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THE THEORY AND PRACTICE OF COMPARATIVE LEGAL REASONING  
From Inspiration to Rational Legal Justification

by

*Markku Kiikeri*

*Thesis submitted with  
a view to obtaining the Degree of Doctor of Laws of  
the European University Institute*

Florence,  
March 1999

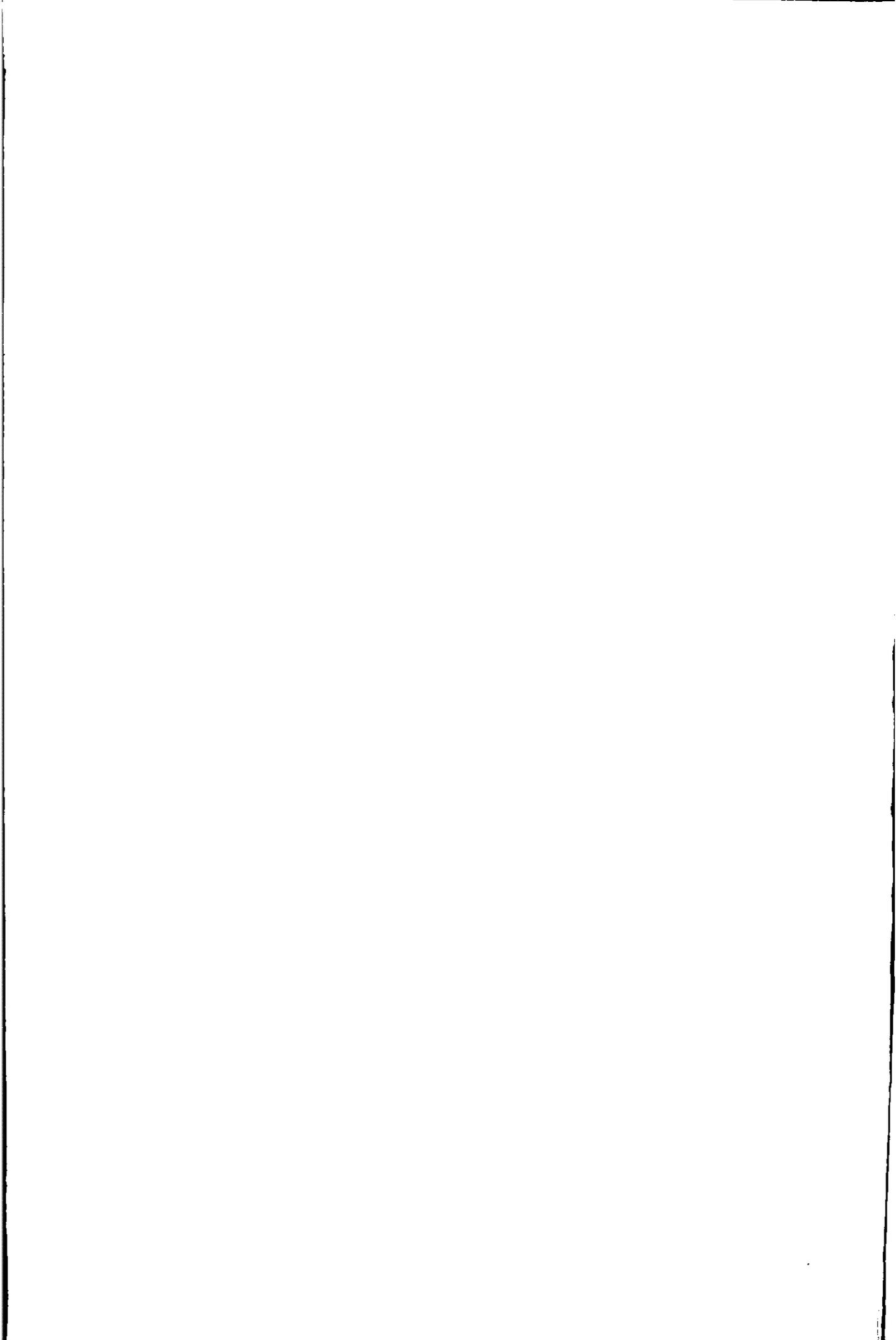
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Law and the Concept of Comparative Legal Reasoning  
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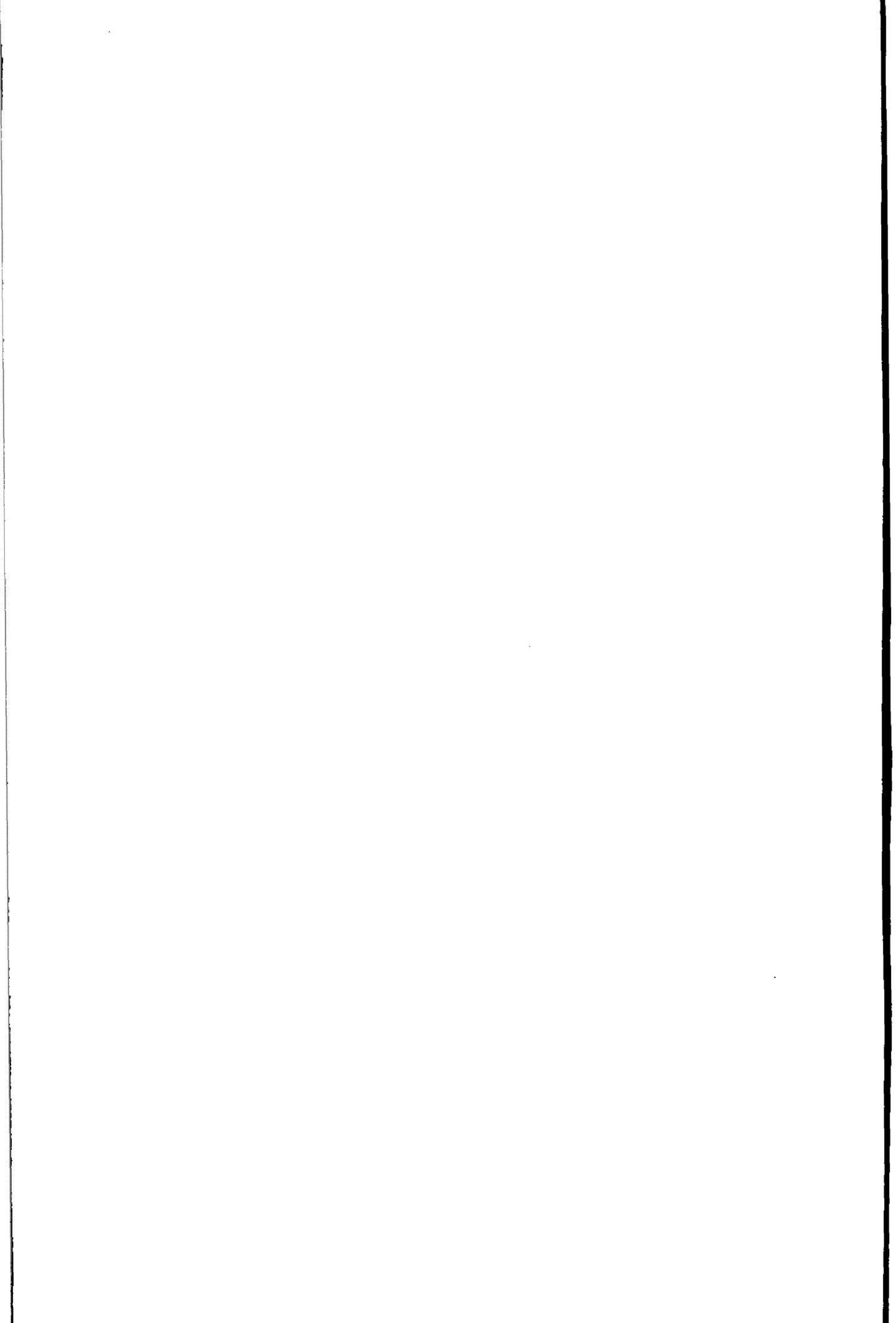
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**VOLUME I:** Law and the Concept of Comparative Legal Reasoning  
**VOLUME II:** The Practice of Comparative Legal Reasoning and European Law



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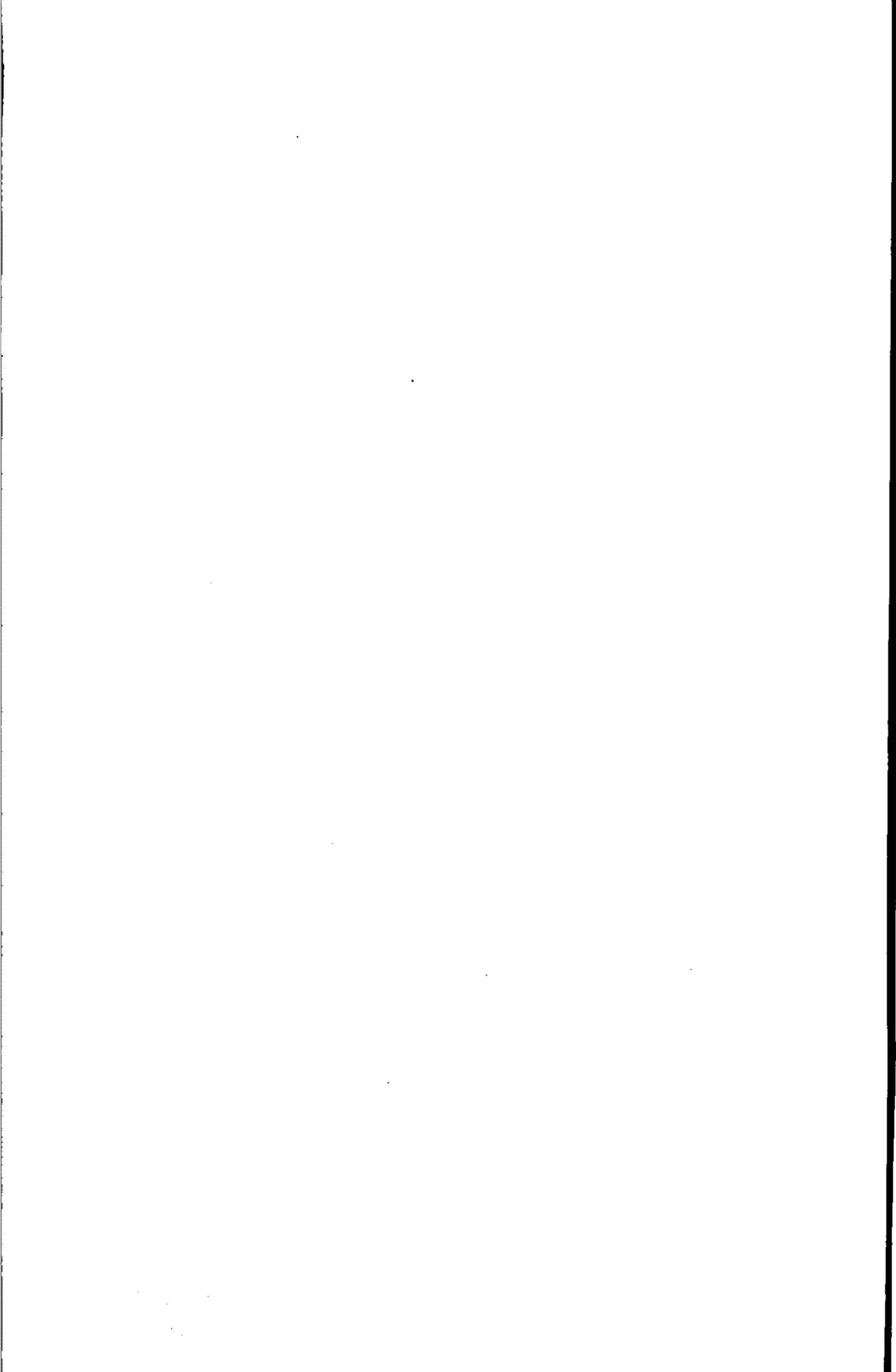
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In Villa Schifanoia, on 3d March 1999,

Markku Kiikeri



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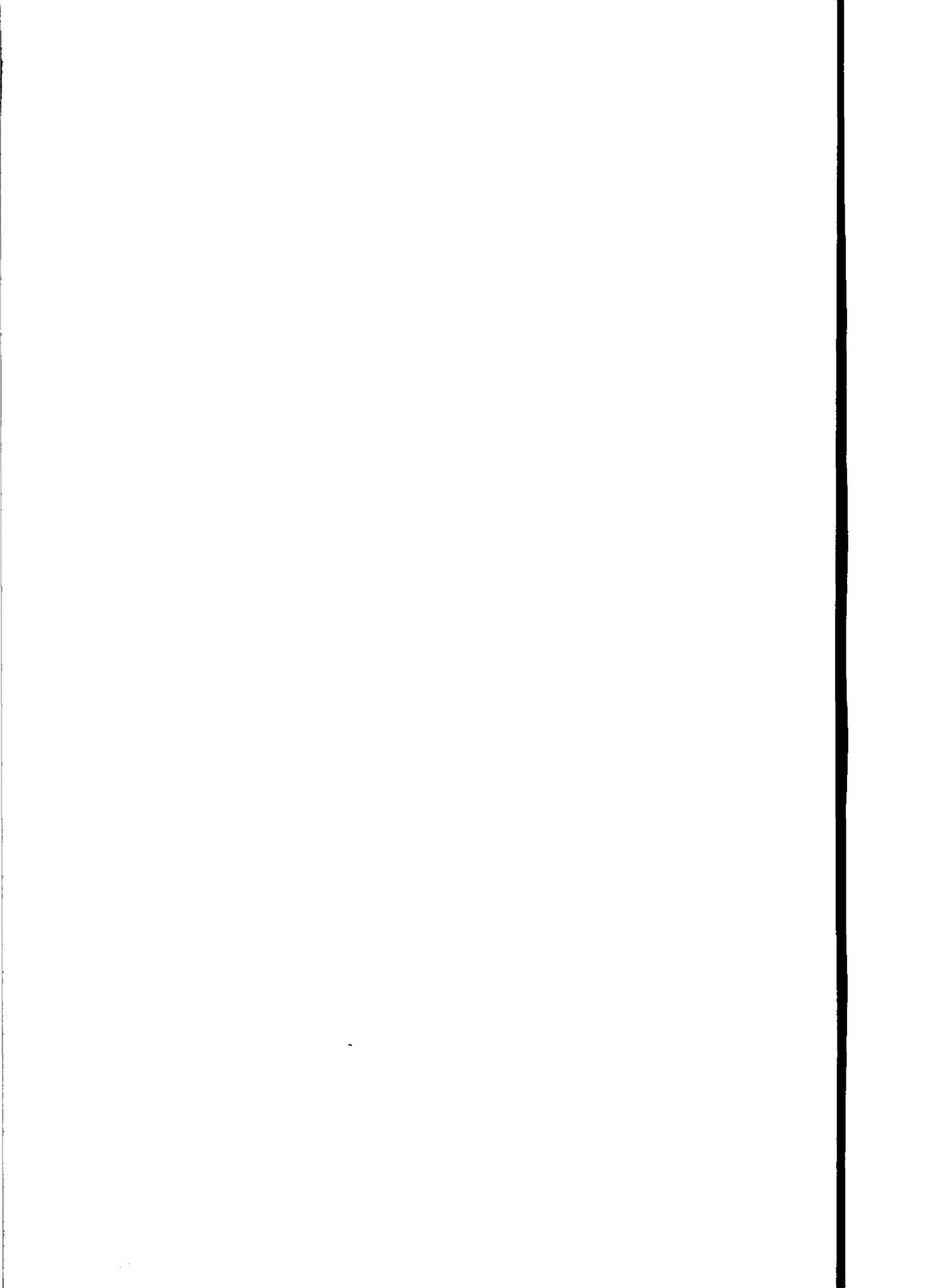
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## SUMMARY

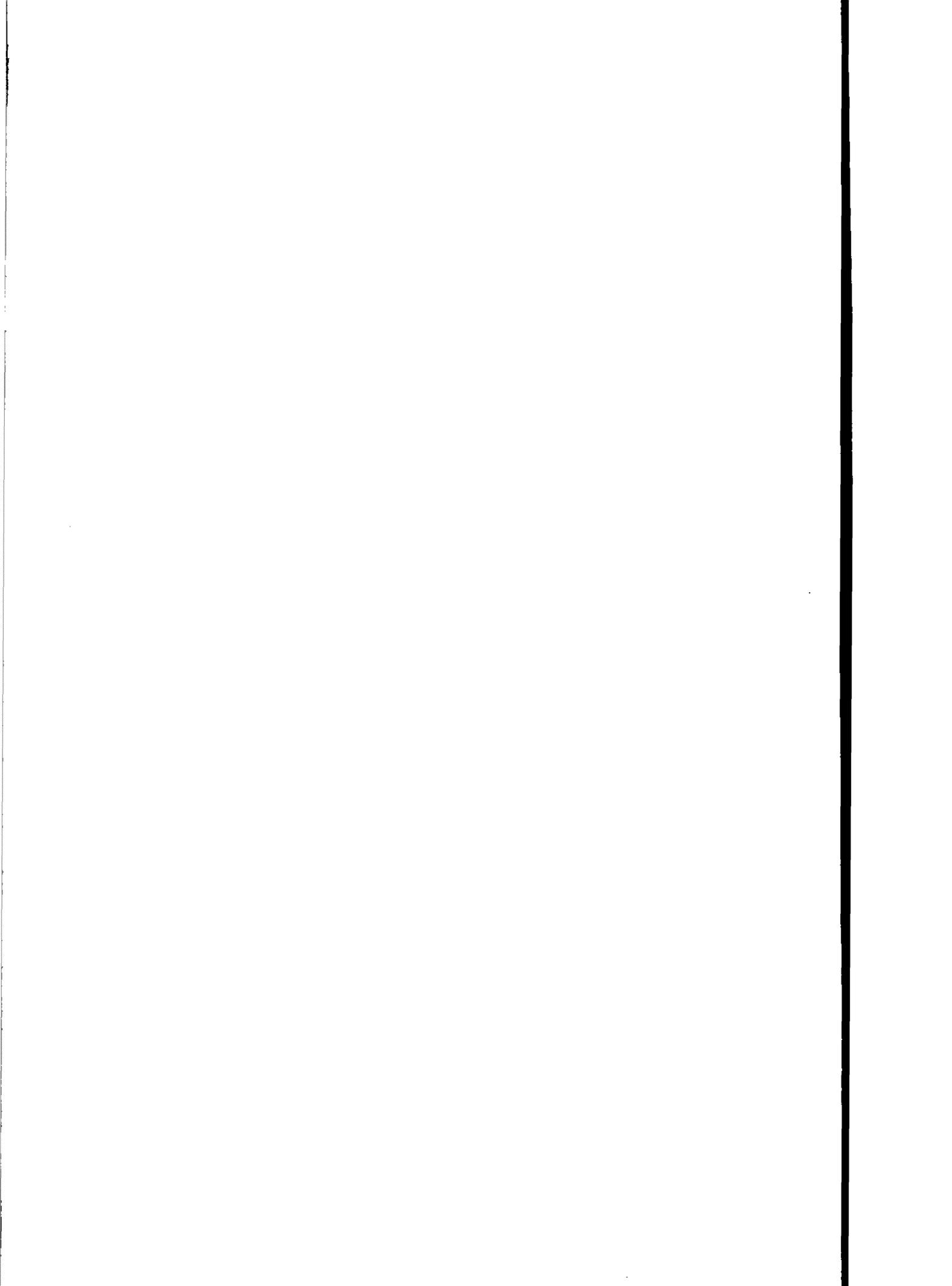
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## LITERATURE AND INTERVIEWS



***"As soon as men are in society, they lose their feeling of weakness;  
the equality that was among them ceases, and the state of war begins"***

**(Montesquieu, The Spirit of Laws, Part I, Book 1, Chapter 3: On positive laws, 1748)**



# I. INTRODUCTION

## 1. Preliminary remarks

European law is an extremely confusing phenomenon<sup>1</sup>. This is so even though the discourse in legal theory, in international law, and in different national systems all seem to reflect the traditional concept of modern positive law.

European law - consisting of internal and external relations and the discourses of all legal institutions in Europe - seems to exceed the limits of predictability and understandable explanation<sup>2</sup>. Furthermore, if we assert that the relative legitimacy of these institutions is connected to this explanation, we recognize that we are looking at a phenomenon which requires clarification. One has to "get to the bottom" of European law.

On the other hand, it is not difficult to notice that the discursive and democratic idea of law is in crisis, and that institutional corporate instrumentalism is coming to the fore.<sup>3</sup>

Comparative law comprises a part of this obscure phenomenon of European law<sup>4</sup>. Indeed, the main argument of this thesis is that comparative law seems to be at the heart of the European law - or even its brainchild. Furthermore, the idea here is that by studying it - in theory and in practice - one may bring to light certain key questions relevant to the present analysis of European law.

A preliminary issue for consideration is what is meant by comparative law? Why does the problem of comparative law arise?

The machinery which is put in place to guarantee the smooth functioning of social cooperation can be called legal order. In a more systematized form, it is a legal system<sup>5</sup>. It may

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<sup>1</sup> 'European law' may be defined as a phenomenon consisting of the law of European countries and the law of the European Union and the European Human Rights System. European institutions are the institutions of national and European level legal systems (orders). European level legal institutions are the courts of European Community (Union) and the European System of Human Rights.

<sup>2</sup> The question is about traditional legal structures and dynamics within them. In Europe, states are legislating as they always have, but at the same time, the basis of their legal and political existence is changing rapidly. This type of phenomenon will obviously generate certain changes in conceptualization; both during and after the transitional period.

<sup>3</sup> Unger, R.M., 1976, pp. 200-203.

<sup>4</sup> One of the interests of the study springs from the fact that "internationalization" and the "Europeanization" of law - also in its nationally implemented form - underline the role of (innovatory) judicial interpretation. This is connected to the role of comparative law. Comparative law functions in these situations as a "reason of innovation".

<sup>5</sup> Brusini, O., 1938, p.195. By 'legal system' one can understand a system based on the cognitive - legal scientific - process of knowing. 'Legal order', on the other hand, can be defined as a volitive system related to power relationships.

Raz, J. (1971, p.795 ff.) has considered the problem, why we need the "systems" of law (as unity and identity). He maintains that the term "a legal system" is not a technical term. It is basically an ideal term (used in thinking about law). The unity of municipal legal systems can be divided to material and formal unity. This distinction

be said that the main aim of contemporary comparative law is the systematization of different legal orders and legal systems.

These legal orders and legal systems - manifested in institutional forms<sup>6</sup>, and having their own particular geographical, linguistic, and "cultural" outlooks - have a close and practical impact upon our lives. Legal norms of these orders play a part in guaranteeing different freedoms and possibilities. What seems to be natural predictability in social cooperation depends - in the end - on the possibilities for systematized legal orders to intervene in cases of the "malfunctioning" of societal interaction through positive laws<sup>7</sup> On the other hand, the use of force and restrictions upon our freedom of movement and action do not usually occur, in a visible way, in a society, which is functioning well, and seems to satisfy individual demands of equality.

The idea that different people think differently seems to be the rudimentary idea behind comparative law. Why is this so? Do all social systems have their own "ethos"? Are they "worlds apart"? What is "another" social system, legal order, or legal system"? Why are they "compared" and "studied" - and even used as the basis for different types of justifications for acting? Moreover, how is it possible that, even if comparative law seems to be a somewhat haphazard account of individual experiences, there have been attempts to formalize and systematize comparative legal research and practice?<sup>8</sup>

It may be observed that, at one time, at least the distinctions between different social systems and their processes (and, consequently, distinctions between laws) appeared clearer. People were attached to their physical and intellectual-historical environments, and information derived from elsewhere did not seem to appear so relevant for the daily life - at least for traditionally-oriented peoples. At the same time, influences, both received and given, were more visible.

In this day and age the world seems to be full of coexisting and overlapping social and legal orders and systems. The nature of these rules and legal systems does not show itself clearly or distinctively - to a not specialist. One thus has to be more careful in speaking of about

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relates to the problem of the identity of legal systems (ibid., p.796).

The answer to the question of identity can be found when posing the question of what is "*criterion or sets of criteria that provides a method for determining whether any set of normative statements is, if true, a complete description of a legal system*" (ibid., p.797). According to Raz, the three main issues, in this respect, are 1. The relationship between the existence and efficacy of law, 2. The distinction between making (a new) and applying (an old) law, 3. The relation between law and the state (ibid., p.801). We may call them the questions of legal science and the identity of legal systems.

<sup>6</sup> On legal institutions, MacCormick, N., Weinberger, O., 1986.

*"What we call necessary institutions are no often more than institutions we have grown accustomed"* (Alexis de Tocqueville, 1970, p.76).

<sup>7</sup> *"By the attraction of pleasure as they preserve their species. They have natural laws because they are united by feeling; they have no positive laws they are not united by knowledge. Still, they do not invariably follow their natural laws; plants, in which we observe neither knowledge nor feeling, better follow their natural laws"* (Montesquieu, The Spirit of Laws, I.1.1.)

<sup>8</sup> Different examples can be found in the classification of legal systems, as will be discussed below.

particular or general features. This may be related to the value and instrumental rationality prevailing in post-industrial (information-based) societies.

On the other hand, nor does it appear easy any longer take to notice the traces of these constant influences. Adaptations, influences, imitations, and copying are the basic canons of the modernist world<sup>9</sup>. In this sense, traditional identities, for example, do not appear clear. People seem to identify themselves more with the information channels hitting the headlines. Discussions concerning nations, legal orders and systems - discussions on ideal identities - do not seem to be particularly important, or even attractive. They appear, instead, as self-evident notions.

At the same time, the traditional (meta-)classifications of legal systems within comparative law do not seem to be plausible any longer. Cultural, political, and institutional structures have changed - and are changing - so dramatically that no basic and acceptable classification can be proposed. It seems that a grouping based on one idea can be outdated rapidly after the passage of time. In an "information society", the interpretational value of these distinctions is not self-evident. All that seems to be permanent is the dynamics and the change itself.

Nevertheless, we may claim, in our contemporary society, that the differences of "systems" could be found in the interpretations of these seemingly similar systems and their rules. This idea is based on the observation that as and when experiences accumulate in daily life - or, when following the decision-making of legal institutions - these differences strike us. We may

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<sup>9</sup> Generally speaking, "modern" is seen as a contradistinction to the traditional (Lash, S., 1987, p.355). Yet, modernity can be seen as renaissance 16th and 17th century rationalism, whereas modernism is a 19th century arts' paradigm. The logic of modernity could be seen as a form of an ideal possibility. In its concrete form it is a process. (Modernity in law, see Weber, M., 1969, pp. 284-321. For recent discussion of this, Unger, R.M., 1976, pp.192-222.)

Contemporary social practices can be seen in terms of modernism, as a transformation of modernity into instrumental and substantive rationality (Lash, S., 1987, p.356, and 364, Weber, M., 1969, pp.304-305). For modernism as anti-rationality, see *ibid.*, p.357 ff.). This is so especially in its institutionalized form.

For imitation in law, see Sacco, pp.394-395. Imitation is a form of social learning (see for example, Miller, N.E., Dollard, J., 1941).

By imitating, one creates a subject-matter, becomes topical, i.e. situational in a discursive sense. Imitation leads to relatively "local" practical considerations. However, it "locates" the discourse within the premises of the user of the topical arguments. All the same, imitative discourse seems to close the discourse. It is the end of communication, and forces the parties to the discourse toward other forms of communication. There is no escape from this type of argument - in a logical sense - unless one starts a new discourse. This takes place in "self-referential" form.

This leads to a disparity of societal discourses. Furthermore, the modern perspective upon the evolution of the discourse and social form of organization disappears.

The problem of "argumentative understanding" (i.e. the argumentative imitation) seems to induce non-discursive learning, which does not create any dynamic discourse and does not maintain a discourse, but - rather - forces one to find the dynamics within non-social forms. This seems to be the pathological problem of the transfer from the modern society to postmodern discourses.

The modern rationality may assume, nevertheless, a hermeneutic approach, where the analogy (historical) is a practical instrument as such, without connections to the aesthetic or affective identity (identification). In communicative acting, analogy is only an analytical process.

In this sense, there does not seem to be, for example, any conceptual conflict between the post-modernism vs. high modern. Some "postmodernists" may have understood rationality and pluralism another way.

notice that these differences are based on differences in day to day life and practical discourses. The differences within daily life - and in legal interpretations - appear in more careful observations of the acting of various people and groups of people. Observation of the laws, institutions, and the behaviour of people is part of the hard core of contemporary comparative law. On the other hand, even if there are methodological and traditional forms of observation, the basic idea is that of individual inspection.

Why do we make and express these "comparative" observations?

As maintained, we make these observations because they strike us and because they are interesting. On the other hand, we try to avoid them if they seem to be too frustrating. Nevertheless, whenever we do face differences, it seems that, almost automatically, we start to use these observations as narratives in order to amaze or to achieve some other purpose. By using these observations, we may try to alter our behaviour in order to adapt ourselves - or other people - to changes - or to contrast behaviour so as to make a statement regarding the correctness of another form of behaviour<sup>10</sup>. We take them up, as arguments, within a social discourse.

Is there thus something special in the observation of legal behaviour?

"Our" form of "behaviour" - in general - seems to be the form of behaviour which we feel to be the binding and the correct one - except when we are told otherwise, and we tend to fall in with that. This seems to be based on the identity emanating from societal discourses. However, in the field of law, the binding character of our form of behaviour is categorical. This binding character is connected to the social and binding nature of law as a social discourse. We cannot change law(s) solely based on our personal preferences. This applies also to those who interpret and apply the law. Courts, for example, must apply the rules as they are directed to apply them. Administrators and police, on the other hand, cannot deviate from the types of behaviour which is binding upon them in terms of these social discourses.

If we already have categorically binding laws, what would be the purpose of observing the legal behaviour of others? Furthermore, why should this be done according to certain formal criteria? Moreover, why would this be a relevant factor within a discourse? Here we are no longer discussing the situation where we must adapt our behaviour to the laws of another country - for example, because of our physical or mental attachment to it. We have to examine the basis of such reasoning.

This is the basic question of this thesis. One may say that by concentrating on these dynamic processes of comparative observation and reasoning in legal systems and legal orders one may begin to recognize certain constant issues in contemporary legal discourse, and to see traces of the dynamics of the law. In this sense, one does not look into the changes of some ideal legal rules as such, but instead gains an insight into normative ideologies of legal institutions and

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<sup>10</sup> On phenomenology and the role of comparative law, see Mössner, 1974, p.205.

their actors in general<sup>11</sup>.

In conclusion, the preliminary and basic concrete questions of this study are: why (other) legal systems are observed, how they are observed, what is done with this information, why the information is used as it is used in legal institutions, and what seems to be the results of these uses to the legal systems, institutions and individuals?

Our specific focus is European law<sup>12</sup>.

## 2. The subject: some problems and proposals

**The thesis.** The contextualization of comparative reasoning<sup>13</sup>, as described above, means its contextualization as a legal theoretical and practical phenomenon. This requires an examination of the consequences of the theoretically contextualized comparative legal reasoning in concrete decision-making, and an examination of its value for contemporary legal discourse (and in particular for European law).

The first argument of this thesis is that comparative considerations play an important role on many levels of the European legal discourse, especially in so called "hard cases".<sup>14</sup> On the other hand, the claim is that comparative law has become "institutionalized"<sup>15</sup>

<sup>11</sup> This is in accordance with general neo-institutionalist theories of law and politics.

<sup>12</sup> This thesis concerns the "free trade of legal ideas" (put forward, for example, by Justice Holmes, *Abrahams v United States*, 250 U.S. 616, 630 (1919)). It concerns the transfer of legal rules, concepts, and systematic parts of one legal system to another. However, the question is also about the exchange of legal ideas in a refined way. It relates to the processing of legal ideas in different legal systems. Consequently, in the end we may ask: who's free trade is it, and what are the limits, functions, and legal outcomes of this free trade?

<sup>13</sup> The term "comparative reasoning" is used here because the intention of this study is to examine the argumentative, even "contextual", forms of the use of comparative observations. These comparative observations are used for arguing in favour of certain legal interpretations, and this reasoning can be studied in legal theoretical terms, which are to be developed below.

The term "*harmonizing interpretation*" - proposed by some - gives the impression that the use of comparative material has as its objective the harmonization of laws in different legal systems (Against the use of "comparative", see Kisch, 1961, p.168). This applies also to an alternative conceptualization "*unificatory interpretation*" (Idem.). To call this process comparative reasoning emphasises the idea of process rather than the idea of an aim or a result of an exercise. This is related to the theoretical emphasis of the study.

<sup>14</sup> The "hard case" nature of comparative law related considerations has been explained by Otto Brusiin (1962, pp.43-48). The idea is expressed as follows.

According Brusiin, comparative considerations and research are perhaps the most important a *stimulus* for the legal theorist to achieve intellectual liberation from the perspective of one legal order. Unless such liberation takes place, the legal phenomena in "one's" system are - for the observer - only illustrations, exemplifications - useful for the development of purely theoretical problems. Brusiin refers, for example, to the remarks of Hans Kelsen that one of the foundations of his legal theory has been the comparative research.

Brusiin says, consequently, that for a legal theorist the comparative research is never an end in itself, but only valuable means. One may say that because valuable legal research is based on the theoretical perspective of a legal phenomenon under consideration, comparative research seems to be a preliminary step in getting to this theoretical perspective. (On this point, see Strömholm, S., 1972, and Klami, H.T., 1981, p.123.)

Consequently, a study of legal theory is a study of a legal phenomenon in the larger sense, concerning its psychological, logical, behavioral, and argumentative elements, beyond the norm in question.

We may relate this observation to this study too. This study has been built upon comparative

Secondly, the argument in this thesis is that a step has to be taken towards the idea of comparative law as a category of "sources of law" in order to ensure that the contemporary European legal discourse remains traditional and value-based, instead of legally instrumental. One could assert that this reevaluation has importance for both legal science and legal practice, and an impact upon the development of the concept of European law and European socio-normative systems as a whole.

Related to the latter perspective, it is suggested that the relationship between different legal orders and "systems" is a "discursively reflexive" one. This idea of "discursively reflexive European law" does not, however, exclude the discursive "opening up" of legal justifications in European legal orders and certain changes in the orientation of European legal research.

**Theoretical focus.** As mentioned above, the basic theme of this work is to view law from the point of view of legal discourse theory. However, this evaluation is made within empirical context. This empirical survey establishes the background for the consideration of the functionality of European law. Hence, the study appears more "holistic" than traditionally

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observations on the uses and non-uses of comparative law. This way we have gained a theoretical perspective, which tries to focus on the use of comparative law from the "psychological" (or, rather "phenomenological") logical, behavioural, and argumentative points of view. Consequently, the analysis will include some considerations of the (quasi-) psychological, (quasi-)logical, behavioural, and argumentative aspects of the uses of comparative law - as the structure of the work indicates. All this takes place in realm of the legal theory, as is explained below.

On the other hand - following the logic of Brusiin - we may say that we are also, in fact, observing the behaviour of (legal) actors in their attempts to liberate themselves from the narrow perspective of the one legal system. We, in fact, analyze the intellectual move to the theoretical perspective. At the same time, we also follow a process, in which a person who has taken this theoretical perspective applies this analysis to a legal phenomenon in a legal decision. Indeed, it seems that we are analysing a genuine attempt to make a complete legal analysis in a decision-making process! Moreover, we also follow this reasoning process to the final normative conclusion, if possible. This seems to be an observation of a complete process of legal consideration. What we may say, in other words, is that this study concentrates on the institutional solutions to legal theoretical questions.

However, as one may conclude later, we analyze and generalize, in many ways, our observations on these different stages of analysis. This is so because we need to make a theoretical analysis of the legal phenomenon of comparative legal reasoning and not only look into the individual and particular process of comparative legal decision-making.

The final synthesis at the end of this thesis relates to the analysis of the relationship between discursive legal theory and the theory of the institutionalized law. This way we end up with an evaluation of the relationship between these two. This serves as a basis for a theoretical perspective on European law, which is made in the conclusions of the study. (Regarding the need for and importance of a final synthesis of the 'microsystem' and the 'total preliminary system', see Brusiin, O., 1962, p.44).

<sup>15</sup> A description of the characteristics of legal institutionalization is given by Weber, M., 1969, pp.299-300. He maintains, for example, that

*"If the legal profession of the present day manifests at all typical ideological affinities to various power groups, its members are inclined to stand on the side of order. Which in practice means that they will take the side of the legitimate authoritarian political power that happens to predominate at the given moment. In this respect, they differ from the lawyers of the English and French revolutionary periods and of the period of enlightenment in general"* (ibid., p.300).

dogmatical<sup>16</sup>. In the end, we are trying to focus on European law from the point of view of the theory of comparative legal reasoning.

In this sense, the investigation is expected to tell something about the "evolutional" side of the law as a system rather than the evolution of a particular doctrine or interpretation of a legal rule. Consequently, the results of the inquiry must be understood in the context of a specific legal phenomenon, namely "European comparative law"<sup>17</sup>.

### 3. The relevance of the study

**General remarks.** In European law, comparative reasoning has gained additional relevance, for example, because of the reintroduction of principles such as subsidiarity into legal terminology.<sup>18</sup> This type of "prudential" dimension - transplanted into the European legal system - are certainly unthinkable without the help of comparative aspects, though it is not guaranteed that even comparative law can extricate the European law in its contemporary "prudential" crisis<sup>19</sup>.

Comparative aspects are also related to the discussion on federalism. The discussion on federalism is becoming more and more attractive in European law due to the tendencies toward the increasing competencies of the European Union<sup>20</sup>.

Furthermore, it has been suggested - at the institutional level - that comparative law should "assist" in the construction of the European system.

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<sup>16</sup> That is, it considers how the comparative argument was, and is, constituted. On the other hand, we may ask, what is its role in constituting legal norms and legal systems. The first idea refers to its quality as social science, and the second idea its quality as a legal discursive act.

<sup>17</sup> The intention of this study is not to provide any particular interpretation of a rule or a norm in the European law, but to interpret European law in general.

<sup>18</sup> Some analysis, see Ward, I., 1995, pp.28-30.

<sup>19</sup> Discussion, see Weiler, J.H.H., 1998.

<sup>20</sup> One example of the latter is seen in the Amsterdam Treaty from 1998, where the European Court of Justice was given a right to interpret basic right instruments. This seems to bring the European law towards European constitutionalism.

Mr. Ward has analyzed the relationship between federalism and integrity of legal systems from the point of view of Kantian philosophy in a following way (Ward, I., Kant and the Transnational Order: Towards a European Community Jurisprudence. A draft of the paper presented in European Law seminar in 1993 in Edinburg, Scotland):

*"Kant's identification of economics and commerce as the ultimate impulses behind any such future order was indeed prophetic. What Kant advocated therefore was a world order of the confederal type which exists in the Community today. What he did not advocate, of course, was the federal order which some perceive the ultimate ideal of the Community, and which has also been detected as the underlying trend of the Community judiciary. Kant's suspicion of fully federal orders lay essentially in the pragmatic, because any such orders can challenge the integrity of discrete communities, chiefly, by their tendency to institute politically sovereign bodies. However, if a federal order was once established, in the European Community or indeed in any political system, then Kant would have vigorously continued to stress the fundamental importance of maintaining the integrity of the normative order".*

In general, the similarity of European aims and objectives - combined with the deviating traditions and interests - is the a notable contemporary phenomenon. This is why comparative law - or comparative reasoning - is a relevant subject. It seems to be a form of justification for practical syntheses and choices, which are made at different levels of different systems and orders in Europe.

On the other hand, by examining the contextual and justificatory uses of comparative law, one may be able to glimpse the legal-discursive identity of European law. This may augment the idea of legal identity, which is determined only by a focus upon positive rules and institutions. The doctrinal approach to European law often represents only the facade of the phenomenon. By way of contextualization, one may commence looking into the selection of "European essentials" which are, in many ways, the basis of the European legal identity.<sup>21</sup>

**Lack of a study.** Legal research on comparative law in this century has aimed at the examination of the role of comparative law in practice. Yet, a genuine and extensible discoursed analysis of the uses of comparative law is yet to be produced. It seems that the nature of comparative reasoning in legal decision-making has not been authentically considered in contemporary legal literature. The relevance of the study is increasing because of the expansion of use of comparative law in legal drafting, reasoning and interpretation.

In fact, one could even claim that this has led to rather restricted idea of comparative law.

**Institutionalization.** The history of comparative law enables us to understand contemporary forms of comparative reasoning<sup>22</sup>. On the other hand, at the heart of the history of comparative law there seems to be a phenomenon of legal institutionalization<sup>23</sup>. This forces legal research to take a more empirical approach to the comparative reasoning within legal institutions. One has to turn to analyses of particular aspects of the use of comparative law in different legal institutions so as to explain why it is attempting to use comparative reasoning in international and regional legal systems and orders. One has to find values embedded within the use of comparative law in legal decision-making.

**The marginality and the centrality of the subject.** The fact that studies of the phenomenon of

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<sup>21</sup> On the historical cultural identity, Häberle, P., 1994, p.26. Good analysis, see Legrand, P., 1996, p.56 ff., on somewhat different basis.

<sup>22</sup> "... our understanding of an analogy will often be incomplete unless we take into consideration the earlier analogies, which one amends or replaces" (Perelman, Ch., Olbrechts-Tyteca, L., 1969, p.392).

