All full-time researchers are fully trained German lawyers. This is important especially when writing expert opinions for German courts or authorities: A German lawyer knows the professional background of German judges and administrative staff and can therefore explain the foreign law in a way they understand. Apart from their German legal training, the researchers have profound knowledge of the language(s) and the culture(s) of “their” country or countries, and of course they get to know the law of that country/countries very well.

■ 2.2. *The work of the Munich Institute for East European Law: a combination of basic and of applied research*

What does the research work in the Institute for East European Law look like? How do the researchers fulfil their duties? Comparative law studies in the Institute for East European law are a unique combination of basic research and applied research.

The first step of all research is to monitor the legal development. For this purpose, the researchers study the official gazettes of the East European countries – nowadays in electronical form – in order to ascertain new laws and changes in the normative acts. They also study the court practice and the legal literature from and about their countries. Apart from the German and international journals on East European and on comparative law, the institute holds a wide variety of legal journals from Eastern Europe. Just to give an impression: from Hungary, there are in paper (in alphabetical order)⁸: *Aarms*, *Acta Humana*, *Acta Juridica Hungarica*, *Állam- és Jogtudomány*, *Annales Universitatis Scientiarum Budapestinensis de Rolando Eötvös Nominatae. Sectio Iuridica*, *ELTE Law Journal*, *Gazdaság és Jog*, *Jogesetek Magyarázata*, *Jogtudományi Közlöny*, *Jura*, *Közbeszerzési Szemle*, *Közjogi Szemle*, *Magyar Jog*, *Magyar Kereskedelmi Jogi Évkönyv*, *Parlamenti Szemle*, *Polgári Jogi Kodifikáció*, *Pro Futuro*, *Pro Publico Bono*, *Új Magyar Közigazgatás* and, from now on, *Central European Journal of Comparative Law*; more journals are accessible online. The study of *Magyar Közlöny*, *Kúriai Döntések* and these journals provide a fairly comprehensive overview of the situation of Hungarian law. In the other country departments, the situation is similar.

The next step is to document the most important aspects of the legal development. The researchers of the Institute for East European Law write monthly chronicles, ordered according to the fields of law, about the most important normative acts and court decisions. These chronicles are published in a monthly journal edited in the institute: *‘Wirtschaft und Recht in Osteuropa’*. These two steps – monitoring the legal development and documenting it – guarantee that each researcher has an up-to-date overview over the legal system of the researched country or countries.

Apart from the monthly *‘Wirtschaft und Recht in Osteuropa’* (WiRO), the institute edits the annual journal *‘Jahrbuch für Ostrecht’* (JOR) as well as a book series titled *‘Studien des Instituts für Ostrecht München’*. Further research activities encompass the translation of East European normative acts, individual or all-institute research projects, the publication of research results in journals, books and other media, contributions to the German loose-leaf collections on foreign law, advice to decision-makers in the political⁹ and economic sphere, fostering international contacts and exchange

⁸ Some of these journals have ceased to exist. The institute possesses the old volumes.

⁹ Just one small example: During the time when Hungary did not have a Ministry of the Interior, Germany hosted an EU meeting of the ministers of the interior. From Hungary, the invitation was confirmed by the Minister for Justice and Public Order. The German Federal Ministry of the Interior called the Munich Institute for East European Law inquiring why Hungary did not send the ‘proper’ minister to that meeting.

and, last but not least, writing expert opinions for courts and authorities as well as for law firms, companies and other private clients.¹⁰

Most of the translations of East European laws and other normative acts are published in a four-volume loose-leaf collection edited by the institute: 'Handbuch Wirtschaft und Recht in Osteuropa'.¹¹ This handbook contains both descriptions of the central fields of civil and economic law and translations of the most important economy-related normative acts. The form of a loose-leaf edition was chosen because it makes it easy to update translated normative texts. The handbook is designed to help the German legal and business practice, but serves as a tool for academic studies as well.

