Preface and justification

How can you know what the applicable law is?

'Applicable law *and* civil law': shouldn't that be 'applicable, civil law'? Yes, that is what it should be. However, at the moment, applicable law does not *per se* concur with civil law. The focus in legal practice, in jurisprudence, but particularly in legal education should be to address this question.

A feeling of amazement prompted the writing of this book. It is amazing that 'European law' is deemed 'external law', causing it to be viewed as a law which 'comes from without'. Nothing is in fact less true. European law does not come 'from without'. It is applicable law and thus part of the national legal system of every EU member state. However, in today's parlance and in the prevailing approach, reference is made to 'Union law' and 'European law' as if it was contrary to 'national law'.

As the approach in this book is not based on the prevailing view and customary practice of 'European law', a justification must be provided right at the outset. This book ignores the ways of thinking and working currently used in the various jurisdictions. Everywhere, these jurisdictions repeatedly[1] adopt the basic principle that European law is a 'higher law' and must be integrated as a *corpus alienum* into the national legal system. Furthermore, in the prevailing school of thought, the *status quo* ensuing from the origin, structure and hierarchy of that European law is taken as a basic principle. And from this, the applicability, or not, of European and/or national legal rules is derived 'top-down' from hierarchically higher European law to lower national law.

However, in the following study, the focus is on the reverse question: 'What is the applicable law, irrespective of its origin, how can it be construed and, in particular, where can it be found?' This reverse question covers cases which have to be solved daily, as well as legal opinions, judgments and rulings that have to be prepared. Consequently, the question addresses the need to ensure that *applicable law* is being implemented. And that is a 'bottom-up' approach.

The prevailing approach, which takes the perspective of 'higher European law' down to national law, cannot provide an answer to the question: 'What law is applicable in a specific case?' Consequently, a practising lawyer — judge, solicitor, barrister or academic — is unable to find an answer to the question: 'Where can the applicable law be found?' Apparently, because of the complexity of the law originating in Europe, the 'top-down' approach has to suffice with descriptions which are very general and have to keep all possibilities open or can only be deemed

1. The few authors who have, for some time, been asserting that 'European law' is actually part of 'national law' are discussed in Chapters 2 and 3.

'searching'. It cannot answer to the question 'What the applicable law is'. Below are some randomly selected sentences from relevant literature.[2]

An example of a strong generalisation:

> 'All of this implies that the contours of European law are fairly badly defined and there is a considerable lack of clarity and uncertainty about the impact this actually has on civil law'; 'In concrete terms, it is possible for differences to exist between the possibilities and the scope of judicial reviews of the lawfulness (of a decision)'.

'Searching', or keeping other possibilities open:

> 'If, nevertheless, the ruling has to be explained in this way (…).'

Very unambiguously 'top-down' reasoning, but only generally descriptive:

> 'Within this context, the question in respect of civil law cases is what the substantive consequences are for parties of the choices of the European Court or of their national court (…).'

To a degree even confusing, or 'difficult to think':

> 'From the perspective of civil law, however, the highest court of justice reasons — in the first place — as a national civil court and applies Union law obligations within the frameworks defined by national civil law.'

In this latter citation, the 'top-down' impact is, on the one hand, evident, because Union law provides the hierarchical and normative framework; on the other, a primacy of 'defined by national civil law frameworks' should apply. In any case, this primacy is incorrect, as will be explained in this book. When it comes down to it, Union law transcends national frameworks. These frameworks do not, therefore, exist any longer. The applicable law consists of laws which have both national and European origins side-by-side, whereby laws with European origins are normatively higher.

Any lawyer who needs to find the prevailing, applicable law for a given case will fail to do so when referring to the currently available literature. That is a painful observation. This is due to the descriptive exercises being inevitably written in a general way, as it is too difficult to 'catch' the quantity of possibilities covered by European law other than in general terms and overarching concepts. Moreover, the exercises are by necessity generally descriptive, precisely because they have to be conceptualised and abstracted to interpret the new reality and place it within a framework. Yet, it is, for now, the only available literature which lawyers can

2. The source reference is omitted, as the generality is typical of articles written on the 'top-down' subject (and, consequently, inevitably appears in almost all texts).

use to acquaint themselves with applicable law. It fails, however, to offer these lawyers any specific answers in respect of applicable law.[3]

Thus, it is an issue for any lawyer who wants or, even better, must have an answer to the question: 'What, in this specific case, is the prevailing, applicable law, irrespective of whether its origins are national or European?' National law only has some applicability when it remains within the norms of European law. And that will surprise no one, but as lawyers we should, in the first place, ask ourselves *which* law is really applicable. This is the key question in this book. The realisation that this question must be asked *in advance* will make 'great strides' through the current ways of working and classification of legal areas and will pay scant attention to the existing approach to 'European law' (hence this prior justification). Also, the looming question is: 'How should that applicable law and all its — to use the prevailing terms — "impact" be recognised?' This last question in particular proves to be quite difficult to answer.

