

Ralf Michaels

forthcoming in Oxford Handbook of European Private Law (Basedow, Hopt, Zimmermann eds., Oxford University Press)

Restatements

1. Term

A restatement re-states, at least in principle, what already exists. A restatement is not a law and is not typically promulgated by the legislator. Rather, restatements emerge when scholars and practitioners systemise the applicable law in a new, more accessible form, concentrating on the most important principles. Restatements can therefore be distinguished from other texts, although the distinctions are sometimes not sharp. The main difference with a codification is that a restatement lacks the force of law. Otherwise, the structure and content of a restatement look similar to a codification, and substantively most codifications are in large part restatements of existing law rather than the creation of new law. A restatement can thus be called a private codification. Compared to principles and to general principles of law, the rules of a restatement are normally more detailed so that they can be applied as rules. Many texts labelled principles, however, resemble more closely restatements in rule form. Finally, restatements differ from model laws in that they reproduce the law as it is, while model laws suggest the law as it should be; however, an overlap exists here as well.

In a broader sense, the legal encyclopaedias of → Natural Law and of the Enlightenment were restatements, as was the systematic representation of national law in the → *Pandektensystem* and in French private law of the 18th and 19th centuries. All these scholarly works did not merely list the totality of the law; rather, they represented law as a system. In a narrower sense, the term restatement refers to the so-called Restatements of the Law of the American Law Institute (ALI), as well as to later projects influenced by these Restatements. This entry examines only restatements in this narrower sense.

2. The U.S. Restatements of the Law

At the beginning of the 20th century, law in the United States was found to be uncertain and exceedingly complexity. Lack of legal certainty was found due to lack of agreement on the fundamental principles of the common law, lack of precision in the use of legal terms, conflicting and badly drawn statutory provisions, the great volume of recorded decisions and the number and nature of novel legal questions. The main reasons for the complexity were the lack of systematic development and also the variations among the laws of the different states. To address these problems, the ALI was founded in 1923 “to promote the clarification and simplification of the law and its better adaptation to social needs, to secure the better administration of justice, and to encourage and carry on scholarly and scientific legal work.” The main instrument was to be a restatement

of the most basic legal subjects to make the valid law accessible. The most promising method was seen in the scientific systematisation of the case material into distilled legal rules. From their very inception, the first generation of Restatements was regularly criticised as overly formalistic and conservative because they accorded with the European-influenced formalism of the 19th century. Some recent assessments have been less negative.

The compilation of Restatements lasts many years and is marked by intensive, continuous exchange between scholars and practitioners. The ALI first determines, after careful preliminary study, whether a topic is suitable. Then, the ALI appoints a reporter, usually a scholar, who prepares an initial draft with a group of assistant reporters. This draft is then discussed with a small group of advisors, including practitioners and scholars, and is then revised. This revised draft is discussed by the ALI Council, a group of about 60 prominent judges, attorneys and professors. After the discussion, the revised draft is either referred to the reporter for further consideration or is presented as a tentative draft at the ALI Annual Meeting, which includes more than 4,000 members. This assembly discusses the tentative draft and accepts it as is or, more frequently, asks the reporter to make further changes. Eventually, the final and approved text is published by the ALI.

The character of the Restatements has noticeably changed over time. The First Restatement appeared between 1932 and 1944 in fields of the common law which, in the European view, largely belong to private law: agency, contracts, torts, restitution, property, trusts, securities, conflict of laws and judgments. These first-generation Restatements comprised to a large extent only rules and short explanations and conveyed an impression of unity and unambiguity, which was soon criticised as not reflecting reality. The Second Restatement, published from 1952, which treated further development of the law, took up this criticism and also added new fields like landlord and tenant law and foreign relations law. Many of its rules are formulated more openly and are less focused on uniformity; often they are consciously in conflict with each other. While the rules became less important, the commentaries and evidence of the valid law became more important. The published Restatement now also addressed the question of how far the rules of individual states depart from the solutions of the Restatement. Work on a Third Restatement has been underway since 1977 new, non-private law fields being included, for example international arbitration and international trade law.