The Institute of East European Law as well as its individual researchers participate in research projects sometimes of a purely legal and sometimes of an interdisciplinary nature. Two examples: In 2016/17, the Hungarian Constitutional Court and the Hungarian Kúria jointly invited research on the relationship between supreme courts and constitutional courts. The author of this paper, who is the managing director as well as the institute's country expert on Hungarian law, together with a Hungarian colleague, successfully applied with an interdisciplinary project: the comparison of that relationship in selected Central European countries.¹² Every year, the Deutsche Akademische Austauschdienst (German Academic Exchange Service) sponsors a German-Ukrainian-Kazakh seminar organised by the Institute of East European Law and the University of Regensburg together with the Centre for German Law of the Taras Shevchenko University Kyiv, the National University of Kazakhstan and more Ukrainian universities. The subjects alternate annually between direct democracy and administrative judicial protection, subject-matters of high actuality in all three countries. Advanced students and doctoral students from Germany, Ukraine and Kazakhstan meet in spring and in autumn, present their papers on selected aspects of the subject-matter of the seminar, hear presentations by professors and practitioners – in 2019, e.g., the President of the Hungarian Kúria described the first experiences with Hungary's new Administrative Litigation Code – and, finally, draft a model law for direct democracy resp. administrative litigation.

In Germany there are extensive loose-leaf editions, covering all countries of the world, on the fields of law where foreign law is generally often applied or where the knowledge of foreign law is important: citizenship law, family law, law of succession, civic status and registration. These collections are written for practical use in courts, public authorities and law firms and usually contain both the translations of

10 The expert opinions for the legal practice are dealt with in detail infra, chapter 3.

11 More information is available at: <https://www.ostrecht.de/publikationen/wi-ro-handbuch.html> and <https://www.beck-shop.de/handbuch-wirtschaft-recht-osteuropa-wi-ro/product/381>.

12 Attila Vincze, Herbert Küpper (with the participation of Lukas Diem and Claudia Fuchs): *Az Alkotmánybíróság és a felsőbb bíróságok kapcsolata. Konfliktusok és kooperáció jogösszehasonlító szempontból*, handed in in 2017. Later, an extended version was published in German language: see Küpper and Vincze, 2018.

the pertinent foreign laws and explanatory texts. The researchers of the Institute for East European Law update “their” countries in these collections.

Teaching is not the primary focus of the Institute for East European Law because it is not a university institute. However, most researchers assume teaching obligations either at German universities where they teach the law of “their” respective country or countries, or at universities in “their” countries. The author of this paper, e.g., regularly teaches at the Andrassy University Budapest, as well as at the doctoral school of the Law Faculty in Pécs and the training of Hungarian-German / German-Hungarian legal translators in Szeged. Here again, the country expert system shows an advantage. In academic contacts with the hyper-centralised countries of Eastern Europe, the first addressees usually are the institutions based in the respective capital city. A specialised country expert, however, has the chance to establish contacts with institutions beyond the capital. In my case, I teach in Pécs and Szeged, and I keep close contact with the faculties in Miskolc and Debrecen as well as with judges, attorneys etc based all over the country. This is of particular importance because Hungary consists of more than Budapest.

Apart from university teaching, the institute operates as a training institution in the practical legal education, accepting trainees who are interested in comparative law. And the institute serves as a receiving organisation for foreign guest researchers. The institute’s extensive library on Eastern European laws attracts researchers even from Eastern Europe itself who want to conduct comparative research on more than one Eastern European state.

3. Expert opinions on foreign law as applied comparative law¹³

One of the institute’s core activities, apart from the basic research and its documentation in monthly chronicles, are expert opinions for German courts and authorities. This task is the reason why the institute belongs to the Federal Ministry of Justice and not to the Federal Ministry of Science. Quite often, courts and authorities from other countries than Germany seek the institute’s legal expertise because their countries do not possess a similar research institution. Most foreign requests come from Austria, followed by Switzerland, the Netherlands, and the Scandinavian states. International clients for the institute’s expertise were i.a. the International Criminal Tribunal for the former Yugoslavia and the international military troops in Bosnia-Herzegovina.

■ 3.1. The legal basis of an expert opinion on foreign law

Germany does not have the centralised court expert system that Hungary has. On the contrary, the German court expert system is just as decentralised as most aspects of

13 Küpper, 2004, p. 32.

public life in this country.¹⁴ If a German court needs external expertise – be it on foreign law, on medical causation, on the psychological situation of an accused, on the market value of a property, or on the interpretation of accident traces on a car wreck, just to name some examples – it will search for such an expert. For certain fields of expertise, including foreign law, there are unofficial lists. No court is compelled to choose an expert from that list, but is free to choose whoever it wants. In private and economic cases, the court will seek the consent of the parties first, whereas the parties' approval of the prospective expert is less important in criminal and administrative cases.