No thorough study or knowledge of European law, nor a more extensive, in-depth study of European law, nor an even more extensive, in-depth study of the jurisprudence of the European Court of Justice (ECJ) offers any comfort. On the contrary, the more extensive and in-depth the study, the greater the number of questions and uncertainties. In other words, the unfathomable nature of applicable law increases precisely as we look for it in laws and rules with 'European origins'.

The idea of 'finding an answer through a study' is thus reversed: the more a person studies the applicable law, the greater the number of ambiguities, uncertainties and conundrums there appear to be.

This book focuses on the *issue of knowing* the applicable law, hereinafter to be called 'knowing problem'. On the basis of a number of illustrative contemporary judgments by the European Court of Justice, the study examines which *applicable law* a Member State lawyer has to deal with and which key questions arise. These fifteen key questions form the core of this book. In respect of each of these fifteen questions, the question posed is: 'How should the applicable law be recognised?'

The message to the legal world of civil law is, therefore: *Wake up! European law is part of applicable law and should as such – and not, therefore as a separate supplement under the flag of 'IPL, European law or its impact' – be studied, recognised and implemented. It is applicable civil law!*

This idea is still rarely found in legal literature. However, at the start of the twenty-first century, Van Gerven, Smits and Hesselink[4] have expressed the need to acknowledge a 'bottom-up' approach. For example, Van Gerven spoke of

3. A positive exception tot this situation is the 'correlation table' in the explanatory memorandum to the legislation, meant to implement Directive 2008/48/EC and Directive 2013/38/EU and Regulation (EU) nr. 1093/2010 (OJ EU 2014, L 60/34), *TK* 2015/16, 34292, 3, pp. 15-33. The correlation table specifies the places where the provisions of the Directives and the Regulation are part of the implementation law. See A.A. van Velten, 'Privaatrecht Aktueel', *WPNR* 2016, no. 7092, pp. 73-74.

4. See W. van Gerven, 'A Common Law for Europe: the Future meeting the Past?', *ERPL* 2001, pp. 485-503; J.M. Smits, *Constitutionalisering van het vermogensrecht, Preadviezen uitgebracht voor de Nederlandse Vereniging voor Rechtsvergelijking*, Deventer: Kluwer 2003, pp. 1-164. The title of the book by Martijn W. Hesselink, *The New European Private Law*, The Hague/London/New York: Kluwer Law International 2002, gives rise to the suspicion that a 'bottom-up' approach is assumed, but it actually contains an approach based largely on concepts and structures (which work in a 'top-down' way).

> '(…) an urgent need to combine the "top-down" approach inherent in codification, with the "bottom-up" approach inherent in Source and Casebooks in which materials from all legal systems involved in the codification enterprise are collected.'[5]

The approach advocated in the following pages fits in seamlessly with this statement. However, this was written in a period in which ardent consideration was being given to a European codification everywhere. Viewed in this context, Van Gerven is, in the relevant article, arguing for 'A Common Law for Europe'. This codification would have to be prepared as a 'treaty' between member states and, subsequently, after having been signed and ratified, would have to be introduced and enforced. However, at that moment, the codification would 'clash' with the traditional applicable law of the (ratifying) member state. Consequently, an 'urgent need' would immediately become apparent:

> 'In order to maintain uniformity, the Treaty should provide in a preliminary ruling procedure with an existing or a newly established Community court. To avoid the codification work to be carried out, and once in force to prevent it from operating, in the abstract, there is an urgent need to combine the "top-down" approach inherent in codification, with the "bottom-up" approach inherent in Source and Casebooks in which materials from all legal systems involved in the codification enterprise are collected.'[6]