<sup>23</sup> The legal theoretical formulation of this concept can be found in Weinberger, O., 1998. Weinberger maintains that "neo-institutionalism is ... a synthesis based on a philosophical construction of a specific action theory with a theory of legal institutions (p.2). Central to this theory is an idea of "institutional facts".

comparative reasoning are lacking may be connected to the claim, made by many scholars, that comparative law is not an essential element in legal practice, or that it is a marginal phenomenon in the practice of law. The argument is that comparative law aspects are seldom considered in legal interpretation ("cognitively"), and that their use is not explained explicitly (argumentatively)<sup>24</sup>. Consequently, the idea seems to be that comparative considerations are not phenomena of modern positive law. Furthermore, there is some support for the view that comparative law can hardly be classified as a source of law and legal norms, as traditionally defined.<sup>25</sup>

These viewpoints regarding comparative law emphasize the "quantitative", dogmatic, and institutional dimensions of law.<sup>26</sup>

One could declare that all these non-contextualist approaches to law preserve this idea of the "marginality" of comparative legal considerations. This may be one of the reasons why there have not been general studies on the role of comparative legal considerations in several legal systems<sup>27</sup>.

However, the question of marginality cannot be clearly resolved solely on the basis of quantitative and dogmatic observations. Quantitative marginality does not necessarily imply "material" marginality. In other words, there is a need for an alternative perspective to the

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<sup>24</sup> For example, Kamba, 1974, p.499. We can call this "contextual comparative law".

<sup>25</sup> See, Koopmans, T., 1996, p.545, and de Gruz, P., 1993.

<sup>26</sup> With regard to the "quantitative" approach in comparative law, see Yntema, H.E., 1978, pp. 167-168. She stresses the point that there is no fundamental disparity between the quantitative and qualitative method of inquiry (ibid., p.196). The differences between these approaches derive from the types of data collected and the "mechanics" of manipulation of the data (idem.). Quantitatively analyzed situation and some remarks on lack of use, Zimmermann, R., 1995, p.24 (referring to Drobnig, 1986, p.610 ff.).

For quantitative and qualitative aspects in Comparative law, see Merryman, J.H., 1977, p.475. The qualitative study refers to a study with a purpose of identifying elements on which an unidentified substance in the law is composed. One does not understand substance *a priori* but attempts to identify it with the help of some elements.

The purpose of quantitative analysis is to examine how much of each element a "substance" contains. Here one starts from a particular rule or norm of a system, and examines its extension. If one starts from the legal substance (particular legal rules), one ends up with the quantitative approach to law. If one starts from an element in an unidentified normative rule, one has an alternative perspective to the system using this element. Here the legal interest is not *a priori* determined by the systematic connections.

Furthermore, a qualitative study may reveal something about tendencies and value judgments in the system, whereas the quantitative study only reproduces the hidden value decisions and tendencies.

On the qualitative interest in comparative law, see Sacco, R., 1991, p.388.

A study of comparative legal reasoning is a qualitative study because it aims at revealing the context of the comparative legal argument and at determining the aims of the comparative reasoning.

On the general perspectives and comparative law, see Neumeier, K., 1973.

(Without qualitative research, orders would seem "natural", see Perelman, Ch., Olbrechts-Tyteca, L., 1969, p.508.)

<sup>27</sup> One could say that no comprehensive and compound study has been produced on the role of comparative considerations in different legal systems. Considerations seem often to be based on "beliefs" on the general and factual situation (see, for example, Koopmans, 1996, p.555).

The fact that one can see comparative reasoning taking place mainly in the dissenting and concurring opinions is also part of the "marginality" of the comparative argument. However, the role of these dissenting opinions for legal evolution has not been really considered.

phenomenon. This may break new ground in the field of comparative law. The alternative approach consists of empirical approaches to the quantitatively marginal legal conceptualizations, deviations, creations and confirmations in connection to comparative considerations.<sup>28</sup>

#### 4. The philosophical nature of the subject

**Comparison.** One of the main problems of this examination is embedded in the very nature of the subject, namely, to the idea of comparison itself. Comparison as a subject - the heart of every interpretive process - may easily involve the mixing up of the methodology and the subject itself.<sup>29</sup>

As an intellectual process, comparison could be defined as a reference to something, comparison with (establishing relationship between) something, and adoption from or of something (a "formation")<sup>30</sup>. It is a dynamic relationship. Comparison seems to be an intellectual move or a process between things, establishing a relationship between things. At the heart of this process is the subject (a person) her/himself - whether she/he is a person as a social construction

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<sup>28</sup> When speaking about analogy, Perelman observes (Perelman, Ch., Olbrechts-Tyteca, L., 1969, p.372) - by referring to Hume, D., A Treatise on Human Nature) - that

*"It is true that some philosophies - notably those of Plato, Plotinus, and St. Thomas Aquinas - have justified the use of analogy in argumentation because of their particular conceptions of reality, but in such cases the use of analogy has been linked to the metaphysical conception, with which it stands or falls. The empirists, on the other hand, for the most part look on analogy as a resemblance of quite minor importance because of its weak and uncertain character. It is more or less explicitly accepted that analogy constitutes the least significant member of the series identity-resemblance-analogy. Its sole value is that it makes it possible to formulate a hypothesis for verification by induction".*

However,

*"Any complete study of argumentation must therefore give it a place as an element of proof".*

It looks, at first blush, like the closer we get to concrete legal interpretations - interpretations, which are directly issued to the parties in a process - the more "rare" comparative considerations are. The "power of law" does not seem to be based on comparative law. The power of comparative law seems to be in the legal discourse in general - in its connection to dogmatic and scholarly works.

<sup>29</sup> See, Jucquois, G., *Comparatisme 2: La méthode comparative dans les sciences de l'homme*, (Peeters, 1989), p.10. The comparative method can be claimed to be the essence of human sciences (ibid., p.12). See, also, Piaget, J., *La situation des sciences de l'homme dans le système des sciences*, In: *Tendances principales de la recherche dans les sciences sociales et humaines*, (Paris, Ed. Havet, J., 1971), p.9. On the non-existence of any specific comparative jurisprudence in science, see Allen C. K., 1931, p.12.

In the context of comparative "legal philosophy", Graveson, R.H., 1958, p.653. On the idea of comparison being at the heart of every process of interpretation, see Frankenberg, G., 1985, p.420.

Comparative method is defined as: *"Any method that involves examination of similarities and differences between phenomena or classes of phenomena, with the aim of establishing classifications and topologies of social phenomena, and testing of hypotheses of causal relations by examining the empirical associations and temporal ordering of factors"*, Jary, D and J, Collins, *Dictionary of Sociology*, 1991, p.103.

So also, Roth, G., 1978, p.xxxv.

<sup>30</sup> In law, Zaphiriou, G.A., 1982, p.71.

or an ideal subject.<sup>31</sup>

On the other hand, comparison seems to be a dynamic way of maintaining one's identity as opposed to static identity. This is why comparison is a continuous process, whereby identities established are reconstructed and deconstructed continuously. This includes all the explicit "nonidentities" maintained.

**The nature of the process of comparison and analogy.** The dynamics embedded in comparison could be explained by the ontological "difference" existing in the idea(l)s (things) compared, which forces the comparison to be a "circular" or a "sylleptic" process. The way to stabilize this dynamism is the claim of analogy; that is, a relative similarity.<sup>32</sup> This phenomenon may be illustrated could be explained by the ideas presented by Paul Ricoeur.<sup>33</sup>

According to this author history is a reconstruction, because within it there are elements of both source critics and critics of the document itself. The past does not "show" itself to us in documents. Documents are historical "traces", which give us a place for the past in the historical discourse<sup>34</sup> about the document. The document is a "lieu-tenance", a "place-

<sup>31</sup> In this sense, it invites "reflection", which is - evidently - a form of rationalization, alternative to pure intuition. Reflection and intuition are necessarily in any conflict with each other (Graveson, R.H., 1958, p.652). (Also, Rawls, J., Theory of Justice, Cambridge, 1971).

According to Immanuel Kant (1992, pp.592-593) comparison is part of the logical actus of understanding, through which concepts are generated. In this process, there is "comparison (*comparation d.i. die Vergleichung*) of representations among one another in the relation to the unity of consciousness".

*Note: "...By first comparing these objects with one another I note that they are different from one another in regards to the trunk, the branches the leaves etc; but next I reflect on that which they have in common among themselves, trunk branches, and leaves themselves, and I abstract from the quantity, the figure, etc., of these; thus I acquire a concept of a tree"... "abstraction is the negative condition under which universal representations can be generated, positive condition is the comparison and reflection. For no concept comes to be through abstraction; abstraction only perfects it and encloses it in its determinate limits".*

The logic of Kant, in this sense, seems to be constructive. However, obtaining a concept (*Questiones facti*), and the judicial question (*Questiones juris*) which is a question of justifying with what right one possesses this concept and uses it (for this, see Kant, I., Gesammelte Schriften (Prussian Academy, ed. 18:267, No.5636. In: Arendt, H., 1982, p.42).

For example of constructivism in comparative law, see Zweigert, K., Kötz, H., 1977, pp. 37-40.

Comparison may be related to the legal analogy. It has been claimed that "because reasoning by analogy presupposes a particular view to the rule application, namely, the rule application as a form of acting, its topic is the rule application itself. Logically this means that rules figure in the object language as individuals, rather than as sentences" (Verheij, B., Hage, J., 1994, p.71).

For the view that comparative argument is ultimately an analogical argument, see Valladão, H., 1961, p.109.

<sup>32</sup> "Social institutions are based on analogy"; Douglas, M., How the institutions think (N.Y.) 1987, p.30.

<sup>33</sup> Ricoeur, P., 1993 (1984, pp.436-452).

<sup>34</sup> Foucault, M. (1977, 1990 [1976 ], pp.87-89) - for example - sees historical discourses as matters of social power in particular and special languages. According to him, there seems to be no phenomena outside these discourses. By studying the particular discourse, one can only find the structure of that discourse, the "episteme".

The difference between Foucault and Habermas (1987) seems to be evidently in the way the discourse gets its meaning. For Foucault it is the power which determines the meaning of a discourse. For Habermas, the meaning

keeper"<sup>35</sup>. The reference to the past is, in other words, "indirect".

Ricoeur employs three concepts to explain, how this past "in" the document could be "seen". These concepts are the "other" ("l'autre"), the "same" ("la même") and the "analogy" (l'analogie)<sup>36</sup>. In the historical intentionality<sup>37</sup>, the "same" is a rudimentary reproduction ("reenactment") in the present. It is not epistemological in nature, not "understanding through the lived" - to "live again" ("re-vivre") - but to think again ("re-penser"). Furthermore, it is only possible to rethink something which is rethinkable.

In the "rethinking" the "difference"<sup>38</sup>, there is a dialectic turn. The "same" turns out to be the "other" - different variants of the negative ontology. In the "place-keeper", there is now the "difference". Nevertheless, it is not possible to understand the "other" and the "same", or to

is derived from the relationship between discourse and communication.

These two aspects are present in the historical discourse. However, the discourse can be claimed to be an interplay between powers, which can be reduced to the subjective meanings the reproduced forms attain in the psychology of minds. The power makes a text meaningful.

A discourse can - *a posteriori* - be easily seen as a reproduction of certain forms of power. This should also take place, because it enables anyone to establish genuine alternatives. On the other hand, the discourse is, in its open form - as a non-instrumental expression of values and feelings - a communicative act.

A discourse seems to aim always at the reproduction of something, which is - on the other hand - used as a premiss for an action. This way the discourse is not itself important, but what is instead important is how the reproduced forms of power (Foucault) or the "common understandings" (Habermas) are used. Law, as a reproduced form - having its traditional nature, and being the basis of legitimation - is used in a certain way. In the end, it is not so significant to look, what are the outcomes of the discourses as social forms, but how is this communicative sociality used in everyday life. The factuality of law, for example, determines the ultimate meaning-creation of legal forms. The consequences of social actions determine the logic of social behaviour - despite the power and understanding dimensions of discursive and communicative acting. Every discourse has - in the end - only the subjective meaning as the basis of an action. In this sense, we should be aware of "meaningless" discourses, and look to the discourse and its environment at the same time.

While Foucault stresses the tracing of the mechanisms and technologies of power, Habermas stresses the importance of the possibility of discursive criticism. The only distinctive feature seems to be the emphasis of the positive (Habermas) and negative (Foucault) rationality embedded in the basic starting points of these approaches.

The idea of applying "*episteme*" to legal discourses seems to be quite strange. The Foucaultian project was about the archeology of knowing (and reproducing) in a highly critical manner, whereas the application of the idea of *episteme* to law - as a social phenomenon - seems to be related to the establishing of layers of knowledge, statizing the project. Foucault's idea was to study the power of knowledge, whereas the application of the idea to law seems to imply an establishment of a law as a historical entity (for an example of this, see Tuori, K., 1998, pp.233-248).

Some analysis of Foucault's ideas in general is found in Kremer-Marietti, A., 1985, and on law Hunt, A., Wickham, G., Foucault and Law: Towards a Sociology of Law as Governance (London) 1994, and review essay and independent article, Baxter, H., Bringing Foucault into Law and Law into Foucault. In: Stanford Law Review, 1996 (499-479).

There are examples of the application of the idea of "archeology" also in comparative law, see for instance Legrand, P., 1996, p.280.

<sup>35</sup> "It is the formal frame in the cosmic time".

<sup>36</sup> For some analysis, see Arendt, H., 1982, p.79 ff.

<sup>37</sup> By the concept of "historical intentionality" one can grasp both "dimensions" embedded in the medieval Latin term "*intentio*", taken up by Brentano, F., (Psychology from Empirical Standpoint., ed, Kraus, O., 1973 [1874]). This *intentio* does not necessarily involve only the "intention" to do something. (See also, Husserl, E., *Logische Untersuchungen II.*, Tübingen, 1980).

<sup>38</sup> Where the "re-" and "time" disappear.

get information about it. Knowledge about the "same" and the "other" is not possible as such.<sup>39</sup>

How is it possible for a "place-keeper" - which has, in it, the "difference" - to be a "place-keeper"? Ricoeur explains this by the idea of the analogy. When one describes - "sees" - something "as being something..." ("comme quoi") - one also explains something "as something" ("voir comme"). Here both the identity and the difference are in the description. The binaric explaining and thinking are replaced by tropologies such as synecdoche, metonyms and irony, metaphoric (and also "fictional") explaining.<sup>40</sup>

In this manner one can maintain that there is something that is simultaneously the "other" and the "same". It is in these descriptions where something is seen. The past does not come to us as transparent truth, but through rewriting and redescription we can see the past.<sup>41</sup>

**Comparing "legal phenomena".** There are several possibilities for dealing with the above portrayed phenomenon in connection to law. Here the different general concepts of law are

<sup>39</sup> Ricoeur explains, in this connection, how the nature of difference grows, if curiosity concerning the 'difference' wins the "good faith" (belief) regarding the 'sameness' (referring to, Veyne, P., *L'Inventaire des Différences*, Paris, 1976), and furthermore, if one starts to understand the difference not as a variable of the constant, but rather as an exception from all adaptation to a model.

We could claim that here the analogy may be interpreted as a value.

<sup>40</sup> Comparative and analogical statements can be called this kind of explaining because "if at the time it was introduced it was allotted to a certain thing as its proper signifier, but as the time went by another thing came to be labeled by it owing to some affinity, no matter of what kind, between it and the original (referent), though the word is not the appointed signifier of the second" (Al-Farabi's Commentary and short treatise on Aristotle's *De interpretatione* (trans. and notes Zimmermann, F.W., Oxford, 1987, p.226). "Metaphors" are not used in any science, nor in disputation, but they are used in rhetoric and poetry" (Ibid., p.231).

A "transferred word" is a term "generally known to have been the signifier of a certain thing ever since it was first introduced [but which is] later taken and used to signify a certain other thing, but remains the common name of the first and the second this situation arises when discoveries are made by developing disciplines"... "transferred terms are used in sciences and other disciplines for things whose knowledge is peculiar for specialists, but when dealing scientifically with things generally known which have generally known names, scientist and other specialists should retain these terms and use them in their disciplines in the way the general public understands them." (idem.).

On metaphor, see Austin, J., 1995, pp. 106-108, "Metaphorical and figurative application usually means one in which the analogy is faint... the alliance between the primitive and the derived signification was remote when the analogy is clear, strong and close, and the subject to which the term is deflected lay on the confines of the class properly denoted by it..." (p.108).

<sup>41</sup> See on this point, Ricoeur, P., 1993, 1984.

This is where the understanding and the explanation come together, and where the act becomes affective. We could claim that in an ideal discourse, in the identification to the expression one tries also to reach that to whom one is speaking.

In the philosophical sense, an reasoning is comparative reasoning, and every argument is comparative. This means that in legal discourse, for example, an argument is generally compared with other arguments, and this way one comes to a solution by choosing the prevailing one. The best argument wins. This is the argument in the ideal legal discourse.

For example, Alexy makes the following statement (1989, p.102): "In order to distinguish truth from false statements I refer to the judgments of others, indeed, to the judgments of all others with whom I might ever engage in conversation. Here what I encounter factually includes all speech partners, whom I might encounter if my life-existence were coextensive with that of human kind. The condition for the truth of statements is the potential agreement of everyone else". See also Habermas, 1973.

entering into the picture.

A question must be posed: what is our concept of law? Do we perhaps define it as the transparent and understandable positive commands of the sovereign<sup>42</sup>, as a less crystallized spirit deriving from the environmental and cultural circumstances<sup>43</sup>, or perhaps as principles deriving from the "nature of law"?<sup>44</sup>. On this stage, one enters into the philosophy of normative legal premisses, and to the domain of the philosophy of law.

One may say that none of the approaches to the conceptualization of law is necessarily "irrelevant" or "external". Namely, they may be seen as parts of the general historical discourse regarding legal norms, and they each contribute something to this discourse. Law - in a universal discourse - is a construction and reconstruction of plurality of standpoints. All approaches are within the "context of law", reproducing the form of law and assembling understanding of it by instituting different perspectives to be taken into consideration. This is why different approaches to law - even if controversial - may contribute conceptualization and viewpoints to a study of phenomena (phenomenon) of law - as well as to a review of comparative law and comparative legal reasoning. They can provide methodological measures which facilitate the explanation of the subject.<sup>45</sup>

**Legal comparison.** At the heart of the "legal" is the basic distinction between norms and facts. The idea of law can be claimed to be based on a general comparison between factuality and normativity.<sup>46</sup> The legal comparison (of these aspects) is at the heart of the construction of a legal

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<sup>42</sup>Austin, J., 1995, p.108. Positive comes from "human sources".

<sup>43</sup> Montesquieu (1716-1755) and *L'esprit des lois*.

<sup>44</sup> Aristotle, Cicero, St. Thomas Aquinas, etc.

On this "identity", see Raz, J., 1977, p.796 ff (a bit different formulation of the question).

<sup>45</sup> As Graveson puts it, "...but their theories (jurists of every school) appear to me like photographs of a square house; no single picture can show more than two sides of the building, but each one illustrates an aspect of a house which is peculiar to itself and which seems important to that particular theory" (Graveson, R.H., 1958, p. 658).

<sup>46</sup> This is related to the general tension between facticity and validity, Habermas, J., 1992, p.11-31.

Klami, H.T. (for example, 1981, p.73) sees the ontological dualism of law based on distinctions between norm and behaviour. However, it seems problematic to speak about "facticity" as "behaviour" because then one introduces some evolutive aspects into the distinction. This seems to be so - especially - if one speaks about the reflective relationship between these two categories. We can make a short analysis.

Norm or "normativeness" assumes - traditionally - a description of "legal facts" (tatbestanden) comprising a behaviour, and a description of a consequence of this behaviour. Behaviour in "factuality" - on the other hand - cannot be assumed, in my view, unless analysis of the facts show that certain types of behaviour have existed. Finalistic theory seems to assume categories of behaviour, which means - I think - too extensive concept of acting *a priori*. Unless an extensive analysis of the factuality is effected, no idea of behaviour - in any rational sense - seems possible (in this respect, see some analysis by Raz, J., 1971, p.802 ff.). In fact, in order to respect the integrity (and discursive integrity) of a person, one should be able to analyze the factuality showing the intentions of a person without assuming any "patterns" of teleological or finalistic ideas *a priori*. The decision-maker or the other party - in the adjudicative situation - has to "prove" the intentions of, for example, the losing party to the dispute - and also argue on this basis. The assumption of the behaviour's intention is based on law, not on general finalistic ideas about humans in general. On the other hand, explicit legal reasoning, which attempts to satisfy the demands arising from the assumption

interpretation - the "making up of a complete phrase", a complete legal sentence.

The legal comparison - as a "comparative" interpretation - extends itself to both "spheres" - to normativity and to factuality. By extending the forms of these categories, the process of comparison becomes a three dimensional process of "system constructing".

This means that a system gets its meaning in the factual and normative spheres. At the moment of the practical (legal) statement and the drawing of legal-philosophical analogy, the "legal mind" or the legal "consciousness" - or the socio-philosophical mind of the actor - "orders words" to a system of similarity (word-order)<sup>47</sup>. It makes a choice by creating a form of life, a value - and the possibility for the language-consciousness -relationship. The normativity and the factuality are assimilated, and the legal (linguistic) act passes. The "legal" comparison appears in the form of interpretation of the legal-social system based on the (ideal) distinction of legal/illegal.

In the final analysis, legal comparison is merely a form of thinking and explaining of this process - and a process of rewriting. It does not differ from the general forms of social processes. What differs, perhaps, is the subjective "world picture". In legal comparison, this comprises the image of the "homo juridicus" and its connection to the world.

Nevertheless, some questions remain: who or what is the "homo juridicus"? Is he (it) connected to a particular system, determined by that system, or a free human being?<sup>48</sup>

**Comparison of socio-legal systems as "legal comparison".** The question becomes more complicated if one has to define the systematic relationships in the context of this process, which are based, in turn, upon the ontology, relevance, and materiality of the systems being compared - on the dogmatics and structures of the socio-legal systems. The comparison of "illegal/legal" is

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of intention, treats the persons affected by the norms as persons who act intentionally. Outside that reasoning - in an integrative legal system - no assumptions of legally relevant intentionality can exist.

This is related strongly to the distinction between the analytical and finalistic theories - and also to the "discussion on the "normative theory" - which seems to be central also to Klami's analysis (1981, p.89).

<sup>47</sup> Deleuze, G., Guattari, F., Postulates on linguistics, p. 79 ff. (In: A Thousand Plateaus. Capitalism and Schizophrenia, London, 1988.).

<sup>48</sup> This question is attached to our concept of law. As seen before, our concept of law is a concept of dynamic interaction between persons and social systems. Only in this social sense can the "homo juridicus" exist. One could claim that it is a socio-legal-cultural construction. As to what kind depends on many things. All the same, its choices describe it.

The conception of a standard "Homo Juridicus" could be identified as a conception of the dogmatic lawyer:

*"Les juristes dogmatic pensent, sinon que tout est droit, du moins que le droit a vocation à être partout, à tout envelopper. à soutenir, comme un idéal, tout l'univers habité. Il régné, chez le juristes dogmatiques, à la fois un idéal et un postulat de panjurisme. Une théorie comme l'universalité du droit de punir (en droit pénal international) trahit naïvement ce panjurisme foncier". (Carbonnier, J., 1995, p.23.*

combined with the distinction between non-legal/legal.<sup>49</sup>

In this phase, we may speak of comparisons of traditional socio-legal systems - examples of positive constructions. These comparisons are effected according to the paradigm or "phenotype" of system or norm concept, which corresponds to the concrete description of the system (state, regional or international legal systems, etc.).<sup>50</sup>

Here we can speak also of legal considerations, appearing either in heuristic or argumentative form, referring to other socio-legal system and to the relationship between these systems. In this connection, we may consider, as well, the possibility for an adoption of a socio-legal idea (analogy), or of a transfer of an idea from one system to another system.

Consequently, the legal comparison becomes a process of social and systematic interpretation by the "*homo juridicus traditionalis*" - and approaches traditional comparative law, comparative legal considerations, and comparative legal reasoning.<sup>51</sup>

**Comparative legal considerations and comparative legal arguments (comparative legal reasoning).** Legal comparison is not exclusively, as we have seen, a matter of a dynamic process of legal heuristics and legal thinking. It can also be a matter of an argument - an unveiling of a form of thinking in a legal historical discourse and in the positive reasoning of legal institutions<sup>52</sup>.

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<sup>49</sup> Carbonnier, J., 1995, p.23.

<sup>50</sup> As Perelman maintains (Perelman, Ch., Olbrechts-Tyteca, L. 1969, p.322) "*in the field of law, reasoning by true analogy appears to be restricted to comparison as to particular points of systems of positive law separated by time, place or content. On the other hand, when resemblances between entire systems are sought, the systems are regarded as examples of a universal system of law*".

On the distinction between law and legal system see Yntema, H.E., 1958, p.497.

Klami seems to speak, in this connection, about the "validity of law", and in relation to behaviour about "prognoses of behaviour" (Klami, H.T., 1981, p.74). However, one may say whether the behaviour is - in this connection - nothing but legally relevant behaviour having a normative aspect as its premiss (for a discussion on this, see Klami, H.T., 1981, pp.74-75).

<sup>51</sup> One could claim that the role and identity of comparative law depends on our conception of law. Namely, if the legal thinking is stressing the "ontology" of the legal system, comparative law seems to be more like a socio-legal systematic study. On the other hand, the norm-ontological approach stresses the "non-contextual" nature of the comparison, and in this way, comes closer to a legal analogy. Traditional comparative law is evidently based on the systematic identity thinking in the context of law.

Frankenberg has seen the question of comparison and learning as the concepts of "distance" and "difference" (Frankenberg, G., 1985, pp.411-455). When speaking of the distance, one makes (or should make?) a distinction so as to avoid confusing the content of a conclusion with universal truth and logic. This forces the comparativist to criticize the neutral referent (the reflection?). This leads to a critical comparison and learning instead of a return to "functional universals", "world-view" and "language", and "ethnocentrism" (idem.).

One might agree with this point of view to a certain extend. However, it lacks a further development, namely, that the process is a form of social learning, but in the form of socially meaningful discourse. Here lies the return to rationalism. One does not have to be a universalist or rationalist in the sense of ethnocentrism, but one can attempt to explain the starting points for his comparative understanding in an auditory, whatever it might be.

This question seems to go back to the dichotomy between dialectics and rationalism (idem.).

Klami has spoken about conceptual realism as one of the starting points of comparative law (Klami, H.T., 1981, p.76).

<sup>52</sup> One can distinguish between two associated processes in individual processes of reasoning. The first is the search for the reasons, and the second is the connecting of them (Hobbes, J., *Leviathan*, 1968, p.96)

If it is openly and visibly (i.e. positively) so, one is able to look into the comparative reasoning as a discursive phenomenon (that is, to view the legal comparison as a traditional phenomenon). This argument, by comparison, can be defined as an open and positive consideration of several objects, aiming at an evaluation of these objects through their relationship to each other.

Comparative legal considerations, however, do not necessarily relate to open and practical legal argumentation<sup>53</sup>. This may be connected to the basic idea of the "modern art of rhetoric", according to which the reasoning takes place by arguments, which support ones decisions, and not by some controversial or alternative proofs and reasons embedded in the consideration processes. This seems to be a "natural" tendency of mind in the processes of constructing "word-orders", analogies, and similarities - in processes, where the question is about the maintenance of coherent consciousness. In this sense, the rewriting seems to become, in itself, an obstacle to an open explanation.

One could say that comparative legal considerations are ruled out from open legal reasoning so as to maintain the deductive rationality and internal coherence and the circular validity-check of the legal decision-making. On this level, legal comparison becomes a strategic and instrumental legal comparison. This enables one to have a reasonable interpretation within a closed system of normative legal reasoning. Legal comparison appear in the contexts of discovery and justification.<sup>54</sup>

**The laws of comparison, and the rationalization of the comparative legal argument.** This subject is paradoxical. In attempting to describe the nature of the subject, one ends up describing the structural laws of law itself, the laws of legal reasoning, and mentioning something about legal choice. This is due to the fact that comparative law is the very heart of the system of law, and that comparison is the basic normative idea of law. Comparison of law seems to be the law itself.

How could we delineate a systematic legal framework? What could be its basic premises? How could we relate comparative law to legal interpretation?<sup>55</sup>

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<sup>53</sup> See, for example, Bogdan, M., 1990, p.33, Kamba, E.J., 1974, p.23.

<sup>54</sup> The idea of the sources of law can, to a certain extent, identified with the context of justification. In this sense, comparative considerations may sometimes be in the realm of the sources of law. (For the context of discovery and justification, see Aarnio, A, 1987, pp.77-78.)

<sup>55</sup> The legal interpretation can be defined here as "*intellectual activity accompanying the law-creating process as it moves from a higher level of the hierarchical structure to the lower level governed by this higher level*". ... *how, in applying a general norm... to a concrete material fact, one is to arrive at a corresponding to individual norm... There is, in short, interpretation of all norms in so far as they are to be implemented, that is, in so far as the process of creating and implementing the law moves from one level of the hierarchy to the next*" (Kelsen, H., 1990, p.127).

We may say that the argumentation in law is a process of selecting legal arguments in realm of instrumental and communicative reason. Consequently, it is the part of the discursive reasoning-process, where both pro- and contra-arguments appear. Legal justification is communicative interpretation of a legal norm. To be communicative, as we will see, it takes place in realm of legal system, i.e., in realm of legal sources, and it is traditionally and value-based way rational.

## 5. The concept of law, the problem of gaps, the concept of legal sources, and the study of comparative law as a legal source of law

**Introduction.** The remarks, in this chapter, are based on observations upon situations where comparative reasoning has been used in filling in "legal gaps" or "*lacunae*". Nevertheless, the analysis is relevant also from the general point of view.

It is clear that if law was universal and complete, no interpretation, argumentation, or reasoning would be needed, and hence, no discursive approach would be necessary. Nevertheless, we seem to need comparative reasoning - and legal reasoning - in law. Consequently, we may ask: Are there gaps in law? What could be a gap in the law? Is the interpretation of law complementary, creative, or affirmative?

In the ideal and "complete" theory, we prefer the idea of affirmative interpretation (in ideal sense), and maintain, as Kelsen did, that the notion of a gap in law is a fiction, i.e. that there are no gaps in the law<sup>56</sup>. Nevertheless, even if there are no gaps in law there is some degree

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Legal reasoning can be defined as a general concept corresponding to an interpretative process based on practical reason including instrumental and communicative forms of reasoning, and aiming at interpretation of a legal norm.

<sup>56</sup> It must be stressed that this idea does not apply as such to the concrete legal order.

Kelsen's theory is the "pure theory of law". We may see it as an attempt to purify for example politics from law (or law from politics), and in this way to avoid "legal institutionalization". It leads usually towards such a practical attitude towards law, where positive legal rules have a value as such (Kelsen, H., 1992, p.7). As Brusiin puts it regarding the institutional lawyer, *Law appears to him predominantly as a conscious social technique for a solution of special social tasks (legal problems)*. This idea may be related to legal eclecticism.

Otto Brusiin (1962, pp.47-48) recognizes that even in Kelsen's theory (or theoretical thinking) the elements of human behavior and legal norms seem to be interwoven. However, his claim that Kelsen "pretends" his system to be "purely normative" can be contested. It is true that the epistemological structure of law is far from simple. However, in legal theory, we are still speaking about the normativeness of a system. The legal phenomenon under study and "in one's cognition" is to be understood as normatively legal, contrary to ideas of cognitivism about knowledge as such. Furthermore - as Brusiin himself recognizes, within legal phenomenon, there takes a place an intellectual liberation. Could this liberation be somehow related to this "pure normativeness" in Kelsen's theory?

Regarding gaps, see Kelsen, H., 1946, pp.146-148. Fictions do not have any historical existence. On the indispensability of legal fictions as instruments of human thinking, see Fuller, L.L., *Legal fictions* (Stanford, 1967). Furthermore, an extensive analysis of interpretation and gap as a fiction is given by Kelsen, H., 1990, pp.132-135. Commentary on this, see Paulson, S.L., 1990.

We may say that Kelsen's approach was traditional, but also "traditionalizing". We may say that his basic ideas relate to necessity and possibility, which seem to correspond to his basic ideas on rights to property and personal liberty in constitutional systems. Furthermore, the distinction between "ideality" and "reality" of law is recognized. The actual law seems to relate more to ideas of cultural possibility: *Theoretical commentaries supposedly assisting in implementing a statute are in fact thoroughly political, making suggestions for the legislator to consider, attempting to influence the creative function of the courts and administrative agencies* (Kelsen, H., 1990, p.131). The ideality may relate more to the ideally formal tradition, which should recognize - but not apply and have as its premisses - any "realistic" (instrumental and value based) approaches. This also seems to indicate that any "will" and "intention" - as well as "sovereignty" and "community" based categories - are excluded from form of law (*ibid.*, p.129). For Kelsen the interpretation was a search for possible interpretation.

Kelsen maintains also that *"Both familiar means of interpretation, argumentum a contrario and analogy, are worthless, if only because they lead to opposite results and there is no criterion for deciding when to use one or the other"* (*ibid.*, p.131).

of uncertainty in legal discourse and in the social conception of law. This feature can be explained in the following way.

**The social concept and the discursive integrity<sup>57</sup> of law.** We can maintain that the concept of

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It has been also stated that "*Fictio, in old Roman law, is properly a term of pleading, and signifies a false averment on the part of the plaintiff which the defendant was not allowed to traverse; such for example, as an averment that the plaintiff was a Roman citizen, when in truth he was a foreigner. The object of these fictions, was of course, to give jurisdiction, and they therefore strongly resembled the allegations in the writs of the English Queen's Bench... the fiction is that it (law) remains what it always was... they (fictions) satisfy the desire for improvement... at the same time they do not offend the superstitious dislike for change which is always present*" (Maine, H., 1954, pp.16-17). However, Maine is not as skeptical regarding them as Hobbes, but sees their function in the evolution of law: "*but it would be equally foolish to agree with those theorists, who, discerning that fictions have had their uses, argue that they ought to be stereotyped in our system ... legal fictions are the greatest obstacles to symmetrical classifications*" (ibid., p.16). "*Fictions, equity, and legislation all, (Bentham would say), involve law-making. They differ only in respect of the machinery by which the new law was produced ...*". However, "*Legislation and Equity are disjoined in the popular mind and in the minds of most lawyers; and it will never do to neglect the distinction between them, however, conventional, when important practical consequences follow from it*" (ibid., p.18).

<sup>57</sup> We have already spoken about the discursive integrity above. In relation to the idea, we could use also an expression of "integrative discourse", which would also refer to the basic idea of the discourse as a respect of the integrity of the parties in the discourse as individuals, but also as a part of a discursive community.

We have to maintain that the term is definable only in the course of the study. It has to be re-written by an analytical approach to the subject.

Ray F. Carroll speaks about the general idea of integrity related to the business and professional organization (internet pages, article *Integrity: the organizing principle*, last updated: June 22, 1996):

*"Integrity demands that recognition be given to valuing the ideas which others have to offer. For the accountant it means providing users with the information they need in order to make a fair assessment. It also demands open-mindedness and an intense respect for the truth. Integrity requires not only truth telling, as quite naturally comes to mind, but also truth finding. The very act of participating in a discourse suggests that genuine consensus is possible and that it can be distinguished from a consensus which is false. According to Habermas ((1984). The theory of communicative action: Vol. I Reason and rationalization of society. Boston, and see McCarthy, McCarthy, T. (1978). The critical theory of Jürgen Habermas Cambridge) rational decisions about truth claims requires a structure which is free from constraints such as neurotic or ideological distortions. His thesis is that the structure is free from constraint only when all participants have an equal opportunity to be heard. This means that each participant has the same chance to command, to oppose, to permit, to forbid, and to express his or her attitudes, feelings, and intentions".*

...

*"It is the contention of this paper that individual agents for a business or professional organization ought to act with integrity. It has been argued that this involves acquiring the disposition of open-mindedness, engaging in serious discourse, and practising dialogic leadership. This engages the wholeness of what it is to be human. As Alasdair MacIntyre (MacIntyre, A. (1981). After virtue - A study in moral theory. Notre Dame) has said, integrity cannot be specified at all except with reference to the wholeness of human life".*

In the context of ethics, see Mark Mason (In Defence of a Dialectical Ethic Beyond Postmodern Morality. In: Philosophy of education 1997, internet pages):

*"To summarize, the ethics of integrity which I have postulated is constituted by a respect for the dignity of being and by responsibility for the moral choices we make. Respect for the dignity of being is associated with a Kantian deontological ethics which I have located at the objective or foundational pole of the dialectical morality posited here. Responsibility for moral choices is associated with Hume's visceral morality which I have located at the pole of the dialectic identified by Rorty's notion of solidarity, by Levinas's face to face situationally responsible morality, and by Bauman's moral responsibility to the other. To repeat by way of conclusion, moral action is wrought*

law is connected to a social concept of law, which is based, in turn, upon the communicative rationality of human beings<sup>58</sup>. Our concept of law is this type of discursive concept of law.

This "communicative socialness" is exactly the reason why the concept of law is "beyond" our thinking, and why there seems to be uncertainty in law. Because we do not have an exact idea of what communication is all about *a priori* the concept of law as a social phenomenon is beyond us and the uncertainty remains<sup>59</sup>.

All the same, this is not the whole story. The discursive and communicative concept of law, although uncertain, can nevertheless be balanced against the idea of discursive integrity of law<sup>60</sup>. Law regulated by this type of idea - even in the case of uncertainty - maintains the coherence of such a concept, and we may preserve the idea of "gapless" law.<sup>61</sup>

However, we must ask, in relation to this concept of gapless law, how can these ideas of discursive integrity and uncertainty in law be described? An answer to these questions is necessary if we want an explanation of the role of legal sources in relation to discursive integrity of law.

We may re-emphasize the point that problems of the social concept of law described above concern different forms of communication and their decisiveness. We may speak of uncertainty connected to language (words, phrases, and sentences etc.), regarding their syntactic, semantic and pragmatic dimensions, and uncertainty as to the interaction between different elements of language. However, one has to be still more analytical and specific.

As is known, any "situational disturbance" can function as a "basis" of communication. The colour of the speakers' clothes, his symbolic surroundings, his behaviour, and the tone of his voice are good illustrations of properties which may determine the affective nature of the everyday communication. Analysis of these traits is a matter of rhetoric. All the same, they do nevertheless form a part of the study of legal discourse too in the following sense.

The communicative uncertainty is often the reason for certain strong reductions being made in the social realm and in the realm of law. These reductions can be reductions - for

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*by this tension between objectivity and solidarity, between foundational commitment and face to face responsibility, as we strive towards "as much intersubjective agreement as possible," towards a discursively principled morality".*

<sup>58</sup> Habermas, J., 1987, 1992. Some criticism of the discourse philosophy, see Weinberger, O., 1994, p.240-247. Weinberger maintains (1994, p.247): "I completely agree with Habermas that discourses in society and an appropriate organization of them is one of the most important and even a defining characteristic of every democratic system. But I disagree with him that discourses as such are a measure and, so to speak, a sufficient legitimation and justification of any result of a social discursive processes".

<sup>59</sup> For instance any idea regarding transparent communication seems to be problematic.

<sup>60</sup> This idea may be derived from the idea of Dworkin, R., 1986.

<sup>61</sup> On the theoretical concept of coherence, for example, Alexy, A., Peczenik, A., 1990, p.131 ff., Peczenik, A., 1994, 167 ff.

example - to ideal form of language, to certain group of people - or even to a person<sup>62</sup>. This seems to be due to the fact that human beings have a tendency to seek to safeguard continuity and predictability and to solve *a priori* the problem of uncertainty.

It seems to be correct that it is not sufficient simply to rely on our capacity, in every situation, to take into account different types of communicative acts. There is always the possibility that different persons look upon different things as relevant communicative acts, and in this sense, - even if agreement on some things seems to have been achieved - no factual understanding has been reached. For example, one person can concentrate his attention to the symbolic environment, and rely upon the holistic "experience" he gets from an act. Another person may observe the use of the words "law", "value", or "morals", and in recognizing them, may rely on the speaker's sensibility to "human interests". There can be differences also in "teleological" considerations. One can, in some historical "understanding horizon",<sup>63</sup> see certain types of phrases leading to certain types of actions, whereas another person may forget certain historical experiences - and concentrate his attention upon the precise subject - matter to which the speaker refers to. On the other hand, the interpreter may have taken into account some kind of regularity of action by the persons in the speaker's. He may know that a type of a slogan - gathers people together, who are interested in certain types of things, and that these types of groups have a tendency to "motivate" themselves with similar types of aim, which presumably leads in turn to certain types of actions.

On the other hand, the individual characters of persons in a group can also comprise part of interpretation, as well as the character of the original speaker. The way certain people tend to organize themselves can, for example, be a decisive part of interpretation.

Thus, it is recognized that there can be problems in interpreting and reinterpreting discursive situations. How could we, consequently, solve this problem of uncertainty, especially in the realm of law? How could we attempt to guarantee the discursive integrity of law?

It can be claimed that all interpretations, reasoning, and arguments make sense in the legal sphere, if they are, firstly, aimed at interpreting law, and secondly, if they are relying on prearranged categories of relevant distinctions (i.e. systems of reflective concepts in concrete terms, *a priori* definitions of the things to be looked upon in a concrete situation, "legally relevant situations", descriptions of social problems, etc.).