In general, courts that need an expert opinion on foreign law will address the university institutes for the collision of laws and comparative law.¹⁵ Most law faculties have such an institute. These institutes, however, usually employ experts on Western European and North American legal systems. Furthermore, there are one or two chairs for Turkish, Islamic, or Japanese law. For East European law, there are two university institutes left (in Cologne and Kiel; and there is a chair for law at the interdisciplinary Institute for East European Studies at the Free University of Berlin), but they have little staff and cannot provide legal expertise on all East European countries. Therefore, in cases involving e.g. Russian, Polish, Hungarian, Croatian, or Bulgarian law, the court or authority will request an expert opinion from the Munich Institute for East European Law. For reasons of procedural law, the request for an opinion is not addressed to the institute as such but to the concrete researcher. The nomination of the expert for a case needs to address a natural person who is then obliged to give the opinion *in persona*.

The legal basis for the introduction of external expertise in a court procedure is decentralised again. There is no law on court experts or on expert opinions for all courts, but each branch of the judicial system has its own procedural act¹⁶ with more or less explicit rules on the nomination of an external expert and their rights and duties. If an expert is employed in an administrative procedure, the legal basis is the specific law applied in that procedure or, if that law does not contain any pertinent rules, the general administrative procedure act. The most detailed rules on external expertise can be found in the Civil Procedure Code and the Criminal Procedure Code.

In a German court (or administrative) procedure, foreign law is an object of evidence, i.e. the expert and the expert opinion are 'means of proof', like witnesses, a confession or objects of evidence. There is no established rule whether foreign law

14 On centralisation and decentralisation as the typical traits of the Hungarian resp. the German legal culture see Küpper, 2016, pp. 131–141. On the centralised Hungarian system of court experts see most recently Kúria, Joggyakorlat-elemző csoport: A szakértői bizonyítás a bírósági eljárásban: Összefoglaló vélemény, 12.2.2015, http://www.kuria-birosag.hu/sites/default/files/joggyak/osszefoglalo_velemenye_2.pdf; Bányai, 2020, pp. 120–122.; Bartal, 2018, pp. 321–326.; Cséffai, 2019, pp. 80–87.; Nogel, 2018, pp. 162–168.

15 The charters of the Max Planck institutes for foreign laws expressly state that expert opinions on foreign law (except on request of the government) are not a task of these institutes.

16 There are separate codes of procedure for civil, criminal, administrative, labour, social, and financial courts, for the Federal Court of Patents, for the Federal Constitutional Court, one each for the constitutional courts of the 16 federal states, as well as for the various disciplinary and similar courts.

and the evidence concerning it are a question of law or a question of fact. The German courts seem to adopt a pragmatic stance and treat it sometimes as fact and sometimes as law.¹⁷ The wrong interpretation or application of foreign law may be a reason for appeal, but legal practice is not uniform and takes a rather pragmatic approach.¹⁸

■ 3.2. *Statistical overview of the practice of the Institute for East European Law*

Expert opinions on foreign law are most frequent in civil (including economic) cases. This is true for expert opinions on East European law as well. Every year the Munich Institute for East European law delivers between 80 and 120 formal expert opinions. This number does not include the frequent informal inquiries which, by virtue of their size or their role in the procedure, do not require a formal opinion but are answered through informal information. Some 70–80 percent of the formal expert opinions concern civil and economic cases. The exact content differs from country to country.

With respect to the EU member states, the most frequent constellation are traffic accidents. EU law allows EU residents to sue the insurance of the other party of a traffic accident at their place of residence even if the accident happened in another EU state. This plaintiff-centred forum does not alter the applicable law: In these cases, the law of the place of the accident is to be applied. So, if a German resident suffers a traffic accident in Hungary, (s)he may sue in Germany, but the German court will have to apply Hungarian law. In about a third of the Hungarian road accident cases, the plaintiff is a German resident but a Kosovar or a Turkish citizen, usually on their way to or from visits to family in the former homeland. And in quite a few cases the defendant is not Hungarian, but the insurer of a Polish, Slovakian or Czech lorry. In the practice of the Institute for East European law there are court cases where a plaintiff German resident of Kosovar citizenship – or, if we do not accept Kosovo as an independent country, of Serbian citizenship – suffered on Hungarian territory a road accident caused by the Slovakian driver of a lorry insured in Poland – a classical text-book case for the collisions of law.