The reality of 2016 is somewhat different. Thoughts about a European legal code or an *ius commune* appeared to be linked to economic prosperity. It would seem they are not (or cannot be) expressed as frequently during an economic downturn (since 2008), when member states pay more attention to their 'own territory'. However, the divide or, as Van Gerven also referred to it, the dichotomy[7] between, on the one hand, European law and, on the other, the national laws of the member states, shows no sign of decline. Therefore, today's world has the issue of having two applicable legal systems, as it was more recently expressed by Van Gerven and Lierman[8] or, in respect of administrative law, by Van der Burg and Voermans.[9]
In this book, attention is requested for the *core problem* caused precisely by that 'dichotomy', which can be deemed outmoded.[10]
Finally, four comments on this justification. Firstly, in this book use has been made of a considerable amount of (primarily Dutch) literature about 'European law' and

5. W. van Gerven, 'A Common Law for Europe: the Future meeting the Past?', *ERPL* 2001, p. 486.
6. Van Gerven, *ibid.*
7. Op. cit., pp. 490-491.
8. W. van Gerven & S. Lierman, *Beginselen van Belgisch privaatrecht I, Algemeen Deel, Veertig jaar later, Privaat- en publiekrecht in een meergelaagd kader van regelgeving, rechtsvorming en regeltoepassing*, Mechelen: Kluwer 2010. Also see, for example, P. Verbruggen & B. van Leeuwen, 'Aansprakelijkheid voor gebrekkige medische hulpmiddelen', *NTBR* [Dutch Journal for Civil Law] 2015/45, sec. 6: '*In die zin raken EU-recht en het nationale vermogensrecht in steeds verdergaande mate verbonden, ook in gevallen die puur nationaal van aard zijn*.' [In this sense, EU law and national civil law are becoming increasingly connected, even in purely national situations.]
9. F.H. van der Burg & W.J.M. Voermans, *Unierecht in de Nederlandse rechtsorde* (Mastermonografieën Staats- en bestuursrecht), Deventer: Kluwer 2015.
10. See Chapter 4.

its 'impact'. This literature is abundant. In this research, every attempt has been made to trace and repeat the 'opinions in this literature' as well and precisely as possible. It is, however, inevitable that something that has been cited as the 'opinion' of one author could also be found in the works of another author. Explicitly, the choice of citations was made without any preference or regard for any particular person. The primary purpose of the book is to present the knowing problem related to applicable law.

Secondly, social science research could shed further light on the subject matter, for example with questions and supporting empirical research such as: 'Are there — for the time being, or at any given moment — any reasons of a (social) economic or political nature to leave 'European law' out of the equation, or precisely to include it?' However, this book does not focus on such social-science research; the analysis in the book is of a normative nature: the applicable law, which consists of standards applicable to the assessment and solution of cases, should and ought to be found and should be able to be found.

Thirdly, that analysis is 'politically neutral'. The starting point and basic principle of this book is that Member State lawyers will be confronted by laws from national and European origins. In order to ensure justice is done, they should be able to find and recognise these laws.

Fourthly, this book primarily refers to 'law of European origin' or 'law from a European source'. The latter does justice to actual reality, the former — 'Union law' or 'European law' — no longer does, on the grounds of the approach of applicable law.

The research for this book was concluded on April 30th, 2016.

Chapter 1

Introduction: a knowing problem

Lawyers are taught to work with applicable law. In order to be familiar with the applicable law, they should 'keep up to date with their literature'. Here, in two sentences, the reality and ways of working of lawyers throughout the past century. Past because, in contemporary times, applicable law can no longer be easily 'recognised'. There is a knowing problem related to applicable law with a European origin. There are numerous examples, of which the ones below are particularly striking:

- The Dutch government imposed a penalty on Essent because the company had failed to apply for work permits for 'third-country nationals'.[11] On the basis of previous legislation and case law, the government believed its decision was well founded and correct. However, it was deemed incorrect by the Court of Justice of the European Union (hereinafter referred to as the ECJ). The ECJ expressed itself in strong terms, stating that — in the previously conducted proceedings — the Minister and the court and Council of State should have been familiar with the applicable law of European origin (Articles 56 and 57 of the Treaty on the Functioning of the European Union[12] (hereinafter TFEU)) as the law had been well-known for a considerable time.
- In a public procurement procedure, the German city Landau obliged tenderers to commit to paying a minimum wage if they were awarded the contract. The German company RegioPost objected to this requirement. The city of Landau, as well as the German and Italian governments, believed that questions submitted to the ECJ for a preliminary ruling in this context would have to be inadmissible because there were no apparent cross-border aspects in the main proceedings. This believe was found to be incorrect by the ECJ. The preliminary question relates to the applicability, in this national case, of a European directive and the TFEU. Consequently, the question is admissible, '(...) even were this question (…) posed in proceedings in which all the elements correspond to the internal situation of any member state.'[13]
- With the permission of the Danish government (customs authority), a European subsidy was granted to Agroferm, a Danish company which manufactures raw materials for animal feedstuffs. However, some years later, it transpired that the raw materials should have been classified in another category of Customs Rules and the subsidy — DKK 86.8 million — was reclaimed. Agroferm opposed the demand on the grounds of national legal certainty and the principle of legitimate expectations. Following the opinion of Advocate General Kokott, the ECJ was clear about the way in which the concept 'legitimate expectations' should be understood when it relates to applicable Union law:

11. ECJ EU 11 September 2014, C-91/13, *JAR* 2014/262, with commentary from E.J.A. Franssen (*Essent Energie Productie BV/the Minister of Social Affairs and Employment*).
12. TFEU: Treaty on the Functioning of the European Union (TFEU).
13. ECJ EU 17 November 2015, C-115/14 (*RegioPost GmbH & Co. KG/Stadt Landau in der Pfalz*). The quote comes from Consideration 49.

> Member State nationals, entrepreneurs and lawyers should know the applicable law. And, in this case, that law was of a higher order, being applicable law of European origin (Union law).[14]

These three examples are striking because, on three occasions, a national government or, as the case may be, local and national governments — read: their lawyers — who should be deemed to be (able to be) familiar with the workings of European law, applied that law incorrectly or 'missed' the fact that it was applicable law. This raises the question as to whether there is something inadequate in the knowledge and understanding of, as it is referred to, 'European law'.

An analysis of these and other cases in different areas of law provides an affirmative answer: there is something lacking in the 'ability to know' the law of European origin. Despite that, this law is not only convincingly valid in all areas, it also exists as the applicable law of a higher order, with a priority over 'national law' — to the extent that still exists as such — and has a normative connotation. In other words, there is an essential knowing problem regarding 'the applicable law'. And this problem increasingly makes the applicable civil law a hidden law.

In the following pages, a number of exemplary 'knowing questions' are discussed which provide evidence of this knowing problem (Chapter 5). These are questions a member state's lawyer should be posing, and may already have posed, in respect of every legal area and every case which he or she comes across on a daily basis. The questions offer insight into the degree to which the applicable law ensuing from European sources can be referred to as 'hidden applicable law'. The knowing questions appear to be nourished by a trio of prevailing paradoxes (Chapter 3), and by the dichotomy of 'national law versus European law' (Chapter 4). The picture that emerges from the research — which, as is stated in Chapter 5, forms the core of this book — is that applicable law from a European source determines the substance of applicable civil law (nationally speaking) in all sorts of virtually unpredictable ways. This occurs in all areas of the law, irrespective of territorial or substantive boundaries.

The knowing problem is, however, insufficiently acknowledged in Dutch legal practice, as well as in jurisprudence and legal education, because applicable law from a European source is not easily recognisable.[15] This book concludes with a call (Chapter 6): a call to start studying the genuinely applicable law robustly and as soon as possible, not only in legal practice but also in jurisprudence and, in particular, in legal education. This will mean following a long and unknown course of study and a renewed conceptualisation; renewed because for centuries continental legal systems have all relied on such processes. Despite this, it is essential that a new and coherent legal system based on the legislation of Europe and member states be charted.

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14. ECJ EU 20 June 2013, C-568/11, *AB* 2014/270, with commentary from J.E. van den Brink and W. den Ouden (*Agroferm A/S/Ministeriet for Fødevarer, Landbrug og Fiskeri*).
15. In administrative law, this process of interdependence, which results in an applicable administrative law, would appear to have made more progress. See, for example, Tom Barkhuysen, 'De inpassing van de prejudiciële procedure in het Nederlandse bestuursrecht', in: T. Barkhuysen et al, *Europees recht effectueren, Algemeen bestuursrecht als instrument voor de effectieve uitvoering van EG-recht*, Alphen a/d Rijn: Kluwer 2007, pp. 325-350, or the special issue of *SEW* 2015/11, *Europees recht en de nationale rechter*, especially the contributions from H.G. Lubberdink and J.E.M. Polak (no. 186), H.G. Sevenster (no. 192) and C.M. Wissels (no. 187).

The initial step will, however, be to provide a short explanation of the nature and importance of the knowing problem.