The analysis of the discursive integrity of law has, consequently, the following dimensions. Firstly, the question may be about the categories of the distinctions relevant to legal interpretation (and consequently, for reasoning and argumentation), and secondly, it may refer to the means of how we recognize legally relevant situations in the first place? The first question can

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<sup>62</sup>These categories correspond to different types of authorities presented by Weber, for example (See, Weber, M., 1978).

<sup>63</sup>For this concept, see Gadamer, H-G., *Wahrheit und Methode* (Tübingen, 1965), p.265 ff.

be defined as a question of sources of law, and the second as a question of the moral and political basis of law.

Here we will briefly analyse this latter question: How do we recognize legally relevant situations?

We can say, with regard to groups such as police, parties of a legal disputes etc. that they recognize "relevant situations" based on their authority, which have has been conferred them by law (in constituting definitions). In other words, a person or a collective body has been given authority to act, whenever he perceives it to be important. They have been recognized as legally relevant actors. On the other hand, all recognitions of "legally relevant situations" take place on the basis of the societal discourse (and education) about the limits of the possibility to act (with regard to the police), or about one's rights and duties in society (with regard to individuals). Furthermore, in contract law, for example, the parties, in the form of a contract, may further define their rights and duties in relation to certain specific commercial acts, as precisely as they want. In this latter sense, *ad hoc* - or more permanent - social associations (institutions) may define for themselves the basis of the interpretation of legally relevant situations and acts (certain breaches, for example).

The second question - the question of legal sources - is closely connected to the question of the recognition of legally relevant situations. Namely, those who identify some kind of a possibility to act, must have, in some ways, an idea of legal sources (comprising the sources of distinctions relevant to recognition). The role of the sources of law may become relevant in the "affirmative" sphere, based on a learning process and the "socialization" processes of the parties in question (whether with a commercial, political or other type of organization).

Consequently, the recognition of legally relevant situations is chiefly a question of education and linked to the unconscious recognition of one's rights and duties. The interpretation of law, on the other hand, is based on the intentional use of legal sources so as to communicate with other persons, not to make value-based choices on the basis of one's legal status.

The determination of legally relevant situations is associated with the general societal discourse. However, whenever participating in general discourse, a person does not necessarily aim at the interpretation of law, but at expressing his opinion in general. His orientation may not fulfill even our first condition, i.e. the idea that one must aim at interpreting law. In general discourse, persons do not act as legal persons, but as individuals with the aim of taking part in the discourse in a general public sphere<sup>64</sup>. In commercial interactions, for example, the question of recognition is often closely connected to the economic and material losses occurring. In a civil liberties question, on the other hand, the problem is often related to one's

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<sup>64</sup>For this concept, see Habermas, J., 1986:2, p.320 ff., 1993, p.467. See also Baynes, K., 1992, 172 ff.

In this sense see also the idea of Dworkin that the public legal interpreter should be seen as a "moral" actor seems to be problematic (see Dworkin, R., 1986, p.1).

moral and political "sense" in a particular situation.

Legally relevant situations have to be recognized *a priori*. This makes it possible to interpret and to reason about law in a communicative way. Legally relevant situations then move in the sphere of legal problem-solving, for example, by parties, administrations, or individuals. Here the competent body for this type of problem-solving interprets the situation. In contemporary legal systems we call these bodies courts, whether these be administrative courts, arbitration courts etc. To define these bodies as legal problem-solvers is extremely important. This is so because by recognizing these bodies as legal problem solvers, we link these bodies to law, and accordingly, to legal sources of interpretation. This does not mean that these bodies would be the only institutions which could interpret the situation. The crucial idea is that these bodies are legally bound. Only this way are we *a priori* capable of controlling them, and to discuss or debate with them in a problem-solving context with arguments, which are binding upon them. This way we are able to maintain the discursive integrity of law. Consequently, the legal problem-solvers have to interpret law according to defined legal sources.<sup>65</sup>

Now, it can be noted that the definition of the relevant distinctions for interpretation is decisive in the interpretation of a situation. Without having an idea of relevant distinctions, the interpreter might make a use of any type of distinction and the decision-making might become arbitrary from the communicative (and social) point of view and might serve to increase the uncertainty rather than preserve the integrative discourse on law. This type of situation emerges in a case where the "legal process" itself is not a decisive source of arguments<sup>66</sup>. If the interpretation is not based on reasons deriving from the sources of law, the reasons may not be valid (there is no reason-ability, and the interpretation is not rational). The interpretative rationality, in this sense, means the teleological, historical, and other type of interpretation of the valid reasons defined in the realm of the legal sources. We cannot speak about communicative problems *a priori* in any way other than in relation to acceptable sources of distinctions.

Who defines legal sources?

This question can be linked to the previous consideration of the identification of legally relevant situations. In this sense, the identification of legal sources may have a connection to moral, political and general discourses<sup>67</sup>.

However, we can say that the explainer of legal sources also is aiming at the

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<sup>65</sup> Some discussion, see Aarnio, A., 1997, pp.189-189, Peczenik, A., 1989, p.313. Peczenik, A., (1994, p.153 ff.) develops his idea by starting from a Moral Education Argument.

<sup>66</sup> This difference seems to be the decisive distinction between - for example, Anglo-Saxon and continental legal thought. One may say that English courts, which consider only the arguments presented by the parties, differ from the continental systems, where the legal decision-making institutions make a preliminary examination of the applicable law and legal arguments.

<sup>67</sup> This is especially so if the recognition of legally relevant distinctions derives from the reasoning of the parties in the legal processes.

interpretation of law. Persons defining legal sources have to take account of the legal discourse. They should aim at guaranteeing the discursive integrity of law by understanding that they are not only bound to rather arbitrary distinctions of the contingent general discourse, but are part of the more universal legal discourse, in which they identify the relevant legal sources. One can claim that these persons are perceiving - on a scientific and permanent basis - the institutions (or "institutional actors"), which (re)produce the (possibly) relevant legal sources. This takes place by evaluation and demarcation of the communicative abilities of various institutions (or institutional actors) in order to sustain them as sources of legally relevant distinctions.<sup>68</sup>

This leads to theories of legal sources, which are related to political theories. In this sense, different categories of legal sources may be defined - *a posteriori* - on the basis of political theories or social practices. For example, in the realm of democratic theory, the relevant sources may be found in the materials which have been produced in the process of political law-making by traditional democratic institutions<sup>69</sup>. In this sense, the political discourse on an issue may give some indications as to the relevant legal sources. However, this is not necessarily so. The idea of discursive integrity of law has to be perceived.<sup>70</sup>

Returning to our basic definitions of law we can say that categories of basic distinctions - the legal sources - can be established in the realm of the legally integrative discourse. The rationalization of legal sources means the establishment of a valid source of law by examining the nature of the reasoning and arguments deriving from it, and by exploring the uses of this reasoning, in political and legal practice. Simultaneously, this type of study is connected also with the analysis of the nature of these reasons in relation to their correspondence with theories concerning them and on the legal discourse as whole.

Now, the investigation presented above is fundamental from the point of view of

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<sup>68</sup> We may recognize the explanation of this idea in Kelsen, H., 1992, p.13-14 (§7. Cognition of legal Norms vs. Legal Sociology).

For some analysis of "communicability", see Arendt, H., 1982, pp.63-65, pp.68-72.

<sup>69</sup> What, then, is a democratic body? This question is based on the political history, which, nevertheless, must be somehow related to social utility and to the question of a good institutional arrangement for the maintenance of the predictability of decisions. For some discussion, Sartori, G., International Encyclopaedia of Social Sciences (MacMillan, Vol 4, 1968) p.112 ff.

We do not go into this question here, because the question of traditional democracy is not interesting to us in the context of the topic. However, what we may maintain is that comparative law as a source of law is not really "democratic" in this traditional sense of the word - as will be argued below.

We could claim that, for example, different constitutional or European Courts are democratic based on their "substantial" concern for individuals. The context of their establishment history does not give any indication of this, however. They were not born out of the struggle towards individual rights, but from the formal establishment of "guaranteed" rights. This way, their evaluation as democratic bodies has to be made according to the evaluation of their daily practice.

<sup>70</sup> Raz, J., has proposed that the rule of law should be understood as a part of the culture of democracy, where the judiciary is (publicly) responsible for a more slowly changing legal doctrine. The question is, according to him, about a culture of legality as such (1990, p.331 ff., especially pp.338-339). He also emphasizes the democratic continuity (ibid., p.339).

the subject of this thesis. Namely, we are studying the interpretation of law on the basis of comparative legal information<sup>71</sup>. In other words, we have to stress the fact that in this investigation comparative interpretations examined are produced by some legal institutions which are aiming at the interpretation of law, and, first and foremost, they are normatively bound to the idea of interpretation of law on the basis of legal sources.

Consequently, the survey of comparative law as a legal source is not based solely on the reference to authoritative legal institutions, but on the rationality of comparative arguments in these institutions. This way we may sustain a critical perspective upon the study of comparative law as a legal source.

Ultimately, the question is whether the distinctions deriving from comparative law can be considered legally meaningful, in the sense that they guarantee a predictable interpretation and integrity of the legal discourse in general?<sup>72</sup> An answer to this question requires scientific rationalization of comparative legal argument.<sup>73</sup>

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<sup>71</sup> This study provides only a brief survey of comparative law in legislation.

<sup>72</sup> One can claim that the fundamental (rational) premisses of the legal discourse are in the sincere value-decisions. Nevertheless, these value-decisions should be traditionally oriented, because the traditional orientation is the only way to avoid the instrumentalization of law.

Philosophically speaking, sincere value-based expressions are the only possible way to identify oneself to others ideas in some dialectical discourses. Otherwise, no sincere communication exists, or, instrumental acting generates instrumental identity, and this causes a negation of any discourses as possibilities for a social process. On the other hand, value-based discourses are also ways to learn. In value-based acting, the environment is seen also as a possible source of valuable information. On the other hand, value-based acting makes one susceptible to instrumentalizations. Here the role of traditionality is visible. It is only way to find out the distinction between instrumental and value-based acting.

Ultimately, as the theory of legal discourse seems to maintain; the traditional quality is guaranteed by the auditory, which can control the nature of the value decisions.

Any evolutionist idea of systems of law lacks an idea of value decisions, because they lack context. The particular context has to exist to enable one to recognize any value decision. Evolutionary systems can be seen only as "analogical". In this sense, any separate 'application' discourses do not seem to exist (some discussion, see Alexy, R., 1993, p.157 ff.). In this sense, we can have instrumental and evolutionary theories (though they lack any value nature in discursive sense).

Some critical analysis of the "evolution in law" -theories, La Torre, M. (1997, especially p.344 ff.) recognizing the phenomenological ("metaphysical") nature of these theories (ibid., 331), and contextuality of the application of law related to their problems (ibid., p.346).

<sup>73</sup> Generally speaking, by rationalization, one attempts to get rid of myths residing in the creation of social meaning. This way one is able to transfer the discussion to the spheres hidden from dogmatic forms of rationality, i.e. to begin a new discussion about the rationality of a system in other terms.

Barthes, R., (Mythologies, Paris 1975, see also, Vattimo, G., *Societa Transparente*, 1986) who studies how the myths are dealt with by "archaic", "cultural relativistic" and "moderate irrationalism" modes. (Barthes, R., 1975, p.429). Myth cannot be a subject of rationalizing and demonstrative knowledge. Especially in the cultural relativistic approach the study of the myths of the "other" starts the discovery of the myth and belief system of one's own culture. The basic structures of both cultures are "mythical" (Vattimo, G., 1986, p.46). These myths are narratives on the mythical experience.

Comparative law, for example, is a strongly unstructured and "unscientific" discipline, which transfers problems, connected to it, to these types of areas of cultural discourse (cultural relativism). Comparative method is a narrative explaining about experiences. The "danger" of comparative law as a process of explanation is seen in its nature of being a mythical (see for example Strömholm, S, *Comparative legal sciences. Risks and Possibilities*, In: *Law under Exogenous Influences*, ed. Suksi, M., Publications of Turku Law School, V.1, No.1/1994), and Kahn-Freund, in

The main question seems to relate consequently to the transfer of comparative law, comparative legal arguments, and comparative considerations from the phenomenological, practical, value-based, and instrumental "inspirational" phenomenon to the rational sphere of legal reasoning. Furthermore we may also ask on which scale this could be done.<sup>74</sup>

In a concrete form, this requires an examination of the nature and the tradition of comparative law discourse, i.e. a study of particular legal systems as one of the basic sources of legal reasons. On the other hand, one should be able to find answers also to questions such as , "in which systems comparative arguments are used" (the quantitative aspect of the study), and "what functions comparative considerations have - in that particular legal system - in relation to particular legal norms" (i.e. the legal-logical causalities between the norms and comparative law).<sup>75</sup>

**Comparative law as a source of law, and the study of legal gaps.** We return here to our original question. It has been maintained as I have already argued that there are no gaps in law, but because of communicative uncertainty, the idea of sources of law is needed in order to maintain the discursive integrity of law.

Nevertheless, a question remains: why are comparative arguments sought to be used in cases of lacunae, and how could this particular characteristic be taken into account? To put it in another way; what kind of attitude should we take towards the fictional processes of gap filling?

It is noted that we have to incorporate the social and communicative concept of law, as well as the functional side of the law, and commence to take seriously the processes of fictional gap filling. The demand of sincerity of a discourse demands that all "hardnesses" must

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a form of a joke (witticism), "*On the professor of comparative law the gods have bestowed the most dangerous of all their gifts, the gift of freedom*" (1966, p.40). Comparative legal studies usually leave the "basic principles" open and maintain the myth. This takes place in order to maintain "cultural organization".

The narrative model in historical research reveals new forms of rhetorical models, on which the historical writing itself is based upon (Vattimo, G., 1986, p.49). Comparative law, for example, is a narrative model; itself a kind of a culturally relativist model of argumentation. By these narratives the myth of culturally relative law is kept alive. In reality, however, the cultural relativist models are not possible to keep apart.

The research of comparative reasoning, on the other hand, is a study of the use of these narratives (and their forms) in the argumentative practice on the culturally relative law, a study of the processes of demythologization or remythologization - both occurring in the same process of the "non-metaphysical" ("demythologizations" of) law (of the modern or modern law) (compare, *ibid.*, pp.50-51).

<sup>74</sup> The use of comparison as inspiration becomes evident for example in the article by Koopmans, T., 1995, p.545 ff, 549 ff.

<sup>75</sup> An example may be given on this stage. Liberal positivism considers the freedom of expression to be guaranteed by positive rights. Nevertheless, as we will see, cultural restrictions play a role in their application. This, on the other hand, is only to be found in cases where the application of positive rights is combined with normative comparisons, for only in these cases is the factuality - the connection between the normativity and factuality - to be found. Here the "form of life" (Wittgenstein) meets the linguistic behaviour, and the "cultural limits" are seen. The nature of comparative considerations is bound to the interplay between the normative (systems) and the cultural spheres.

be taken seriously. If the sincerity rule is followed, all "hardnesses" are real in the sense that they are believed to be true.

Consequently, one could claim, for example, that these fictions are so as to explain something which seems to be important, but which does not seem *a priori* to be legally accepted. This is why the difficulty of a situation is explained by fictional means, and why the filling up of fictional gaps has been called for in hard cases<sup>76</sup>.

In conclusion, we can concentrate on (comparative) analogies. We do not have to solve the problem of "fictional" gaps. We can merely rely on the integrative discourse of law. We can examine the fictional gaps and their filling by going all the way through the process of interpretation. This way we may discover the result of this fictional operation. These cases are exceptionally interesting because the fictions operate to resolve a problem of the "existence - nonexistence" of law, and furthermore, because, through its study, one may arrive at a genuine emphasis upon the normative issues involved<sup>77</sup>.

Therefore, in the final analysis, interpretation is normative and not only (legal) philosophical and (legal) theoretical<sup>78</sup>.

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<sup>76</sup> The reference to hard cases, fictional lacunae etc. connotes the tragedy of "socially not knowing". This is very persuasive. Aristotle, for example, thought that the fear and pity could be provoked by referring to these types of tragic phenomena. On the other hand, this type of reasoning does not seem to rely on discursive concept of law.

It looks as if the fictitious situation is refers directly to the emotions. This way the analogies for "solving the problem" seem to be - rhetorically - "strange saviors". (See, Janaway, C, *The Oxford Companion to Philosophy*, p.279). Consequently, the use of analogies seems to be connected to the rationalization of affective situations by poetic means, where

*"the tragic poet is an imitator, and therefore, like all the imitators, he is thrice removed from the king and from the truth? That appears to be so."* (Plato, Republic X, trans. Jowett, B., New York, 1992, p.598).

On legal fictions, Maine, H.S., 1952 (1861), p.13 ff. (*"These instrumentalities seem to me to be three in number, Legal Fictions, Equity, and Legislation Their historical order is that in which I have placed them"*, *ibid.*, p.15.)

<sup>77</sup> This type of operation in interpretation is based on the "goodwill" analogy, and makes it possible to arrive to a fairly extensive interpretation of the nature of the fiction and its filling up. In other words, to study an analogy, one has to use analogy as a basic method.

The study concentrates, consequently, on questions like what one uses in the discourse, how the discourse occurs, between whom it is effected, where the discourse takes place, and what follows from it.

<sup>78</sup> We may also speak about "political gaps" in systems. These are the gaps resulting from the fact that political discourses are incapable of resolving problems in society by formal means (legal means, see Granger, R., 1979).

A characteristic - and a "tragedy" - of the legal comparative filling of gaps may be, for example in the supranational and international level, that a comparative interpreter may start to see unacceptable also all those legal rules, which have been constructed on the basis of discursive political processes of another social system. In his context such rules do not exist because of this "political gap", and this "should be so also in other systems".

This phenomenon may be related to the phenomenon, visible on international and regional level, that rules deriving from national political processes are rejected on the basis that they are somehow unacceptable on a principled basis. In this type of process, the basic and static distinctions of different "functions and roles" prevailing in the supranational institutions start to determine the evaluation of socio-legal systems as such. In realm of this type of conception the possibility for changing any roles and functions is replaced by static and relatively permanent social ideals. The political gap is replaced by one basic distinction as a normative fact, and by this distinction the politically constructed legal norms are evaluated. In the ultimate sense, this may be related to the expression "substantive principles". This is also related to the functionalist approach to law. By the principled restrictions, the basic structures

## 6. The methodology, restrictions, and structure of the study

**Methodology and restrictions.** This study has several dimensions, and is related to various questions. It is associated with the questions on axioms of interpretation (logic and meaning), the types of linguistic social actions, the discourse in general, rationality of the legal reasoning, the nature of the legal discourse in systems of law, the relationships between legal systems, and finally, with the question of the role of comparative law in the system(s) of law and law in general. All these dimensions have had an impact upon the methodology, restrictions, and the structure of the study<sup>79</sup>.

As maintained, the approach of this work is legal theoretical. Consequently, the legal scientific methodology is - mainly - comparative<sup>80</sup> and legal historical. However, the methodology is "comparative" in an extremely wide sense. It consists of some dogmatical observations and the use of methods of qualitative social sciences in the legal sociological sense. The legal sociological observations are related to the analysis of legal systems and institution, which - on the other hand - provides a possibility to focus on some legal normative questions from the point of view of the basic legal categories like principles and legal sources (*core of the legal dogmatic opinions*).<sup>81</sup> The interest on the behavioural regularities (in legal institutional sense) are not related directly to the content of the legal norms as such<sup>82</sup>. However - as indications of "customary" institutional procedural norms - they may have some *legal relevance* associated with the core of the legal dogmatical opinion in matters of legal institutional (and perhaps systematic) nature of legal orders.<sup>83</sup>

The problems of the legal historical methodology are dealt with in connection to the historical observations.<sup>84</sup>

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are maintained, and the political discursive processes are restricted.

Another tragedy may be, all the same, that the political processes can be "total", in the sense that the political gaps do not exist at all (like in totalitarianism). However, in discursively open political processes these types of phenomena do not exist. On the other hand, too substantively principled systems may also appear politically "totalitarian", because they tend to emphasize the effectiveness (functionality) in social relations.

<sup>79</sup> The impact has been not only to the "logical" structure, but also to the "quasi-logical" structure of the work - to the interaction between the main text and the comments in the footnotes.

<sup>80</sup> See, *supra* n 14.

<sup>81</sup> See Aarnio, A., 1997, p.75.

We may ask whether legal systematization of legal systems as such is possible. Comparative law - traditionally - has maintained that it is possible. This has led to certain attempts of classifications, as seen below. However, in this work, we maintain the dynamics of such systematizations.

<sup>82</sup> Aarnio, A., 1997, p.75.

<sup>83</sup> Aarnio, A., 1997, p.76, and 286. Aarnio calls this "*theoretical legal dogmatics*" (ibid. p.285-286).

<sup>84</sup> The legal historical method is, in this sense, mainly descriptive and explanatory. The is to describe the historical forms of the use made of comparative reasons (a history of the legal methodology), and, on the same time, to focus on some intentions of these historical authors. Furthermore, questions of historical causality may be perhaps identified in relation to some of these legal institutions in question. Moreover, some context may be created for studies related to the

More concretely, the literature is composed of articles and books on social and legal philosophy, legal theory, and the tradition of comparative and national law.

The legal theoretical analyses, which have proceeded this study have been largely excluded for discursive reasons. However - as has been already noted - the theoretical analysis is based on a discussion of general theory of rationality (Weber<sup>85</sup>), and its criticism based on the theory of communicative action (Habermas<sup>86</sup>). The legal approach has been discussed on the basis of remarks by Kelsen and some other writers. The move to more legal discursive spheres is made with the help of general theories of argumentation (Perelman)<sup>87</sup>. The legal discursive theories have been chosen on the basis of different types of rationalities (value-based theory<sup>88</sup>, and more "traditional legal discourse theory<sup>89</sup>). Furthermore, some more sociologically oriented theories of law have been "adjusted" for discursive analytical purposes<sup>90</sup>. From the structural point of view, these legal theories will be referred and used in the course of the investigation in several occasions. However, their use is related to different parts of the study so that the traditional comparative law theory is analysed - in the end - by the traditional theory of legal reasoning, whereas the instrumental and value-based theories (of legal justification) follow the empirical study of concrete legal justifications.

In the history of law, the discussion of comparative law is extensive. Most of it was not at hand. Consequently, there were no possibility of considering it all. Practical limitations had to be made.

The material on comparative law theory consists of writings of traditional 20th century comparative law authorities. The method of selection of the comparative law theory has been mainly a "reading" method. The elements for this study have been adopted from various materials dealing with types of issues in the comparative law context. This is related to the fact that no equivalent studies really exist. The discussion on comparative law theory has been reconstructed for the purposes of the study. Some discussion of the possible "social connections" between various discussions is made in the next chapter. On the other hand, the discussion on the comparative reasoning in European Courts attempts to be comprehensive.

As maintained, many of the limitations of this study are based on economic reasons

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contents of these institutions (On this, see Aarnio, A., 1997, p.76-77). See, part II, chap.1.

<sup>85</sup> Weber, M., 1978.

<sup>86</sup> Habermas, J., 1987.

<sup>87</sup> Perelman, Ch., Olbrechts-Tyteca, L., 1969.

<sup>88</sup> The basic source, Alexy, R. 1989, and, in general, Aarnio, A., Alexy, R., Peczenik, A., 1981 (133 ff, 257 ff, 423 ff.), and Wróblewski, J., 1974 (33 ff.)

<sup>89</sup> The basic source, Aarnio, A., 1986. See also, Bell, J, 1986, p.45 ff. He divides these studies to studies of the logic of legal arguments and studies of the practice of legal reasoning. Arguments should be directed to someone, usually to people dealing with law (ibid., p.49 ff.).

<sup>90</sup> Teubner, G., 1993.

restrictions and limited time available. Furthermore, both the historical and more contemporary analyses have been based occasionally upon secondary and incomplete sources. One may rationalize these restrictions and imperfections with regard to the nature of the work as a study of legal theory. When confronted with highly general questions, one has to use the results of many other writers in order to avoid the research becoming an inquiry into specific questions, which would require instead a separate investigation. On the other hand, some "secondary" sources have been taken up simply because they have explained the context of the issue discussed, or because they support the explanation of the phenomenon.

On the other hand, there is use made of legal decision-making material from the European Court of Justice (European Community legal order), from the European Court of Human Rights (European Human Rights system), and more limited numbers of cases from national courts of some European states (from the Supreme Court of Finland, France, Germany, Great-Britain, Italy, Sweden, The Netherlands, and also the United States).<sup>91</sup> Moreover, there is use made of certain administrative documents and interviews of judges and administrators from some of these courts (the European courts, supreme courts of Finland, France, Germany, Great-Britain, Italy, and Sweden). Moreover, some remarks on the legislative practice are made on the basis of legislative drafting and legislative governmental proposal materials from Finland, France, Germany, Great Britain, Italy, and Sweden.

The study is restricted to these countries (and legal systems) on the basis of the traditional classification of the major legal systems in Europe. When attempting to cover "European" practices, it seems to be normal to look into the legal systems, which present different legal traditions as described historically by comparative lawyers. One may claim that the legal systems analysed in this study represent more or less alternative legal "possibilities" and "techniques", and function as general examples. Therefore, the selection does not have to be inclusive.<sup>92</sup>

Administrative courts are not part of the study. There are study economical reasons for this exclusion. Furthermore, administration is strongly legal socio-systematically oriented,<sup>93</sup> which means that comparative observations do not appear in the reasoning of these courts so frequently as in normal courts.

The study of interview and case material is justified on the basis that they are in the hard core of the instrumental and value-based uses of comparative law material. The emphasis of certain countries reflect the analytical quality and "quantitative openness", which the justifications

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<sup>91</sup> There is some discussion on the selection of this material before the corresponding chapter.

<sup>92</sup> Tur, 1977, p.246. Some ideas on the criteria for the choice of countries and the usefulness, see Mattila, H.E.S., 1979, p.45.

<sup>93</sup> For this, Scheuner, U., 1963, p.714. For comparative law in administrative law in different countries, see Rev. Int.Dr.Comp., 1989.

have in these systems.

One of the premises in the reporting of the results of the research is that no special attention is paid to the differences between countries as such, but the overall and particular features are analysed on a general basis. This is due to the fact that the purpose of this work is not to make any fundamental comparative observations, but rather to explain the general features of the use of comparative law and comparative reasoning in different spheres of law. Often different systems are mentioned because they have a certain referential and explanatory importance.

In spite of all these restrictions, it is clear that one cannot avoid the intuitive, subjective and culturally determined factors determining the choices of the material in this kind of study.

**Structure.** The first part of the study examined the general theoretical framework for the study. The following part is devoted to the question of the concept of comparative law and theory of comparative reasoning. The first chapter of the second part deals with the history of comparative reasoning<sup>94</sup>. The second chapter focuses on the idea of modern comparative law in general.

The third part of the work concentrates on the examination of how European legal work must be seen from the point of view of this theory. In the conclusions, there is an attempt to combine these analyses and focus on the idea of how we must approach European comparative law (and comparative European law). Certain remarks are made concerning the practical role of comparative legal arguments in European law and in legal discourse as a whole.

Some reasons can be given for the separation of the theoretical and "empirical" analyses.

It would have been possible to present different "comparative observations" - from different courts - in connection to the analysis of the theoretical questions (nature and forms of comparative reasoning). Indeed, in doing so the theoretical observations could have been enlightened by some clear examples.

However, because different types of comparative reasons and interactions between arguments - in relation to normative solutions, and institutional and procedural questions - become easier to understand, if the case is presented as whole. This presentation maintains a division between the theoretical and empirical parts. This divided presentation attaches the legal normative questions more perceptively to the analysis of concrete forms of legal reasoning. On the other hand, the separation of these parts makes the examination of the nature of practical (comparative) reasoning - in the light of the argumentative principles developed in the theoretical

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<sup>94</sup> The study of the tradition of comparative law helps to "reconstruct" the way comparative law has been seen in practical decision-making in general. Here certain remarks are made on the role of comparative law in the history of "governance", "legislation", and "legal interpretation".

part - easier.

**Some comments on the empirical study of comparative legal reasoning.** Two changes of perspectives did take place during research. The first change has been explained above in relation to the restrictions. The second change must be explained more thoroughly.

In the beginning, this research had focussed on comparative reasoning in concrete justificatory processes. Subsequently, one could note that comparative law played, as well, a role in the "context of discovery" and in the "contextual reasoning"<sup>95</sup> of legal decision-making institutions. It was used in the context of constructing the argument concerning the interpretation of the rules of the systems.<sup>96</sup>

It would have been interesting to note the relationship between the original preparatory work and the final justifications, if this material was available. However, this material appeared to be difficult to obtain. In some legal institutions (such as the European Court of Justice and the European Court of Human Rights, for example), there are comparative studies made on a systematic basis for internal use, but these studies are classified as confidential. Even researchers do not seem to be able to access this material. The same seems to apply, for that matter, also in national courts. However, in state legal systems, the "systematic" nature of comparative observations does not seem to be similar.

The mere knowledge of and information concerning on the existence and the nature of these "comparative observations" would have been in itself a basis for certain interesting remarks on contemporary European legal orders. Nevertheless, for this reason, the empirical material of this study consists - in addition to written decisions of the courts - in interviews of the personnel in these courts. In other words, in addition to the traditional critical textual analysis of the legal documents produced in decision-making, there is use made of the qualitative methods of social sciences<sup>97</sup>.

The use of this method may be justified also by the following remarks.

Decision-makers are at the heart of legal systems as discursive systems. This is the reason why observations of the internal decision-making process of the courts reveal some aspects of the hard core of the legal decision-making. Certain viewpoints of certain personnel

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<sup>95</sup> One can make a distinction between the context of discovery, the context of justification, and the justification. The first one is presented by the real "institutional-inspirational" sphere of the decision-making ("informationally" closed), the second one is connected to the internal institutional argumentation (opinions, documented argumentation of the parties and intervening parties in general, and - furthermore, closed discussion of the judges). The latter is the normative reasoning of the court itself. See analysis of the terms in Aarnio, A., 1987, p.77-78, and Comanducci, P., 1995, p.35 ff..

<sup>96</sup> See Bogdan, M., 1990,p.33, Kamba, 1974, p.499.

<sup>97</sup> In the compilation of the qualitative studies, some use has been made of the book, Hoikkala, P., The discourse analysis of Deun a Vandijk [Deun a Vandijken diskurssianalyysi]. In: The analysis and interpretation of qualitative material [Kvalitatiivisen materiaalin analyysi ja tulkinta (ed., Mäkelä, K., Helsinki, 1990) pp.142-161.

may expose some relevant features of contemporary law which are not directly visible in the legal arguments conducted in public forum. For example, these different organizational aspects and attitudes may explain the practical importance and the function of the "marginal" and "external" discourses of comparative law.<sup>98</sup>

## II. TO THE CONCEPT OF COMPARATIVE LEGAL REASONING

### 1. Some etymological observations on the word "comparison"

With regard to the word "comparison"<sup>99</sup>, one may identify some etymological lines of the Indo-European languages.

The Sanskrit word "para"<sup>100</sup> seems to be related to the Greek "παρά" in "παραβολή", and the Latin "para" in "comparo"<sup>101</sup>. The English, Spanish, and French words for "comparison" derive from the Latin form.

The German "vergleich" is composed of "ver-"<sup>102</sup>, which is alleged to correspond -

<sup>98</sup> For some discussion of the value of the interviews, see the chapter on the comparative reasoning in practice.

<sup>99</sup> "Comparative law" relates to "diritto comparato" (Italian), "droit comparé" (French), "derecho comparado" (Spanish), "Rechtsvergleichung" (comparison of law) "vergleichende Rechtslehre" (German), "komparativ rätt" "rättsjämförelse" (Swedish), "vertaileva oikeus" "oikeusvertailu" (Finnish), "rechtsvergelijking" (Dutch), "retsammenlignende undersøgelse" (Danish).

"To compare": *implies as an aim the showing of relative values and excellencies or bringing out of characteristic qualities, whether they are similar or divergent*. "Comparison": *is often used as the comprehensive term: it is preferred when the differences are obvious and an intent to lay bare resemblances and similarities for the sake of expounding or judging is implied* (Webster's New Dictionary of Synonyms, 1978, p.166)

<sup>100</sup> It seems that "para" in Sanskrit refers to any kind of relating (Monier-Williams, M., Sanskrit-English Dictionary. Etymologically and philologically arranged. Cognate Indo-European Languages, Oxford, 1899, p.586), but mainly to "leading beyond" of place, time, amount, sequence, degree, range, relation (Macdonell, A.A., A practical Sanskrit dictionary, with transliteration, accentuation, and etymological analysis throughout, Oxford, 1954, p.152).

"Pari-", on the other hand, seems to refer to "around" (adverb), and at the beginning of the word, "fully", "quite", "entirely", "excessively" (idem., p.155).

<sup>101</sup> It is also noteworthy that in the Latin there seems to be two versions of the verb comparo; "compar-o" and "comparo". The latter refers to "preparing" or "getting ready (physically or mentally)", "to make", "to produce", "to institute", but the former to "placing together", "matching", "treating equal", "to estimate or evaluate in relation to each other". "Paro", as such, means "to prepare" or to "get ready", whereas "com" ("cum") means "with" or "together", "con" related to time, manner, contrast, and reason ("simultaneity", "connection", "joint action", "enclosure", "completeness", or "intensity", see ancient "quom" or "quum". (Oxford Latin Dictionary, p.382-383).

The Greek expression refers to 'juxtaposition', 'comparison', 'illustration', 'analogy', and also 'by-word', 'conjunction'. In contemporary Greek "comparison" also "σύγκριση". (see also Liddell, H.G., Scott, R., Jones, H.S., A Greek-English Lexicon, Oxford, 1937, pp.1304-1305). "βολή", for example, a "throw", in modern also a "shot" Ibid., p.321).

<sup>102</sup> Correlating: Old (high) German, fir-, far-, Old saxon far-, Old english for-, Old Frisian fur- (for-), differing from Gothic faur-, fra-, fair-.

The Latin term "Universe" is constructed from the Latin "unus" and common indo-European (Germanic?) loan "verto" ("Vorto", Gothic "waerthan"). In Latin "to turn", "to circle", time "passing", "to move" - and also to "to interpret" and "to explain", "to make something", "to change", also "to turn elsewhere", "turn upside-down",

for example - to Sanskrit<sup>103</sup>, Greek<sup>104</sup>, Latin<sup>105</sup>, and common Indo-European (Germanic) words<sup>106</sup>. This prefix has been used in deriving "vergleich" from "gleich".<sup>107</sup> The Swedish "för" or "föra" in "jäm-föra" seems to derive from the same Germanic origin.<sup>108</sup>

In Swedish and in German there are also (borrowed) expressions corresponding to the Latin based "to compare" ("komparera", "Komparation")<sup>109</sup>. In Swedish, the expression "komparative rätt" seems to be the prevailing expression for "comparative law"<sup>110</sup>, whereas in German "vergleichende Rechtslehre" corresponds to the expression for "comparative law" in this context.<sup>111</sup>

"to destroy").

This is related to Sanskrit "vartate" ('rotating'), German "werden" ('to become').

The relationship between "ver-", "verto" (uerto), and "wert" is not established, even though some connection may be seen.

<sup>103</sup> "Pura", pra-, pari- (Oldindian).

<sup>104</sup> "Para"-, "pro-", "peri-".

<sup>105</sup> "Por-", "pro-", "per-".

<sup>106</sup> "Per-".

See, Grimm, W., Deutsches Wörterbuch, 1960, Leipzig, and Kluge, Etymologisches Wörterbuch der Deutschen Sprache (Seebold, E., Berlin, 1995) p.854.

In relation to verbs it may indicate some kind of "stronger" or "more effective" or "over"-acting (and also opposite). In Gothic it also indicates "through" and "over" (Frisk, H., Griechisches Etymologisches Wörterbuch., Heidelberg, 1970, p.513) - as in Latin (in addition to "during", and "from the beginning to the end, completeness", and certain "intensity". Also in Sanskrit "pari-", related. (Meillet, A., Ernout, A., Dictionnaire Étymologique de la Langue latine, Paris, 1959, p.497).

<sup>107</sup> The "gleich" has its corresponding forms in different Old Germanic languages ("gelich-", "gilih-", "gilik-", "galeika", "galeiks-", "glikr-", "gelice-", "leika-". (Kluge, 1995, p.326.)

This also corresponds to the Dutch "ver-lijk" or merely "gelijk".

<sup>108</sup> "Jäm" relating to "jämlig", "equal" in English. Earlier, "iaemn", "iamn", corresponding to "even" ("equal share"), "just". In Island "jafn", "jaevn", and related to Gothic "ibns", Old Saxon "eban", Old German "eban" (now "eben", corresponding to "even", "plain", "flat", also "equal share", "just", "exact", (Breton, "ewn", "effen"). The origin is unclear (Kluge, 1995, p.203, also Wessén, E., Våra ord, deras uttal och ursprung, Stockholm, 1969, p.184).

See also, "Fur-" (even if history unclear). Islandisk, "fora", Saxon "forian", Old German "fuorran" (now "führen"). Not in Gothic, Old English "féran" (Hellquist, E., Svensk etymologisk ordbok, Lund, 1948, p.257). However, "för" or "före" corresponding to forms in Gothic (claimed to be similar to ver- in German, English "for") has a unclear history. It could be related to "ver-" due to its similar functions and accompanying rules. (ibid.)

<sup>109</sup> Kluge, 1995, p.466, mainly professional usage. Swedish word, Hellquist, E., 1948.

<sup>110</sup> As a professional discipline. "Jämföra" is used also in the legal context. However, it seems to refer more to the process of comparison, not to the systematic discipline as such.

<sup>111</sup> It has been claimed that the Finnish "vertailla" ("verta", "vertainen") has its corresponding forms in Old Germanic "Wertha" (Waerth), which has been the basis for "Wert" in German, ancient Norwegian "verthr", ancient Swedish "waerther", contemporary "vård" in Swedish and "verd" in Norwegian, the Gothic wairths, Anglo Saxon weorth, ancient Frankish "werth" ("worth" in English, basically meaning "value" in Latin terms). (Meri, V., The birth of words [Sanojen synty] Jyväskylä, 1985, p.438.) In this sense, "vertailla" seems to be connected to value comparison ("equal-value", "to value equal").

Either the words have unidentified common origins, or the loan was connected, for example, to commercial relationships, where the process of "evaluating" could be the reason for the linguistic loan. The latter "loaning" has been supported by etymologists (idem.). (On some proto-Germanic reconstructions, see, Languages of the World, The New Encyclopedia Britannica, Vol. 22, Macropedia, Knowledge in Depth, 15th ed. Chicago, 1985, p.658.)

One could here go into the typologies of different languages.<sup>112</sup> From the analysis of these expressions, one could draw some conclusions - by assuming an "unbroken historical transmission", or by taking into account the rules of typology, which suggest that adaptations make languages (and parts of language) isolating and analytical.

The prevailing idea in this work is, however, that "language" is a product of continuous historical process, and a dynamic part of communication. Furthermore, the intention is not - on the basis of these minor observations - to produce any real interpretation of the expressions used. At least the modern usage of language seems to be connected rather to utility than to style<sup>113</sup>. Etymology refers to figurative (stylistic) thinking - obviously connected to different expressions. However, the "substantive" meaning of each linguistic expression is a matter of use of language and discourse.

One could claim, however, that the Germanic version "vergleich" connotes 'production', 'creation' or 'maintenance' of similarity ('evaluate equal' or to 'turn-into-equal') - as a kind of a teleological idea<sup>114</sup>. In this etymological sense, the Germanic expression seems to take more of a "constructive" approach where the comparison is dealing with abstract entities.<sup>115</sup> On the other hand, the Latin-based expressions seem to connote procedural or productive aspects

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The similarity is in Karelian-Aunus's "verrata" ("verta"), Estonian "võrrata" ("vörd"), Vepsian "verz", Votian "vörröt" ("vörta") (Nykysuomen sanakirja, Häkkinen, K., Porvoo, 1987.). There is also a similar type of word in Lapp ("vaerti"). The Hungarian, Liivi and Mordovian languages do not seem to have this word, at least in this meaning (However, in Hungarian at least "összehasonlít" ("össza" meaning "together", and "hasonlít" meaning "resemble", "to be similar to"). In Hungarian, there is the word "ért" ("to understand", "to refer to") and "érték" ("value"). Összehasonlító jog means "comparative law".

In Finnish, there also exists a word for value ("väärtti") and evaluation ("värteerata"), which however, seems to be more a late loan from Swedish, and indicates "evaluation", which is not the case in this context.

In Chinese, for example, "to compare" corresponds to "bi-jiao". Both syllables independently seem to refer to comparison, the latter, however, indicating also a "check".

<sup>112</sup> On constructive and non-constructive, and fusional and analytical languages, see The new Encyclopedia Britannica Macropedia, vol. 22, Knowledge in depth, Chicago, 1985, p.588-589.

<sup>113</sup> Perelman, Ch., Olbrechts-Tyteca, L., 1969, p.15.

Style is a relevant distinction also in the context of comparative law. We may say - from the point of view of the communicative action theory - that style appears to be important in the sphere of "affective" rationality. Namely, when the disagreement in a communicative situation is referred to be as fundamentally obstructed and the "integrity" is breached, the style seems to be an explanation of the "irrationality" of the situation. Style is used when even the value based rational acting does not seem to be important anymore.