In this context we must not forget, however, that the inclusion of an external expert on foreign law does not question the principle of ‘*iura novit curia*’. This means that the expert will only describe the foreign law, whereas the domestic German law – including the German law of collisions and the pertinent EU law – remains within the realm of the German court. In practice, however, a sizeable proportion of judges try to “smuggle” questions on the German law of collisions into the questions to the expert, hoping that the expert on foreign law knows the German law of collisions better than the German court does. There are two possible ways to react to this. First, the expert on foreign law may formally protest and refute the parts of the questions relating to German (including EU) law. Second, the expert on foreign law may ignore the inadmissible questions on German law and concentrate on the foreign law. The Institute for East European Law usually chooses the second way in order not to undermine the

17 Baumbach, Lauterbach, Albers and Hartmann, 2016, p. 1337.

18 Baumbach, Lauterbach, Albers and Hartmann, 2016, p. 1929.

court's authority with a formal protest. Only when the attorney of one of the parties keeps insisting that the expert should include into the answer the questions on the law of collisions, the researchers of the institute protest formally.

Another large group of cases concern family law. Most family law cases are related to the law of the Yugoslav successor states or to Polish law. Many ex-Yugoslav and Polish citizens live in Germany. When they file a divorce or argue about maintenance or the right to see their children, the law of their citizenship is applicable. Germany is home to many emigrants from Hungary as well, but usually at least one of the Hungarian spouses holds German citizenship, too, and this opens the avenue to the applicability of the German autonomous law. For this reason, there is no need to apply Hungarian law in most 'Hungarian' family law cases.

In Hungarian law, a large group of cases relates to dentist liability; about half of these cases are heard by German and the other half by Austrian courts. In the department for Czech law, a large group is liability cases for plastic surgery. In both cases, the reason is obvious. Other frequent fields of law are real property, contracts, and company law. In the latter group, there is a certain 'standard case' of an Eastern European company active on the German market; when a law-suit arises and the East European company fears to lose it, it often protests that it does not exist at all as a legal person because allegedly there has been a major mistake in its foundation process: as a non-entity, it purports that it cannot participate in the court procedure. The question whether a company founded and registered in, e.g., the Czech Republic, Hungary, or Poland, naturally is a question of Czech, Hungarian, or Polish law, and this is where the expertise of the Institute for East European Law comes in.

A large number of business-related cases with respect to Russian law encompasses questions of customs law and customs criminal law, legal regulations very popular among Russian authorities for blackmailing foreign investors, and of the non-enforceability of Russian court decisions against the Russian state within Russia. Trade mark disputes, too, are typical for Russian law. The background is that the Russian state wishes to re-nationalise the old Soviet trademarks that were privatised in the 1990s, often to Western investors. Within Russia itself the Russian state can capture these trademarks without having to observe Russian (or any other) law, but on the world markets Russia can assert its claim only if non-Russian courts accept that. For this purpose, Russia usually argues that the privatisation process violated the Soviet or Russian law of the time. This gives rise to court orders for expert opinions on Soviet and Russian privatisation law of the late 1980s and early 1990s. The cases where the Munich Institute for East European Law gave expert opinions include the trademarks for vodka brands 'Stolichnaya' and 'Moskovskaya' as well as the cartoon figure 'Cheburashka'.¹⁹ Most of the law suits on ex-Soviet trade marks are conducted before Austrian courts.

Expert opinions on foreign criminal law are ordered comparatively rarely because the law of collisions does not envisage the application of foreign law by criminal

¹⁹ In a similar case concerning Polish law, the Institute for East European Law delivered an opinion in a trade mark dispute about 'Lolek and Bolek' pending before a German court.

courts. Yet, in some criminal cases questions of foreign law may play an auxiliary role. If the criminal act was committed outside Germany, the question of punishableness under German law may depend from whether that act is a criminal offense also in the country where it was committed. In 2019 a criminal court requested an expert opinion on Ukrainian sexual criminal law: on a bus from Kyiv to Germany, one passenger had sexually molested the young woman sitting next to him while the bus was still on Ukrainian territory; he was arrested and charged when the bus reached its destination in Germany. In this constellation, the German court has power to punish the act only if it is punishable under Ukrainian law as well, and also for the sentence the provisions of the Ukrainian law are of relevance. Another typical question in criminal law is the exact meaning of a foreign previous conviction and of the pertinent criminal records. For no known or obvious reason, the majority of these questions concern Czech law.