The new form with rules and detailed commentaries makes it possible for reporters to openly suggest solutions which do not reflect the valid law in the majority of states. Sometimes these suggestions are accepted because of the authority of the Restatements or the reporter. Newer Restatements, such as Agency (2006), also incorporate worldwide legal comparison and thereby transcend the original idea of a simple reformulation of domestic law. Even though the Restatements are not official in character, they play an important role in jurisprudence as a reference text. However, great differences exist, both between individual Restatements and in regard to their implementation in different states.

Europeans sometimes think the main function of the U.S. Restatements is the overcoming differences between state laws and promotion of U.S.-wide legal uniformity. As we have seen, however, the differences in state laws are only one of the problems addressed by the Restatements, and in newer Restatements it is clear that no attempt is being made to claim U.S.-wide legal unification where it does not exist. U.S.-wide legal unification is being pursued in other ways. Thus, the National Conference of Commissioners on Uniform State Laws (NCCUSL), works, as does the ALI, on model laws. The most successful of these, the Uniform Commercial Code (UCC), has been implemented in almost all states, admittedly with differences in detail. Case law has also achieved a partial unification. Whereas the federal courts are very limited in their ability to rely on and create a federal common law, state courts, in interpreting the law of individual states, regularly use the decisions of the courts of other states as persuasive precedent.

3. European Restatements

The idea of the restatements was taken up in Europe, especially in contract law. In 1968, the General Secretary of → UNIDROIT, Mario Matteucci, encouraged the formulation of a “Restatement of International Contract Law.” First conducted as a “progressive codification of the law of international trade,” the project resulted in the 1994 → UNIDROIT Principles of International Commercial Contracts. The → Principles of European Contract Law, a parallel project, appeared in 1995. Even though both works are called “Principles,” they are explicitly inspired by the idea of the restatements and are similar in form, containing rules, short commentaries and (for the European Principles) comparative law references. From the beginning, both projects emphasised the desire to establish the best rules more than their model in the United States. There are also differences in the manner of preparation. Instead of one individual reporter, the Principles relied on different reporters for individual areas; the final project did not undergo an intensive public discussion with non-members of the working group or practitioners before publication as did the U.S. Restatements.

The success of these restatements has led to other restatement projects. The Restatement of European Insurance Contract Law (2007) showed the parallels already in its name; it has since been published as “Principles” (2009). This project was from the beginning conceived as preparatory work for a legislative harmonisation and for implementation in the → Common Frame of Reference (CFR). It relies not only on the law of the member states but also on existing EU insurance law. Another restatement is the Restatement of Labour Law in Europe that is currently being prepared by the → European Labour Law Network and is scheduled for finalisation by 2015. Other projects adopt the name “Principles” but resemble restatements in structure and content; the focus is regularly on the legal systems of the member states. Such restatements include the → Principles of European Tort Law (2005) as well as the Principles of European Family Law, of which two parts have been issued: Divorce and Maintenance between Former Spouses (2004) and Parental Responsibilities (2007) (→ Family). Methodologically, both projects are similar to the contract law principles, albeit

with stronger reliance on questionnaires and country reports. Principles of European property law and principles of European contractual networks have also been proposed. UNIDROIT has with the ALI also published global Principles of Transnational Civil Procedure (2004). The former UNIDROIT general secretary has suggested the formulation of Principles of Conflicts of Law.

While these projects are in the first instance aimed at bringing together national legal systems, the → Acquis Principles represent a restatement of EU Law. The Principles extrapolate a general contract law from the individual regulations contained in special instruments (mainly issued with regard to consumer contracts) and in the process make numerous legal policy decisions, so that the result goes beyond a simple compilation of existing law. An occasionally proposed restatement of European consumer law is not probable at this time, especially in view of the proposed Directive on Consumer Rights (→ Consumers and Consumer Protection Law).