<sup>114</sup> Even if the distinction between com-paro is recognized in (Klein, E., A Comprehensive Etymological Dictionary of the English language, Amsterdam, 1966), there is an argument that also in English 'compare' would mean 'to make equal' (ibid., p.322).

<sup>115</sup> "Vergleich... 2) Rhetorik: rhetor. Figur zur Steigerung der Anschaulichkeit einer Aussage, wobei mit Hilfe von Vergleichswörtern (so-wie) zw. Zwei Wirklichkeitsbereichen, die in einem Punkt eine Übereinstimmung aufweisen müssen, eine Beziehung hergestellt wird" (Brockhaus Enzyklopädie, Mannheim, 1994, p.205).

This may be seen in Daig, H-W., 1981, p.397-398. He recognizes a possible "substantive" element in "comparative law".

- without any *a priori* "similarity" aspect<sup>116</sup>. This may be more noticeable in languages where borrowing has isolated the "original" meanings (and perhaps resulted in more analytical and functional uses)<sup>117</sup>.

Even if the remarks on different connotations appear "weak", one observation seems to be remarkable. The formal expression for 'comparison' itself seems to be capable of being a matter of a loan. One may ask: Can this really be so? Can also the idea of 'comparative law', for example, be borrowed? In this sense, how could comparative law be "thought"? Can we learn comparative law?<sup>118</sup>

## 2. Comparative arguments in ancient and new rhetoric

The comparison as "*imago*" and "*similitudo*" in ancient rhetoric. There were - according to some ancient theories of rhetoric<sup>119</sup> - two different "types" of comparisons. While the comparison as "*similitudo*" was defined as a "*manner of speech that carries over an element of likeness from one thing to a different thing*", the comparison as "simile" - which can be, in a way, identified with "imago" - was seen as "*a pictorial image for the aids of memory, based on a priori resemblance*".<sup>120</sup>

It was thought that, in the latter technique, there is a similarity already before the comparison (in thought), and its function is to "praise or censure" (or to blame) something. The

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<sup>116</sup> "*Comparatio, 1. comparison, a weighting of the relative merits or other values (of), 2. (rhet.) argument based on the more probable of two possibilities; plea for justification from the greater good of the ultimate end.*" (Oxford Latin Dictionary, 1968, p.372).

<sup>117</sup> On this problematics, Daig, H-W., 1981, p.397.

The Greek expression ("παράβολή" or "αντιπαράβολή" has in it the idea of "putting together", and does not seem to have any connotation of production (latter, however, "reply by comparison or contrast" (Liddell, H.G., Scott, R., Jones, H.S., A Greek-English Lexicon, Oxford, 1937, p.160, referring to Aristotle, Rhetoric. Furthermore, the noun "παράβολή" seem to have been associated - in ancient Greek - to values based on moral stories etc.).

This exists - as a loan - in Latin ("parabola") and also English ("parable", "parabola"), and in German ("Parabel"). In Latin "parabilis" means something which is (easy) to acquire ("cultus, divitiae naturae").

The Finnish "vertailla" seems to have a connotation of 'evaluation of things'. It seems to do with values as such, a way of ascertaining value comparability rather than any 'equalization' or 'production'. It might refer more to a check on comparability. Furthermore, it seems to refer to the very *ad hoc* nature of the process, rather than any systematic process.

In modern Greek the "συνθετικό δίκαιο" seems to be preferred in the context of comparative law, connoting a kind of a 'synthetic law' ('law') ("συγκριτική τοῦ δικαίου" and the "critical" aspect, see Daig, H-W., 1981, p.397). (In ancient Greek, δίκαιος, "observat of the custom or a rule", 'civilized', later "equal", "even", "well-balanced"; "lawful", "just"; persons, things: "meet", "right" fitting, "normal", "real", "genuine". "συνθετικό", "constructive", "skilled in putting together", *ibid.*, p.1716, 429).

<sup>118</sup> In modern comparative law, "comparison" seems to refer to both co-production (production) and reproduction of law and legal systems of positive law - and some qualitative aspects of law. Nevertheless, the methodological problems exist - and the question of "reproduction" and "production" is not so clear.

<sup>119</sup> Rhetorica Ad Herennium (AH), see, Caplan, H., [Cicero, auctor incertus?] Ad C. Herennium de Ratione Dicendi (Rhetorica ad Herennium) Cambridge, 1954.

<sup>120</sup> AH, 4.46.59.

idea of "*imago*" or "*simile*" was not to be a proper ground for a comparison ("*parem rationem comparationis*"). One could say that it was thought to be the basis of an "imaginary" discourse - and not a foundation for an attempt to maintain an analytical discourse and a parallel relationships of elements ("*paria sunt omnia relata*") of the compared.

"*Similitudo*", on the other hand, was seen as an orthodox conception of comparison, because - as one could interpret it - it is based on a discursive approach stressing the element of "speech" (reasoning), and not the subjective idea of *a priori* similarity. Furthermore, if the aim is to establish a detailed parallel ("*per conlationem*"), it functions as a rational (reasonable) and verifiable basis ("*rationis confirmato*") of a comparative argument - whether in legal or literary practice.<sup>121</sup>

**The forms of comparative arguments in the "new" rhetoric.** The "new rhetoric"<sup>122</sup> has distinguished between the argument by comparison,<sup>123</sup> making an order ("ordering"), and the argument establishing "opposition" (according to some criteria). These are the "results" of comparison.

One of the essential forms of comparison is the comparison by superlative, where the object (for example; a general custom in law) is considered superior to all members of a series (for example; "state law(s)"), or unique of its kind, and therefore beyond comparison (for example; the normative relationship between the "autonomous" superior orders and national laws).

These attributes generate the distinctions between "generality", "disparity" (many), and "example" types of comparisons. They are based on the structure of reality.<sup>124</sup>

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<sup>121</sup> This idea can be used in the study of comparative legal reasoning as a form of legal interaction. We can speak about a comparative discourse, which starts from certain systematic legal assumptions (difference), and where there is an attempt to relate systems to each other - and this way arrive at practical solutions to a legal problem. This comparative legal reasoning can be called comparative reasoning based on legal "reality", whereas the comparative "imaginary" discourse is based on the "fabled" nature of law.

In this latter sense, legal comparisons seem to be decorations of the main argument, and not rational reasons proven to be valuable for the explanation. It is based on a need for rhetorical persuasion, which means that one is not aiming at an understanding based on alternative considerations.

<sup>122</sup> Perelman, Ch., *Olbrechts-Tyteca*, L., 1969.

<sup>123</sup> Arguments by comparison should be differentiated from arguments by identification and by analogy - to a certain extent. Arguments by identification can be seen as universal and ideal arguments, whereas arguments by analogy as practical arguments. In a comparative arguments, on the other hand, there is no "measure" expressed. It is assumed, and it is precisely this feature makes them "quasi-logical". (Perelman, Ch., *Olbrechts-Tyteca*, L., 1969, p.243). They are often presented as statements of fact.

<sup>124</sup> With regard to the "example" or "illustration" type of argument Perelman (Perelman, Ch., *Olbrechts-Tyteca*, L., 1969, p.350) says that "*when the two relations encountered belong to the same sphere, and can be subsumed under a common structure, we have not analogy but an argument by example or illustration*".

Lawyers tend to reason from (legal) cause to (legal) effect. This is associated with the nature of the legal argumentation and legal systems as legal "teaching" system (i.e. the nature of different types of argumentative styles (*idem.*, ff.). On the other hand, in an attempt to avoid critique, to argue with persons which who are *a priori* assumed to be opposing - one has to argue with examples.

**Analogy.** What about analogy? What is the relationship between comparison and its results, and analogy according to the "new rhetoric". Special attention should be given to argument by analogy and argument by example.

Analogy - in rhetorical terms - is more a "resemblance of relationship" than a "relationship of resemblance".<sup>125</sup> It "leads" to the relationship rather than is the relationship itself. It is an argument for the relationship. It establishes the "structure of reality"<sup>126</sup>. In that sense, it is the comparative argument itself, a finale of the comparison<sup>127</sup>. Because of its nature as a "conclusion", it could be regarded as a pure form of a non-analytical comparison.

A "rich analogy" results from the complexity of each term in the analogy<sup>128</sup>. This could be deemed to demand for a more analytical approach.<sup>129</sup> The analogy can be extended, amended or corrected by the author herself, or by the critic.

In its supreme form, there exists a comparison by opposites.<sup>130</sup>

The choice of the terms of the phoros in analogy can increase and decrease the value of the terms of the theme or modify them. The analogy causes an interaction between the part of the analogy, and this initiates a transfer of values.<sup>131</sup>

This is connected to the use of comparisons in reasoning. The inductive and example nature of comparative arguments seem to belong to a system where the reasoning is aiming not to teach, but to convince expected critics. At the same time, it looks like they are based on an assumption of "a common structure".

This may be related to the idea that in legal systems, where there is no prevailing idea of autonomous formal authority of law but an assumption of it, one uses more example type argumentation.

<sup>125</sup> Perelman, Ch., Olbrechts-Tyteca, L., 1969, p.372, referring to Grenet, *Les origines de l'analogie philosophique dans les dialogues de Platon*, p.10.

<sup>126</sup> See, Perelman, Ch., Olbrechts-Tyteca, L., 1969, p.350 ("establishing of reality"). This is related to the argumentation by "comparative analogies" in law.

Varis, M., 1998, p.101 ff. About "schemes" in language.

<sup>127</sup> One can find many indications in *New Rhetoric* (Perelman, Ch., Olbrechts-Tyteca, L., 1969).

<sup>128</sup> Perelman, Ch., Olbrechts-Tyteca, L., 1969, p.375. "*There is no whole to analogy*" (or to rich analogy etc) ( *ibid.*, p.385). Extension of analogy can be made to "inventive" (analytical?) and "probative" (principled?) directions (*ibid.*, p.386).

<sup>129</sup> The terms of the analogy can be divided into the "theme" and the "phoros" as sides of the analogical argument. (In law, for example, the theme can be seen as the original system and the phoros as a compared system.) Their relationship determines much the nature of the analogical argument as a whole. The more complex the respective terms are, the more "rich" the analytical considerations must be - in order to grasp the complexity of the relationship of the terms.

A special case is the double hierarchy (For example, because Gd is superior to Mh, Jd is superior to Jh, is the same as a analogy: Jd is to Gd what Jh is to Mh).

<sup>130</sup> Perelman, Ch., Olbrechts-Tyteca, L., 1969, p.387. Comparison by opposites is "*taking analogy and showing how it is inadequate*". Here one occupies " - in the military sense of the word - the hearers mind, and he is shown the falseness of an idea that might arise spontaneously". This is due to the fact that "*the speaker manages to suggest that the sole basis for the disputed thesis is the argument by analogy that he is engaged in refuting*" (*Idem.*).

In a systematic sense, it seems that the comparison by opposites is connected also to the argumentum absurdum. Namely, this is so in those cases where the opposite seems to be absurd from the point of the systems internal rationality.

<sup>131</sup> Perelman, Ch., Olbrechts-Tyteca, L., 1969, p.382 ff.

Analogy is important for argumentation (and to invention and "discovery"), because it makes possible the development and the extension of thought.<sup>132</sup> Naturally, this creates dangers if taken too far. From the inventive point of view, the use of analogy is not problematic, but from the probative point of view it is. Namely, it can easily lead to drop-off of in conviction. It is unstable<sup>133</sup>.

Different analogies have different results and structures in connection to the theme. They can also stress different aspects of the theme.<sup>134</sup> This is why the "earlier" analogies certainly give light to an analogy. In this sense, it is possible to use several phoros - also opposites - in the analogical explaining. The separate explanation of the phoros emphasises the insufficiency of each of them separately - but taken together, it highlights the direction of thought.<sup>135</sup>

In analogical reasoning, one may attempt to unify and keep separate the theme and the phoros, where their "realities" are assumed to be reversible. This way the analogical argument seeks to "integrate" the theme and the phoros. In the same way, it can be claimed, they depend on a common principle.<sup>136</sup> The intertwining can be neglected, however, by keeping the theme and the phoros explicitly separate.<sup>137</sup> In general, one could affirm that this can be achieved by "poor" analogy - by comparing only the "necessary" elements.

One can sustain that the analogy serves as a means for an invention (an "induction"), rather than as a proof. If the analogy is to be fruitful, it should be employed with examples and illustrations of general aspects. By establishing this relationship, the theme and the phoros are unified<sup>138</sup>.

**Example, illustration, and the model.** As maintained, whenever two relations belong to the same sphere and can be identified with a similar structure, we are speaking about argument by **example or illustration** rather than about a "poor" analogy.<sup>139</sup> One could include within this type of argument the superlative type of comparative argument. However, example and illustration seem to be more clearly within the same structure of reality, as compared to the latter type of

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<sup>132</sup> Perelman, Ch., Olbrechts-Tyteca, L., 1969, p.385.

<sup>133</sup> Perelman, Ch., Olbrechts-Tyteca, L., 1969, p.393 and 398.

<sup>134</sup> Perelman, Ch., Olbrechts-Tyteca, L., 1969, pp.390-391. As an example, he gives the idea of how classical thought used more spatial analogies, whereas modern thought prefers dynamics (idem).

<sup>135</sup> Perelman, Ch., Olbrechts-Tyteca, L., 1969, p.391.

<sup>136</sup> Perelman, Ch., Olbrechts-Tyteca, L., 1969, p.394

<sup>137</sup> This is typical of comparative legal reasoning. The identity of the system is sought to ensure by some kind of a claim of separation (in the end) - though the unity of the systems in real analogical argumentation is strongly emphasized. This attempts to guarantee the relative and formal autonomy of the systems involved.

<sup>138</sup> If deduction creates a result which is unsatisfactory as an answer to the basic question, it is interrupted by an invention, i.e. a new rule is proposed or a new argument adjusted by taking account of recognize topos, Honoré, A.M., 1974, p.84 ff.

<sup>139</sup> Perelman, Ch., Olbrechts-Tyteca, L., 1969, p.373.

argument.<sup>140</sup>

Where example makes generalization possible (by establishing a rule, for instance), illustration provides support for already established regularity.<sup>141</sup> Models, on the other hand, encourage imitation.<sup>142</sup>

Example can function as a starting point for a generalization, but it does so with certainty only when a lesson is explicitly derived from it. The plurality of examples introduces "poetic" generalizations. All the same, differentiation seems to require justification.<sup>143</sup> One can also go from a particular example to a particular conclusion.<sup>144</sup>

Example has many times the status of fact. This is part of its force. Furthermore, its effectiveness can be also related to the plurality of different examples. However, examples can modify the meanings of the other examples. By using "*exemplum in contrarium*", for example, one can direct the generalization that follows in a certain direction. This can also be done with examples of "exemption".<sup>145</sup>

Illustration, being a clarification of an "existing" rule, can be more vivid. In connection to illustrations, effectiveness and credibility are many times achieved by first stating the rule, and then the illustrations.<sup>146</sup> Here the illustration functions as a concretization of the general rule. In this way it endeavours to make the rule more understandable.<sup>147</sup>

**Models and anti-models.** A 'model' type of argument can be associated with "inspiration". Modelling is imitative behaviour. It is connected to the spontaneous identification of prestige and value in the model. By modelling, one may try to guarantee the value of the behaviour.<sup>148</sup>

Indifference can also serve as a model. This shifts the nature of the model to the argument of the arguer, thus avoiding the imitation.<sup>149</sup> On the other hand, a model can be converted to an anti-model - deterring anybody from using it. Here the deviation is usually

<sup>140</sup> This seems to correlate, for example, with the relationship between international and national systems and on the other hand with the situation internal to national legal orders. The social dimension, within the sphere of each system, determines the similarity of the structures of reality.

<sup>141</sup> It has been claimed that the argumentation by example belongs instead to the deliberative auditory than to judicial debates (Aristotle, 1991).

<sup>142</sup> Perelman, Ch., Olbrechts-Tyteca, L., 1969, p.350 and 357.

<sup>143</sup> Perelman, Ch., Olbrechts-Tyteca, L., 1969, p.356. Perelman explains: "*This is why persons engaged in argumentation frequently adopt the notions they use to suit their exposition - except in those disciplines, in which the use of concepts is accompanied by techniques defining their field of application*".

<sup>144</sup> Perelman, Ch., Olbrechts-Tyteca, L., 1969, pp.351-352.

<sup>145</sup> Perelman, Ch., Olbrechts-Tyteca, L., 1969, p.354.

<sup>146</sup> Perelman, Ch., Olbrechts-Tyteca, L., 1969, p.359.

<sup>147</sup> Perelman, Ch., Olbrechts-Tyteca, L., 1969, p. 360.

<sup>148</sup> Perelman, Ch., Olbrechts-Tyteca, L., 1969, p.361 ff.

<sup>149</sup> Perelman, Ch., Olbrechts-Tyteca, L., 1969, p.364.

laboured, however, without it necessarily proposing an alternative.<sup>150</sup>

The arguments concerning models and anti-models can be applied to discourse itself.<sup>151</sup>

Because of the dynamic nature of reality, modelling (or anti-modelling) is problematic, unnecessary, and can even be dangerous. Namely, modelling in reality must also be dynamic.<sup>152</sup>

**Arguments by *e contrario*, *a fortiori* and *a coherentia*.** Three types of arguments seem to exist in connection to "comparison": *e contrario*, *a fortiori* and *a coherentia*.

With *e contrario* arguments the rejection of an interpretation or a conclusion is suggested. It is based, on the other hand, on a "fact" accomplished by a comparative treatment of a subject. This way, an alternative interpretation may be adopted *e contrario* to the comparative result.

Arguments *a fortiori* are characterized by the idea of "with a better reason". If a comparative generality for example is presented, the *a fortiori* argument connected to it may claim that ("with a better reason") a solution must be accepted. In the form *argumentum a maiore ad minus* of this argument, the claim is that because there is generality, the particular solution should be according to that "with a better reason"<sup>153</sup>.

The argument *a coherentia* affirms that a solution - or an interpretation - must be complied with because of "comparative" coherence, for example, between (or within) the systems involved.

**Some analysis of analogy and innovation in legal discourse.** Analogy appears to be an incomplete imitation. The innovative character - which it is claimed to possess - could be, consequently, attached to this incompleteness. It is the restricted similarity which seems to be the basis of the innovative character of the analogical arguments. This applies both to the main legal analogy between premise and the norm, but also to analogy between the comparative results and the "main" premise.

Furthermore, this incompleteness seems to be related to the analytical quality of the analogical argument. It seems that - in the case of a "rich analogy" - the innovative character is less visible. The innovative character is linked to incompleteness in the following way; the more the analytical analogical argument we are talking about, the less innovative possibilities we have.

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<sup>150</sup>Perelman, Ch., Olbrechts-Tyteca, L., 1969, p.367

<sup>151</sup>Perelman, Ch., Olbrechts-Tyteca, L., 1969, p.368.

<sup>152</sup>Perelman, Ch., Olbrechts-Tyteca, L., 1969, p.369, referring to Kant, I., Critique de la raison pure (for example, Gallimard, 1980).

<sup>153</sup> In the form of *argumentum a minore ad maius* the idea is "inductive": for example, if an act is prohibited - "with a better reason" - all such acts should be prohibited. In the case of comparative law, this could be associated with reasoning which claims that the authority of one system (and its rule) in one case should provide authority in all cases.

In realm of this idea, we may refer to the theory of audience(ies). On the other hand, if the relationships in an argument are determined by a pure analogy (with no explanatory character), the innovative quality of an analogical argument can be considerable.

In conclusion, we could claim that the more we use poor analogies, the more we have innovative space in a justificatory discourse. In this sense, the study of the analytical nature of comparative argument is, to a certain extent, a study of innovation - and in legal terms, an inquiry into legal innovations.<sup>154</sup>

Is there an "institutional argument"? As we have seen, analogical reasoning is often a matter of innovation or discovery. That is why it usually belongs to the "context of discovery" in law.

One could maintain that whenever the (comparative) considerations in law fail to establish the value-based and traditional types of comparisons in an open form - and whenever they appear in the institutional context - the arguer argues by means of an argument based upon "institutional identity".

This can mean a partial identification of the (comparative) considerations - internal to the institution with the explicit public argumentation. However, this is characterized by the factual separation of these two parts. Here an affiliation is created between the results of comparative considerations deriving from the institutional discourse (internal discourse) and public justification, but this connection is not expressed.

In this sense a justification happens to be, for example, a normative definition (a "best definition"). These types of definitions indicate how the words or concepts should be used. Here the justification itself seems to function as a kind of a "descriptive" statement (however, being a necessary and normative by its nature - a "necessary" definition.).<sup>155</sup>

This is a typical attribute of a legal endeavour.<sup>156</sup> Law is - basically - an attempt to resolve incompatibilities, to reach compromises. In this sense, law is a method of developing techniques. These techniques are always capable of being improved and there are always possibilities for resolving conflicting aims.<sup>157</sup> The endeavour seems to be to restore the coherence

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<sup>154</sup> Consequently, we enter into the sphere of acceptability of legal innovations. This is why the study of comparative reasoning must contain socio-philosophical. Rationally, innovation has to be determined on the basis of reason. Through the analogies (and comparative arguments) one finds ideas on the basic principles and hard cases of the system. Furthermore, it is exactly here, where the system is "self-explanatory" - and where its identity can be revealed.

<sup>155</sup> Opposed to this, there is a possibility of using descriptive definitions, which indicate what meaning is to be given to words in a certain environment and at a particular time (definitions which point out the essential elements of a descriptive definition, or a complex definition, which combines, in various ways, elements of the other three types (Perelman, Ch., Olbrechts-Tyteca, L., 1969, p.211).

<sup>156</sup> Perelman, Ch., Olbrechts-Tyteca, L., 1969, p.414.

<sup>157</sup> Perelman, Ch., Olbrechts-Tyteca, L., 1969, p.414, referring to Demoque, Les notions fondamentales du droit privé.

of the system by making a "distinguo".

All the same, there are certain problems connected to this idea. A line may be drawn in order to work toward discursive coherence and integrity.

We are not going to discuss this question here, but rather in connection to the analysis of specific examples of legal reasoning. One could assert that this evaluation cannot be made in the abstract. This question has to be combined with the investigation of the real institutional arrangements and their functions taken together as a whole.<sup>158</sup>

**Conclusions.** We may try to summarize the structure of reasoning. This could serve as a method in the analysis of the comparative legal argumentation and justification.

Legal justification is, in general, based on generality argument and pro-arguments of a solution. It is a kind of an analogy between the result and the argument, which appears to be the decisive part of a justification.

Comparative legal arguments are, on the other hand, generality, disparity and, and example types of arguments. The theme of the comparative legal argument is the domestic legal system(atics), which is related to the "phoros" of the comparative counterpart of the argument (foreign system or systems).

The decisive comparative legal argument is usually in a comparative legal generality form (eg. analogy as such). It may be within a rich (i.e. analytical) or more synthetic type of generality argument. If it is an example type of argument, it usually is a representation of a more analytic attitude in reasoning and in interpretation. In its illustrative form, it is kept separate from the phoros. If it is not analytic or illustrative, it comes close to pure modelling.

We have to remember, however, that the analytical quality of comparison may be irrelevant to its persuasiveness<sup>159</sup>.

If comparative (legal) disparity arguments, whether rich or non-rich, analytic or synthetic - appear as decisive parts of the justification, the justification is not based on any generalizable premises - except on the comparative disparity as such. The justification is then, basically, a justification of these disparities (non-analogies in relation to the phoros, i.e. other legal systems). Then it moves in the realm of the tradition of comparative law.<sup>160</sup>

However, this type of disparity argument may appear also as a justification in an *e contrario* form. Then the generality is somehow autonomously resulting from the disparity as an unacceptable or rejected premise. Then we are close to an argument by identity or coherence. This may also be in a form of example or illustration. Usually, the latter type of argument is based

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<sup>158</sup> See, Perelman, Ch., *Olbrechts-Tyteca*, L., 1969, p.456 ff. Perelman describes how the interaction between different arguments belongs - to certain extent - to each systemic context and multiple themes (*ibid.*, p.392).

<sup>159</sup> Perelman, Ch., *Olbrechts-Tyteca*, L., 1969, p.245.

<sup>160</sup> For more discussion, see below.

on the idea of anti-modelling.

Same type of phenomenon can be seen in the case, where any other type of generality is used in *e contrario* form. Then we are basically speaking about a justification by comparison by opposites. These two types of arguments may appear in synthetic or in analytical, rich or non-rich forms.

In conclusion, we may say that - in some ways - the identities and the "nonidentities" belong also to the realm of comparative legal argument and justification. They seem to function as presumptions for comparative reasoning as such.<sup>161</sup>

In general, an adoption of a legal norm, without an analytical and "rich-analogical" approach, may be called the value-based establishing of a comparative justification. As maintained, this can be an argument by comparative generality or disparity. These value-based justifications are often established on the identity of some kind,<sup>162</sup> and on concepts and "dogmas" internal to the value-based comparative argument and legal tradition. Here we approach also the idea of "coherence".

These types of reductions should be, nevertheless, justified.<sup>163</sup> Usually, however, these identities are not analysed and reproduced explicitly.<sup>164</sup>

In comparative legal reasoning, the question is usually about partial identity (as opposed to complete identity)<sup>165</sup>. This is due to the closed system character of legal orders and systems. This, on the other hand, can be associated with the idea of normative legal culture. In the case of nonidentity, which can be, for that matter, used as as well a legal argument, the elements can stimulate a disparity of approaches. In this case, the elements are "nonidentifiable".

The fact that certain arguments can be arguments by "nonidentity" does not mean necessarily that they are based on paradoxical thinking. Generalities are not necessarily determined by the "tautologies of identity".<sup>166</sup>

The analysis of the partial identities as "common" terms - the enquiry into the criteria, upon which the comparison is based - transfers the problem of comparison to the

<sup>161</sup> Nonidentity can be called "negation of a term by itself" or "an identity of contradictories" (Perelman, Ch., *Olbrechts-Tyteca*, L., 1969, p.218). Here in the beginning the terms are capable of being identified, but after interpretation, difference arises, which can be known before argumentation (*Idem*).

<sup>162</sup> Perelman, Ch., *Olbrechts-Tyteca*, L., 1969, p.210. Identity is a result of a relation to something. Identity is itself an abstraction.

<sup>163</sup> Here the interesting question is about nominal and real definitions. In law, nominalism - as an extreme idea of formalism - could be neglected as such, for nominalism assumes arbitrariness. We should instead speak about real definitions as such, for in law they are a matter of being either true or false, but not arbitrary (see, Perelman, Ch., *Olbrechts-Tyteca*, L., 1969, p.211).

<sup>164</sup> This has to be distinguished from the basic "identity" of law, which assumes certain criteria of being (see, Perelman, Ch., *Olbrechts-Tyteca*, L., 1969, p.393).

<sup>165</sup> For these terms, see Perelman, Ch., *Olbrechts-Tyteca*, L., 1969, p.211 ff.

<sup>166</sup> Perelman, Ch., *Olbrechts-Tyteca*, L., 1969, p.211.

comparison of the elements themselves. This is a highly complex exercise. Ordering and opposition become often devalued, when one seeks to do justice to various elements in a comparison.<sup>167</sup> The analyses of the criteria uncover the argumentative structures - the elements upon which the ordering itself is based. The predominant - and often incompatible criteria then come to light.<sup>168</sup>

### 3. A history of comparative reasoning

#### 3.1. Some methodological remarks

**Preliminary observations.** We have maintained that comparison is a process. The conceptualization of the elements compared can determine even the description of this process, as we have seen. In the most abstract sense, the definition of this process can be associated with the idea of value. However, one does not seem to be genuinely able to "borrow", imitate, or "compare" processes.<sup>169</sup>

Consequently, what could comparative law be in methodological terms?

If we follow this logic, it can be seen that comparative law emerges as a rewriting and renewed discussion of law. Comparative law is not a form of law, but a process of law, which both upholds the value of law and changes law (where laws are rather not to be deemed of value). These processes take place paradoxically, simultaneously. Comparative law seems to be a process, where (the) law(s) - as abstract form(s) - has (have) value, but yet in substance it (they) does (do) not have value as such. This may be the reason why comparison is devised. (The) law(s) can be changed in substance without touching the form. The aim of comparative law - in the abstract - seems to be the formal continuity (vs. discursive continuity and discursive integrity of law). Consequently, we may say that comparative law has to do with substantive legal change, connected to a formal maintenance of law(s). From the point of view of positive law(s), this seems to be an unattractive proposition.

At the same time, it can be noted that comparative law demands - in order to be applicable - a certain degree of abstractness of (the) law(s) compared. It seems that comparative

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<sup>167</sup> Perelman, Ch., *Olbrechts-Tyteca*, L., 1969, p.211 ff..

<sup>168</sup> Perelman, Ch., *Olbrechts-Tyteca*, L., 1969, p.211 ff..

<sup>169</sup> This can be related also to the following idea: We could maintain that one cannot either compare, imitate, or borrow any "ideal" concept of equality, for the discovery of the ideal concept of equality seems to be also a matter of a constant process of comparison. If one "borrows" an ideal concept of equality - or argues with it - one automatically commences to redefine it. In "comparisons" and "equalizations", the most important element is the qualitative analysis of the compared. Any previous definition of equality and comparison is in vain. Comparisons and equalizations seem to be functional processes, processes of rewriting and rediscussion.

law can function only in an environment where we employ "substantively changeable" forms of law(s). Comparative law thus seems to be most closely related to certain type of law(s).

**The problem of the identification of historical continuities in a historical study of comparative law.** Both comparative law and the history of law - and, moreover, the history of comparative law and the comparative history of law - all have an idealistic tendencies. They are inclined to ignore the practicality of law as a basis for legal discourse and to give frequently too much emphasis to temporal continuity of different "legal" ideas. They also stress, for example, the methodological universality of comparative law.

As maintained, the identification of historical continuities in law and in comparative law is problematic - as in any of the social sciences. This is also due to the fact that all power-systems - such as law - are instrumental in certain contexts. The concept of constitution, for example, seems to reflect more different instrumental uses than historically coherent sets of integrated reasonings. Neither does comparative law have any universal history. What is compared is what is needed to be compared in any given situation. It seems clear that the historical orientation of comparative law is not part of the discourse regarding forms of legal rationality as such.<sup>170</sup>

This is the reason why the following (comparative) legal arguments have to be studied in historical "isolation"<sup>171</sup>. This is the only way to maintain the principle of discursive integrity of a historical legal argument. The idea of historical isolation gains - in a history of comparative law - stronger significance than in a study of "normal" legal arguments. Because the historical examination of comparative law is a deliberation over relatively contingent rewriting-processes of law, the particular context of the comparator becomes central.<sup>172</sup>

In conclusion, comparative reasoning is fascinating. It seems that when we study comparative legal reasoning, we study an argument of(in?) a change. In historical terms, such reasoning reveals itself as a types of "legal change". The legal nature of comparative law in legal history seems thus to be directly related to its character of a matter of change.

**The function and the nature of comparative legal formants<sup>173</sup> of law.** This part of the study

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<sup>170</sup> On different "families of legal sciences, see Aarnio, A., 1997, p.75 ff.

<sup>171</sup> On some problems, see Brusiin, 1953, pp.442-443.

This can be associated to the problems of postmodernist philosophy of history.

<sup>172</sup> If we, for example, directly identify a legal argument within its historical context, this problem does not appear. The context of an examination of an argument's legal nature does not appear relevant as it does in the study of a comparative legal argument, whereas the original operation has been a construction of the legal argument on comparative basis.

<sup>173</sup>See, Sacco, R., 1991. This idea will be examined in greater depth later in this work.

of comparative reasoning in history is based on the idea of formative law.<sup>174</sup> We will speak about this notion further in another context. However, we may say that this approach means that the identification of "legally" relevant subjects - such as Aristotelian constitutionalism, Machiavellian legal instrumentalism, Bodin's idea of sovereignty, and Montesquieu's notion of separation of powers - may be seen as "historical legal formants". They appear as "legal" (formants) from the point of view of the contemporary formalistic theory of law, and from the point of view of legal history. These historical legal formants have been taken from their historical contexts and used in different spheres in different ways. They represent the weak marginality of law within the hard core of the legal discourse, but - paradoxically - also the most extensive and persuasive form of legal possibilities and legal formants.

How are these legal formants and "comparative formations" related?

As may be noticed, comparative law seems to function as a preliminary stage of abstraction of these notions. The argument on the second level of (dialectical) legal discourse is derived from comparative processes. On the other hand, it is this transfer to the second level which usually leads to the formation of new theories and practical solutions (legal formants) in law.

Hence, concepts such as constitutions, sovereignty etc. seem to live their own life within the universal history of law ("universal discourse"), and they unquestionably form a part of our "basic legal culture" and in spite of their historical contexts. For some reason, however, these formants have potential to be at the centre of cultural and systematic values.

One could ask whether or not it is the process of the comparative formation which guarantees the relative historical stability of these legal formants? Or is it the peculiar nature of these topics which results in a dialectical approach? That is, are these legal formants directly reflected within the idea of and examples for "good" form of government.<sup>175</sup>

On the other hand, we could ask, whether it is instead change in the actual nature of the form of life, which functions as a stimulant for comparative dialectics? Furthermore - seen from the phenomenological point of view - the explanation for the shift to the comparative approach and for two-level processes could be found in changes within subjective and personal experiences. A striking feature is also that in those cases where these types of topics are adopted, one seems to be forced to move to the practical level - or to the socio-philosophical discourse on law - with all its life-formative aspects. Moreover, legal theoretical problematization does not seem to effortlessly subsist within comparative legal reasoning.

It can be maintained that it is this two-stage comparative process which somehow generates historically persuasive formants. It is contended that the persuasiveness of these

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<sup>174</sup> On the "formative" and "developing" nature (in contrast to the informative nature) of comparative law, see Fix-Zamudio, H., 1990, p.27.

<sup>175</sup> Question recognized also by McRae, K.D., 1979, p.A 28.

"comparative legal formants" is a result of the fact that in these types of arguments, two historical formants emerge: abstract but "strong" legal topics are intertwined with a historical "change" formant - i.e. comparative "legal" analysis - with all its peculiar phenomenological, subjective and life-formative aspects.<sup>176</sup>

**Conclusions: the "tertium comparationis" within a historical review of comparative legal reasoning.** It seems to be impossible to coherently identify a concept of law common to different (historical) societies which would be, on the one hand, the "tertium comparationis" - the common legal denominator - in history, and, on the other hand, also the element of ("legal") comparison by which different historical phenomena could be connected. Even if a comparative argument could be made, we may question what exactly make it a comparative *legal* argument?<sup>177</sup> How could we, for example, compare the archaic forms of comparative *legal* thinking and argumentation with those of contemporary forms of legal thought?

This objection is sound. This is why aims of this study is not really to "compare" and to relate these different forms of comparative legal reasoning with each other, but rather to examine them as kinds of possible legal arguments in history - as legal formants and as legal arguments in historical isolation - as we have maintained above.

Despite all these problems, we may try to explain the "tertium comparationis" of this historical review in the following way.

It can be claimed that modern legal science - and modern legal practice - are based on the same legal ideology that was promoted by the medieval universities - as well as by those who sought to explain archaic forms of law. This ideology is the supreme authority of law.<sup>178</sup> However - unlike in the study of a logical, fabled, and "exact" legal argument - in a study of a comparative legal argument, the supreme authority of law is expressed in a form of explanation of the ideal law (or laws). We do not speak about "ritualistic" choices among the forms of law. This idea is related to the principle of the discursive integrity of law, which was explained above. The authority of law is not directly derived from the "fantastic" explanation of positive forms of law and legal texts in a particular society, but from the analytical explanation of these forms for that particular historical discourse and audience.

The performance in law is assumed, accordingly, to be linguistically and positively contextualized. Comparative law and legal reasoning are seen - in this study - as linguistic

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<sup>176</sup> "In this exercise, truly, I have appreciated the saying of Plato - nothing is more difficult or more nearly divine than to separate accurately" (Bodin, J., 1945, p.3).

<sup>177</sup> For some discussion, Duxbury, N., 1989b, p.95 ff., a critical point of view to Legendre, P., *L'amour du censeur: Essai sur l'ordre dogmatique* (Paris, 1974) pp.23-36.

<sup>178</sup> See, Duxbury, N., 1989b, p.95 ff.

explanations of law in a comparative form.<sup>179</sup> Furthermore, the approach is modern. This means that the positivist and formalist legal tradition is assumed (vs. the "non-positive" and intuitive "context of law" approach). Consequently, there are no meaningful "structuralist" assumptions: if there is any structure, it is the reasoning within the discourse itself.<sup>180</sup>

a deviation takes place here from the closed idea of law as a "deductive" law, which persists in religious and ethnological legal systems. The history of comparative law is based on the idea of linguistically rational types of persuasion rather than on the role of an "archaic" figures like priest-like or extremist logician (becoming paradigmatically or institutionally blind lawyers). This type of "common factor" is increasingly more appropriate because in comparative reasoning we usually speak about a person (or a subject) as a "constructor" of a legal analogy. The comparativist perceives him- or herself a participator in a historical legal discourse. He or she tries to explain his or her intentions rather than hide them.

Finally, the question of whether or how such comparative legal reasoning has been successful or understood has depended on various circumstances (such as the authority of the person, etc.) and on certain miscellaneous factors in a particular discursive sphere or in the universal legal discourse. However, its particular or overall "success" is not particularly interesting. That is, even if the particular (comparative) analogy was not successful in that particular historical context, it may have had - and may have in the future - some consequences for the historical discourse on law. It nevertheless comprises a 'legal possibility'. In this sense, the history of comparative legal reasoning is a study of the attempts to construct an ideal and universal tradition of law within the universal legal discourse. These arguments do not seem to belong to any restricted "absolute equilibrium".<sup>181</sup>

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<sup>179</sup> Krygier (1986, p.251) explains how the authoritative presence is, inescapably, there in the tradition of law. The power to decide on the past and present is, however, rarely absolute, *"but it must conform to canons of coherence and plausibility known to and accepted by participants in the tradition"*.

<sup>180</sup> The anti-structuralist criticism claims (see, Duxbury, N, 1989, p.97) that it is problematic to assume the "logos". All the same, if the approach is modern, one does not have to assume anything, but may remain in the realm of documented historical materials as material for interpretation.

Krygier, M. (1986) speaks about legal tradition. He makes a distinction between the pastness, which is maintained by the idea of "origination" - and which is heterogeneous in nature - and tradition, which is authoritative presence - significant in the present. Thirdly, the tradition is a social phenomenon, i.e. it is connected to the real life (discourse?) of generations. They do not live only in the behavior of one individual. Law preserves and maintains tradition, and draws systematically and constantly from traditions (Ibid. p.240).

Gorla, G., (1980, p.308) makes an interesting point in relation to the idea of modern scholarship of comparative law: *"We can say, using our comparative terminology, that the modern scholar of comparative law, in order to appreciate his position in the contemporary historical period, has to compare (we could say 'vertically') his own position with that of the scholars in the different periods of the history of comparative law, always bearing in mind the more general context of the legal history of the jurist's cultural setting"* (ibid., pp.269-274)

<sup>181</sup> Contrary to the "closed" idea of law, as an ultimate societal authority in the form of legal text and positive the comparison of law is connected to the "self-authority" of legal sciences. It does not represent the rationality of the legal text as "one text", but as determined by the comparator's intentions. The Comparator deviates instead from the particular ritual - abandons the ritual of law - and treats the law as a "possibility of law".

For some discussion on the need for a historical study of comparative law, see Gorla, G., 1980, p.308.

### 3.2. Some forms of comparative legal argument

#### 3.2.1. The early legal comparisons

**Context.** Early Greek law, for example, was never thought to have been collected.<sup>182</sup> Law was "philosophical", but also "political", in the sense that law was based on the procedures effected in the tribal groups forming the state ("polis")<sup>183</sup>. Nevertheless, it may have been separated from pure vengeance.<sup>184</sup>

The codes came later, during the time of Dracon (621 BC) and Solon (594 BC), during the Aristotelian age, when the judiciary asserted its position in Greek society.<sup>185</sup> The early codes are reported to be based on comparative observations.<sup>186</sup>

The early Greek<sup>187</sup> laws were orally "procedural" and not "legal-positivist" - in the modern sense of the word. Like in all "archaic" systems, the magico-religious power of the judge or the "lawyer" (having the "*autoritas, basileus*") - or of the witnesses of oaths - seemed to be the main determinants of the effectiveness of the law.<sup>188</sup> This appeared to be so even if the forms were extremely strict and clear. It has been maintained that this is the early idea of the "psychology" of the legal,<sup>189</sup> The "sacrosanctness" of the *nomos* proved to be obstacle for the

He maintains that "*such an approach would enable us to know where 'modern' or 'contemporary' comparative law stands in relation to somewhat more general or extensive history of law (in its political, economic and cultural context)*". For certain directives for this type of study (applied in this study too) (*ibid.*, p.309).

<sup>182</sup> Duxbury, N., 1989a, p.243, referring to Calhoun, G.M., Introduction to Greek legal science (ed. Zulueta, F. De, Oxford, 1944) p.7-8.

<sup>183</sup> On the analysis of "polis", see Arendt, H., 1998, p.28 ff. On problems and development of comparative law, "polis", and Aristotle, see Péteri, Z., 1977, p.100 ff.

On the stages of legal development in the Occident in general, see, Weber, M., 1969, p.303-304.  
For some discussion of early "transplants", see Schlesinger (1980), p.9.