Probably the second largest group after road traffic accidents are pension cases. These usually start before the pension authority and involve the subsequent procedure before the social court as well. Under German law, ethnic Germans who move into Germany from certain East European countries (former Soviet Union, Poland, Czech Republic, Slovakia, Romania and, in certain constellations, the former Yugoslavia) may have their East European pension biography acknowledged for a pension under German rules. This requires the translation of an East European, usually socialist working biography into the categories of the German pension law. It is obvious that this difficult task is prone to give rise to innumerable debates: What was the exact status of a tractor driver in the 1970s in the Kyrgyz SSR – and does it make a difference if (s)he worked on a sovkhoz or a kolkhoz? Was the village secretary in a small settlement in the Carpathian mountains in the early 1980s ‘close to the regime’, which would disqualify him/her from the pension privileges under German law? Do or do not count as pensionable income the fees for the trade union which in socialist Czechoslovakia were deducted directly from the worker’s income and transferred to the trade union? Another aspect of immigration from the former Soviet Union is the question whether certain Russian pensions or property in the former Soviet Union may be, has to be or must not be deducted from the German social aid. In the case of a Hungarian receiving German social aid the institute had to describe the legal nature of the Hungarian ‘indemnification pension’.²⁰ Pension-related questions form the bulk of expert opinions in administrative procedures.

A more recent field for administrative bodies to request expert opinions on East European law about is immigration. Under EU law, asylum seekers can only be sent back to another EU country if the asylum procedure there meets European standards. Quite often, asylum seekers in Germany claim that they cannot be sent back to Hungary, Croatia, Bulgaria or Romania (or, outside the scope of the Institute for East European Law, to Greece). In such a situation, the asylum authority or, more often, the administrative court seeks confirmation about the EU-conformity of the asylum

20 The expert opinion is published in *Jahrbuch für Ostrecht* 2013/2, pp. 435–438.

law of the given country and requests an expert opinion. Here again, the principle of ‘*curia novit iura*’ prevails which means that the expert opinion will describe the foreign law. Whether it complies with EU law is a question for the court (or the authority) to answer because EU law is part of the domestic law and as such can be neither an object nor a yardstick in expert opinions on foreign law. In 2015 the German administrative courts started to select test cases in which they asked for an expert opinion, published the expert opinions in the data bases on asylum law, and have used the opinions and their assessments in the numerous subsequent cases. This way, they save the tax payer many costly expert opinions. The expert opinion on Hungarian law was requested by the Administrative Court of Düsseldorf in 2015. In its judgement the court came to the conclusion that in certain – though rather exotic – constellations the Hungarian law did not award the asylum seeker a hearing to the extent required by EU law. In recent years, the pertinent case-law of the European Court of Human Rights on the post-2015 asylum law of many states has become an important source of information for asylum authorities and administrative courts in Germany. This and the results of the test cases have led to a situation where the requests for expert opinions on asylum law have dropped to zero.

■ 3.3. *How is an expert opinion on foreign law written?*

In the usual course of things, a court (or an authority), when noticing that foreign law is relevant to their case, formulates an order that an expert opinion on the pertinent foreign law is to be requested. This order nominates the prospective expert and formulates the questions to be answered in the opinion. As mentioned before, the court will seek agreement with the parties on the person of the expert in civil and economic, but not necessarily in other cases. An expert who has delivered a private expert opinion to one of the parties is usually barred from being appointed court expert, but if all parties agree such an expert may be appointed.

The appointment needs to be accepted, but acceptance may only be refused on sufficient grounds. With the appointment a contract arises between the court and the expert, and at the same time the expert obtains the status of a participant in the procedure. Consequently, the expert incurs certain duties such as confidentiality and, most important of all, neutrality. The violation of these duties may be sanctioned.

In very rare cases a party may try to obtain a favourable opinion with inadmissible means. During the last three decades, there has been one attempt of bribery in the practice of the Munich Institute of East European Law. One of the parties called the expert on the phone insinuating that they would consider a reward if the expert advocated a certain interpretation of the law in their favour. In such a case, the proper procedure is that the expert notifies the director of the institute; both notify the judge in charge of the case. Since the telephone call was not recorded, there was no proof, and consequently the court could not sanction the party in question. The judge asked the researcher of the institute whether he still felt sufficiently neutral even after the

attempted bribery, and when the expert gave a positive answer the court continued his appointment – happy that it did not have to look for a new expert.