By contrast, the project on a Common Core of European Private Law is not actually a restatement. This project seeks to present the similarities and differences of European legal systems, without seeking a systematic body of rules or evaluating the rules that are found. The draft for a → Common Frame of Reference (DCFR) from the Study Group for a European Civil Code is not actually a restatement for the opposite reason: it is too normative. The DCFR touches significantly on the Principles of European Private Law and (less so) on the Acquis Principles, but it exceeds both of them in going significantly beyond the status quo and must therefore be seen in the first place as a legislative proposal. Also speaking for this conclusion is that, in contrast to the new U.S. Restatements, comparative law studies appear to have played only a limited role in the drafting of many of its rules.

4. Comparison

Despite the similarities, many differences exist with the U.S. Restatements. A first difference concerns the point of departure. The main problem in the E.U. member states does not lie in legal uncertainty or a lack of systematisation. Continental European private law has traditionally been codified, and even English law is more systematic than American law. The main problem in Europe consists in the differences between the legal systems of the member states, which are more fundamental than in the United States. The private law of the E.U., on the other hand, is still unsystematic, but the reason for this is the fragmentary character of European lawmaking, which cannot simply be expanded into a system. A complete restatement would have to combine EU law and the law of the member states and therein combine very different private law concepts. Up until today, this combination has not yet proven very successful.

A further difference concerns the material used, which in the U.S. traditionally has been case law and in Europe largely legislation. The task in the U.S.A. is first and foremost to distil general principles from judicial decisions in concrete cases; in Europe, one must frequently unify already existing abstract legal rules. The difference is not absolute: the growing importance of legislation in the U.S.

presents new challenges to the compilers of the U.S. Restatements, while in Europe case law is being incorporated into the work, though not to anywhere near the same extent as in the United States.

The method is also different. The U.S. Restatements appear under the authority of a generally recognised institution, the ALI. The European restatements, by contrast, are created to a large extent by privately founded working groups. Even the merger of the most important working groups into the Joint Network on European Private Law has not changed this fundamentally. Occasional proposals for a European Law Institute have not been implemented. Further, the U.S. Restatements are examined and improved during years of exchange between reporters and outsiders, especially practitioners; their consensus is necessary before publication can take place. In contrast, most European working groups are made up almost exclusively of academics; exchange with outsiders, especially practitioners, usually occurs, if at all, only after publication. The Draft Common Frame of Reference (DCFR) is only a partial exception. It was first issued as a preliminary draft, but the time for comments of just under one year was significantly shorter than that of U.S. Restatements, and the “stakeholder meetings” held during its preparation also did not lead to the intensive participation of practitioners as in the United States. Consequently, the current draft is largely identical to the earlier draft.

The differences in method lead to different results. The U.S. Restatements do have a certain policy character; reporters suggest the ‘best’ rules more often than is appreciated by outside observers. Still, the extent of such suggestions is smaller than that found in most of the European Restatements. When U.S. Restatements make policy suggestions that depart from the status quo, it is clear from the commentaries. By contrast, all European restatements combine merely descriptive rules with potentially prescriptive rules, usually without revealing the difference. Overall, the European restatements, arising out of the European history of codification, are significantly more focused on systematisation and coherence than the more recent generation of U.S. Restatements.

This difference is connected to differences in the objectives of the restatements. The main roles of restatements are to allow for clarity in difficult questions and, through systematisation, to make it easier to achieve consistency in the resolution of cases. Restatements are in this regard not primary but secondary sources of law. They can only assume that role, however, to the extent that they are not only normatively persuasive but also, by and large descriptively accurate in providing an authoritative, reliable account of the existing law. Many of the U.S. Restatements have achieved this presumption; up to now this is less so for the European restatements. One reason may be that the comprehensive commentaries of the U.S. Restatements facilitate access to the law of the individual states. By contrast, in Europe almost all restatements are more or less explicitly developed as preparatory work for a European codification that should make access to the law of the member states irrelevant. This may make stronger policy positions appear desirable.

For some restatements, especially the UNIDROIT Principles and the PECL as well as more recently for the DCFR, there has been debate whether they could be selected as the applicable law – a debate that never existed with regard to the U.S. Restatements. The European legislator had for some time appeared to be sympathetic to such an idea before it was finally rejected in the Rome I Reg (Reg 593/2008) (→ Contractual Obligations [PIL]). In contrast, some restatements can be selected in arbitral proceedings, though in fact the UNIDROIT PICC are only rarely chosen and the other restatements almost never. The UNIDROIT PICC are occasionally used as additional authority for questions in domestic law but almost never as the applicable law.