<sup>184</sup> Duxbury, N., 1989a, 257, quoting Wolff, H.J., The Origin of Judicial Litigation among the Greeks, In: Tradition 4, 1946, p.33,34,59.

<sup>185</sup> Duxbury, N., 1989a, 245, quoting Brehier, L., La Royauté Homérique: Les Origines de l'état en Grèce. In: Revue Historique 84, 1904, p.1 ff.

<sup>186</sup> "...and the goal of both Solon and Lycurgus to supply much needed legislation from the observations of a long journey" (Bodin, J., 1945, p.7).

<sup>187</sup> As well as early Roman techniques of "law" - though the latter was strongly based on codified law.

<sup>188</sup> Duxbury, N., 1989a, p.245-247, referring to Huvelin, P., Magie et droit individuel. In: L'année sociologique 10, 1905-1906, p.1-147, Gernet, L., Droit et prédroit en Grèce Ancienne, In: Anthropologie de la Grèce Antique, Paris, Maspero, 1968, p. p.248.

Duxbury, N., 1989a, p.252, speaks about the "secular-religious dimensions" of the oath. (For this, see Watson, A., 1993.)

<sup>189</sup> Duxbury, N., 1989a, p.253.

These features could be associated with medieval legal thinking of law as a "regiment of men" and not as a "regiment of formal laws". This seems to be was typical to early Canon law and Roman-catholic administration, which was evidently based on the Roman legal thinking and ideas of administration. These Romano-canon processes

legal comparison<sup>190</sup>.

Plato's *Nomoi* (Laws) seems to be based on the idea of positive law.<sup>191</sup> He compares the historical laws of *Vetus Graecia*, and takes into account also the laws and produce of peoples outside the Hellenic ethnic group (and makes critical remarks regarding them).<sup>192</sup> He analyses the laws of Attic, Sparta, Crete, Cartage, Cynthia, Persia and Egypt ("autochthonous" law).

His comparative treatment may be claimed to be "value-based" in the sense that he does not aim to justify the uses of comparative observations, but he instead uses them as arguments in order to persuade and legitimize, and in idealization.<sup>193</sup>

**The context of Aristotle's comparative project; positivity and natural ethnology of comparative law.** The first "legal" comparisons, in the history of law, are found in the works of Aristotle<sup>194</sup>. The first extensive comparative work in legal history was this *Athenaion Politiea*, consisting in a collection of "constitutions" of 158 city states<sup>195</sup>. It is likely that the pupils of the school had a central role in its production, though the idea seems to originate from Aristotle.<sup>196</sup> The work consists of (comparative) historical treatment of the constitutions, and a description of the function of each constitution. In other words, the comparison is "historically" comparative.

The comparison of "laws" or different rules does not make sense before a certain level of formal positivity of law exists. This was the case in Aristotelian Greek society and long before that. Aristotle's study of different constitutions was based on already well-established rules of procedure and societal power in Greek societies. The fact that Aristotle made an attempt to construct a scientific synthesis of the constitutions of many city states means that at least for him - and evidently for his compatriots - the law was positive in form, and to a certain extent, independent from the religious and archaic forms of case law.

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were the basis of administrative law of the emerging modern European states (see, Néve, P.L., 1986, p.50).

<sup>190</sup> Hamza, G., 1991, p.19, referring to Triantaphyllosopoulos, J., *Rechtsphilosophie und Positives recht in Griechenland*, In: *Festschrift Zepos* (ed. Wolff. H.J., Athen-Freiburg, 1975) p.689.

<sup>191</sup> Plato, 1970, 1961. Also, Prigsheim, F., *The Greek Law of Sale* (Weimar, 1950) p.128.

<sup>192</sup> Hamza, G., 1991, p.10.

<sup>193</sup> Hamza, G., 1991, p.10., referring to Weiss, E., *Griechisches Privatrecht auf Rechtsvergleichender Grundlage I* (1923), p.7, and to Wenger, L., *Römisches Recht und Rechtsvergleichung*. In: *Archiv für Rechts- und Wirtschaftsphilosophie*, 1920/1921, pp.123-127. Also Hug, 1932, p.1028.

<sup>194</sup> However, one could claim that many comparisons made by Aristotle were not exactly legal, but rather political and moral - continuations of the "good life" definitions in Aristotle's *Nicomachean ethics* (Aristotle, 1953).

A private law comparative argument was presented by Theophrastus in his analysis of sale and purchase. He takes into account the Attic law, the law of polis Thurioi, the law of Mytilene and statute of Charondas, see Hamza, G., 1991, p.11, referring to Theophrastus' *Peri Symbolaion* (In: Stobaeus., *Flor.* 44, p.20-21, and to Dareste, R., *La science du droit en Grèce. Platon, Aristote, Théophraste* (Paris, 1893, repr, Amsterdam 1968), p.305 ff..

<sup>195</sup> Jaeger, W, 1955.

Aristotle went through 158 constitutions (Aristotle, 1952, p.2).

<sup>196</sup> Aristotle, 1984, p. 9, 13.

Consequently, here the idea of law presumed not an equilibrium based on things such as sacrifices or other types of "ritualism" of law or case law for the resolving of social conflicts or moral breaches, but rather a stable idea of law as a social instrument, and as an effective and rational means of persuasion. This assumes a power of discursive audience considering positive laws as good instrument.

It has been maintained that Aristotle's method turned towards empiricism at the end of his life.<sup>197</sup> It has been also claimed that "*Politics*" was based on the collection of constitutions preceding it.<sup>198</sup> Against this background, Aristotle's comparative analysis in books IV-VI of *Politics* could be placed within the latter part of his "career" rather than the earlier one.<sup>199</sup>

**The nature of Aristotelian comparative reasoning in *Politics*.** Aristotle's project in *Politics* had an objective of constructing the ideal of best possible form of government of a state. In this sense, the project was "normative". However, according to him, only small reforms - executed on the basis of "knowledge" - were considered fruitful in practice. This way, changes could be seen to be moderately good, i.e. it could be observed as to whether they turn out to be good rather than bad.

To achieve his purpose, he analysed ideal forms of government in theory, the basis of his method (the comparative method), and the empirical (comparative) aspects of different "systems".

In relation to the first question, Aristotle makes a distinction between a form of government and laws. The latter are something which express the principles of a form of government. One can study laws as a separate phenomenon in addition to their relationship to the form of government. While the form of government question seems to be, basically, the question of the "existence" of the form of government (and its laws), the question of the laws is a matter of laws' relationship to ethics.<sup>200</sup>

Keeping this in mind, he emphasizes - in relation to the study of the comparative method - the knowledge on (1) the different possible forms of government, (2) restrictions upon the study of the construction of the "ideal" (according to circumstances), (3) what kinds of forms

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<sup>197</sup> For example, Sihvola, J., , 1991, p.279.

<sup>198</sup> Rhodes, P.J., 1972, 12-13.

<sup>199</sup> For problems in the interpretation of the history of *Politics*, see Jaeger, W., 1955.

For the idea that Aristotle was not so keen on Athenian democracy, see Rhodes, P.J., 1972, p.13. However, it is possible that Aristotle's comparative project was his or somebody else's reaction against the collapse and intentional destructions of the city-states on Greek soil. It could be seen as a respond, for example, to the policy of Alexander the Great, which diminished the importance of the traditional city-states.

<sup>200</sup> Aristotle, 1962 [Now: *Politics*] Book IV, Chapters 1-2, and 3, see, Sihvola, J., 1991. This follows from the distinction between ethics and politics in Aristotle.

However, one could claim that the existence of a form of government was an ethical question for Aristotle, which becomes clearly visible in his defense of the city-states.

of government there are in reality, (4) the historic-cultural background of these "examples", (5) what kinds of people have constructed them, and (6) what are the material and human factors which might determine the creation and preservation of a form of government<sup>201</sup>.

Aristotle's method, in general, looks "traditionally" comparative. He emphasizes the fact that there are necessarily different types of forms of government, depending on the material conditions dissimilar between them.<sup>202</sup> Nevertheless - as we may note - he maintains, for example, the supremacy of the "Greek" forms of government over the laws of the non-Greeks, the barbarians.<sup>203</sup>

His more thorough historical-comparative reasoning<sup>204</sup> concentrates on the types of nominations of officials,<sup>205</sup> political disturbances<sup>206</sup>, the types of revolutions in governmental systems<sup>207</sup>. On this basis, he constructs the conditions for the maintenance of governmental systems. This includes, for example, measures such as the obligatory laws, the stabilization of the population, the balancing of different groups, the prohibition of benefiting from public offices, the protection of property, the prevention of capital concentration, and the selection of suitable and competent people to offices, education etc.<sup>208</sup> Kingship can be preserved, not by the use of excessive power<sup>209</sup> and tyranny rather by using it in order to come closer to the kingdom. However, the best form seems to be civil society based on the principle of freedom and virtues, mixing many characteristics of many different systems<sup>210</sup>. The conditions for the best form of government are connected to the agrarian form of society taking into account geographical circumstances.<sup>211</sup>

**Some concluding remarks.** Aristotle examined the Hellenic forms of government, laws and power structures in order to find confirmation of and deviations from Platonist ideas and ideal

<sup>201</sup> *Politics*, Book V.

<sup>202</sup> *Politics*, Book IV, Chapter 3.

<sup>203</sup> Aristotle's comparative approach was thus limited by the distinction between the superior Greeks and the non-Greek (barbarian) world.

<sup>204</sup> His historical-comparative analysis is wide. It includes examples and their analysis from the period 700-340 B.C. Geographically, the examples extend to Persian, Macedonian, contemporary Sicilian, Assyrian, Kosian, Rhodosian, Athenian, and Mythilian politics.

<sup>205</sup> *Politics*, Book IV, chap. 15.

<sup>206</sup> *Politics*, Book V, Chap. 1, 2-4, and 12.

<sup>207</sup> *Politics*, Book V, Chap. 5-7, 10.

<sup>208</sup> *Politics*, Book V, Chap. 8.

<sup>209</sup> *Politics*, Book V, Chap. 11.

<sup>210</sup> *Politics*, Book VI, Chap. 15.

Civil society, in this sense, can be interpreted "holistically" - in relation to more "segmented" way of thinking.

<sup>211</sup> *Politics*, Book V, Chap. 6-7.

models, which comprised the conceptualization of political philosophy of that time. From this he drew some generalizations.

It ought to be asked whether the interest of Aristotle was really to reproduce the "positivized" Hellenic constitution by scientifically comparing and historically narrating on it, or merely to find empirical evidence for the acceptability of the Platonic and his own ideal constitution? The type of reasoning in *Politics* would suggest that his main interest was political theory and not the maintenance of any tradition.

However, the issues of the context remains unclear<sup>212</sup>.

### 3.2.2. Roman law

It has been proclaimed that early Roman law was based on the Roman juriconsults Responses, on which the development of law mainly depended, and that the fall of the republic caused "institutionalization" and "systematization" of principles (*compedia*).<sup>213</sup>

Comparisons by the Roman iuriscunsultis have been seen as "theoretical".<sup>214</sup> Furthermore, the use of foreign law does not seem to be a particularly central idea. However, when comparative arguments were used, their application was extremely "practical"<sup>215</sup> and instrumental. The interest in such studies arose from the need to resolve a particular case. This can be related to the Roman iuriconsultis' main focus upon private law<sup>216</sup>. In addition, external

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<sup>212</sup> It is possible to see the Aristotelian project from the contemporary modern perspective.

Some have claimed that Aristotle's project was "philosophical speculation" on the basis of comparative law (Zweigert, K., Kötz, H., 1977, p.42). This kind of statement is a quite "modernist" interpretation of the Aristotelian attempts.

Some writers, such as Dworkin, see the great classical political philosophy as utopian, and claim that these ideas were born in the studies of "*social justice from the point of view of people committed in advance to no government or constitution, who are free to create the ideal state from the first principles*" (Dworkin, R., 1986, p.164).

In my view, this idea is based on a misinterpretation. Whatever one thinks about the historical construction of constitutions and law, the fact is that these studies of political philosophy are born within a certain context, in some interest, and are based on observations of some systems which seem to be valuable for the observer.

This is exactly what takes place in the Aristotelian project. Consequently, one may say that the purpose of Aristotle was to find the best constitution, but also to defend the city-state institution as a traditional form of life and law. These two objectives were not necessarily in conflict with each other.

<sup>213</sup> Maine, 1954, p.24. "*The final blow to the responses was dealt by Augustus, who limited to a few leading consults the right of giving binding opinions on cases submitted to them, a change which, though brings us nearer the ideas of modern world, must obviously have altered fundamentally the characteristics of the legal profession and the nature of its influence to Roman law*" (idem.). This institutionalization was connected to "*the most active promulgators of constitutions (by) princes, who like Constantine, have the concerns of the world to readjust*" (ibid., p.25). "*A permanent court of appeal and a collection of approved commentaries will very shortly be added; and thus we are brought close on the ideas of our own day*".

For some comparisons of ancient and modern western law and legal concepts, see Smith, J.C., 1968.

<sup>214</sup> Hamza, G., 1991, p.13, referring to the Marcianus's definition of *Lex*.

<sup>215</sup> See also, Hamza, G., 1991, p.19.

<sup>216</sup> Hamza, G., 1991, p.7.

observation - in the form of visiting foreign countries - was used, at least in earlier times<sup>217</sup>.

Sextus Caecilius Africanus was one of the first in Roman jurisprudence to use comparisons. He considered Plato's *Nomoi* and the twelve tables parallelly - and contemplated the laws of the city-states as well.<sup>218</sup> Gaius also made comparative observations in his treatment of the origin of the *Lex Collegii* (associations) and *actio finium regundorum* (the end of the regime)<sup>219</sup>.

Cicero, on the other hand, referred only briefly to Roman and "foreign" law ("*Lex Athenis*" and "Attic law", as *omnes gentes*) in his treatment of *ius naturae*.<sup>220</sup> His unanalytical comparative observations expressed the idea of natural law being above the laws made by senate and peoples. Some remarks are made also on Plato's *Politeia*. Furthermore, in mentioning civil institutions of Roman law, Cicero referred to "all other national law" - the laws of Lycurgus, Draco, and especially Solon - as "ridiculous". He argued from absurdity so as to maintain the superiority of Roman institutions. Comparison is thus used for rhetorical effect, but also in order to encourage comparative observations. Thus he also had pedagogical purposes.<sup>221</sup>

Roman law is contrasted with Greek law also in his remarks on *parricidium*.<sup>222</sup> The comparative remarks refer to the "wisdom" of one's own ancestors in declaring *parricidium* strongly punishable, for this serves to deter anybody from committing this act. In connection to rituals - regulated in twelve tables - he makes reference to Solon's laws. Here he interprets certain provisions based on the fact that these laws were borrowed.<sup>223</sup>

Cicero's comparative remarks did not aim at any explanation or contextual treatment of the subject. This may be due to the extremely value-based nature of the subjects.

After Cicero, the attitude toward the Hellenic tradition remained dismissive.<sup>224</sup> Comparative law really did not develop further.<sup>225</sup>

The comparative reasoning in Roman writings seems to be characterized by "critical

<sup>217</sup> "As well as the purpose of the decemvirs in traveling throughout Greece" (Bodin, J., 1945, p.7). See also Hug, P., 1932, David, R., Brierly, J.E.C., 1978, p.1.

<sup>218</sup> Hamza, G., 1991, p. 13 (ref. Noct. Att. 20,1,4).

Greek law had upon impact to the development of Roman law, see Hug, 1932, p.1030, referring to various writers. However, there was no evidence of real scientific development (ibid., p.1031).

<sup>219</sup> See, for direct reference, Hamza, G., 1991, p.18.

<sup>220</sup> Cicero, 1970, III: xxii, 33, also, 1993, xxxi, xxxiii, IV:iii., V:ix.

<sup>221</sup> Cicero, 1942, I:xliv, 197.

<sup>222</sup> Cicero, 1939, xxv, 70. "Parricide" being the murder of a parent (father).

<sup>223</sup> Cicero, 1970, II:xxiii, 59-64. Also II:xv, 38.

<sup>224</sup> Hamza, G., 1991, p.16, referring to Beauchet, L., *Historie du droit privé de la République Athénienne* (1897, Paris, reprint Amsterdam, 1969) p.ix. The phenomenon can be seen also in the works of Tacitus, for example.

<sup>225</sup> Hamza, G., 1991, p.18. Cicero as a master of eclecticism, van Zyl, D.H., 1985, p.55.

contrasting".<sup>226</sup> An uncritical viewpoint regarding one's "own" rules seemed to prevail<sup>227</sup> - unless the question was about historical connections. Especially in public and "international" law, the Roman legal thinking was "Latin" centred<sup>228</sup>. This may have been due to the fact that the law was powerfully connected to religious rituals. The binding character of law was strongly linked to the same religion.<sup>229</sup> Law was presumed to be a combination of archaic rituals and positive rules.<sup>230</sup> It appeared to be impossible to declare law to be obligatory solely on the basis of its statutory form and its subjective acceptance by a person or an abstract public entity.

### 3.2.3. Medieval comparative law

*Collatio legum Mosaicarum et Romanarum; Lex Dei.* The idea prevalent in the middle ages was that one could compare nearly everything both historically and sociologically. Comparison in the middle ages was also a practical exercise. In this sense, the approach did not really differ greatly from the approach which prevailed during the previous periods. On the other hand, it has been argued that the idea behind comparison was integrative rather than contrastive<sup>231</sup>.

Nevertheless, comparative legal studies seemed to be rare phenomena<sup>232</sup>, even if some examples of comparative law may be found in some medieval legal collections.<sup>233</sup>

*Collatio legum Mosaicarum et Romanarum* is a collection and comparison of laws, mainly "public laws" (criminal law) made in approximately 400 AD.<sup>234</sup> It contains comparisons of laws from Hebrew and Roman origins, and its method is "universal-historical" It seems to be impossible to identify the author of this comparative collection of laws and many other features of this book also remain obscure<sup>235</sup>. This body of writings is perhaps the only source of

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<sup>226</sup> Bodin claimed that lack of education maintained this primitive "comparative mediocracy" (Bodin, 1945, p.145, 172).

<sup>227</sup> Hamza, G., 1991, p.20, and, for example, Rabel, E., Aufgabe und Notwendigkeit der Rechtsvergleichung, In: Rheinische Zeitschrift für Zivil- und Prozessrecht, 1924, p.7.

<sup>228</sup> Watson, A., 1993. On the lack of "public law" in Grotian sense, see Vitányi, B., 1983, p.45, 47 ff.

<sup>229</sup> See Watson., A., 1993.

<sup>230</sup> Watson, A., 1993. Schiller, A.A., 1978, pp.160-161.

<sup>231</sup> Schlesinger, R.B., 1995, pp. 477-478. On Lombardian School and its precursors, see Hug, P., 1932, pp. 1035-1036.

<sup>232</sup> Hug, P., 1932, p.1035, referring to Savigny, C.F., Geschichte des römischen Rechts im Mittelalter (2nd ed, 1834), p.459, 463.

<sup>233</sup> "Neither Hadrian nor Justinian had any interest in foreign law..." (Bodin, J., 1945, p.7).

<sup>234</sup> Hug, P., 1932, 1033. Neumeier, K.H., 1973.

<sup>235</sup> Triebs, F., 1905, p.i ff.

comparative legal jurisprudence from this period<sup>236</sup>.

This corpus seems to form part of the establishment of Canon law in the middle ages. It has been one of the main sources of learning on the development of the merger between Roman criminal law conceptions with the Canon law. In this process, Germanic and Christian ideas generated the ideas underpinning canonic law delicts<sup>237</sup>.

In general, the 11th century establishment of Universities and the glossatorial explanations of the Corpus Juris instituted "legal science". In addition, this development also reestablished the preeminence of "*pontifices*" from the Roman tradition, as the main explainers of the "holy" law.<sup>238</sup> As a result of this development, one of the most productive and basic "comparisons" was the practical comparison between and synthesis of the rationalistic Roman law and the more socially-oriented forms of Germanic law. Many modern functional and collective legal institutions, such as security and incorporation, would not have been perhaps possible without this synthesis.<sup>239</sup>

**Conclusions concerning the early comparisons.** Both ancient private and public comparative law had radically contrasting function. Furthermore, it has been claimed that comparisons in the law of ancient times and the early middle ages were only comparisons of customs<sup>240</sup>. During this period, comparison as a systematic method seemed to be related to political theory, and not to any systematic studies of positive laws in the modern sense. Some exceptional "positive" comparisons were attached to different codifications during that time. We could say, for example, that because codifications were rare, the historical comparisons were accepted without criticism. The idea of a universal history of law prevailed. This feature can be related also to the difficulties entailed in acquiring sufficient information concerning societies and their laws.

#### 3.2.4. From 12th to 16th century

**Machiavelli and the establishment and maintenance of the state; an example of an instrumentalist comparative government.** The renaissance has not been seen as a particularly vivid period from the point of view of comparative law. This period was characterized by studies of ancient laws. On the other hand, renaissance development was typified by the birth of the

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<sup>236</sup> See also Schitzer, 1961, p.8.

On the relationship between Canon and Roman law in practice, see in this context Triebs, F., 1905, p.viii.

<sup>237</sup> Triebs, F., 1905, p.x.

<sup>238</sup> Duxbury, N., 1989b, p.90, referring to Legendre, P., *Jour du pouvoir: Traité de la Bureaucratie patriote* (Paris, 1976) p.102, 188.

<sup>239</sup> Van den Berg, G.C.J.J., 1984.

<sup>240</sup> Valladão, H., 1961, p.99.

national lawyer and so called "national purification".<sup>241</sup>

Machiavelli has not thus far been mentioned as a legal comparativist in legal history. Nevertheless, an attempt to do so is made here. It can be said that one of the basic types of comparative legal approaches and uses of comparative observations - the instrumentalist form - was first set forth in his work, the *Prince*. This type of strategy was, however, not without historical modelling.

15th century Florence - the context of Machiavelli's *Prince* - was characterized by much disparity, argument, and arbitrary rule, and Italy as a whole was lacked a centralized power. Concentrated power was established, by contrast, in France and Spain. It was powerful city-states such as Venice, Florence, and Genoa together with the Church state, Milanese Duchy, the Napolian "foreign" kingdom, and several small principalities which instead ruled the Machiavellian world. In this context it was quite evident that Machiavelli had in mind examples of diverse power struggles, and that he was principally interested in the means of retaining. The idea of having a national unifier was a key issue for him.

Machiavelli observed the situation also from the "internal" point of view as he was involved heavily in Florentine public life through his official assignments. In his early career, in the last decade of 15th century, Machiavelli was responsible for the external affairs' magistracy under the authority of the governing Council of the Republic. During the period between 1500-1504, he spent some time in France, where he was introduced by the idea of a "strong nation" - i.e. one united under a single "prince". He went later on various missions, which obviously also had an impact upon his thinking on government. These missions took him to Italy, Switzerland and Germany in 1508, and to France in 1510-1511<sup>242</sup>.

Machiavelli wrote the *Prince* after the revival of the Papal power to Florence in the form of the Medici government. The book seems to be, in a way, a history of the pre-Medician form of government in Europe. However, his context was always the Florentine republic and its development.

**Machiavellian comparative argument.** Machiavelli was an extreme "instrumentalist". *The Prince* included various descriptions of "good" uses of laws and religions in governance.<sup>243</sup> Machiavelli was familiar with the idea that ample knowledge of the areas requiring government was essential.

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<sup>241</sup> See, Hug, P., 1932, pp.1039-1041.

<sup>242</sup> Kekewich, L.M., 1997.

<sup>243</sup> Kekewich, L.M., 1997. See also, Skinner, Q., Machiavelli (Oxford, 1981), Ridolfi, R., Vita di Niccolo Machiavelli (2 vols.3 ed., Firenze, 1969) [The life of Niccolo Machiavelli, trans. Grayson, C., 1961]

Machiavelli's interest was in introducing the comparative legal method so as to serve the State. He considered comparative information - knowledge of the prevailing and previous laws of other systems - valuable for the effective establishment of the State. He saw comparative observations as a relevant part of the effective use of power and of the maintenance of law and order. The key idea was the maintenance of power by the instrumental use of laws of the conquered areas.

With the help of examples, amongst others, from Florentine governance of Pisa, Sparta's rule in Athena and Theba, and the Romans's domination in Greece and in the Mediterranean area Machiavelli gave examples of the governance of the conquered areas by means of using the existing positive law as instruments. The analysis of the circumstances was considered important. This idea was illustrated by a two-tiered example. While Turkey, with its "decentralized" system, appeared to be difficult to obtain, but easy to keep, the French system was based on a centralized system of loyalty, which made it easy to conquer, but difficult to keep.<sup>244</sup>

This idea formed the beginning and the context for the further study of the government of the states, which were accustomed to living in accordance with their own laws. The precondition for this type of governance over these "legal" states was the idea of the positivity of law. One had to keep these areas "under their own laws", but at the same time utilize this system by establishing a government according to the form familiar within that system. Machiavelli's idea was not necessarily to adopt similar forms of government. Indeed, and this connection, Machiavelli speaks, with a help of certain examples, about the dangers of letting the peoples keep their previous laws. Namely, In the stage of the revolution, the ideal of freedom, associated with the tradition of the state's former laws and giving the possibility of reference to the earlier form of is a strong weapon in the hands of the revolutionaries. For this reason, the areas and their laws which were accustomed to the idea of freedom and strong legal tradition should be totally destroyed.<sup>245</sup>This is related to the fact that areas which do not have tradition but which are still accustomed receiving orders, such as rural areas, are very useful allies in the establishment of government.

**Conclusions.** It may be said that Machiavelli expressed a particular "legal point of view" in *Prince*. He saw legal systems as forms of effective power. However, the problems of the Machiavellian approach are also visible from this same legal point of view. For Machiavelli, law was an instrument of power, but without any idea of (discursive) continuity. The Machiavellian approach stresses the importance of knowing the laws of other "systems", so as to instrumentalize those parts or forms of the law which are best suited to the purposes of the ruler. This

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<sup>244</sup> Machiavelli, N., 1997, p.24.

<sup>245</sup> Machiavelli, N., 1997, p.27.

includes the manipulation of relatively "empty" forms of law - divorced and purified from any substantive tradition - by giving them substance in accordance with the traditions of the ruler -, i.e. by infusing them with ruler's intentions. At the same time, the pluralism of the legal system was taken for granted. The Machiavellian idea of comparative law thus represents a pure form of the instrumentalist approach to (comparative) law.<sup>246</sup>

Machiavellian historical-comparative examples were highly superficial. He selected comparative examples predominantly on the basis of his intention of highlighting successes and failures in the establishment of comparative government. However, his insight into the political and cultural context seems to be exceptionally profound.

Machiavelli was genuinely one of the first to emphasize the study of existing systems in a systematic way. He identified similarities and differences. Nevertheless, it seems as if the basic principles of governance and the use of comparative information derived from his own tradition.<sup>247</sup> On the other hand, even if he had a standard historical-comparative approach typical of that time, his own examinations were related primarily to "real-life"(-time) observations. He based these "comparative" commentaries mostly upon his personal experiences.

One of the basic methodological standards for instrumentalist comparative law in Prince was unequivocally the idea of "power"<sup>248</sup> - in a "personalized" form. Machiavelli appeared able to identify the limits of the implementation of power within societies and (changes to) law in fairly absolute terms. In this sense, his comparative approach was in some way restricted. In terms of this approach, any society could be compared - inasmuch this helped the strategies of the intellectually and physically strongest power.

It has been claimed that in the 15th and 16th centuries Machiavellian ideas established the basis for an idea of the nation state. This was a result of an empirical orientation within the political sciences.<sup>249</sup>

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<sup>246</sup> On Machiavelli's concept of law, see Bodin, J, *Republic*, First French ed., the Preface I, in Bodin, J., 1979.

<sup>247</sup> An interesting comparison may be made between the Machiavellian use of foreign laws (e.g. the statements by the Pope Gregorius the Great in his letters to missionaries) where he spoke about the use of foreign religions (from Grimberg, G., *History of Nations*, 1965, p.163, unofficial translation):

*"After much thought I have come to the conclusion that one does not have to destroy the English pagan temples, but only the pictures in them".*

Gregorius urged missionaries to replace these objects with catholic ones. Furthermore,

*"When the people notice that their temples have not been destroyed, thus come more readily to their old meeting places,... Namely, it is absolutely impossible to destroy suddenly pagan ideas from the hearts of the barbarians. He who wants to climb a hill cannot do so in one leap but step by step".*

<sup>248</sup> Or even violence.

<sup>249</sup> Cassirer, E., *The Myth of the State* (Oxford, 1946) p.119.

Some other comparativists during the period under examination can also be mentioned.

1470 Sir John Fortescue (Justice of King's Bench) wrote the *De Laudibus Legum Angliae* (London, 1616, Fortescue, *The Commendation of the Laws of England*, 1917, transl. Grigor, F.) in some kind of a comparative form (Winterton, p.89), studying basically French political and legal institutions in quite contrasting ways (see also, Hug, p.1039, referring to Holdsworth, *History of English Law*, 3d ed., 1923). The common law and civil law were compared with the purpose of contrasting the goodness of the common law with the civil law (p.116, Graveson, 1984,

**Bodin: the dynamics of sovereign power, and law as an argument within a discourse.** The 16th and 17th centuries were characterized by emerging modern comparative law and by the so-called "differentia" literature<sup>250</sup>. Comparative studies were concentrated on internal comparisons of the laws in certain territories<sup>251</sup>.

The context for Bodin was religious war, the religious absolutism, and the collapse of civilized society.<sup>252</sup> During this period, Huguenot constitutionalists expressed their opinions with the aid of Calvinistic ecclesiastical practices. Governmental powers were to be distributed in order to help the Huguenots have something to say in administrative policy. They proposed the idea of federalization. This was to be basis of provincial and local authority. This created a

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Schmitthoff, M., 1941, p.102). The work was in the form of a dialogue with a fictional Prince and the Chancellor. Fortescue was himself in exile, and a diplomat in Portugal and Scotland, returning to England in 1471. Holdsworth maintains that "his exile made him a diplomat and a statesman. He was at leisure to reflect from the outside upon the condition of his country and upon its system of law, in the study of administration of which he spent the greater part of his life... like Bentham, a lawyer and a practical political philosopher. Both men clearly saw some of the evils from which their own age suffered".

Roman law and Lombard law was compared for example by Ferenti of Ravenna. Also American Indian law was studied by Garcia (*Origenen de los Indios de el nuevo mundo e indies occidentales*, 1607). Some Civil and Roman, and Civil and Canon law comparisons were made (Christopher St. Germain, 1523-1530). Raguellus compared Justinian law with that of new and old testament (Hamza, G., 1986, p.57).

The "civilian" William Fulbecke - contemporary of Bodin, and influenced by him and Fortecue - wrote the *Parallele or conference of the Civil law, the Canon law, and the Common law of This Realme of England* (1601, 1618 notes by Hargrave, F., London) It was written in dialogical form, and - in its part dealing with sovereignty - suggested compromises (see Terrill, R.J., 1981, p.177). He wrote also "*The pandectes of the law of nations containing several discourss of the questions, points, and matters of law, wherein the Nations of the World doe consent and accord, giving more understanding and opening of the principall obiects, questions, rules, and cases of civill law, and common law of this realm of England*". *Opinion commenta delet dies: Nationum iudicia confirmat* London, 1979, Amsterdam, (1602). In this latter book, historical and present comparisons did not differ (typical of this period). For some analysis of this, see Terrill, R.J., 1981, p.174-175.

Sir Thomas Ridley wrote (1607) *A view of the Civile and Ecclesiastical Law*. (Analysis, see Terrill, R.J., 1981, p.178-).

One "public" comparativist was also William Prynne (*Soveraigne Power of parliaments and Kingdoms*, 1643), McRae, K.D., 1979, p. A 60. Furthermore, Stair in Scotland published 1681 *The Institutions of the Law of Scotland, collated with the Civil, Cannon and Feudal Laws and with Customs of neighbouring Nations*. Thomas Wood has been also mentioned (See, Constantinesco, J-L., 1971, p.77).

On the practical nature of comparative observations in England, see Hug, p.1039. The "civilian" experts were employed in the service of internationalized law, but also in "internal" functions - especially after the reformation. They were opposed by common lawyers and the humanist revolution in the writing of history. (see, Terrill, R.J., 1981, p.172-173).

In France, the comparative method was propagated by Francois Hotmann (*Antitribonianus*, 1567).

In Hungary, Werböczy (*Tripartitum 1517*, see Szabó, I., 1977, p.9).

On some comparativists, comparative law, and comparative "legislation" in the history of Benelux area from 16th century to 20th the century, see Nève, P.L., 1986, pp.47-74.

<sup>250</sup> Hug.P., 1932, p.1042, and different examples.

<sup>251</sup> Hug, P., 1932, p.1044. There was also a tendency toward a reorganization of law - especially the customary law of France at the time, McRae, K.D., 1979, p. A 6.

<sup>252</sup> See, McRae, K.D., 1979, p. A 67.

problem for Bodin from the point of view of sovereignty<sup>253</sup>.

**Bodin's argument.** Bodin's *Methodus*<sup>254</sup> gives an interesting picture of the transitional period from medieval to the modern age.<sup>255</sup> It has been claimed that it reflected the move from an authoritarian philosophy of history in a type of "pseudoscientific" direction<sup>256</sup>.

*Methodus* was - to a certain extent - an empirical inquiry and a work on the methodological ideas for his later work, the *Republic*<sup>257</sup>. It was about methods of studying history, and about the philosophy of history. It dealt with the idea of universal law.<sup>258</sup> According to Bodin, only in the narratives of human affairs is the best part of universal law hidden. One may learn from the study of history.<sup>259</sup>

Essential historical research consists in the study of "human actions and human rules", aside from philosophical and theological studies:

*"From this subject we have collected the widely scattered statutes of ancient peoples, so that we may include them also in this work. Indeed, in the history the best part of the universal law lies hidden; and what is a great weight and importance for the best appraisal of legislation - the custom of the peoples, and the beginnings, growth, conditions, changes, and decline of all states - are obtained from it."*<sup>260</sup>

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<sup>253</sup> Reynolds, B., 1945, pp.x-xi. For some other interpretations, *ibid.*, see p.xxi. Bodin was himself arrested and accused of heresy for nearly one and a half years, McRae, K.D., 1979, p.A 7, A 24. He later also faced inquisition on several occasions (*ibid.*, p.A 11). For Bodin's treatment of the subject, see Bodin, J., 1955b, pp.105-106.

The comparative method was one of the methods used in resolving the problems of cohesion and autonomy of the state (see, Terrill, J.R., 1981, pp.170-171).

<sup>254</sup> Bodin, J., 1945. An earlier book was the *Juris universi distributio* ([1559] In: Oeuvres Philosophiques de Jean Bodin, ed. Mesnard, P., Paris, 1951). Here he claimed that the development of the legal system development had failed because of too great a reliance upon Roman law. For the strategy of collecting and comparing public law, private law, legislation, edicts, and customs of the famous commonwealths, see Terrill, R.J., 1981, p.172.

<sup>255</sup> One could speak of a change from strict Aristotelianism toward more "analytical" logic.

<sup>256</sup> Reynolds, B., 1945, p.xi. However, we may say that it was also a change away from a certain type of restriction of the relevant data toward another type of restriction upon data - a change in methodological thinking. See also, McRae, K.D., 1979, p.A 28.

<sup>257</sup> Bodin, J., 1979. See, Reynolds, B., 1945, p.xi, and McRae, K.D., 1979, p.A 6.

It has been maintained that this was influenced strongly by Peter Rasmus's teachings (for analysis of this see McRae, K.D., 1979, pp.A 26-27). Its characteristics were the strong interest in "empiricism", its simplicity, directness and practicality.

<sup>258</sup> Also as an anti-nationalist method, see analysis of this, Reynolds, B., 1945, p.xxiii. Bodin's universal law aim has also been seen as aiming towards a more comprehensive science of society, McRae, K.D., 1979, p.A 6. His concern was the general problem of social order (*ibid.*, p.A 21).

<sup>259</sup> Bodin, J., 1945, p.17. He gives also several examples of direct imitation by rulers in history (*ibid.*, p.13). Historical learning is based on its profitability, pleasure and facilitating qualities (*idem.*).

<sup>260</sup> Bodin, J., 1945, p.8. *"The chief subject matter of this method consists of these facts, since no rewards of history are more ample than those usually gathered about the governmental form of states"*.

In *Methodus*, Bodin described historical studies as universal or particular. Universal history includes studies of many men and many states - those histories, which have been recorded or best known. The study can be made comprehensive or brief. In its latter form, history (annals) is a recording of events without an inquiry into causes.

Bodin goes through the essential elements which make up a good historical study. These elements included ideas on the reading and arrangement of the material, comments on the choices of the material, and some directives for the evaluation of the material.<sup>261</sup> He proposed a move from general observations to more particular ones (towards detailed narratives).

The interpretation of some historical writings should take place according to the background and training of the historian in question.<sup>262</sup> Furthermore, he notes also that the lack of an emotional standpoint - an essential condition for a successful study - is related to the fact that one studies either a society in the distant past, or a society which is not his own. However, any "morality" attached to the interpretation is problematic, unless one has an authority in that field of matter.

Furthermore, a separation of societal control mechanisms (government) is proposed as a methodological directive. However, Bodin does not support any division of the ultimate authority.

In the end, *Methodus* turns into the study of different forms (or arts) of government, and an analysis of their characteristics.<sup>263</sup> This was essential for the understanding of history in general, but it also generated - according to Bodin - the possibility of good administration.<sup>264</sup> Here the examination departed from the empirical emphasis, and became an inquiry into the best form of government supported by comparative-historical - but also comparative-factual - observations, and furthermore, by family analogies. This all led to the description of sovereignty based on some kind of a limited monarchy in the interests of all.<sup>265</sup>

It has been claimed that Bodin's approach in *Methodus* renders it different from previous works on the subject, because it introduces juristic knowledge to the study of the philosophy of history. Bodin was a "comparative constitutionalist" in modern terms. In fact -

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<sup>261</sup> Bodin, J., 1945, pp.1-2.

<sup>262</sup> We may say that Bodin explicitly restricted the sources according to their reliability (the backgrounds of the authors). There was no real discussion of different types of interpretations. In this sense, he regarded the writers trustworthy as "institutional" actors.

<sup>263</sup> McRae, K.D., 1979, p. A 75. Contrary to *Republic*, definitions of sovereignty and distinctions between law and justice do not appear.

<sup>264</sup> Bodin, J., 1945, Chapters V and VI.

<sup>265</sup> Bodin, J., 1945, pp.156-164. See, Reynolds, B., 1945, p.xx, for analysis of certain contradictions, *ibid.*, pp.xxv-xxvi. Interestingly, in his analysis of changes and declines, the greatest reason seemed to be the unequal distribution of wealth (Bodin, J., 1945, p.223). However, Bodin, J., 1955b, V.2-. See also, Reynolds, B., 1945, p.x.

In the preliminary remarks - in the 1606 version, Bodin disclaimed any support for absolutism and objected to the increase of the royal power.

according to his own view - he seemed to be the first one<sup>266</sup>.

Bodin presented his legal material in the following way:

*"Then from every source I collected and added the legislation of all people who have been famous for military and civic disciplines. In this connection, also, I made use of the standards of jurisconsults, as well as of the historians, so that consideration is given to degrees of the Persians, of the Greeks, and the Egyptians, no less than to the Romans. From the Pandects of the Hebrews, also, chiefly from the books of the Sanhedrin, I planned to take all the best things In this matter... have promised me their aid. Not to be without the statutes of the Spanish and of the British and of all the most famous states of Italy and of Germany (for it would be endless to seek more obscure) I trusted to be able to join them to our own at the same time. I wish we might also possess the civil code of the Turks. Certainly by some means we should have the public law on which the flourishing and powerful empire has been established. To these will be added the legal doctrine and the supreme authority of the decisions in [your] court, as well as those in the Imperial court. I have obtained them partly from the work of our men, partly from .... Thus, by the rule of Polycletus, we have decided to examine laws and actions of law; but by lesbian rule, to examine equity and the office of judge [Aristotle's Nicomachean ethics]"*.

Bodin's comparative studies themselves do not make any distinction between the historical and the more contemporary comparative approach.<sup>267</sup> On the other hand, his sensitivity to historical, sociological and systematic contexts in *Methodus* was not impressive. Bodin's approach was not based any socioeconomic analysis, but he used as reflective concepts ideas deriving from the religious ones, as well as from the contemporary "natural" sciences.<sup>268</sup>

He considered mainly the "methodological" benefits of comparative law. However, he evaluated, for example, his scholarly sources with an analysis of their backgrounds, and defined criteria for their evaluation, in which the analytical approach was decisive.<sup>269</sup> On the other

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<sup>266</sup> "So it seems to me remarkable that, among so many writers and in so learned an age, until now there has been no one who has compared famous histories of our forbears with each other and with account of deeds done by the ancients" (Bodin, J., 1945, p.9).

<sup>267</sup> For some analysis of the *Republic*, McRae, K.D., 1979, p.A 27.

<sup>268</sup> Montesquieu, nation and socio-geographical criteria.

Bodin's works may be seen as one of the basic texts of state positivism (Bodin, J., [1576] Territorial sovereignty), applied, for example, by Hobbes in his *Leviathan* (1651) and Grotius (1625). On this, the context, see Yntema, H.E., 1958, pp.495-496. It provided a basis for further development towards monarchical and democratic states with ideas of economic and social justice (*ibid.*, p.496).