Before making the order to request an expert opinion, the court may inquire with the institute whether the problem in question falls within the scope of the institute's expertise. Such a preliminary information procedure is infrequent, but does happen, usually if the country in question does not “belong” unequivocally to the Institute for East European law²¹ or if the required field of law is exotic.

When the court decides to request an expert opinion in a civil case, the order will oblige either the plaintiff or both parties to advance the foreseeable costs as fixed by the court. In a civil case the experts' costs are part of the costs of the procedure which are to be borne by the defeated party. The state does not want to advance the experts' costs in order to avoid having to try and recover them after the end of the procedure. In cases where the state bears the costs of the procedure anyway such as certain criminal, administrative, social, financial, or labour procedures, advancing the costs of the opinion is less important. If the court requests advance payment from one or both parties, it will go to the next step only after the full amount will have been paid.

The usual next step is that the court sends, together with the order, the entire case file – German courts²² usually in paper, Austrian courts, which are much more advanced with electronic case files, often in electronic form. The expert first reads the order, and then the file.

The question(s) by the court, as set out in the order, are the core of the entire expert opinion. The adequate wording of the questions may cause problems, the source of which lies in the fact that in Germany, Austria and the other countries that request expert opinions, a foreign element does not constitute a separate competence within the court. For this reason, there are no specialised chambers or judges for cases with an element of foreign law. A case with a foreign element may hit every judge, and most expert opinions are requested by judges who face this problem for the first time in their life. Moreover, neither the university nor the subsequent practical education prepare a judge or an administrative official to formulate a request for an expert opinion on foreign law properly. A reform of court competencies might help. If a foreign element constituted a criterion for competence, every court could form one (or more, as the case may be) specialised chambers, and the judges active in these chambers can specialise

21 Recently a court seeking an expert on Latvian law started such a preliminary inquiry, being aware that the institute did not have a country expert on Latvian law, and being unable to find anybody else in Germany. In this special case the institute could accept the request because the question could be answered on the basis of the Latvian Civil Code of 1937, re-enacted in 1992, which exists in an official German version.

22 Administrative bodies have a somewhat different standard procedure. They keep the files and only send the order and, as the case may be, copies of the most relevant documents. The reason for this different practice is that a court procedure usually is suspended during the work of the expert so that the court can dispense with the file. An administrative authority, on the other hand, often continues its procedure so that it needs the full case file.

in the German law of collisions, the technique of formulating questions and of choosing appropriate experts.

The wording of the question may bear several sources for problems. First, a question may not be exact enough. The task of the expert on foreign law is to describe the applicable law, not to apply it to the case in question, nor to solve the case on the basis of the foreign law. The expert opinion is to provide the knowledge necessary to put the German judge into the position where (s)he can apply the foreign law and solve the case. The more exact a question is, the more exact the answer can be. A very wide question such as “Is the plaintiff’s claim justified under the law of ...?” requires a very extensive opinion – the cost of which may be out of proportion with the value of the dispute. On the other hand, the court is often not in the position to formulate a precise question. The facts may be unclear, or a precise question may be possible only in knowledge of the foreign law – a knowledge which the court does not have but wishes to obtain. If a question is too vague or if it, with view to the pertinent foreign law, does not hit the spot, it often helps to clarify open aspects in a direct communication between expert and judge. In most such cases, the judge will give the expert *carte blanche*. Sometimes, however, the differences between the question in the court order and the question useful to solve the case are so blatant that the court order has to be reworded formally.

The second trap when formulating the question is the domestic law of the court. Many judges solve the case in their head on the basis of their own law. Accordingly, they formulate questions that make sense according to German or Austrian dogmatics. This does not mean, however, that these questions advance the solution of the case in Russian, Bosnian, Moldovan or Slovakian law. In road accident cases many plaintiffs demand immaterial damages. In German law, these claims are based in the law of tort. The new Hungarian Civil Code of 2013, just to name one example, has shifted the legal basis of these claims from tort to personality rights. As a result, a thinking in the categories of tort may not be adequate for formulating the questions proper to solve the case in Hungarian law. More examples: there are strong differences in the details of land registers and company registers between all European states, and these differences may have an impact on the material law. In some countries, statutory prescription is an instrument of material civil law, in other countries of civil procedure law. The German or Austrian judge needs to abstract from the peculiarities of the German or Austrian rules when drafting a question with view to Polish, Lithuanian or Serbian law.