All European restatements aspire to serve as preparatory work for possible community law-making. It may be, however, that the inherent compromise between descriptive-comparative law and prescriptive-legal policy, which characterizes more or less all these projects, will be an obstacle. The U.S. Restatements were from the beginning explicitly understood as an alternative to law-making; a unified federal private law codification is hardly ever seriously discussed and would be impossible under the U.S. Constitution. The European Union legislator might perhaps be better served by a more strongly descriptive restatement, which would make clear whether there is need for legislative intervention. It appears doubtful that the legal policy views of scholars will persuade the EU legislator simply because they are expressed in the form of Restatements. That is particularly true for the DCFR, which on the one hand contains strong legal policy views and on the other hand explicitly says that a political reference framework must take up other legal policy ideas.

Ralf Michaels

Literature

Klaus Peter Berger, *The Creeping Codification of the Lex Mercatoria* (1998); Ralf Michaels, 'Privatautonomie und Privatkodifikation – Zu Anwendbarkeit und Geltung allgemeiner Vertragsrechtsprinzipien', (1998) 67 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 580 ff; Wolfgang Wurmnest, 'Common Core, Grundregeln, Kodifikationsentwürfe, Acquis-Grundsätze – Ansätze internationaler Wissenschaftlergruppen zur Privatrechtsvereinheitlichung in Europa', [2003] *Zeitschrift für Europäisches Privatrecht* 714 ff; Richard Hyland, 'The American Restatements and the Uniform Commercial Code', in Arthur Hartkamp, Martijn Hesselink, Edwoud Hondius, Carla Joustra, Edgar du Perron and Muriel Veldman (eds), *Towards a European Civil Code* (3d edn 2004), 59 ff; Michael Joachim Bonell, *An International Restatement of Contract Law – The UNIDROIT Principles of International Commercial Contracts* (3d edn 2005); Joachim Zekoll, 'Das American Law Institute – ein Vorbild für Europa?', in Reinhard Zimmermann (ed), *Globalisierung und Entstaatlichung des Rechts, Teilband II: Nichtstaatliches Recht: Geltung und Genese* (2008), 101 ff; Lance Liebman, 'The American Law Institute: a Model for the new Europe?', in Fabrizio Cafaggi and Horatia Muir-Watt (eds), *Making European Private Law-*

Governance Design (2008), 209 ff.; Nils Jansen, *Non-Legislative Codifications and the Making of Legal Authority* (forthcoming)

Legal Sources

Research Group on the Existing EC Private Law (Acquis Group), Principles of the Existing EC Contract Law (Acquis Principles), Contract I: Pre-contractual Obligations, Conclusion of Contract, Unfair Terms, 2007; Contract II: General Provisions, Delivery of Goods, Package Travel and Payment Services, 2009

UNIDROIT Principles of International and Commercial Contracts (1994/2004)

Principles of European Contract Law, 1995/2003

Uniform Commercial Code (UCC)

European Group on Tort Law, Principles of European Tort Law – Text and Commentaries (2005)

Katharina Boele-Woelki, Frédérique Ferrand, Cristina González Beifuss, Maarit Jänterä-Jareborg, Nigel Lowe, Dieter Martiny and Walter Pintens, *Principles of European Family Law Regarding Divorce and Maintenance Between Former Spouses* (2004), Principles of European Family Law Regarding Parental Responsibilities (2007)

ALI/UNIDROIT Principles of Transnational Civil Procedure as Adopted and Promulgated by the American Law Institute at Washington, D.C., U.S.A. May 2004 and by UNIDROIT at Rome, Italy April 2004 (2006)

Jürgen Basedow, John Birds, Malcolm Clarke, Herrmann Cousy, Helmut Heiss, Leander D. Loacker (eds.), *Principles of European Insurance Contract Law (PEICL)* (2009)