<sup>269</sup> Bodin, 1945, pp.5-6. *The last [best] type consists of those trained not only by precepts and forensic practice but also in the finest arts and the most stable philosophy, who grasp the nature of justice, not changeable according to the wishes of men, but laid down by eternal law; who determine skillfully the standards of equality; who trace the origins of jurisprudence from ultimate principles; who pass on carefully the knowledge of all antiquity; who, of course, know the power and the domination of the emperor, the senate, the people, and the magistrates of the Romans, who bring into the interpretation of legislation the discussions of philosophers about laws and the state; who know well the Greek and Latin languages, in which the statutes are set forth (und. MK).* Who at length

hand, there is a negation of most of the classics as relevant material.<sup>270</sup>

Furthermore, a specific feature of Bodin's approach was that he repudiated the idea of deriving any "universal principles" from Roman law, mainly because of the functional nature of Roman law as it stood.<sup>271</sup> He neglected the authority of the scholarly interpretations by claiming that scholars commenting upon Roman laws

*"should have read Plato, who thought there was one way to establish law and govern a state: wise men should bring together and compare the legal framework of all states, or of the more famous states, and from them compile the best kind".*<sup>272</sup>

This idea was the basic objective of his comparative legal approach.<sup>273</sup>

Bodin's theory - based on his "comparative" approach - was that the course of events was determined by popular traits (the character of the people), and these in turn by climate. He added also some other determinants to the picture ("primitive traits").<sup>274</sup> On the other hand, his comparisons were "absolute" and functional in nature. All things compared had a

*circumscribe the entire division of learning within its limits, classify into types, divide into parts, point out with words, and illustrate with examples" (p.6).*

On others, *Ibid.*, pp.5-6, and p.8.

Bodin's material derived also from his discussion in the Paris bar (McRae, K.D., 1979, p. A 38).

<sup>270</sup> Reynolds, B., 1945, p.xxv.

<sup>271</sup> Bodin, J., 1945, p.2. He maintains also that *"At a time when all things suffered from the crudest barbarism, fifteen men appointed by Justinian to codify the laws so disturbed the sources of legislation that almost nothing pure is dragged forth from the filth and mud"* (*ibid.*, p.4). He recognized the instrumentality related to this historical codification: *"from this condition has originated that immense and diffuse abundance of degrees to eliminate discrepancies among the laws themselves and to put together in some way members torn from the entire body"* (*idem.*).

See also, McRae, K.D., 1979, p.A 6. Bodin proposed a kind of *ius gentium*, to base laws upon the common practice of all nations (*idem.*).

<sup>272</sup> Bodin, J., 1945, p.2, and also, p. 4. *"... but it cannot be doubted that had the elder Francis [Francis I?, 1500] lived longer he would have undertaken this additional task of correlation and would have completed it. It would not have been necessary to invite jurisconsults from Greece or to summon legislators from elsewhere"* (Bodin, J., 1945, p.7).

<sup>273</sup> *"To this objective I directed all my studies - and all my thoughts"* (Bodin, J., 1945, p.2).

<sup>274</sup> Bodin, J., 1945, pp.144-145. See also Reynolds (1945, pp.xiii-xiv), where she demonstrates how different peculiar factors (such as racial, planetaria, numbers etc.) were well suited to the "Platonism of the Renaissance". On Bodin's Platonic "great chain of being", McRae, K.D., 1979, p.A 22. However, in Republic Bodin distinguishes his approach from the Platonic one (*Republic*, 1955a, I, p.2).

The influence of climate was claimed to be a continuation from Hippocrates to 20th century theory, see for example, Reynolds, B., 1945, p.xii, referring to Busson, H., in Introduction to Pomponazzi's *Les causes des merveilles de la nature*, p.25, and Febvre, L.P.V., *A geographical introduction to history [Terre et l'évolution humaine]* (coll. with Lionel Bataillon, trans. E. G. Mountford and J. H. Paxton, Westport, Conn) 1974 p.108). Febvre has claimed that Montesquieu, Buckle, and Miss Sempie are only *"Bodin revised, corrected, and considerably enlarged, but it is never anything but Bodin"* (Reynolds, B., 1945, p.xii). In Montesquieu's *Spirit of Laws* many similarities can be found, though direct references are lacking.

See, Bodin, J., 1979, V.1. On Bodin's theory of climate, see McRae, K.D., 1979, p.A 21.

“function” in a “unity” despite their differences.

In the *Six Books on Commonwealth (Republic)* Bodin's starting point was the idea of *Methodus* -, i.e. the idea of the study of universal law or knowledge of human affairs.<sup>275</sup> However, *Republic* is a book more concerned with an ideal form of government (sovereignty) than an argument for a particular situation. The “comparative” legal material serves now as an established and a well-defined reference point in different stages of the development of the argument - appearing as listed examples, but also in more analytical form.<sup>276</sup> The comparative methodological observations no longer emerge to the extent they did in *Methodus*.<sup>277</sup> However, the “climate” theory is repeated in a compact form.<sup>278</sup>

*Republic* clearly defines the concept of sovereignty, and examines its limits and

<sup>275</sup> See also, McRae, K.D., 1979, p.A 24.

<sup>276</sup> McRae, K.D., 1979, p. A 39. “and I have supported this by divine and human laws and authorities, and most of all by reasons which compel assent” (*Republic*, the “Geneva edition”, the preface).

For example, extensive historical analysis was made of ideas of citizenship in Rome (Bodin, J., 1955b, I.6., pp.54-56), the Swiss type of divided sovereignty (I.7., p.75-79), Feudalism “and tributary princes” in different countries (I.9., pp.116-119, historical analysis, listing, for example, England, Scotland, Denmark), analyses of types of sovereignty (I.9., p.128 ff., in Germany, Italian states, England, Switzerland, Lithuania, Poland, Jerusalem, Hungary, Papal state - especially in its relationship to Emperor and King of France - and shortly also the Koranic and Muhammadan world, listing also Scotland, Ethiopia, Turkey, Persia, Muscovy, also in I.10.), types of states (II.1. and 2., especially pp.186-192, II.6-7, using Italian states, Swiss Cantons, German Empire, Spain, England, Denmark, Sweden, Rome, Athens, also in II.4-5), definitions of state bodies (III, some countries like Spain, England, Germany, Poland, extensive analysis of the Roman public law), the rise and fall of entities (IV.7., City of Muenster, Persia, Egypt, the Hebrews, Macedonians, Corinthians, Spartans, Athenians, Celts, election of a prince in Poland, Bohemia, Hungary, Denmark, Norway, Sweden, Italian states, Switzerland, etc.), avoidance of sedition (IV.7., Italian states, reformation in Sweden, Scotland, Denmark, England, Swiss Confederates, Empire of Germany), attitude towards the prohibition against discussion of religion (Kings of East and Africa, Spain and Muscovy, the Hebrews, some German towns, Turks, Goths), form of commonwealth in different conditions, in relation to dispositions (V.1., “Swiss, a people who came originally from Sweden” (!?), Hannibal-Italy, Arabs-Spain, Spaniards-Germany, etc. list of people and historical events), “Swiss Confederates wisely preserve their popular forms of Government... all their Kings are elective, and they expel them the moment they turn tyrant, as was done to the Kings of Sweden, Denmark, Norway, Poland, Bohemia, and Tartary” (V.1., lists of climate and condition analysis), military training (V.5, p.605, Venice, in general, and many other countries), neutrality and alliances (V.6., p.623, Italian and Swiss cities, Scots and England, papacy, etc), revenues (VI.1., Italian states, Swiss, Spain, Poland, England, Germany), types of commonwealths (V.4., various), succession of power (VI.5., p.728, especially England, Salic law), some criminal law questions, etc.. Furthermore, many cross-comparative “synthetic” examples are presented in the chapters mentioned above.

It has to be noted that references in different versions differ considerably.

<sup>277</sup> The first French version differs - to a certain extent - from the later Latin version, see McRae, K.D., 1979, p. A 30, analysis, *ibid.*, p.A 37. In the preface of the Latin version the list of “good” sources - in studying the art of government - are repeated, including also personal experience in public affairs (*ibid.*, p.A 73).

Also the “audience” seems to differ. McRae, K.D., (1979, p. A 31) which claims that Bodin - in the Latin version - “made a genuine attempt to accommodate the new [Latin] version to the foreigner's point of view”. It seems to be more contextual in the political sense, whereas the French version is “legal” in its relation to comparative aspects (*ibid.*, p.A 37). In addition to further reading (German examples), his experiences in visiting England and the Netherlands influenced arguments by providing detailed examples (*ibid.*, p.A 32). Furthermore, the emphasis upon universality and legal rules is less visible in the latter version, and the stress seems to be more in practice - contrasting the ideal and the factual (for example, Bodin, J., 1955b, 5.10., McRae, K.D., 1979, p. A 36). For some interesting comments on the English version used here, see *ibid.*, p.A 37.

<sup>278</sup> Bodin, J., 1955b, Book V.

functions in theory.<sup>279</sup> However, one can easily notice that it is - in its historical context - a regeneration of royal authority in France.<sup>280</sup> On the other hand, it is a product of the time (including examinations of paternal powers and slavery etc.)<sup>281</sup>

Later on, Bodin's writings turned towards philosophy and religion. However, his comparative method prevailed, even if in a different form.<sup>282</sup>

**Conclusions.** It has been claimed that Bodin's approach demonstrated some kind of a theory of continuity.<sup>283</sup> We may say that Bodin stressed the importance of discourse. This may be seen, for example, in the fact that the comparative approach ran through all his works. In the ultimate analysis, he considered that the failures of one type of discourse could be replaced by other discourses, and by the discourse between religions (i.e. between those particular elements, which were to destroy the ultimate sovereign).<sup>284</sup>

However, Bodin - in his comparative approach - took part of a discourse, which was extremely value-based. He did not discuss possible alternative interpretations of the rules of different systems according to different writers, but made a selection of the "relevant" or "trustworthy" writers as sources *a priori* according to their background and nature as legal historians. Furthermore, even if "sociological" observations were part of his comparative method

<sup>279</sup> Absoluteness (perpetualness), natural law limitations (like the rule of "promises-keeping", "everyone shall have his due", the requirement of a consent, property rights), *lex imperii* limitations (succession rules, "non-alienation of any public domain" -rule, ) see, McRae, K.D., 1979, pp.A 13-17. These rules are strongly related to the constitutional history of France. They appeared in *Republic* as strongly restricted principles (and in *Methodus* under a wider interpretation, *ibid.*, p.A 16).

These rules seem to be connected to some kind of idea of continuity. However, Bodin did not really have an idea of political constitution. Analogically, we may say that the *Lex Imperii* functioned as guaranteeing the modern political continuity or integrity. (see also, McRae, K.D., pp.A 18-19). In his analysis, McRae, K.D., has a sort of constitutional idea, which does not consider any continuity in the discursive sense, but as a legal logical problem - as did Bodin).

See also Bodin's ideas on continuity (Bodin, J., 1955b) IV.3. There he discusses the possibilities for avoiding the causes of changes in states, the maintenance of consistency, how in different states different laws function to preserve of the state, good reasons to changing old laws, gradualness in changing laws and reforming magistrates, etc. (also *ibid.*, IV.7., p.530).

<sup>280</sup> McRae, K.D., 1979, p. A 9.

<sup>281</sup> Bodin, J., 1955b, pp.32-46. *Republic* seems to rely on ideas such as means of transitions from family to civil society. There are also distinctions drawn between different types of associations such as town, cities, and commonwealths.

<sup>282</sup> Bodin, J., Colloquium of the Seven about Secrets of the Sublime [Colloquium Heptaplomeris de Rerum Sublimium Arcanis Abditis] (translation with introduction, annotations, and critical readings, by Kuntz, M., L., D., Princeton, 1975). This work inquired critically into the ideas of the Christian religion. The book is a discussion of seven persons from seven different religions. These aspects were already visible in his last versions of *Republic* (McRae, K.D., 1979, p.A 32).

On the dialogue form on many comparativists, see Schmitthoff, M., 1941, pp.102-103.

<sup>283</sup> Reynolds, B., 1945, p.xxvii. "... ruling in rectitude and integrity" (Bodin, J., 1979, *Republic*, 1. French ed, the preface I). "There is nothing more dangerous to the commonwealth than that its subjects should be divided into two fractions, with none to mediate between them" (Bodin, J., 1955b, V.2).

<sup>284</sup> For some analysis, see McRae, K.D., 1979, p.A24.

and approach, it was distinguished - in practice - from the main "legal" observations. It appeared mainly in theoretical and separate form as an indication of the methodological premises Bodin had. In some analyses, the climatical context was used in connection to analyses of legal institutions.<sup>285</sup>

Bodin was the one attempting to throw light upon to the concept of sovereignty which had, in his time, been so badly confused in the abstract and which had also been muddled within the practice of the medieval feudal system.<sup>286</sup> This may also be the reason why he refused to see the concept of sovereignty in any functional sense (the idea of a mixed state etc.), and why he maintained a strict concept of 'sovereign' and of the proposed monarchy.<sup>287</sup> On the other hand, his theoretical concept was morally neutral, accepting any type of sovereign as a sovereign.<sup>288</sup> The functional problems were the problems of rules (functional) rather than a matter of fundamental premises.<sup>289</sup>

Bodin was modern in the sense that he associated the supreme political authority with the state. This authority was realized by lawmaking. His interest was apart from the judicial and administrative functions as such.<sup>290</sup> On the other hand, it has been maintained that Bodin was directing his attention to the real world rather than simply to the theoretical realm. Its comparative approach must be seen part of Bodin's desire to apply his concepts to a "comparative" reality of a European legal world.<sup>291</sup>

**Bell and the "Common European Jurisprudence".** In the practice of the time, this idea was that foreign authorities could be referred to (especially the *communis opinio totius orbis*) when

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<sup>285</sup> Bodin, J., 1955b, V.1.

<sup>286</sup> Also, McRae, K.D., 1979, p. A13.

<sup>287</sup> Bodin, J., 1955b, VI.4.

<sup>288</sup> This latter aspect is reminiscent of the Kelsenian approach to the question. Ethical qualifications appear in the concept of state, however (McRae, K.D., 1979, p.A20).

<sup>289</sup> For Bodin's problems in understanding any functionality in legal orders of his time, see McRae, K.D., 1979, p.A 20. McRae's constitutional idea is evident also in his analysis of Bodin's work.

<sup>290</sup> McRae, K.D., 1979, p. A 14.

<sup>291</sup> McRae, K.D., 1979, p. A 20.

We may say that Bodin's ideas on sovereignty were in line with the development of modern constitutional traditions in many countries (contrary to some opinions, McRae, K.D., 1979, p.A 21).

It has been claimed that his ideas suit well also to the idea of European federalism. It has been claimed that *Republic* would provide many ideas for reformation of the national state (also in the form of European integration, McRae, K.D., 1979., p.A 66-67). However, some ideas in the *Republic* may be difficult to adjust to the notion of supra-(national)state legal orders: "*If, however, the orders of the prince are not contrary to the divine and natural law, he [magistrate] must execute them, even if they are contrary to the law of nations, for the law of nations can be modified by the civil laws of any particular state provided natural justice and equity to which the prince is bound is not infringed, but public and particular utility only is in question*" (1955, III.4. p.86). In this passage Bodin seems to construct a hierarchy between the law of nations and the law of the sovereign. Equity and natural law seem to justify deviation from the law of nations.

the statutes, customs, and judicial and doctrinal determinations were in accordance with each other in the European area. This was so even if the case was clear according to the applicable municipal law.<sup>292</sup> Comparative law was considered as a necessary ingredient in the practical and theoretical activities of jurists.<sup>293</sup> The main purpose was to find the "similarities". The differences were the "*varietas in unitate*".<sup>294</sup>

Many treatises and commentaries on municipal law included comparisons for various purposes, and were used mainly to illustrate and integrate municipal law within the framework of the common law of Europe. However, continental lawyers - with few exceptions - considered the "*orbis*" to be continental Europe, or regarded, for example, English law within a narrow perspective. This applied also to the practical jurisprudence, to the *Allegationes* and *Consilia* of lawyers.<sup>295</sup>

The "common law of Europe" has been defined as a juridical idea, according to which there was a concordance between the laws of states, especially among those emerging and developing between the 15th and 18th centuries. This accord related to the various feudal, canon, roman, commercial and international laws existing at that time. In this sense, it comprised a "Common European jurisprudence".<sup>296</sup>

Bell<sup>297</sup> was one of those who applied a comparative approach to the consideration of the Lex Mercantile and the principles of European private law. He himself called it the "common jurisprudence of Europe".<sup>298</sup>

<sup>292</sup> Gorla, G., 1982, 129. This was based on the practical and theoretical role those jurists (of each country), who were trying to show that municipal law was not based on arbitrary ideas (i.e. that it accorded with common experience and common reason, as represented in the *communis opinio totius orbis*). This is different from the idea that an idea be "in accordance with natural law" (idem.). There were no dominant authorities in England, however, (Schlesinger, R.B., 1995, p.480).

<sup>293</sup> Gorla, G., 1982, p.129.

<sup>294</sup> Gorla, G., 1982, p.130. It was typical to compare municipal law with the Roman "*ius commune*" of the author. Also Gutteridge, H.C., 1944, p.3 ff.

Regarding *Ius Commune* and its reception in Europe, see Wiegand, W., 1991, pp.230-231. On the unified Europe of 17th century, Schlesinger, R.B., 1995, p.278.

<sup>295</sup> Gorla, G., 1982, p.130.

<sup>296</sup> Gorla, G., 1982, p.133. See also, Gorla, G., Moccia, L., 1981, p.144, 163. Regarding its disappearance and the consequences of this, see *ibid.*, pp.153-154.

<sup>297</sup> Mr George Joseph Bell (1770-1843).

<sup>298</sup> Bell's writings are interesting, because they give some indication of the ideas prevailing during this period.

Bell explores the idea in his book that there is recorded evidence of the Universal Law Merchant, grounded upon principles of equity (Bell, G.J., 1870 [1810], p.xi).

His treatment of the subject is strongly Roman law based. However, he maintains that "*the object of this work ... [is] directed to an investigation into the differences ... between international law and conflicts of laws ... object mercantile usage ... to a common standard in different countries*" (*ibid.*, pp.4-5).

He starts from Lord Mansfield's definition of the mercantile law as "*a branch of public jurisprudence, not restricting for its character and authority on private institutions or local customs of any particular country, but on the principles and usages of trade, which common convenience, and a universal sense of justice had recognized as fit to regulate the dealing of merchants ... in all the commercial countries of the world*" (*ibid.*, p.3-4). "*the law*

Bells comparative considerations were fairly unanalytical. He did not go far in his works to investigate different legal systems, even though he mentioned practices - and especially the writers of other European states - as sources of his statements.<sup>299</sup> However, he regarded foreign sources as *"not to be quoted as precedents, or as authorities to be implicitly followed, but to be taken as guides towards the establishment of the pure principles of the general jurisprudence"*.<sup>300</sup>

Bells aim, in his research, was to highlight differences and similarities between systems, and to compile legal material for lawyers in England and Scotland.<sup>301</sup> On the other hand, he wanted also to separate, with regard to certain legal institutions, "modern" law from the law in the Roman system, and especially to distinguish certain concepts in Scottish and English law from Roman concepts.<sup>302</sup>

In speaking of the international character of maritime law, he establishes a doctrine concerning the adoption of foreign law<sup>303</sup>:

*"The continental collections and treatises on this subject, and the English books of reports, have been received as authority by our judges, where not unfitted for our adoption by any peculiar idea, which our practice does not recognize. Of these authorities it may not be entirely useless to make a slight enumeration."*<sup>304</sup>

He makes explicit the idea that the *"first authorities in order and weight are the*

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*merchant is universal. It is part of the law of nations, grounded upon the principles of natural equity, as regulating the transactions of men who reside in different countries, and carry on the intercourse of nations, independently of the local customs and municipal laws of particular states.. consist ... decisions of courts ... writing of lawyers in different countries ( "not making law, but handing it down")... recorded evidence of the application of the general principle ... guides towards the establishment of the pure principles of general jurisprudence"*.

The comparisons - in the book - are Roman law based (according to him, others had *"peculiar forms and narrower maxims"*). He uses Scottish law and English law, American (adoptions based), French, Dutch law, and that of different types of institutions (*"tribunaux de commerce"*). Russian cases are also quoted (Custom House Court of St. Petersburg, *ibid.*, p.238). The use was basically "illustrative". There is no extensive comparative analysis in the modern sense of the word. The analysis of Roman, English and Scottish law is "reproductive" (descriptive).

At the end of the book, there is a kind of an analysis of conflicts of law situations.

Bell also wrote *"Inquiries into the contract of sale of goods and merchandise judicial decisions and mercantile practice of modern nations"* (Edinburgh, 1844), which referred to foreign authorities, institutions, and treatises (Bynkershoeck, *Questiones juris privati*, Statutes of New York, Law of Holland, French Law, and English law).

<sup>299</sup> Bell, G.J., 1870, pp.x-xi. Interestingly, he speaks about *"integrity of our system of law"* ... *"still much caution is to be observed in the adopting of English judgements as authorities in Scotland"*.

<sup>300</sup> Bell, G.J., 1870, pp.x-xi.

<sup>301</sup> Bell, G.J., 1870, pp.xiii-xv.

<sup>302</sup> For example, in connection to concepts such as Mandate, Partnership and Insurance, and Paper money, see Bell, G.J., 1870, p.506.

<sup>303</sup> According to Gorla, G. (1982, p.127) Bell also applied these determinations to mercantile law jurisprudence and to the general jurisprudence of Europe, where in the case of the latter customs and statutes are not mentioned.

<sup>304</sup> Bell, G.J., 1870, p.547

ordinances or statutes and Customs of maritime States"<sup>305</sup>, then the "determinations of Maritime and mercantile Courts of Modern Europe", and finally the "works of foreign authors in maritime law which are relied on in our courts".<sup>306</sup> These sources apply, where lacunae or uncertainties exist (*omissus* or *dubious*) in local law<sup>307</sup>.

In treating the French Ordinance of Louis XIV, he analyses the reasons why this particular law ought to be considered as an authority. He referred to the

*"...patient and careful digest of all that was fixed in the usage and customs of maritime nations or expressed in the ancient codes... and by settling with a wise and comprehensive spirit of legislation, looking to the general jurisprudence of Europe, those ambiguous points of maritime law in which either the customs of nations were at variance, or on which no prevailing usage or certain rule was to be found"*<sup>308</sup>

During this period, modern comparative law gained gradually increasing role in the development of law. Comparative law became a form of legal learning. This kind of interest was related to the various laws becoming a subject matter of academic learning and writing. This began to occur in the middle ages in continental countries and in England just after nineteenth century.<sup>309</sup>

### 3.2.5. "Modern" comparative law

Montesquieu and the "Spirit of Laws". The 17th and 18th centuries were characterized by influences from the natural law school, methods of speculative rationalism, and a lack of empirical studies<sup>310</sup>. Comparative studies as such were exceptional, even if there were differences

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<sup>305</sup> Rhodian laws, *Il Consolato del Mare*, the Laws of Oleron and Visby, the Ordinances of the Hanseatic Towns, *Le Guidon de la Mer*, the Ordinance de law Marine of Louis XIV of 1681, the French Code de Commerce of 1807.

<sup>306</sup> Bell, G.J., 1870, p.547 ff.

<sup>307</sup> In the 16th and 18th century conceptualization, the *casus* was "*decisus*" (decided) where the statutes and customs left no room for interpretation (it was decided in point, *in puncto*). If this was not clear, the courts decisions (*decisiones*) were used. In the absence of the latter, the case was decided according to the "*consilia*" or "*allegationes*" of the lawyers. If the "*communis opinio*" was not found in this field within the law in Europe, the search was then for the majority opinion, the best opinion, or the opinion which best accorded with the local law. (Gorla, G., 1982, p.128).

<sup>308</sup> Bell, G.J., 1870, pp.547-549. Gorla G. notes (1982, pp.127-128) that the passage expresses the idea of what jurists of the 16th-18th centuries called *recursus ad legem alii loci*; the law of "this place" was considered to prevail in a certain matter. Foreign ideas were considered suitable for the particular conditions and exigencies of the local law.

<sup>309</sup> Rheinstein, M. 1968, p.204.

<sup>310</sup> Some examples of the promoters of comparative legal studies in different forms can be mentioned: Leibnitz (*Nova Methodus*), Selden (especially works on Hebrew and oriental law), Herman Conring, Arthur Duck, Grotius, Vico and Montesquieu, Heineccius, Hugo (Hamza, G., 1986, pp.57-66), and also Pütter (*ibid.*, pp.62-64), Schilter (*ibid.*, p.63), and Schott (*ibid.*, 64-65), Portalis, Toullier (Gordley, J., 1995, p.555). That natural law was the first real basis of comparison of laws, which seemed to challenge the ideas of comparisons in antiquity (*ibid.*, p.66). How historical

- for example - between continental and English law<sup>311</sup>. An increase in legislative activity was also characteristic of this period.

The early basis for the comparison of laws, in modern terms, was established by Montesquieu, the great enlightenmentian thinker. He is perhaps the most well-known user of comparative observations from this period. Indeed, Montesquieu defined the basics of modern comparative law<sup>312</sup>, and himself made extensive comparative observations. It has been claimed that with his idea of 'comparison of nations' Montesquieu (re?)established the modern ethno-cultural and national state paradigm of legal comparison.<sup>313</sup> It may be said that he used the concept of 'nation' as a basis in establishing a solid alternative to the prevailing religious and anti-empirical paradigm.

Montesquieu's concept of 'law' and 'nation' were associated forcefully with the "spirit of laws", which was related, on the one hand, to the "physical" conditions and circumstances of peoples in certain geographical area, or on the other, and to the laws systematic relationship and reciprocal influence upon each other.<sup>314</sup>

One may say that this idea generated a growing attention to different legal cultures.

Montesquieu's tests consisted of all relevant characteristics. At the centre was the climate, but features such as environment, geography, fertility of soil, size, geographical position, sociological and economic factors, cultural factors (family structure), national characteristics

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school opposed the comparisons (ibid., p.66). On some methodological discussion during that time, see Hug, P., 1932, pp.1046-1047.

In *De Jure Belli ac Pacis* Grotius makes a distinction between natural and human law. Natural law is based on the divine will, and it can be found by reason. International law (law of nations) and civil law belong to the latter category. They are based on human will (see, Vitányi, B., 1983, p.42 ff.). Although Grotius can be seen as a legal scientist who derived his natural law ideas from the human nature, he also saw the importance of studies of the "factuality of law" (Verheul, J.P., 1994, pp.143-144, also, Hamza, G., 1986, p.59 ff.) (custom). These observations supported his idea of law common to all nations, and the rationalistic natural law system (Hug, P., p.1049). Yet, the project of Grotius has been seen aiming to provide legal tools for Dutch commercial capitalists. Furthermore, international law - especially private law - was still unregulated by national states. It must be noticed that Grotius wrote also his *De Jure Belli ac Pacis* abroad - in exile.

Vico attempted to prove, on the other hand, the existence of a universal legal history, reflecting different legal developments in relation to general truth and metaphysical principles (Hug, P., 1932, p.1049).

<sup>311</sup> Hug, P., 1932, pp.1051-1052.

The development of case law - in the context of the influences deriving from Roman law sources - was typical also within Swedish law during this period (see Jagerskiöld, S., 1978, and Blomstedt, Y., 1986, pp.14-17, adoptions in Finland, see Blomstedt, Y., p.18 ff. About influences from different countries, see Björne, L., 1995, p.1, 235 ff.

<sup>312</sup> Montesquieu can be considered as the founder of modern comparative law, see for example, Gutteridge, H.C., 1949, p.12, David, R., Briery, J.E.C., 1978, p.4. However, it has been claimed that Montesquieu developed the concepts of Savigny (Winterton, G., 1975, p.90). Also, Kahn-Freund, O., 1974, p.9, Hug, P., 1932, p.1050.

Montesquieu's approach can be considered as the basis of sociological comparative law.

<sup>313</sup> Montesquieu, 1989, 1. 1. 3, and 3.19.27.

<sup>314</sup> Montesquieu, 1989, I.1.3. In the spirit of laws, political and civil laws are not separated. Political laws form the principle and nature of the government, and civil laws maintain it.

(temperament), religion, and political factors were also momentous.<sup>315</sup> These factors and laws had dynamic and reciprocal inter-relationships, and influenced each other.<sup>316</sup>

By using criminal laws as an example, he maintained that laws must be compared in a "holistic" way:

*"Thus, in order to judge, which of these laws is more in conformity with reason, they must not be compared one by one; They must be taken all together and compared together".<sup>317</sup> ... "What laws seem alike are sometimes really different".<sup>318</sup>*

Laws must be therefore examined in the light of their purpose and context.<sup>319</sup>

These observations expressed the systematic and the sociological dimensions of comparative law.

Montesquieu's personal history explains his interest in foreign legal systems. We may say that just as for Aristotle, Machiavelli, and Bodin<sup>320</sup>, his personal experiences abroad were extremely significant for him.<sup>321</sup> On the other hand, he used historical material, in an extensive way, and seemed to rely on various "anthropological" studies.

Furthermore, Montesquieu used comparative climatic and legal observations in mixed form, perhaps more than any other writer before him.

**Montesquieu's argument.** Montesquieu examined comparatively "constitutions", forms of governments, and different laws, and defended an idea of the best constitution against other

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<sup>315</sup> Montesquieu, 1989, 1.1.3 \ 3. 14. 1-2 \ 3. 18. 1-31 \ 5.24.1-. See also Cohler, A.M., 1989, p.xxv.

*"I do not say that the climate in large part produced the laws the mores and the manners of each nations, but I say that the mores and the manners of a nation should be closely related to its laws"*, Montesquieu, 1989, 3.19.27 (See some analysis, Graveson, 1958, p.649 ff.).

For Montesquieu's criteria, and economic and social factors, see the analysis of Kahn-Freund, O., 1974, p.7.

What he failed to take into account were the more modern ideas about "political and ideological missions", capacity to accept/resist economic and political influence, techniques of executing and formulating foreign policy, different types of institutions, different concepts of law and methods of legal discourse, the interactions between international and national law, etc. These elements refer to many ideas of positive (post-national) state law, and to the self-referential features of law (the law as its own determinant?). (See also, Butler, 1977, pp.115-116).

Even if Montesquieu does not make explicit reference to Bodin in his *Spirit of Law's*, it is clear that Bodin's climate theory has had an impact upon Montesquieu's approach. It would be interesting to study the relationship between these theories (see also, Reynolds, B., 1945).

<sup>316</sup> Montesquieu, 1989, 3.19.27.

<sup>317</sup> Montesquieu, 1989, 6.29.11.

<sup>318</sup> Montesquieu, 1989, 6.29.12.

<sup>319</sup> Montesquieu, 1989, 6.29.1-19.

<sup>320</sup> De Tocqueville, etc.

<sup>321</sup> On his personal history see Kahn-Freund, O., 1974, p.9, Cohler, A., M., 1989, p.xviii.

forms of governments; the objective established in the Greek tradition.<sup>322</sup> However, his preliminary ideas and the empirical analysis are not very clearly separated in his "final report".<sup>323</sup>

Montesquieu's agenda seems to be partly a defence of the legislative and executive against the judiciary. His concern was the invalidation of statutes by the interpretation of the judiciary.<sup>324</sup> These observations originated within the context of French political life, even if the arguments he used were historical and comparative observations of the differences and similarities in laws in different times. One may observe many fallacies in Montesquieu's theory concerning the role of the judiciary. Neither did his idea survive the realities of the revolutionary agenda nor was it reflected as such in the French legal system.<sup>325</sup>

However, Montesquieu's ideas concerning the separation of powers became an essential element of the revolutionary conception, and had an impact both upon the anti-federalist and federalist schools, including those in America.<sup>326</sup> His influence is also seen in the works of Hugo, Savigny, Eichhorn, and some other writers of the German historical school, and in the

<sup>322</sup> We may recognize an idea of social integrity in his works, see Cohler, A.M., 1989, p.xxvii. In despotic governments, people are *separated* from each other, whereas with a moderate government, people share something.

<sup>323</sup> On this "rococo" nature, see Cohler, A.M., 1989, p.xxi.

<sup>324</sup> Montesquieu, 1989, 2.11.6. Also, Capelletti, M., 1989, p.137. Cohler says (1989, p.xxv) that Montesquieu's idea was the same as Burke's and Blackstone's: The basic principle was attached to the structure of the government as such, not to some first [legal?] principles.

<sup>325</sup> Capelletti, M., 1989, p.137 ff., Merryman, J.H., 1996 111 ff. Certainly, and even if the jurisprudence was and has been glanced at by the courts, they never cite it. Contrary to these views, see Cummings, R., 1986, p.594 ff., and p.627 ff., relating the increase of the role of court mainly to the development since II World War, but emphasizing the importance of the discussion on the separation of powers.

Theoretically one could say that in Montesquieu's vision, the doctrine itself guarantees the separation of the different functions. The doctrine controls negatively the functions of the different branches of the state. The balance of powers doctrine in the American sense one may be seen more clearly as a "political" balancing in strongly institutional sense. It seems that the relative power and coherence of the institutions themselves are the guarantees of the functioning of the system.

Merryman's analysis of the "reality of French (and Soviet) revolution" in his article is interesting historically (especially the history of the evolution of the French court system). However, it is strongly ideological and based on impressions (as he maintains himself too). One may also recognize a peculiar idea of the right "*European course*" (i.e., he maintains that there was "*the attempt to turn Soviet law from its European course and build a socialist law on the principles stated by Marx and Engels...*" (ibid., p.118)). (Marxism - according to Merryman - is not European!).

We may say that changes are not born in a "vacuum", and neither do they cease to exist - even if the institutional forms may disappear. Merryman seems to have quite strong institutionalist analysis. Moreover, he emphasizes, and rightly so, that Montesquieu was interpreted wrongly in the following centuries. However, he sees this misinterpretation concerned mainly the doctrine of separation of powers (ibid., p.110 ff.). Personally, I think the misinterpretation was about the general political philosophy of Montesquieu and the enlightenment in general. I think his and enlightenment's main idea was a search of a sensible political and legal auditory, rather than to "*paint in dark colours*" the past (ibid., p.114). The idea was, evidently, based on an attempt to take clear distance from prevailing institutions deriving from past instead of reproducing them in a speculative manner (like it may have happened in Germany in the post-enlightenmentian period). In Merryman's analysis the discussion on the "filtering" and controlling mechanisms of general legal discourse is absent. The separation powers is seen too formally (in ibid., p.113).

<sup>326</sup>Cohler, A.M., 1989, pp. xxiv-xxv, xxvii. Capelletti, M., 1989, p.137 ff.

ideas of Hume, Ferguson and Smith.<sup>327</sup>

**Montesquieu's paradox and its explanation.** Montesquieu's argument seems to be paradoxical. For one thing, it seems to neglect any legal relativism between different national laws. He seemed to be also against any possibility of "transplantation" of legal rules from different societies, stating that if something like this was to be done, it had to be done with the utmost care.<sup>328</sup> At the same time, nevertheless, he put forth one of the most major intentional doctrinal adaptations within the history of legal thought based on an (historical and empirical) analysis of English "constitutional" life. He offered a clear "foreign" model.<sup>329</sup> His comparative approach establishes one of the most powerful doctrines within western legal thinking, the separation of powers, which is used as a model in many countries in the western world.<sup>330</sup>

Hence, it may be said that Montesquieu's basic ideas related to the institutionalization of political discourse. In order to do this, he laid down fundamental concepts governing the divergence between social systems. His idea seemed to be that only by having fundamental distinctions between nations, could one transfer the discourse from legal and principled discourses to political institutions, which were to be related in a certain way (separation of powers). Unclear definitions of the political community made justification and reasoning - by means of "necessary" (legal) distinctions - depend upon arbitrary universalist relationships and connections. Consequently, only a system, which is concentrated within three types of power-structures - and is based on this solid and quite "natural" national identity - can function well and is able to solve societal and political problems within this institutionalized discourse.

**The impact of the Montesquieuan comparative argument; "nation-law", legislation and "descriptive" comparative law.** We could claim that Montesquieu's ideas have had an impact upon the study of comparative law in two ways.<sup>331</sup>

Firstly, the role of the courts and material law was due to the "*bouche de le loi*" doctrine, minimized, even if they were (and are) essential elements of legal comparison. Secondly,

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<sup>327</sup> Rheinstein, M., 1968, p.206., Cohler, A.M., 1989, p.xxvi.

Also interesting was Montesquieu's "fictional comparative reasoning" in his Persian letters". The situation in Europe was compared - by two Persians in Europe - to Persian society (see, Montesquieu, Persian letters).

<sup>328</sup> Montesquieu, 1989, 3.19.1 ff.

<sup>329</sup> Montesquieu, 1989, 2.11.6, p.166.

<sup>330</sup> Cohler, A.M., 1989. One of the Montesquieu's paradoxes was that he understood the relativity of societal discourses (national ones). At the same time, however, he made incorporations from other systems, which - in theory - seem to contradict his own ideas.

<sup>331</sup> See also the analysis by Constantinesco, L-J-, 1971, p.78 ff.

the interest of comparative law became attached to the legislative<sup>332</sup>. The emphasis upon the importance of parliamentary laws in comparative law ensured that national legislation became the main idea of comparative law. These propositions were to prevail in the theory of comparative law for centuries.

On the other hand, modern comparative law - especially in its 19th century form - seemed to merge the legal and "natural" (non-relative) ingredients of Montesquieu's theory. At the same time his ideas on governance became "legal". The problem has been, in the reinterpretation of Montesquieu's approach in recent times, the overemphasis of the idea of a 'legal' nation and 'national law' within a modernist and holistic context. What has been considered as a notorious fact of law, sociology, and political philosophy. This has led, within the study of comparative law and in the use of comparative law in legal and political institutions to an unanalytical approach to the characteristics of the "nation-law" as a process. We may claim that it has also engendered the possibility of the holistic instrumentalization of law.

Consequently, the Montesquieuan heritage seemed to have given modern law a more "descriptive" direction. The repercussions of this approach have been, in the 19th and 20th centuries, the idea of the independence of comparative law as a legal discipline and the overemphasis upon the idea of the autonomy of comparative research<sup>333</sup>. In its ultimate form, we are faced with institutionalization of comparative law. The "scientification" of comparative law has reproduced - especially in its institutional form - one type of concept of legal system. We may say that this approach made comparative law turn away from the practical discursive sphere toward some kind of "cultural" approach, whereby other systems were seen, again, *a priori* to be in contrast.<sup>334</sup> Namely, it may be said that, in this paradigm, legal systems seem to have identities as socio-legal systems. This has resulted in practical self-maintenance of national legal systems in a process of similarity/disparity exploration, made without any normative aim in mind.

The Montesquieuan approach emerged also as a perfect model for the nationalist and ethnological comparative law of the 19th century. It had all the qualities of a persuasive socio-historical analysis. The claim regarding the autonomy of the nation suited many purposes perfectly.<sup>335</sup>

Nevertheless, the analysis in the *Spirit of Law's* was practical, as we have maintained. Many interpretations of Montesquieu's approach do him no justice. If his approach

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<sup>332</sup> Gorla G., has claimed for example (1981, p.147) that this was the reason for the disappearance of the European Common law, and that this was basically only English law where it remained.

<sup>333</sup> On the struggle for independence see Hug, P., 1932, p.1029.

<sup>334</sup> Some discussion on different periods in this respect, Schlesinger, R.B., 1995, p.477.

One of the contemporary misinterpretations of Montesquieu by Legrand, P. (1996, especially p.81) missing the discursive point of view.

<sup>335</sup> On ethnological approach, see Schmitthoff, M., 1941, p.102. It is based on ideas upon the "different evolutionary stages of mankind" and the primitiveness of societies.

is to be understood properly, one has to interpret it in its context. To interpret it solely as a transplant or as a categorical statement is to put too much emphasis upon political dimension and to comparative law methodologization.

Montesquieu's idea can be interpreted not as a transplanted model as such. His approach was to produce an extensive argumentation on behalf of a type of "new" government in some historical context.<sup>336</sup> His aim was practical, and not methodological in theoretical terms. We may say that Montesquieu took part of the socio-political discourse, and he recognized his audience - even if he sometimes tried to universalize his basic arguments. In the end, we may claim that the idea of the autonomy of socio-legal systems he proposed created possibilities for fruitful receptions, and he did not try to discourage this from happening.<sup>337</sup>

One may understand the nature of his approach also from the point of view of the comparative law discourse prevailing during this time. There was no systematic comparative discourse in place. There was thus no real comparative audience for Montesquieu. The audience was the political audience of a particular political system. Every use of comparative argument was instrumental in the sense that other legal systems represented a legitimate argument and even a legitimate model. This is why he did not see comparative law as a method, but as a practical argument.

Consequently, Montesquieu's idea was to argue for the universality of the doctrine of the separation of powers. To be able to do this comparatively, he had to maintain the existence of disparate systems. He started from the relativization of political systems as "natural" - socio-anthropological and fundamentally political nations<sup>338</sup>, and relativized in this way the legitimation on which the existing political systems were based. In this way he was able to use comparative argument. This should be remembered in the modern comparative law. By relativizing social systems in general, he made it possible to argue comparatively for a fundamental political change. Consequently, he saw systems as being "culturally" different but politically alike.<sup>339</sup>

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<sup>336</sup> See, Cohler, A.M., p. xxiii, Montesquieu, 1989, 6.30.1 ff.16.31.1 ff.. He clearly took part, in the final analysis, in fundamental discussions of that time.