The third source of problems are the facts. It helps enormously when the court gives the facts which are to be the basis of the expert opinion on foreign law. Extracting the relevant facts from the statements of the parties in the case files is not only a cumbersome business but is fraught with ambiguities and the necessity to interpret. If this task is left to the expert on foreign law the risk is high that the expert describes the law for a set of facts different from the facts that the court bases the case upon. Such an opinion is useless. On the other hand, if the court defines the facts that the expert is to take as a basis, one of the parties may easily interpret this as a hostile bias by the

court, and the court risks being rejected. In such a situation, a compromise between the necessary unequivocalness of the facts and the neutrality of the court may be that the courts asks what the applicable foreign law is if one takes for granted the statements of the plaintiff (as summarised by the court) and, separately, the statements of the defendant (again as summarised by the court). This question technique does not work in all cases but in many. It is costly, however, because separate sets of facts need to be analysed, which makes the opinion lengthy and expensive. Especially in cases with strongly disputed facts, however, this double analysis of the plaintiff's statements and the defendant's statements is necessary because only the comparison between the two analyses indicates to the court which facts require proof and which do not.

If the question at hand is sufficiently clear or has been clarified in the communication between the expert and the court, the expert can begin writing the opinion. If the court order does not set the facts that are to be taken as a basis, the first step of the expert is to ascertain the facts by studying the statements of the parties. In this case, the opinion's text will have to describe the facts that the expert took as a basis.

The core activity is to answer the court's questions about the foreign law. Sometimes the questions have to be re-grouped or modified to adapt them to the foreign legal system. In extreme cases, a question has no connection to the solution of the case in the light of the foreign law. In this case it is legitimate for the expert not to answer it because an expert opinion does not describe foreign law as *l'art pour l'art*, or to alter the question to the extent that it contributes to answering all relevant questions of foreign law pertinent to the case at hand.

When describing the foreign law, the expert has a role similar to, but not identical with the judge. It is not the task of the expert opinion to solve the case, but to describe the applicable foreign law to the extent that the German sitting judge is able to apply it to the case. The expert on foreign law must not subsume the facts of the case under the rules of the foreign law but must describe the foreign law in sufficient detail so that the judge can do so. If, for example, the interpretation of a given norm is under debate in its country, the expert must not decide that debate but must describe the pros and cons stipulated in the debate and leave the decision to the judge. This sometimes makes it necessary to describe the foreign law in a somewhat wider scope than only the norms that decide the case. Often, norms form a network of legal institutions or value decisions by the law-maker, and if the sitting judge needs to know about this in order to decide the case correctly, these questions of law adjacent, but not in a strict sense pertinent to the case need to be described as well. A question on a detail of the Hungarian form of the trust ('fiduciary asset management') is hardly answerable without describing the general construction of this legal institution, and this may require even some basic description of the interaction of contract and property in Hungarian law.

The wider scope of description necessary in an expert opinion may include legal facts and a glance at the legal culture of the country. A German or Austrian judge can better develop a proper understanding of Hungarian company law when knowing that

in Hungary a limited liability company or even a joint-stock company is not an unusual form for small businesses.

The expert on foreign law is required to concentrate not so much on the law on the books but on the law in action. The goal is to describe the foreign law under the perspective of how a foreign court would decide the pending case. The ideal of the German law is that the German judge decides the case exactly as a foreign judge would. However, there is a second ideal, too. The German court is to apply the foreign law 'correctly'. This means that the German court is not expected to, and in fact must not imitate foreign corrupt court practices or other 'incorrect' distortions of the applicable law in foreign practice. The German court must apply the foreign law the way a foreign court would if acting 'correctly'.²³ In expert opinions on Hungarian law, this gap between 'real' and 'correct' court practice is not wider than in any other Western European jurisdiction and therefore does not pose a problem. In opinions on Russian law, however, there have been cases where there was reason to give a hint that the pertinent Russian court practice was corrupted by political influence, greed, or other illicit factors.

All this shows that an expert opinion on foreign law is a demanding task. The expert needs to know the law on the books as well as the law in action, needs to spot corrupt practices, and needs to be able to explain the embeddedness of the question at hand in wider legal structures and legal facts. All this has to be described and explained in a way that a German (or Austrian) court with its German (or Austrian) legal thinking can understand it. Last but not least, the opinion must present the foreign law in a way that fits into the precise procedural situation.