<sup>337</sup> See, for example, Hug, P., 1932, p.1050.

<sup>338</sup> Montesquieu, 1989, I.1.3.

<sup>339</sup> Montesquieu maintains: "...some have thought that government by one alone is most in conformity with nature. But, the example of paternal power proves nothing... it is better to say that the government most in conformity with nature is the one whose particular arrangement is best related to the disposition of the people for whom it is established" (Montesquieu, 1989, I,1,3) (see, interpretation, Cohler, A.M., 1989, footnote q, p.8). (compare, Bodin, J., 1955b)

In his analysis of Bodin's *Republic*, McRae, K.D. (1979, p.A 22) makes the following remark:  
*"Bodin did not systematically relate the theory of climate to his theory of sovereignty and his classification of states, but its impact on this part of his thought may be clearly seen. The theory of climate served as a strong conservative force, depriving his political theory of its otherwise revolutionary implications. Bodin had a strong preference for the monarchical form of government, but he did not advocate its indiscriminate export. The best form absolutely is not necessarily the best form for particular situations, and some people were plainly unfitted for a constitution on the*

In this way Montesquieu dispensed with prevailing religious and historical methods of argumentation.<sup>340</sup> It was possible for him to neglect the natural and universal legitimation of the existing paradigm and to challenge it as being static vertical (ideal), horizontal (historical), and "natural" political construction of that time.<sup>341</sup> This way, we could claim, he attempted to maintain the discursive integrity of the prevailing particular political discourse; one in which people were no longer convinced of the merits of "descending power".<sup>342</sup>

**Conclusions.** Whereas Aristotle saw comparability as being based on the uniqueness of the Greek city states and their ethnological essence, Machiavelli on the power of the ruler, and Bodin, ultimately, relied on the idea of plurality of religions, Montesquieu established the basis for comparability, and possibility of reciprocal discourse upon the universalist model of government in relation to the sociological and political essence of a nation and its individual people<sup>343</sup>.

Montesquieu taught us an important lesson concerning comparative reasoning. In its "sociological" form, comparative reasoning makes it possible to maintain the internal political discourse of a particular social system, while simultaneously avoiding the problem of considering the specific political system under review as the only one which should prevail. Montesquieu aimed at a more open form of government by these two ways.

It has been claimed that the elements defined by Montesquieu have lost - to a certain extent - their relevance, and that political and structural factors have gained importance in the legal discourse<sup>344</sup>. However, within traditional comparative law research, these elements

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*French model. The whole tenor of the theory of climate was to justify existing forms of government, to promote broad tolerance for the world as it is, and to cast doubt upon the wisdom of deliberate political change.* [und. MK] (ibid., p.A23 relating Bodin to Burke).

<sup>340</sup> Comparative argumentation appears, in his work, as an alternative to this type of argumentation.

<sup>341</sup> Montesquieu, 1989, I.1.1., especially, p.4. He maintains that "god has called him [man] back to him by the laws of religion. Such a being could at any moment forget himself. Philosophers have reminded him of himself by the laws of morality. Made for living in society, he could forget his fellows; legislators have returned him to his duties by political and civil laws" (I.1.1.).

On the 'vertical' and 'horizontal' in this sense, see Zweigert, K., Kötz, H., 1977, p.8.

<sup>342</sup> We may say that this process started quite early, but was intellectually related to the reformation of the 16th century.

<sup>343</sup> Montesquieu, 1989, I.1.3.

One should make the following comment. The idea of 'nation' for Montesquieu seems to be an idealized concept. This means that the nation - and the differences between nations - seem to refer to differences in how persons in different area and social communities see their possibilities, probabilities - and how and in what form they want to increase these opportunities. The different concepts and criteria of Montesquieu for distinguishing nations may be seen as the basic concepts of reflection, by which certain groups of people regulate their opportunities.

<sup>344</sup> This may be related to the fact that the state paradigm has concentrated more upon the politization and legalization of the concept of nation than upon its empirical and discursive nature.

For the state paradigm of law, see Raz, J., 1971, p.811 ff. He is interpreting, however, Kelsen's legal theory quite narrowly and seems to miss its "liberative" aspects (ibid., p.813, and n. 36).

maintain their role as methodological premises.

### 3.2.6. 19th century comparative law

**Context.** The political context for 19th century European law was the growth of nationalism<sup>345</sup> and state corporativism. Simultaneously, the prevailing legal ideology of the 19th century was characterized by an increasing rationalism. National systems became more politically organized, and the accompanying ideas of democratization and the politization of law gave rise to an enthusiasm for the comparison of legislation.<sup>346</sup>

Nationalism related to the increasing internal political coherence - in its various forms - and, on the other hand, to economic competition between national states. As is well known, elements contrary to political unity came under close surveillance. On the other hand, national economic policies seemed to be *ad hoc* in the sense that international economic regulatory forms and customs were used so as to protect national economies from external disturbances. Benefits were granted to different nations depending on different circumstances. The instability and unpredictability of the international trade increased protectionist policies, with predictable results.<sup>347</sup> At the same time, constitutional and legislative autonomy increased.

**Law.** The 19th century was the period typified by tendencies towards unification and simplification in law.<sup>348</sup> Furthermore, during this epoch the positivization of natural law thinking also took place.<sup>349</sup>

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<sup>345</sup> For example, David, R., Brierly, J.E.C., 1978, pp.2-3.

<sup>346</sup> One of the greatest "comparativists" of this period was Alexis de Tocqueville. I am not going to deal thoroughly here with his "Democracy in America" (Trans. Reeve, H., rev. Bowen, F., Intr. Renshaw, P., Wordsworth, 1998). However, some remarks can be made (see also, Renshaw).

De Tocqueville dealt, in the beginning, with the prison system of the United States. However, perhaps for systematic reasons, he related this study to general observations on the American political, cultural and institutional context and his main work became "democracy in America". These two studies can be connected to each other in many ways.

Later he formulated his aim for an examination of the laws of democratic development. This can be directly related to the discourse in France on this issue. He studied the relationship between revolutions and democratization. He saw democratization as a preordained form of government.

Tocqueville conducted interviews and historical studies, and had keen sociological insight.

Generally, concerning the constitutional structuralization and expansion of commerce in Europe from the 16th century to the 18th century, see Gorla, G., Moccia, L., 1981, pp.145-146.

<sup>347</sup> See, for example, Mackinder, H.J., Democratic ideals and reality: a study in the politics of reconstruction (N.Y.) 1950 [1914].

<sup>348</sup> Gutteridge, 1949, p.145, Hug, P., 1932, p.1052. Zweigert, K, Kötz, H., 1977, pp.44-45.

<sup>349</sup> Capelletti, M., 1989, pp.122-123.

This may be related to the ideas of the universal historical school and the universal law movements (for example, Anselm von Feuerbach).

As mentioned above, several "national" codifications were drafted<sup>350</sup>. These codifications can be seen as reactions towards the overwhelming transplanted of Roman law. The autonomy of systems became emphasized from the beginning of 19th century onwards.<sup>351</sup> This led also to a focus upon the study of private law, and to analysis of the codifications of this time<sup>352</sup>, as well as to several "modelled" laws.

The nationalization of private law - via national codifications - led to a stress upon the importance of national states as legislators and law makers and - especially - the centrality of the emerging democratic legislature.<sup>353</sup> One may say that the role of state as a legislature was increased in general.

Furthermore, we may claim that this led to the concept of private international law in its contemporary form, where established internal rules comprise the basis of private international transactions. This was connected also to the importance of modern comparative law as a means of making sense of increasing international commercial activity.

Consequently, we may say that at the beginning of the 19th century the state had the monopoly of control over both the context in which international trade occurred. Furthermore, we could claim that the rise of the use of the statistical methodology led to increasing powers of the bureaucratic state.<sup>354</sup>

**Comparative law.**<sup>355</sup> 19th century comparative law began to apply these emerging system-concepts to different models of legal practice and to make distinctions, within law, philosophy and the natural sciences, between different systems. This was due especially to the emerging of organismic theories of law and nationhood, and the step from rationalism towards romanticism<sup>356</sup>.

Increasing interest in comparative law arose, in the second half of the century, in many countries in the western world<sup>357</sup>. An interest in European law also increased, in other

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<sup>350</sup> France, Germany, etc. See, Schlesinger, R.B., 1980, p.479.

<sup>351</sup> Lambert, E., 1978, p.41. One may also speak about the new coming of the "popular legislation", see Capelletti, M., 1989, p.118. See also, p.131, and Häberle, P., 1994, pp.22-23 (and Wieacker, F., 1967, *Privatrechtsgeschichte der Neuzeit*, 2 aufl., Göttingen, 1967, p.131).

<sup>352</sup> Hug, P., 1932, p.1053. For the French development in particular, see *ibid.*, p.1060.

<sup>353</sup> It has been argued that the codifications were related, in Germany, to German legal socialism, which criticized the abstract legal language used by the French Civil Code. This divorced, as it was argued, legal language from popular language and made it incomprehensible to the masses (Sacco, 1991, p.15).

<sup>354</sup> For this latter idea, see Foucault, M., 1990, p.25 ff, 136 ff, 143-145.

<sup>355</sup> For a thorough introduction to the history of comparative law, see Constantinesco, L.J., 1971.

<sup>356</sup> For a characterization of comparative law during this period in general, see Hug, P., 1932, pp.1069-1070.

One may claim that the distinction between mechanical and organic transplantations was a result of the development of the natural sciences. Before this, legal discourse was understood in a very practical way.

We may say that this the period was characterized by a move from the modern to the modernist.

<sup>357</sup> Hug, P., 1932, p.1053.

countries such as Japan.<sup>358</sup> Modern comparative law took shape, in European countries, once a systematic study of legal systems emerged. It has been claimed that 19th century comparative law had mainly role in the field of criminal, procedural, patent, and copyright law.<sup>359</sup>

19th century comparisons were dominated, especially in Germany, by the historical school<sup>360</sup>. This was based on the idea of universal legal history, with its accompanying ideas of different "stages" of law and on the idea of "*Volkgeist*" as a source of law.<sup>361</sup> The nationalistic and narrowly norm-oriented studies and techniques of law largely neglected the study of sociological and political factors - and more generally - functional, cultural, and humanistic aspects of law and legal systems.<sup>362</sup> Furthermore, the interest was basically on one's own law<sup>363</sup>.

The beginning of the 19th century was characterized also by an interest in comparing compare Roman and Germanic law.<sup>364</sup> One could claim that the focus of this exercise was aimed at the "equalization" of these systems. Furthermore, Roman law was the basis of inter-systematic comparison.<sup>365</sup> In Germany, comparison between the Roman and Germanic traditions resulted in some strong disputes and account was taken of the differentiated legal systems all around Europe, i.e. in France, England and as well in Scandinavia, where no extensive adaption of Roman law had occurred.<sup>366</sup>

In the United States, this period can be characterized as "formative". In this period, comparative law played an essential role<sup>367</sup>. This interest in comparative law was, in the early 20th century, also a matter of immigration to the United States.<sup>368</sup>

Even if the practising lawyer in England did not seem to be interested in continental

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<sup>358</sup> See, Igarashi, K., 1977, pp. 36-42.

<sup>359</sup> Kropholler, J., 1992, p.702.

<sup>360</sup> See, Hug, P., 1932, p.1053. It stressed the importance of Roman law studies. See also Constantinesco, J-L., 1971, p.93 ff.. In 1814 Savigny and Eichhorn had established the *Zeitschrift fur geschichtliche Rechtswissenschaft*.

<sup>361</sup> Zweigert, K., Siehr, K., 1971, p.219.

<sup>362</sup> Capelletti, M., 1990a, p.2.

<sup>363</sup> Schmitthoff, M., 1941, p.103 ff.

<sup>364</sup> Zitelmann, E., 1900, pp.329-332. For the development of similar ideas in England, see Schmitthoff, M., 1941, p.106.

<sup>365</sup> Hamza, G., 1991, p.81.

<sup>366</sup> Rheinstein, M., 1968, p.206.

It has been claimed that, at the beginning of the 20th century, comparative law, together with the "intressenjurisprudenz", assisted the study of private law to open up in a more "universal" direction after the 1900 codification Ranieri, F., 1980, pp.34-56. However, we have to remember that "universalization" took place in extremely strict state-paradigm of law.

On the comparative development of German administrative law (French influences during the Napoleonic era, Restauration, and the end of 19th century and Austrian influences) see Scheuer, U., 1963, p.714 ff.

<sup>367</sup> Pound, R., 1928, p. 183, 191 (see the analysis of this situation in Hug, P., 1932, p.1066). See also, Bognetti, G., 1980, p.5-30.

<sup>368</sup> Bognetti, G., 1980, p.5-30.

law<sup>369</sup>, comparative observations did, for example, function as illustrations<sup>370</sup>, and one may recognize the direct use of civil law conceptions and principles<sup>371</sup> in the work of some lawyers<sup>372</sup>. In England, the basic feature was its "practicality", which resulted in isolation but for reasons different than in continental Europe.<sup>373</sup>

The liberal constitutional movement had a strong impact on Italian constitutional thinking in the end of 18th century. In the beginning of 19th century the focus of constitutional law was in history and the comparison of modern political systems. Towards the end of the 19th and the beginning of 20th century, emerging social problems resulted in the need for the codification of public law.<sup>374</sup>

In Finland, the legal discourse followed foreign development, especially the codifications in the end of 19th century. Explicit comparative studies, in the form of articles, were published on the criminal law especially in the end of the 19th century (concerning Switzerland, Austria, Nordic countries). In the procedural law, the influence from Sweden was constant towards the end of 19th and the beginning of 20th centuries. The German law was followed in the field of private and commercial law, labour law, and in some social law issues in the end of 19th century.<sup>375</sup>

The beginning of 20th century was quite lively in Finland in the field of comparative law (or foreign law studies). However, it was mainly Scandinavian (especially Swedish) and German systems which were studied. Nevertheless, in the field of private and commercial law also some other systems - like French, Italian, Dutch, Belgian, Estonian, United States, and English systems - were considered.<sup>376</sup>

<sup>369</sup> However, on the obligatory use of comparative law in Judicial Committee of Privy Council (serving the British Empire) see Hug, P., 1932, p.1064.

<sup>370</sup> Bentham, J., 1972 (see also the analysis of Hug, P., 1932, p.1063).

<sup>371</sup> Austin, J., Lectures in Jurisprudence or the philosophy of positive law (1832).

<sup>372</sup> Some influential examples may be mentioned: Burke (Commentaries on Colonial and Foreign Laws, 1837), Levi (Commercial Law, its principles and administration, or the mercantile law of Great Britain compared with the codes and laws of commerce of the following Mercantile countries, 1950-1951). See, Hug, P., pp.1064-1065.

<sup>373</sup> Rheinstein, M., 1968, p.205. See also Capelletti, M., 1990a, p.3.

<sup>374</sup> Zagrebelsky, G., 1980, pp.85-112.

<sup>375</sup> In general, Finland maintained, during the 19th century, its Swedish traditions and developed legislation accordingly (see, Modeen, T., 1993, p.784 ff.).

<sup>376</sup> This list is not exhaustive.

From 1930's on, legal dissertations have usually included comparative part. References can be found (in order of quantity of references) to legal systems of Scandinavian countries, Germany, England, Scotland, France, Soviet Union, the United States, Switzerland, Baltic states, Italy, Hungary, Belgium, Austria, Portugal, Canada, New Zealand, and Turkey.

As during the end of 19th century, the comparative observations were strongly related to new codifications elsewhere.

Some discussion on the need of comparative law approach, see Lilius, F.O., On comparative legal science and the law of Finnish related nations [Vertailevasta oikeustieteestä ja suomensukuisten kansain oikeudesta]. In: Lakimies, 1903.

In Sweden the end of 19th century was characterized by influences from France and Germany in private law, and Germany in criminal law.<sup>377</sup>

**Independence and unification in comparative law.** 19th century comparative law had two basic features. Firstly, comparative law had gained a relatively independent status as a methodology and science<sup>378</sup>, and, secondly, the task of comparison was to construct - scientifically - common rules at the international level.<sup>379</sup> On the other hand, typical of this modern period was the increasing focus upon practicality of comparative law even if a separate tendency seemed to be also the study of "system of systems" in the realm of culturally and politically defined comparative law.<sup>380</sup> The focus of the latter idea seemed to be related to the "common origins" approach.

Textual interpretation was the basic method of scholarships. This may be associated with the strong status granted to legislation as a source of law. As maintained above, the law was legislation, and comparative law - consequently - the comparison of legislation. The great codifications in Europe, from the 17th century on, which had established the basis for the nationalization of law, and for practical national legal science, including comparative legal science.

The emphasis upon the idea of the independence of comparative law seemed to be even stronger than it had been at the beginning of the 19th century.<sup>381</sup> Its "autonomy" was possible because of the recent codifications, especially in the field of private law<sup>382</sup>. Furthermore,

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One peculiar incident was related also to the construction of the Finnish constitution in the beginning of the century. The United States and England had some conditions for the acceptance of the Finnish independence in 1918. The United States and England required that Finland should be a "liberal democracy" (not a Kingdom). We may say that these requirements had an impact to the form of the first constitution, and to the peculiarities of Finnish constitutional system compared to the rest of Europe (On this, see Paasivirta, J., *The winners of the I World War and Finland [Ensimmäisen maailmansodan voittajat ja Suomi]* (Porvoo) 1961, chapter V (especially, p.111, 138. On this, and the traditional and political background (internal elements) and development in general, Jyränki, J., 1989, pp.403-527 (p.485 ff.).

<sup>377</sup> Sundell, J-O., 1991, p.237, Hafström, G., 1965, p.195.

<sup>378</sup> One of the leading figures in this development was Anselm von Feuerbach. He was a strong "Kantian" rationalist, but emphasized the importance of empirical studies, and, for example, the idea that comparative studies must be guided by the philosophical method of jurisprudence (see, with direct references, Hug, P., 1932, p.1054, Constantinesco, J-L., 1971, p.97 ff.).

On the independence of comparative law, see Ancel, M., 1978, p.350, and de Gruz, P., 1993, p.1.

<sup>379</sup> For the factual development in this respect, see Schmitthoff, M., 1941, p.109.

<sup>380</sup> The distinctions in comparative law have been based on different ideologies of the legal systems (David, R., 1950). This seems to be the reason for the difference between the common law and continental law being considered more as comprising a difference in technique.

<sup>381</sup> Lambert, È, 1978, p.36.

<sup>382</sup> The "independence" of a discipline has to do with the specific interests involved, which direct the research (see, Rotondi, M., 1973).

comparative law became more "formalistic".<sup>383</sup> Its systematic features were stressed. The notion of its independence was to become related also to the reality, that comparative law was well able to define its object, functions and methods in the abstract.

This generated the specialization of the comparative lawyer.<sup>384</sup>

In the 19th century one could, for the first time, also make the distinction between historical comparative law, which studied systems which had since, disappeared, and the study of living where the prevailing systems. The general prevailing approach seemed to be interested in the practical and instrumental value of comparative law.<sup>385</sup>

Distinctions such as "ethnological"<sup>386</sup>, "historical", "systematic", and "dogmatic" approaches to law were also introduced.<sup>387</sup>

**The "academic institutionalization" of comparative law.** Unification was to be established through scientific studies of private law codes in certain political areas. This became the main focus, for example, at the International Congress of Comparative law in Paris 1900, and for the Annual meetings of the Institute of the International Law.

In Germany, *the Kritische Zeitschrift für Rechtswissenschaft und Gesetzgebung des Auslandes* was established in 1829 publication of which ceased in 1856.<sup>388</sup> In the *Collège de France*, a chair was established for comparative law in 1832. The University of Paris did the same in 1846. Furthermore, the *Revue étrangère de législation* was started in 1834, which continued publishing until 1850.<sup>389</sup> The *Société de législation comparé* was established 1839<sup>390</sup>. The highest point of enthusiasm for modern comparative law can be found in the establishment of the *Société de Législation Comparé* in 1869<sup>391</sup>. As maintained above, this development cul-

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<sup>383</sup> One could say that the lack of codifications in the Anglo-Saxon world generated a more practical idea of comparative law.

<sup>384</sup> See also, Schlesinger, R.B., 1995, pp.479-480 on specialization and institutionalization.

<sup>385</sup> Lambert, È, 1978, p.44.

<sup>386</sup> For example, Kohler, Sailles, R., Lambert, È. (See, Constantinesco, J-L. 1971, p.145 ff.).

<sup>387</sup> Rabel, E., 1978.

<sup>388</sup> On the role of publications, see Hug, P., 1932, pp.1056-1060, Valladão, H., 1961, p.110.

Of comparativists during this period, one can mention Thibaut, Gans, Mittermeier, Zachariae, Bernhöft (latter's über Zweck und Mittel der vergleichende Rechtswissenschaft, in: *Zeitschrift für vergleichende Rechtswissenschaft*, RW I. On Ihering's influence (Zweigert, K., Siehr, K., 1971, P, 215 ff.). These men were influenced strongly by Kant, Hegel and Feuerbach (Constantinesco, 1971, p.91).

<sup>389</sup> Its founder was the French jurist Foelix, who in many ways, laid the foundations of comparative law in France (Hug, P., 1932, p.1061-1062). The "revue" become later *Revue étrangère et Française de législation et d'économie politique* (1835-1850).

<sup>390</sup> Valladão, H., 1961, pp.110-111. One can mentioned comparativists such as Antoine de St. Joseph, Saleilles, Lambert.

<sup>391</sup> Rheinstein, M., 1968.

minated in the Paris conference of comparative law in 1900.<sup>392</sup>

In England, interest in foreign and comparative law continued, mainly because of the global connections of England. a chair of historical and comparative jurisprudence was established at Oxford (for Sir Henry Maine) in 1869.<sup>393</sup> The *Society of Comparative Legislation* was instituted in 1895.<sup>394</sup>

In the second half of the century, there was a renewed interest in comparative law in Germany, France and in the United States. In 1878, the *Zeitschrift für Vergleichende Rechtswissenschaft* was established. The Max Planck Institute was also established in Berlin.

Yale, Columbia and Harvard were the pioneers in academic comparative law in the United States since 1876.<sup>395</sup> In the United States, this the interest in Comparative law disappeared towards the end of the century<sup>396</sup>, but comparative law "came back" to a certain extent, after the second world war both in Europe and the USA.<sup>397</sup>

We may say that towards the end of the century, one passed from comparative legislation and jurisprudence to comparative law in the contemporary sense of the word<sup>398</sup>.

**Conclusions.** One may assert that comparative law already occupied a central place in the European legal discourse in the pre-nationalistic period.<sup>399</sup> The highpoint of modern comparative law was unequivocally, however, at the beginning of this century, when the legal identity of the nationalistic systems seemed to be strongest. Comparative law appeared to be combined with this

<sup>392</sup> Winterton, G., 1975, pp.92-93. The main promoters of the conference were Lambert and Saleilles. On its development in Italy, see Gorla, G., 1986, pp.66-86.

<sup>393</sup> And, at the beginning of the century, in Cambridge. Maine has been considered to represent the "evolutionist" and "organismic" comparative law approach by stressing the idea of "civilized nations" (Maine, H.S., 1861, p.76, see Morgan, J.H., 1954, p. v). On his ethnologism, see Schmitthoff, M., 1941, p.102.

Maine put emphasis on the idea of a "group" (family), not on the "individual". Furthermore, he stressed the idea of "will" as a distinction between the early and the ancient law. Through these ideas, he explains the place of custom, code and fiction in the development of early law, the affiliation of international law and *ius gentium*, the law of nature, and the origins of feudalism. He emphasized the moral philosophical questions and the theological doctrines.

His comparisons were derived from Hindu and Irish law. During his time Hindu law was becoming an important reference point. The fact that he was born and raised in India was a source of this interest. Nevertheless, he was applying "universalist" approaches, in the sense that he compared historically (see also, Morgan, J.H., 1954, p.xi).

Maine considered the "new" comparative law method in his lectures on *"The effects of observation of India on modern European Thought"* (the Rede lecture, London, 1875, p.30-31). See also Maine, H.S., 1954, and Sir F. Pollock, Introduction and notes to Sir Henry Maine's "Ancient law", London, 1906.

<sup>394</sup> Winterton, G., 1975, p.91.

<sup>395</sup> Also, Chicago and Tulane followed at the beginning of this century, see, Pound, R., 1930.

<sup>396</sup> Hug, P., 1932, p.1068. See, however, development after the 60's in practice, Bade, H.W., 1983, p.502, and on the development of transnational litigation law.

<sup>397</sup> Graveson, R.H., 1984, p.117.

<sup>398</sup> Valladao, H., 1961, p.111.

A history of comparative law, see Zweigert, K., Kötz, H., 1977, pp.48-51, Zajtay, I., 1981, p.596 ff.

<sup>399</sup> For comparable development in the United States.

"construction" of legal identity and its interpretation. The identity comprised also forms of "groupings"<sup>400</sup>.

What really happened in 19th century law? The coherence of law based on the Roman tradition was dissolved, and European law at least came to be influenced by positivist pluralism. The methodology of comparative law concentrated on the idea of the *tertium comparationis* itself. In the end, ultimate positivization seems to have caused the degradation of empirical research.<sup>401</sup>

### 3.2.7. 20th century and post-war comparative law

**Context.** As maintained above, one began in comparative law, from the beginning of the century onwards, to stress the economic and historical closeness of nation states, although sensitive points at the ideological and theoretical (philosophical) levels remained. This applied also to institutionalized comparative law.<sup>402</sup> This century comparative law, at least in the first half of the century, has considered its methodological issues mainly in the context of private law.<sup>403</sup>

The breakthrough in system relationships took place after the second world war. "Universalist" concepts were introduced to the European states and the inter-relationship of systems was build up on a supranational basis. All the same, legal discourse remained a matter for particular legal systems. National systems seemed to remain domestic in their focus and concern. It has been maintained that comparative law helped in getting rid of this national insularity, and served the practical purpose of assisting in the construction of, for example, new constitutions. This opening-up seemed, however, fairly temporary.<sup>404</sup>

The 'European' legal level was, during this era, designed as a system with a subsidiary character. Systemic relationships were established by semi-political considerations (i.e. ECHR), or the relationship was regulated by advisory systems (EEC). The universalist legal discourse remained, nevertheless, as a minor issue. On the other hand, the points of contact between legal systems were considered to be, necessarily, points in need of legal regulation, and

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<sup>400</sup> Lambert, for example, made a distinction between "*groupe latin*", "*groupe germanique*", "*groupe anglosaxon*", "*groupe musulman*", and "*groupe slav*". On different "static" groupings, see Bogdan, M., 1990, p.82. On the centrality of the comparison to anglosaxon law in France, Zajtay, I., 1981, p.597.

<sup>401</sup> Markesinis, B., 1990, p.20, Heldrich, A., 1970, p.441.

<sup>402</sup> For some analysis see Constantinesco, J-L., 1971, p.159 ff.. For an example, see David, R., Brierly, J.E.C., 1978, p.16, stressing the idea of the "*experience of all nations*". As Schmitthoff, M. (1941, p.103) maintains "*the parallelism of the reorganization of the international society and the revival of Comparative law found their visible expression in the constitution of the International Institute for the Unification of Private Law in Rome, which works under the direction of the legue of Nations*". However, on the reality of the comparative law function, see Gutteridge, H.C., 1944, p.6-7.

<sup>403</sup> Kropholler, J., 1992, p.702.

<sup>404</sup> Zagrebelsky, G., 1980, pp.89-116.

"voluntary" legal consideration of other systems' solutions seemed to remain as specific matter for isolated comparative law professionals.

We could assert that 20th century comparative law was a direct descendent of the culturally "nationalistic" approach, and that it even went beyond. Cultural differences between legal systems were seen to be increasingly self-evident. However, some innovations during this century render it different from the previous periods<sup>405</sup>.

Contemporary comparative law reflects the basic features of 20th century globalization, economic, social, and cultural assimilation, and political differentiation.<sup>406</sup> Furthermore, the concept of what comprises a 'legal system' has become central. It has also been claimed that increases in capitalist production and economic activity, which served to break down national boundaries, changed the "aims" of comparative law. Comparative law became a matter for lawyers dealing with these questions.<sup>407</sup>

**Transnationalization and coordination.** It has been contended that the interest in the peculiarities of each legal system, which had already emerged by the 19th century, had been replaced in the middle of this century by the interest in unified comparative law.<sup>408</sup>

On the other hand, after the second world war, the connection between comparative law and "transnational" doctrines was established. We may say that in the post-war period, there had been an increasing interest in transnationality in the realm of "universalized" legal principles.<sup>409</sup> "Transnationalism" was seen as the raw material from which "diffusions" or "distillations" were made to different legal systems as "general" law<sup>410</sup>. Transnational adjudication and legislation in the field of public law developed accordingly.

Consequently, one of the functions of comparative law in the 20th century has been the coordination function. This is especially the case in the regulation of private transactions

<sup>405</sup> 20th century comparative law, see Zweigert, K., Kötz, H., 1977, pp.52-56, Zajtay, I., 1981, p.598 ff.

<sup>406</sup> Kahn-Freund, O., 1974, p.8. The latter idea may be contested in contemporary global development. Some analysis, Capelletti, M., 1973, pp.74-75.

<sup>407</sup> Peteri, Z., 1974, p.46, Ancel, M., 1971. See also, Zweigert, K., Kötz, H., 1977, pp.52-56.

This is also due to the increasing importance of economic efficiency and integrated economic markets, which neglect the analytical approach, and which stress the relevance of the examination of the economic context of law and legal systems in comparative law.

<sup>408</sup> Gorla, G., 1982, p.130. On transnationalization, Schlesinger, R.B., 1995, p.479.

<sup>409</sup> Capelletti, M., 1989, p.119 ff.

Contemporary legal positivism has been claimed to be a synthesis, with higher supranational principles connected to ordinary legislation (Capelletti, pp.130-132).

After the second World War, we can start to speak of an emergence of new principles, and also about the positivization of principles. Consequently, courts started to apply different principles within different forms of judicial review (Capelletti, M., p.118).

<sup>410</sup> Mádl, F., 1978, pp.6-7, 35-40 (referring to Langen, E., Transnational commercial law (Leiden) 1973).

The idea of transnational private law was considered to be a central idea to the "socialist" comparative law, whereas the principle orientation may be seen more central to the western scholarship.

(private law) and economic activities, in the coordination of macroeconomic aspects, and in the clarifying of the idea of the separation of powers<sup>411</sup>. The first area has been instrumentalized by international legal practice.

Scientifically, on the other hand, comparative law has, in theory, oriented itself towards sociological comparison, adopting a qualitative approach.<sup>412</sup> However, attempts to resolve its internal philosophical problems still appear in the discussion<sup>413</sup>.

On the other hand, the internationalization and regionalisation of law has facilitated the use of comparative law also in the implementation of international and regional rules and its control.<sup>414</sup>

**Some post-war distinctions.** Post-war comparative law reflected, from the outset, the "cold war" distinctions. Generally, these distinctions had highly political flavour<sup>415</sup>. Distinctions such as socialist countries/western democracies and developed/developing legal systems were the basic distinctions in the comparative law of this period.<sup>416</sup>

The idea of families-of-law was the main connecting factor, and the history and individual system structures came under close scrutiny<sup>417</sup>. Nevertheless, in the context of this development, comparative law gained greater practical significance due to the globalization of world markets and the emerging liberal economy in the west. Comparative law started to be connected, instead, to different branches of law<sup>418</sup>.

It could be claimed that one of the major causes for the decline of the traditional comparative law approach and the confusion of the 90's was due to the fact that some self-evident and fundamental categories of comparative law, such as the socialist group<sup>419</sup>,

<sup>411</sup> "Koordinierungsaufgabe", see Buxbaum, R.M., 1996, p.213.

<sup>412</sup> Buxbaum, R.M., 1996, pp.222-223, Capelletti, M., 1973, p.68.

<sup>413</sup> Buxbaum, R.M., 1996, p.224.

<sup>414</sup> Buxbaum, R.M., 1996, pp.226-227.

<sup>415</sup> Kahn-Freund, O., has claimed that the "political factors gained importance in Montesquieu's strategy" (1974, p.9).

<sup>416</sup> See, Zweigert, K. Kötz, H., 1987, p.37, and Hazard, J.N., 1973, p.362.

On the development of the distinction between the socialist and non-socialist law, see Eörsi, G., 1973, pp.183-184. In United States, Hazard, J.N., 1973, pp.360-361. The "iron curtain" in the field private law, see Schlesinger, R.B., 1968, p.67. The role of the socialist/non-socialist distinction, Tunc, A., 1964, p.285, 294. Some analysis on the comparability, Sacco, 1991, pp.5-6, and on Marxist theory, Klami, H.T., 1981, p.134 ff.

<sup>417</sup> Lambert, É., 1978.

The idea was that structural differences (sources of law etc.) deepened the identity of these systems (idem.). For a contemporary discussion, see *Interpreting Statutes* (Dartmouth)1991.

<sup>418</sup> Ancel, M., 1978, p.357. See also Ajani, G., 1995.

<sup>419</sup> See Zweigert, K. Kötz, H. (1977, p.16) who maintained in a perceptive way that "As the threat of war recedes, the relations between capitalist and socialist countries will become much closer and their ideological differences will probably diminish". This shows, nonetheless, how greatly the distinction between them was political.

On the other hand, the argument seems to assume the existence of a universal system of law, from which the "socialist" system was merely a deviation. This idea seems to be related to a "non-empirical", logical, and

disappeared during the 90's. This revealed the categories' "political" nature. At the same time, after the second world war, the actors in European legal systems and European legal orders were directing their attention strongly towards the United States. Latter part of the 20th century European law has been clearly influenced by its relationship to United States.<sup>420</sup> The reasons for this may be numerous, but an example of the form of this has been transplantation of American models to the European legal thinking (and systems) in a value-based manner.<sup>421</sup> This development was related to the inter-penetration of different forms of language, but had also a jurisprudential and educational dimension.<sup>422</sup>

**Legal institutionalization.** Internationalization has also generated the need for an understanding of the global circumstances and international contexts of the application of law. This has caused the revival of traditional comparative law. However, whereas the 19th century tendency was towards unification, the 20th century strategy seems to be instead the harmonization of law.<sup>423</sup> In this sense, relativism has entered into comparative law thinking. This has also been described as the "realism" of comparative law<sup>424</sup>.

Comparative law established itself once again as a practical measure.<sup>425</sup> After the First World War, comparative law was "institutionalized" within various forms of international

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categorical idea of comparative law. It also assumes a development of legal systems toward a more sophisticated, harmonized, and unified system of law. However, in this system of law "*environment... social justice... These problems cannot be solved by any one state in isolation*" (ibid., p.16). Finally, however, the state seems to be the basic category for analysis "*... they call for full cooperation of all state and people*", idem.). Consequently, the idea of Zweigert and Kötz is "Bodanian"; i.e. the idea that the study of comparative law would guarantee a more universal concept of law (see also, ibid., p.17).

<sup>420</sup> The German constitutionalist influences in Europe (Koopmans, T., 1991, p.494) can also be seen as an indirect adoption of American constitutionalism in Europe.

<sup>421</sup> Pugliese, G., 1978, pp.100-101.

<sup>422</sup> Wiegand, W., 1991, pp.232-235. For some conceptual and "legal institutional" examples, see ibid., p.236 ff.

<sup>423</sup> Winterton, G., 1975, pp.76-77. For the harmonization and unification of comparative law see Schlesinger, 1980, p.33.

Mouly, Ch. (1985, p.896 ff.) has suggested three conceptions of European unification (integration). The first is the legislative one, which was the conception of the past century. The second is the practical and educational conception, and it is more based on sociological analysis. The third seems to be related to the (romantic?) revival of *ius commune*. The fourth seems to be based on integration driven by some type of rational and discursive community.

<sup>424</sup> Capelletti, M., 1973, pp.74-75.

It has been maintained that contemporary comparative law is, and should be, more realistic (ibid., p.72-73).

This realism has certain peculiar characteristics. Namely, for contemporary comparative law "closes" the systems with greater ease in order to be able to use them as legal arguments (for some discussion, see Ancel, M., 1973, p.5).

<sup>425</sup> De Groot, G-R., Schneider, A., 1994, p.53.

For the discussion, in France, on the need for comparative research in practice, see Flécheux, G., Israël, J-J, 1996, p.319 ff., 325 ff.

legal cooperation.<sup>426</sup> Comparative law, which was already ensconced in a scientific crisis, was adapted also to different legal institutions as a means of internal legitimation<sup>427</sup>. After the two world wars, global peace was to have been established by organizational cooperation between states, and this meant, to certain extent, and for a period of time, a step away from the legislative formalism and a move towards more substantive approach to comparative law.<sup>428</sup> This reflects the 20th century's so-called "state-centric universalism".

Recent changes within contemporary Europe have created an enormous enthusiasm for the trans-national transplantation of law. Many systematic and theoretical concerns have been supplanted by economic pragmatism, and eclecticism can therefore be seen. This applies not only to legislation, but also to adjudication and to legal training and education.<sup>429</sup> These types of transplants are ultimate examples of the pragmatism in contemporary comparative law<sup>430</sup>.

Taken together, the tendency within the postwar period has been to shift from the inter-state character of comparative law toward the more pragmatic comparative law of international organizations. International organizations identify their competencies and norms based on comparative observations. Comparative law is used in the formation, formulation, interpretation, and application of norms. The international, even global, audience has to be convinced on comparative basis.

Comparative law has become in many ways, also in the sphere of education, a matter for institutions. This has moved the discussion on comparative law toward the institutional functioning of law.

Consequently, one could claim that, from the scientific point of view, sociological aspects seemed to remain only as declarations of the emerging theories of comparative law. More sociologically oriented approaches to law took the place of scientific comparative law<sup>431</sup>.

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<sup>426</sup> Like *Société des Nations*, see Ancel, M., 1968, p.354. In Japan, see Igarashi, K., 1977.

<sup>427</sup> The "institutionalization" of comparative law may have been a result of the fact that comparative law was incapable of resolving the problems of legal cooperation prevalent at the beginning of the century.

<sup>428</sup> Ancel, M., 1968, p.355.

<sup>429</sup> Ajani, G., 1995, pp.107-112. This transplantation has been encouraged, for example, by the European Community association agreements, and by different western countries, such as the USA, in the form of international commercial agreements. This can be called legally regulated transplantation. The so-called "specialist" transplantation, drafting of "western types of constitutions", is also a contemporary phenomenon (see, Venice Commission Bulletin on Constitutional Case Law, edition 3 (Council of Europe) 1994).

<sup>430</sup> We may recognize two tendencies in contemporary "applied comparative law". First of all, there is a tendency toward extreme pragmatism in the use of comparative law. Secondly, this pragmatism is seen within the dynamic political changes in contemporary legal systems. Pragmatic comparative law is an instrument for the stabilization of dramatic political changes.

<sup>431</sup> Consequently, contemporary comparative law has been obliged to consider sociology only as a "supplementary" part of comparative law. It is part of comparative law doctrine, but it does not have a real and essential application in it. Instead of following its methodological conclusions, comparative law has been institutionalized. It has become a matter of expertise, and a matter of restricted juridical thinking rather than a complete and applied method of law.

In this sense, contemporary comparative law cannot be identified as an adequate legal science, but as

### 3.3. Some thoughts on the history of comparative law in general

**The history of comparative argument as a history of legal phenomenology.** It is unsurprising, that the works of all great comparativists were based on their own experiences in foreign countries.<sup>432</sup> We could call this the phenomenological dimension of comparative law. It could be said that comparative law is bound to the experiences of individuals and that it is strongly inspirational.<sup>433</sup>

On the other hand, these experiences were instrumentalized for practical purposes according to changing circumstances. All periods were characterized by revolutionary changes within legal and political life<sup>434</sup>.

This is one of the most interesting features of comparative law. Namely, one could predict that the systematic study of other legal systems would be the most fruitful starting point for a comparative legal studies. However, the need to write about these observations arises from the fact that there is something in this experience which does not accord as such with previous experiences, as is the case in all social discourses.

**The history of comparative argument as a history of political theory.** The history of comparative law may be roughly divided into different cultural and political periods. On the other hand, these different "periods" correspond to unifying and separatist tendencies within these societies<sup>435</sup>.

Comparative argument is often used in the context of political theory. It seems to be related to the justification of fundamental changes within the basic cultural system. It has to do with situations where internal arguments are somehow problematic from the point of view of

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a practical form of argument within a legal discourse, a technique of law (See Capelletti, M., 1973, p.63).

The lack of a social dimension within contemporary comparative law makes comparative law a phenomenological legal argument rather than a scientific one.

For the evolution of legal systems and the role of comparative law from the point of view of contemporary French legal discussion, see Agostini, E., 1988.

<sup>432</sup> On this, see Jamieson, M., 1996, p.1.

<sup>433</sup> It has been maintained that the "intuitive" model of comparative law cannot be called comparative law, Bogdan, M., 1990, p.27, Kamba, E.J., 1974.

<sup>434</sup> It seems that all the great comparativists worked in a context of disappearing social forms of life. It appeared as if they all were facing the decline of the traditional forms of legal order and social system. They saw comparative observations as essential for its conservation.