The researchers of the Institute for East European Law can do that because they specialise on one or two countries. The continuous basic research which covers the entire legal system (except tax law) provides the researchers with a holistic perspective. This holistic view enables the expert to spot and handle connections between various fields of law. Two examples: in the tort law of many East European countries (and beyond), statutory prescription of claims based on tort is often linked to the statutory prescription in criminal law.²⁴ The procedures and especially the procedural remedies in business-related administration such as register procedures (land register, company register, lien register etc) or procedures of the competition authorities cannot be properly understood without at least some idea of the general administrative procedure law of the country, despite the fact that all these procedures usually have legal bases separate from the general administrative procedure codes. An expert on civil or business law only may miss these links but the holistic perspective of the country expert can place the rules of foreign law into the context of the overall legal system.

Finally, the institute publishes its expert opinions on questions of general interest in its 'Jahrbuch für Ostrecht'. The average number of opinions thus published is 3 to 4 every year.

23 Baumbach, Lauterbach, Albers and Hartmann, 2016, p. 1337.

24 The pertinent Hungarian rule is § 6:533(1) of the Civil Code.

4. Final remarks

As could be seen, the work of the Institute for East European Law combines basic research and applied research ideally. In fact, the basic research of monitoring the foreign legal system to its full extent is the prerequisite of high standards in the applied research. One of the most demanding forms of applied research certainly is an expert opinion on foreign law for a domestic court. This requires an in-depth understanding of the foreign law on the books and in action, the latter purified from corrupt practices, if necessary, and this understanding of foreign law needs to be translated into the dogmatic categories of the domestic legal thinking of the sitting judge as well as into the procedural situation at hand. Still, it is highly satisfying to be able to contribute to resolve a real-life dispute. Let me finish my paper with a one-liner that the researchers of the Institute for East European Law have coined for their work: “An expert opinion on foreign law has three guaranteed readers: the judge as well as the two parties – which is two more than the average academic paper has.”

Bibliography

- Bányai, I. (2020) 'Az igazságügyi szakértő helye, szerepe a döntéshozatalban', *Magyar Jog*, 67(2), pp. 120–122.
- Bartal, G. (2018) 'Magánszakértői vélemény az új Pp.-ben', *Magyar Jog*, 65(6), pp. 321–326.
- Baumbach, A., Lauterbach, W., Albers, J. and Hartmann, P. (eds.) (2016) *Zivilprozessordnung*. 74th edn., Munich: C.H.Beck.
- Brunner, G. (1975) 'Die Methode des Ostrechts im Widerstreit von Recht und Politik', *Osteuropa Recht*, 1975, pp. 89–102.
- Cséffai, A. Cs. (2019) 'Alkotmányos igazságügyi szakértés', *Közjogi Szemle*, 12(1), pp. 80–87.
- Kischel, U. (2015) *Rechtsvergleichung*. Munich: C.H.Beck.
- Küpper, H. (2004) 'Rechtsgutachten durch das Institut für Ostrecht München (IOR)', *Deutsche Richterzeitung*, 2004.
- Küpper, H. (2005) 'Einführung in die Rechtsgeschichte Osteuropas' in *Studien des Instituts für Ostrecht München*, Vol. 54, Frankfurt am Main: Peter Lang Publishing, pp. 686–705.
- Küpper, H. (2016) 'A magyar jogi kultúra egyes jellegzetességei összehasonlító perspektívából' in Jakab András, Gajduschek György (eds.) *A magyar jogrendszer állapota*, MTA TK JTI: Budapest, 2016, pp. 131–141.
- Küpper, H. and Vincze, A. (eds.) (2018) 'Verfassungsgerichte und Obergerichte in Mitteleuropa' in *Studien des Instituts für Ostrecht München*, Vol. 83, Frankfurt am Main: Peter Lang Publishing.
- Luchterhandt, O. (1996) 'Künftige Aufgaben der Ostrechtsforschung', *MfOR-WGO*, 1996, pp. 159–175.
- Maurach, R. (1967) 'Aus der Frühzeit der deutschen Ostrechtsforschung' in *Jahrbuch für Ostrecht 1967/II*, pp. 7–24.
- Nogel, M. (2018) 'A hazai szakértői minőségbiztosítás rendszerének vázlata és annak jelentősége a büntetőeljáráásban', *Magyar Jog*, 65(3), pp. 162–168.
- Schroeder, F.-C. (1983) '25 Jahre Institut für Ostrecht München', in *Jahrbuch für Ostrecht 1983/I*, pp. 9–13.