On this and the dialectical method, see Terrill, R.J., 1981, p.178.

<sup>435</sup> Hill, J., 1989, pp.109-111, referring for example to Schmitthoff, M., 1941, p.103, Bedwell, The Present value of Comparative Jurisprudence. In 29 Yale Law Journal, 1919, p.512-515, Gutteridge, H.C., The Value of Comparative law, 1931, JSPTL, p.26, and . As a concrete program, Hazard, J.N., 1951, p.273.

societal communication<sup>436</sup>. This seems to be the basic feature of all comparative political theories.

This may be seen in all approaches we have dealt with; those of Aristotle, Machiavelli, Bodin, and Montesquieu. By providing observations upon several systems and combining them in the concept of constitution, Aristotle managed to create convincing arguments for the establishment of the constitutional tradition. This was in accordance with his general philosophy on the "middle road". On the other hand, Machiavelli followed the Aristotelian tradition, but towards the opposite conclusion. He advised the ruler to maintain disparities in order to be able to retain power. However, in both approaches, one did not consider it important to stress any autonomous features of the system; the main interest was instead the effective and "good" way of using power. Any argument on substance would have decreased argument's persuasive power.

Bodin, on the other hand, following Aristotle put, to a large extent, emphasis on the idea of consensus. He stressed the importance of the balance between the contending powers of that time, both of which related to religious movements. In the beginning, he attempted to derive arguments from examination of laws, but in the end he understood the fundamental problems behind "legal disputes" and turned to the general legal themes of political philosophy<sup>437</sup>. Finally, he stressed the importance of dialogue between the religions and emphasized different moral ideals.

Whereas Bodin stressed, ultimately, the comparability of religions in a highly dynamic sense, Montesquieu saw the problem in the use of sovereign power in general. Unlike Bodin, he established (historically, and from the point of view of the normative sciences) a strong "natural" division between nations and their laws, and yet tried to maintain the dynamics of political discourse.

Modern comparative law has also changed according to political-social circumstances. Whereas early modern comparative law stressed the "similarity" of problems and solutions despite the differences in method<sup>438</sup>, post war comparative law was characterized, quite evidently, by solutions in different political contexts vis-à-vis Eastern and Western legal

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<sup>436</sup> As we have seen, comparative "law" is a way to challenge and reexamine the very basic premises of positive law. It functions in a process, whereby the basic presumptions of forms of government etc., are considered anew. On the other hand, it reproduces these forms and basic assumptions in another, and perhaps, more developed form. It is strongly connected, in its contemporary form, to the reexamination of institutional arrangements.

In its argumentative form, it challenges traditions of positive legal thinking. These features are balanced by legal theoretical devices.

One could claim, however, that comparative law and comparative observations, and their use as arguments in political philosophy, are often part of "realist" political theory, as opposed to political philosophical speculation.

<sup>437</sup> McRae, K.D., 1979.

<sup>438</sup> See Hill, J., 1989, p.107, Zweigert, K., 1966, p.17, David, R., Brierly, J.E.C., 1978.

systems.<sup>439</sup> The similarities and differences depended upon by different political factors.<sup>440</sup> Inside these different "comparative legal cultures", further distinctions were considered to be minor importance or as matters of "styles".<sup>441</sup> Perhaps the motive behind this was that further analysis would have required a detailed grasp of the application of individual rules and norms.<sup>442</sup>

**The history of comparative argument as a history of the *tertium comparationis*.** The history of comparative law can be also characterized by categorizations of the *tertium comparationis*. This gives an indication of different "periods" of comparative law.

Early comparative law was determined by the distinction between natives and barbarians. It also expressed the supremacy of a system as a traditional form of government. On the other hand (for Machiavelli, for example) all socio-legal systems were utilizable in the same way, and, accordingly, comparable. Nevertheless, in all these types of comparisons, the common factor was their "internal" systematic point of view with regard to the issue of *tertium comparationis*. This "Romanist" perspective remained strong for centuries.

For Bodin, systems were comparable based on the theory of climate, and for Montesquieu as national "legal, climatic, and socio-cultural systems". These types of ideas expanded thought concerning *tertium comparationis* towards more sociological and universally oriented (non-historical) forms of *tertium comparationis*.

Western "modern" law has, however, over the centuries, defined its *tertium comparationis* by reference to Roman law. The break in this tradition has produced several "alternative" ideas on comparative law, and has resulted distinctions, such as the distinctions between continental and common law, socialist and liberal systems etc.<sup>443</sup> At the moment the fundamental distinctions seem to be related to institutionalized constitutional traditions, and also to different conceptions of democracy. At the moment, the European legal systems seem to be comparable, within the institutional framework, as constitutional legal systems with their "own traditions".

Different ideas on comparability have also been determined by the different

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<sup>439</sup> An example of this may be seen in the critical evaluation of the Zweigert, K., Kötz, 1987 by Hill, J. (1989, p.108). He maintains that "*The Soviet legal system, for example, as a result of its ideological bases, faces the 'problem' of how to prevent citizens from acquiring unearned income through the purchase and resale of consumer goods at a profit*".

<sup>440</sup> Zweigert, K., Kötz, H., 1987, p.48.

<sup>441</sup> For example, Hill, J., 1989, p.108. For post-war ideas of culture, see Schweisfurth, T., Cultural and Ideological Pluralism and Contemporary Public International Law. In: Reports on German Public Law and Public International Law to XIIth International Congress of Comparative Law (Heidelberg) 1986 (169-182). There is no clear definition of culture and ideology in contemporary public international law. It seems to be a pre-legal fact (ibid., p.179) related to peaceful coexistence of nations (ibid.p.180).

<sup>442</sup> Zweigert, K., Kötz, H., 1987, p.36. Some criticism, Hill, J., 1989, p.109.

<sup>443</sup> The latter distinction has also been seen as a distinction between the planned economy and market economy, Bogdan, M., 1990, p.61. The function of this distinction, see ibid., p.64.

conceptions of dynamics and statics. These aspects have also been related ultimately to explanations of the acceptability of comparative observations.

Contemporary (modern) comparative law is problem-oriented in a quite peculiar sense. The *tertium comparationis* is the problem in itself. This is why we are dealing, in contemporary comparative law, with legal institutional solutions<sup>444</sup>. Modern comparative law is "functional" and "instrumental" in nature<sup>445</sup>. On the other hand, in contemporary "highmodern" comparative law, we may speak about distinctions such as professional, cultural and scientific comparative law.

**The history of comparative argument as a history of discursiveness.** Within the history of comparative law, one can identify a change away from practical discursiveness (natural law-oriented) toward the more positivist, system-oriented discourses.<sup>446</sup> In its ultimate sense, we may speak about institutional discursiveness.

This fact has caused many problems for the interpretation of the history of comparative law. One could claim that in the interpretation of the early classic and medieval writers, and even Montesquieu, one should stress the practical application rather than the systematic features of modern law. It was only during 19th century developments that autonomy of a legal system began to be recognized. This may have, on the other hand, generated contemporary ideas of critical comparison as a counter-reaction<sup>447</sup>.

**The history of comparative argument as a history of legal identity.** We may identify from this short description of the history of comparative law how legal systems and their rules have been used as arguments for some kind of "identity" of systems. This identity argumentation seems to be based on static presumptions concerning city states, civilization, "Legitimacy" (or "rightness") of power, religion, natural law, nation, ethnicity, and, in the end, on the relative stability of positive and formal legal systems, legal rule, and legal institutional arrangements.

These presumptions concerning identities of law have enabled the dynamic use of comparative observations as an argument in legal discourse. The aim has been, as we have maintained, to prove the existence of constitutions, the "goodness" of one system, different types of sovereign power(s), the existence of common norms, the superiority or uniqueness of a particular legal system, and, as in contemporary discourse, the relative autonomy and sovereignty of legal cultures, particular fields of law and, finally, the institutions and norms of supranational

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<sup>444</sup> Capelletti, M., 1990a, p.6, by referring to the impact of Merryman's thought on these ideas.

<sup>445</sup> Zweigert, K., 1972, p.465, and Pizzorusso, a., 1987, p.79.

<sup>446</sup> Capelletti, M., 1973, p.72.

<sup>447</sup> Capelletti, M., 1973, pp.71-72.

regional systems.<sup>448</sup>

On the other hand, it could be claimed that the increasing discussion concerning the methodological aspects of comparative law is related to the instability and unclear premises of law given the role of different "nonlegal" discourses to law in the 20th century<sup>449</sup>. The independence of comparative law was seen to guarantee the legitimacy of a situation, where legal systems clearly lacked a coherent idea of law. Methodological speculations were reflections of "modernist" ideals of law<sup>450</sup>. It could be argued that comparative law reflected a "crisis" within law, where an attempt was made to solve so-called "hard cases"<sup>451</sup>.

**Conclusions.** The role of comparative law, within the history of law could be analysed in tandem with ideas concerning the role of natural law in the development of law:

*"...it slings between the revolutionary and conservative function. While institutions are still stable and not too incongruous with existing demands, natural law tends to be found bolstering up the status quo. As the institutional status quo becomes increasingly incongruous with the changed economic, cultural and social conditions, this law may become a revolutionary instrument for challenging and demoralizing existing institutions"*<sup>452</sup>

However, comparative law has had an ultimately conservative function, and its revolutionary tendencies can be seen mainly in the substantial changes which have occurred in the interpretations of existing systems and institutions. In this sense, it can be called positivized natural law.

In modern comparative law, the conservative and revolutionary functions seem to coexist and to have some parallel functions. Comparative law may support the idea of the relative rationality of the systemic innovations under consideration, but many support also the up-holding

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<sup>448</sup> Even if we may claim that there are certain "phenomenological features" in each of the works mentioned above, there are many differences between them. It could be maintained that, from the point of view of contemporary ideas of law, Aristotle is a "dogmatic" comparativist, whereas Machiavelli, for example, seems to be more a "phenomenologist". Bodin can be placed more close to Aristotle. Montesquieu seems to be more a political sociologist and an empiricist.

<sup>449</sup> What we have faced during the last 30 years, and may be seeing increasingly in the near future - is the decline of the traditional political and democratic state and its deregulation, the decline of the political party system at national levels, increasing localization, European centralization, increasing corporativism, increasing governmental regulation, and the development of closed processes of rule-making and interpretation.

<sup>450</sup> Some seem to suggest that the modernist era has ended in the sense that there is a tendency to turn to a polycentric (international) law. One has failed in the modern (modernist?) reconstruction of institutional structures (Koskenniemi, M., 1997, pp.337-338).

<sup>451</sup> The history of comparative law is a history of legal identity; a history of legal systems.

<sup>452</sup> Stone, J., 1968, chapter 2. See also Weber, M., 1969, p.288, Graveson, R.H., 1958, p.652. Furthermore, Hill, J., 1989, p.103 referring to the Roman *ius gentium*, "applied to all nations". One could see a direct link between the *ius gentium*, *ius naturale* and general principles of all nations (*idem.*). On natural law and comparative law, see Klami, H.T., 1997.

(self-maintenance) of existing structures. Consequently, when at the beginning of the century states searched for their legal identities, now the state and supranational systems search for their procedural- and rule-identities. This process applies also to the segmented systems of law of post-industrial cultures.<sup>453</sup>

This is why the nature of comparative law has to be studied in the context of the discourse theory of law and theories concerning the sources of law.

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<sup>453</sup> Concerning "segmentation", see Weber, M., 1969, pp.301-303.

#### 4. The contemporary "institutionalized" comparative law

Many views on the best methods of comparative research and optimal usages of comparative observations had already been found within the tradition and history of the comparative law discourse. On the other hand, certain ideas concerning the regulative principles of comparative law may be found in contemporary discussions on comparative law theory.

Here the idea is to critically examine the types of structures of comparative law that have been identified in contemporary comparative law theory within modern institutionalized comparative law.

##### 4.1. Traditional definitions and concepts of comparative law; What is comparative law?

What is comparative law (*droit compare*)? It has been asked whether it is art (Levy-Ullmann), science (Lambert), or a method (Gutteridge)<sup>454</sup>. No general definition has been found<sup>455</sup> or at least such a definition is contested.

It has been suggested that comparison as a process of law consists in the selection of the *tertium comparationis*, the establishment of similarities and differences, essential traits, and the defining of concepts<sup>456</sup>, searching of development trends, and identification of the concrete forms of law.<sup>457</sup>

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<sup>454</sup> Ancel, M., 1962, 1962, p.32, Lambert, J., 1959, p.273, Gutteridge, H.C., 1944, p.1. For a thorough analysis of the comparative law method, see Constantinesco, L-J., 1972, p.23 ff.

Sacco, R., 1980, p.306, claims that "*comparative law is a science*". According to him, it leads to a better knowledge of law.

<sup>455</sup> Constantinesco, L-J., 1971, p.206. The three core questions of comparative law are: why one compares (function), what one compares (object), how one compares (method) (de Vergotti, G., 1993). On the nature of comparative law, Schmitthoff, M., 1941, and Kropholler, J., 1992, p.702.

Comparative studies can relate to socio-legal systems, the norms-structures of these systems, individual institutions or norms, or legal argumentation or to all of them. Comparative law is, in this sense, a historically and sociologically oriented legal study. Contrasting between sociological (Pound) and psychological (Del Vecchio (Feuerbach)) approaches to comparative law, see Schmitthoff, M., 1941, p.101 ff.

One has also made distinctions between applied comparative law, comparative legislation, comparative history of law, abstract and speculative comparative law, and comparative jurisprudence, and comparative *Nomoscopy* (description), *Nomogenics* (evolutions) *Nomothetics* (politics and merits) (three last by Wigmore in A Panorama of the World legal systems (1928) see, Baxter, L.G., 1983, p.88, for some analysis, see Constantinesco, 1971, p.245 ff.). On different distinctions, see Hug, P., 1932, p.1027-1028 (by referring to Wigmore, 1928, p.1115 and Lambert's definitions in The Encyclopedia of Social Sciences (1931), p.126) (commentary on Wigmore and Lambert, Schmitthoff, M., 1941, pp.94-95, and on applied comparative law, *ibid.*, 100, 102 ff).

<sup>456</sup> Kokkini-Iatridou, D., 1986.

However, contemporary comparative law is not only a list of similarities and differences (Markesinis, P., 1990, pp.19-20).

<sup>457</sup> Peterf, Z., 1974, p.53.

One could say that within the idea of comparative law, a double meaning is embedded referring both to the method and to the result<sup>458</sup>. In this sense, comparative law seems to be a dialectical distinction, which represent both "law" and a "norm"<sup>459</sup>, and the comparative process itself<sup>460</sup>.

In the normative sense, comparative law has been identified as positive international morality<sup>461</sup>. In this sense, it seems to be the empirical part of general jurisprudence. On the other hand, comparative law has been asserted to be jurisprudential expertise and learning of the dogmatic content<sup>462</sup>.

On the other hand, comparative law is alleged to "increase" the number of available "perspectives", "broaden" and "deepen" knowledge. This is the academic justification for

<sup>458</sup> Loussouarn, Y., 1981, p.128.

Because comparative law seems to be both a matter of general and particular features, it is not only an instrument of legal dynamism, but also dynamics itself. This is reflected in the two dimensions of comparative law: in the discourse on the methodology, and in the discourse on the practical results of law.

<sup>459</sup> Valladão, H. Argues that these do not have a positivist aspect as "law" (1961, p.108).

<sup>460</sup> Because law requires a certain degree of systematization, and because comparative law is dynamic and contingent in nature, it does not really seem to be part of systematized law. The idea of comparative law, as law, becomes a matter of an evolutionary process.

The attempt to "systematize" comparative law has led to enormous speculative studies on its method as a systematic one.

A more systematic approach to comparative law requires imagination and discipline (Zweigert, K., Kötz, H., 1987, p.33).

Szabó, I (1977, p.41 ff.) has defined comparative law as I. "Historical" comparative study (1. Subsequent legal systems of an identical type, 2. Legal types of different periods), and II. "Logical" comparative study (1. Laws of a social system of identical character a. Branch, family, group, b. Laws belonging to different groups of legal systems within a same type of society, 2. Legal systems of countries belonging to different social systems, a. Every legal system b. Groups of legal systems)

<sup>461</sup> Austin, J., Lectures of jurisprudence and the philosophy of positive law [1832].

In practice, the basic idea of comparative law is that by observing the practices of nations and their laws, one may acquire scientific evidence regarding the higher form of law, and a sense of more universal morality.

However, there are problems in this idea. It assumes that transcendental values are "produced" somehow by the comparative method (Hill, J., 1989, p.103).

It has been argued that comparative law could "*deepen the sense of unitary sense of justice*" (Zweigert, K., Kötz, H., 1987, I:3) by being a more universal legal science (see also, Hill, J., 1989, p.114). An extreme example of problems centered universalism, Godley, J., 1995, p.560 ff. One of the first in the 20th century in this respect, del Vecchio, G., *L'idée d'une science universelle du droit comparé*, 1909. For an analysis, see Lambert, J., 1959, p.273 ff.).

<sup>462</sup> Tur, R.H.R., 1977, p.238. Other type of approach, see Nelken, D., 1990, p.102. One of the aims of comparative legal study has to be the aim of considering its implications for legal theory or jurisprudence (See, Hill, J., 1987, p.113, criticizing Zweigert, K., Kötz, H., 1989). That comparative law is a method for the definition of law as such (Schmitthoff, M., 1941, p.100). On comparative law and learning, see also Frankenberg, G., 1985, pp.411-455. Substantive opus on this approach is Marquesinis, B., *Foreign Law and Comparative Methodology* (Oxford) 1997.

Nevertheless, it looks as if comparative law has stronger connections, in the traditional sense, to the positivist approach to law than to the jurisprudential one.

On the other hand, we can identify the use of comparative law everywhere in social discourses. It has been used by legal researchers, academic professionals, legal historians, jurisprudence and law teachers, sociologists, practitioners, philosophers, and political scientists, etc. (see, David, R., Brierly, J.E.C., 1978, p.6).

Comparative law is in many ways connected to philosophical considerations, Yntema, H.E., 1958, p.498.

comparative law.<sup>463</sup> It has been maintained also, on the contrary, that it can have a function of "scientific" manipulation, whereby it stresses certain characteristic and categories of the "law" in contemporary society.<sup>464</sup>

All the same, the general opinion seems to be that comparative law is an essential element of general jurisprudence.<sup>465</sup> Because general jurisprudence also explores concepts which do not necessarily belong to any particular legal system, it has similar aims as comparative law. In this sense, both are aiming at establishing a conceptual framework.<sup>466</sup>

There has also been some analysis of the different phases of comparative study. It has been maintained that in the descriptive phase one undertakes the description of institutions, the investigation of socioeconomic problems and their institutional solutions<sup>467</sup>. Secondly, in the identification phase, one identifies similarities and differences and in the explanatory phase, one explains these results.<sup>468</sup>

Furthermore, a distinction has been made between the explanation of the structure of law in force, functions of the law in force, and the structure of the law in real life (legal reality).<sup>469</sup> These results can be applied to a concrete problem<sup>470</sup>.

The distinction has also been proposed between descriptive and applied comparative law.<sup>471</sup>

<sup>463</sup> Tur, R.H.S., 1977, p.238 ff. Zweigert, K., Kötz, H., 1987, p.12. For some criticism of this idea, see Klami, H.T., 1981, p.85. Klami asks, what kind of interest of knowledge.

<sup>464</sup> Tur, R.H.S., 1977, p.238 ff.

<sup>465</sup> See, David, R., Briery, J.E.C., 1978, p.5.

<sup>466</sup> Tur, R.H.S., 1977, p.240.

It has been claimed that, in its traditional positivist form, comparative law is a comparison of two or more legal systems in the of the conceptualization of general jurisprudence (Kokkini-Iatridou, D, Netherlands Comparative Law Association, Seminar report, Introduction to comparative research (Inleiding tot het rechtsverlikende onderzoek, Deventer, 1988)).

<sup>467</sup> This "understanding" must take place in the social, political, moral, historical, religious, scientific, and ideological environments (Constantinesco, L-J., 1972, p.232).

<sup>468</sup> Kamba, E.J., 1974, p.517.

In its most simple form, it is a study of the differences and similarities of systems and their solutions (de Boer, Th.M., 1994, pp.22-23). This is a "true" comparative argument, and in this form it can be used as an argument in different types of legal decision-making processes. In a more complicated form, it explains similarities in relation to the functional contexts. (Ibid., p.24). On the problems of the "critical assessment" of the results in comparative law related to historical traditions, social conditioning, and political motives, see Kropholler, J., 1992, p.706.

<sup>469</sup> Kokkini-Iatridou, D., 1986, p.179, Losano, M.G., 1978, p.247.

<sup>470</sup> Mössner, J.M., 1974, pp.220-224.

<sup>471</sup> Gutteridge, H.C., 1949, p.7. Schlesinger, R.B., (1980, pp.2-18) identifies Foreign application as a modeling, contrasting, and a gaining of perspective. Applied comparative law may be contrasted with the "pure comparison of laws" ("*Reine Rechtsvergleichung*") (ibid., p.41).

"Applied" comparative law has been described as a "better solution" comparative law (Hill, J., 1989). This approach stresses the normative evaluation of the "external" legal systems and their norms. It upholds the technical nature of comparative law.



Modern comparative law seems to lack an element, which it, nevertheless, recognizes as one of its basic ideas: the empirical analysis of the "natural" and sociological connections of law.<sup>472</sup> These elements would make it distinctive from other legal methodologies. The lack of these aspects in modern comparative law may be connected to the fact that a high degree of unification is really not the main aim of modern comparative law.

There has been some discussion concerning the relationship of comparative law to the philosophy of law, linguistic philosophy and the philosophy of religion<sup>473</sup>.

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<sup>472</sup> Conditions "de la vie naturelle", include the economic, moral, religious, and the political constitutions of states (Lambert, È., 1978, p.46).

<sup>473</sup> Rabel, E., 1978, p.87. See also, von Ihering, R., *Geistes des römischen rechts auf den verschieden Stufen seiner Entwicklung* (1852-1865) p.265.

Religion has been viewed also as explaining the definition of *iurisprudentia* ("*iurisprudentia est divinarum atque humanarum rerum notitia, iusti atque iniusti scientia*", Ulpian, see Triebs, F., 1905, p.3). Some (critical) remarks have been made also on comparative philology and comparative mythology in connection to comparative studies (Maine, H.S., 1875, p.6, study of comparative mythology related to emerging studies of the Sanskritian language).

Comparative religion seem to have much relevance, when one departs from the Western tradition (see, for example, Hill, E., 1978, pp.282-283). Some use of religion as source of law, in the absence of provisions, has been made, for example, in the Egyptian Civil Code, 1948 (*idem*).

A good example of this kind of relativization can be found in Weber, *Die protestantische Ethik und der geist des Kapitalismus* (Finnish trans. Kytäjä, T., Porvoo, 1980). For some analysis of the connexion between religion and law in Middle East law, see Habachy, S., *Middle East Law, the Link Between law and Religion*. In: *Rapports Généraux au VIIe Congrès international de droit comparé* (Uppsala) 1966, with examples of "internal" differences and most striking examples taken from matrimonial law.

Otto Brusiin has, in the context of matrimonial divorce, made a distinction between three basic (ideological) attitudes: the catholic-protestant, secular, and Marxist attitude (See, Brusiin, O., *Zum Ehescheidungsprobleme* (Hyvinkää 1959) p. 17 ff. A thorough analysis of Brusiin's theory by Aarnio, A. (*Die "Welt des Rechts" in der rechtstheoretischen perspective von Otto Brusiin*. In: *Rechtstheorie* 28, 1997, pp.405-419)). Brusiin's idea has been interpreted by Aarnio in a following way.

Law is a power structure, but also a "communicative" order. Law is part of sociality ("*Gesellschaftlichkeit*"). However, it is not an absolute value system, but a social phenomenon related to value- and aim complexes. In this sense, it has its societal "traditionality" (Aarnio, A., 1997, p.407). Consequently, the main importance (method) in legal comparison, for Brusiin, seems to be related to these value- and aim complexes (*ibid.*, p.410). The main concepts of comparative study are, in this sense, the concepts of attitude ("*verhalten*", social), legal norm ("*Rechtsnorm*", juristic), and basic ideological attitudes ("*ideologische Grundeinstellung*") (*ibid.*, pp.412-413). The concept relates - in the case of divorce, for example - to the distinctions mentioned above, which, on the other hand, seem to have their relation to religion too (*ibid.*, pp.414-415). Basically, these distinctions relate to the attitude towards the continuity of a matrimony (*ibid.*, p.416). According to Brusiin, this type of conception of comparative law does not endanger the matrimony as a social institution (*ibid.*, p.415).

In this (religion) context, the problem of comparative law seems to be related to the question of whether we can go "beyond" law in the context of comparative law. We enter into a "non-systematic" sphere of law. This can be linked with the question of the nature of the "*Rechtsstaat*".

One could affirm, philosophically, that a possible "reason" does not determine the nature of comparative law, but instead it is the legal discourse covering it, which does. The question about the nature of comparative law is not associated with its relativization with religious and linguistic philosophy, but rather with its nature in the legal discourse. The former places too much stress upon the "autonomy" of comparative law from the overall legal discourses.

#### 4.2. The aims of comparative law

It has been claimed<sup>474</sup> that the primary aim of comparative law is the (re)production of knowledge<sup>475</sup>. The goals of modern comparative law have also been seen in the increasing the scientific level of legal studies<sup>476</sup> and understanding of national law, in the perfection of legal language<sup>477</sup>, in the promotion of international understanding of law, in the unification and harmonization of legal systems<sup>478</sup>, and in reaching a dynamic understanding of legal systems.<sup>479</sup>

Furthermore, one of the aims of practical comparative law seems to relate to the establishing of minimum standards. This applies especially to the use of comparative law in international institutions and practices. At the national level, the minimum standard approach has not been regarded as particularly important.<sup>480</sup> When principles and comparative observations are combined, the question may also be about establishing of the highest standard<sup>481</sup>.

Unification and harmonization, two of the most important aims of comparative legal research, have been divided into common core research and the study of general principles.<sup>482</sup> Common core research has a larger sphere of application than the establishment of general principles. The latter idea seems to be more connected to the study or "creation" of legal sources.

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<sup>474</sup> In general, Winterton, G., 1975, pp.97-99, also Fix-Zamudio, H., 1990, p.29. For an analysis in general, Constantinesco, 1972, p.331 ff., Zweigert, K., Kötz, H., 1977, pp.1-3.

<sup>475</sup> Gutteridge, H.C., 1949, p.7

<sup>476</sup> The idea that comparative legal science could reach an authentic scientific level is connected to the view that legal sciences cannot stay solely as national (David, R., Brierly, J.E.C., 1978, p. 93).

<sup>477</sup> This means an establishment of an "international" legal language (Fix-Zamundo, H., 1990, p.29).

<sup>478</sup> See, for example, Wilmar, de, J.M., 1991, p.37, Kropholler, J., 1992, p.704. Unification, see Schmitthoff, M., 1941, p.108 ff. Unification has been seen a fact (Lévy-Ullman) method (Saleilles) doubt (Lambert) as a dream depending on the political aspect of the situation (Gutteridge) (idem.).

<sup>479</sup> David, R., Brierly, J.E.C., 1978, pp.6-10, stressing the unificatory aspect. See also, Fix-Zamundo, H., 1990, p.28-31 (referring to Merryman, J.H.).

This process of understanding has to do with enabling one to see what is essential for the purposes of law and what was an accidental product of history and tradition (Kahn-Freund, O., p.328). See also Tunc, A., 1978, p.285. Graveson, R., 1984, p.109. This is linked with the promotion of the international understanding of law. It causes changes in perspectives. This way one may gain a peaceful and harmonious coexistence within the legal sciences (David, R., Brierly, J.E.C., 1978, p.9, David, R., 1950, pp.78-111).

The philosophy of this understanding in comparative law can be explained, to a certain extent, as contrasting one's "own system" (which is needed) with other systems (which are not needed). One allows systems to stay as material possibilities, as possible legal worlds, which could be realized in some time and place. For some analysis for this point, see below.

It has been argued that the contemporary relevance of comparative law is in the creation of understanding regarding the old and the new "law" (de Gruz, P., 1994, p.343). Nevertheless, it can be maintained that the former functions of comparative law are still relevant.

<sup>480</sup> See, Serisk, R., 1973. However, see Doetring, K., 1987, p.56.

<sup>481</sup> See Doetring, K., 1987, p.56.

<sup>482</sup> Winterton, G., 1975, p.104 (see Schlesinger, R.B., 1968). For a commentary on the latter, Davis, F., 1969, - p.617. Also Schlesinger, R.B., 1980, p.36.

### 4.3. The comparative law method

**The study of the comparative legal method.** It has been affirmed that the essence of investigation by the comparative method is to arrange and order the process of comparison.<sup>483</sup> Some basic approaches to this review of the comparative legal method may thus be mentioned.

The functionalist approach stresses the idea that law and legal systems are part of a general system containing other relevant systems of norms too<sup>484</sup>. This is why socioeconomic arguments must be taken into account in certain situations. This is in contrast to the analytical approach, which studies separate elements and isolates parts from the whole.<sup>485</sup>

Furthermore, some have used distinctions such as bilateral and multilateral, substantive and formal, as well as micro (institutions) and macro (systems) comparison.<sup>486</sup> The functional approach is often related to the "micro" comparison, where the idea is not to compare systems based on their belonging to different larger groups of legal systems, based on certain criteria, but rather to compare the legal norms of certain systems concerning particular problems<sup>487</sup>.

When the study is about the sources of law etc., we may speak about formal comparative law. This can be contrasted with an examination of some specific legal institutions and problems. This can be called dogmatic comparative law.<sup>488</sup> The distinction between internal, regional, and universal comparative law refers to the geographical frame of a study.<sup>489</sup>

It is obvious that comparative legal studies are normative in relation to the

<sup>483</sup> Kokkini-Iatridou, D., 1986, p.155.

<sup>484</sup> One may contend that the functionalization of comparative law does not necessarily mean its functionalization in comparative reasoning. In other words, even if the use of comparative law has gravitated towards legal institutions, the reasoning in these institutions does not, necessarily, appear any longer to be directed towards the functional analysis of legal ideas, concepts, and rules, (i.e. to be analytical etc). Quite the contrary, in fact.

One could assert that the unifying tendencies in modern legal thinking ("form of life in a post-industrial societies") abolishes the need to any functional analysis. It also looks as if the more historical approach stresses more the analytical approach, the examination of differences and similarities. This is due to stress laid upon the importance of conceptualizations as a historical phenomenon. In institutional and functional comparative law, the main emphasis is social unity (as a basic assumption).

It has to be remembered, nevertheless, that even if we speak of functional comparative law, the relevant restrictions are still backed up by certain principles or normative criteria. In fact, one cannot see a great difference between the functional approach and the historical one.

<sup>485</sup> Kokkini- Iatridou, D., 1986, p.177.

<sup>486</sup> Constantinesco, L-J., 1971, p.258 ff., Bogdan, M., 1990, p.57, Rheinstein, M., 1974, p.31, Kropholler, J., 1992, p.702.

<sup>487</sup> Sanders, 1990, p.64.

<sup>488</sup> Kropholler, J., 1992, p.702. This distinction does not seem to be very clear.

<sup>489</sup> Kropholler, J., 1992, p.703. "Internal" or "intrastate" comparison is a comparison in one state or federation. "Regional" comparison is related to a harmonization or unification framework in one region. "Universal" comparative law is a comparative study of all legal systems. (Idem.).

restrictions of the study and the choices made. These choices are regulated by the internal methodological principles of comparative law. This is due to the free nature of comparative studies<sup>490</sup>. As a result, comparative law is a problem-centred method, and, on the other hand, concentrates frequently upon its "internal" principles as the main issue<sup>491</sup>.

Comparative law is, *a priori*, open to many possibilities, though it seems to be, in its applied form, a very strict discipline.

**Some rules of the comparative legal method.** There are several proposals for the methodological basis of comparison in law.<sup>492</sup>

One of the major criteria for comparison is the precision of the subject. Analysis should include the sources<sup>493</sup>, styles and techniques of many legal systems, and their institutional and factual elements, including procedural and evidential law.<sup>494</sup>

On the other hand, some have emphasized the actual results connected to factual situations rather than statutory or judicial language. One of these approaches to comparative studies stresses the importance of "authentic" comparison. In this approach, one may reveal more freely the motivational basis and the sources of arguments. This is not necessarily the case in traditional rule/case studies.<sup>495</sup> The "authentic" approach seems to recommend the use of group-

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<sup>490</sup> Jescheck, H-H., 1974, p.765. The central idea in legal comparison is the choice of elements and parts (Mössner, J.M., 1974, p.197).

<sup>491</sup> However, all restrictions in the sphere of comparative law have a normative character. These restrictions function as the basis of the comparative legal argument. Consequently, the study of the quality of a comparative argument in legal discourse, and in justification, is related to these restrictions (Some discussion, though on different basis, see Schlesinger, R.B., 1968, p.75). This idea seems to apply both to the restrictions of the interpretative use of comparative law, and to the argumentative and justificatory uses of comparative law. The reevaluation of these restrictions can take place on the basis of the legal discourse theories.

<sup>492</sup> See, Schlesinger, B.R., 1968, Schmitthoff, M., 1941, p.96-97 (comparability of compared. Legal and social background, application).

For an extensive analysis, see Constantinesco, L-J., 1972, pp.150-230. He proposes rules of comparison relating mainly to legal sources, and their relationships and priorities. Also, Schmidt, F., 1981, p.527.

There are some problems in the legal source oriented approach in comparative law. Namely, where one is "blindly" concentrating on the idea of legal sources in different legal systems - as the basis of the classification or orientation - one may lose sight of the actual arguments which are deriving from these sources and, furthermore, of the problems for which these arguments are used. The classification of systems - based on the approach stressing the centrality of legal sources - may appear contextual, but, in fact, the results can be more "non-normative" than within the traditional "nominalistic" approach. One may pretend to be self-sufficient without a real need for a dogmatic and general discussion.

<sup>493</sup> Modern comparative law selects its material based on the sources of law doctrines. It "closes" itself to the doctrines of the sources of law. For an emphasis of legal sources idea, see Bogdan, M., 1996, p.5.

<sup>494</sup> For the idea that considerations of many systems increase the reliability of the result, see Schmitthoff, M., 1941, p.97 (referring to professor Kaden). All states should be considered, if the question is about uniformity of law (Kropholler, J., 1992, p.704). The choice is, in many ways, functional and related to the goals of the study (ibid., p.706).

<sup>495</sup> In this type of study, lawyers are given clearly explained cases, which they have to resolve according to their national law "authentically". This material, on the other hand, functions as material for comparison (for the application, see Schlesinger, R.B., 1968, p.76. Also, Sacco, R., 1990, pp.28-29).

based working method, for example.<sup>496</sup>

Generally speaking, it appears as if, in comparative studies, one has to make an independent examination of the subject matter independent of any other elements.<sup>497</sup> Secondly, one has to connect this to its environment (background) by considering surrounding legal and nonlegal factors. Thirdly, one has to make certain explanation. Fourthly, one may make predictions on future development.<sup>498</sup>

Some have proposed that the selection of the law to be compared ought to be based on the idea of "parent legal systems". According to others, any legal system, and not merely the parent legal system, could form the basis of selection.<sup>499</sup> On the other hand, it has been suggested that one should select the compared systems according their "distance".<sup>500</sup> Some have proposed a simple common sense<sup>501</sup> approach to comparative law, where all systems are comparable<sup>502</sup>, or that, at least, one should go into comparative studies with an open mind. The comparison should be based on the absence of any limitations and restraints.<sup>503</sup>

In several works, the idea of the perfect comparative method has been discussed without any attempt to illustrate its application.<sup>504</sup> This has led to several "overambitious" features of contemporary comparative law discussion in theory. There seems to be a need for a more realistic approach.<sup>505</sup>

**Comparative law and other scientific disciplines.** Sociological jurisprudence declared its

<sup>496</sup> Kokkini-Iatridou, D., 1986, p.182 ff. Also Schmitthoff, M., 1941, p.99.

"Comparative coordinator", Lando, O., 1977, p.649.

This 'expertise' system may be criticized because it can result in an extremely positivistic approach; namely, one takes formally into account all accepted legal sources. Formality results, because the situation is "hypothetical". No genuinely-affected interests are involved (see, *ibid.*, p.651.)

<sup>497</sup> Kokkini-Iatridou, p.1986, p.182 ff.

<sup>498</sup> Kokkini-Iatridou, D., 1986, p.190. On this point, see also Wróblewski, J., 1976.

<sup>499</sup> Drobning, U., 1969, p.228.

<sup>500</sup> Lambert, È, 1978, p.44.

<sup>501</sup> Frankenberg, G., 1985, p.431.

<sup>502</sup> Bogdan, M., 1990, p.64. Sacco claims that *a priori* restrictions - based on non-comparability - lack the necessary scientific detachment. The apparent dissimilarity approach can be based, for example, on European ethnocentrism. (Sacco, R., 1991, p.7).

<sup>503</sup> Some discussion, Zweigert, K., Kötz, H., 1987, p.31. Also Drobning, U., 1972, p.123.

Kropholler, J. (1992, p.703 and 705) gives an example of how comparative law questions are related methodologically to the common sense approach. Instead of asking questions in a legal conceptual framework, such as "how pension rights are treated?", one asks the question with common language "how economically weaker spouse is secured in the event of divorce?". However, one should remember the rank of legal sources, for example (*ibid.*, p.705).

This should not, however, lead to formal approach to sources, but to an analysis of reasoning.

<sup>504</sup> Kokkini-Iatridou, D., 1986, p.145.

<sup>505</sup> Kokkini-Iatridou, D., 1986, p.147.

agenda by stating that comparative law should be aimed at a study of systems, doctrines, and institutions as social phenomena. This means relating them to general social conditions.

It seems that there are different approaches to the question of the relationship between law and sociology in comparative law. Some consider sociology as extremely useful for comparative law<sup>506</sup>, while others, on the other hand, consider sociology as an essential part of comparative law, at least in the form of legal sociology.<sup>507</sup>

The sociological strategy in comparative law as a distinctive approach, claims that legal rules are applied in a specific area of social activity along with other rules<sup>508</sup>. By this approach, one can investigate the differences with the help of concepts such as class, socioeconomic status, religion, ethnicity etc.,<sup>509</sup> and, for example, relations of production<sup>510</sup>.

It has been maintained that the use of the sociological method is based rather on a selection of knowledge, where this selection is determined by values.<sup>511</sup> In this sense, comparative law cannot be methodologically sociological. The relevance of sociological knowledge in comparative law may be revealed in the application of sociological data.<sup>512</sup> Rational comparison, however, includes different kinds of sociological observations.

By and large, it looks as if the comparative approach to law is considered, necessarily, secondary in nature, and that it assumes the existence of other methods which are the primary sources of relevant knowledge ("legal norms" and "social facts")<sup>513</sup>

It is clear that a strict legal positivist approach to comparative law would also be problematic<sup>514</sup>. Where the aim of comparative law is clearly to find out the effects and causes of differences between legal systems, the pure positivist approach, assuming that differences are based on the absence of common rules or institutions, may lead to a reluctance to interpret a "legal" case or make a value-based solution, or to introduce regulatory or deregulatory

<sup>506</sup> Bogdan, M., 1990, p.39, referring for example to Constantinesco, L.-J., 1972, p.261. Yntema, H.E., 1958, p.498.

<sup>507</sup> For the use of the tools of legal sociologists, see Kötzt, H., 1982, p.358, Kokkini-Iatridou, D., 1986, p.172. For some analysis, David, R., 1981, p.201.

<sup>508</sup> Feldbrugge, F.J.M., 1973, p.215.

<sup>509</sup> Abel, R.L., 1978, pp.219-224.

<sup>510</sup> Peterf, Z., 1974, p.54.

<sup>511</sup> Hall, J., *Methods of comparative research in comparative law*. In: *Legal thought in the United States of America under contemporary pressures* (Brussels), 1970, p.150.

It seems that comparative law, directed towards sociological observations, achieves additional "political" meaning. This is related to the fact that, under this approach, the autonomy of the systems is emphasized.

<sup>512</sup> Drobning, U., p., 1971. p.296 ff.

<sup>513</sup> Peterf, Z., 1974, p.51, Kokkini-Iatridou, D., 1986, p.156.

<sup>514</sup> Capelletti, M., 1973, pp.74-76.

One could say that, in legalistic traditions, comparative observations of foreign positive law are strongly considered as a political issue. Legal comparison is treated as a legal "myth" which should be left untouched by critical legal science.

measures<sup>515</sup>.

Sociology may, in the study of a foreign systems, provide information also about the efficacy of certain types of regulation.<sup>516</sup> In this sense, it is not so far from the premises of the legal realism.<sup>517</sup>

There have been some concrete proposals on the question concerning the use of sociological information in comparative law.<sup>518</sup>

#### 4.4. The basic premises of comparative law

**General remarks.** As may be seen, comparative law presupposes some kind of structural, linguistic or common sense understanding of law.<sup>519</sup> What follows is an attempt to present some "legal" distinctions associated with this idea.

**The contemporary state paradigm of comparative law.** Comparative law maintains the positivity of law, and is in this sense a part of the formal and positive rationality of law<sup>520</sup>. Modern comparative law is connected traditionally to the state paradigm of law. The constitutional state represents the basic value of the law<sup>521</sup>.

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<sup>515</sup> If we understand comparative statements as declaratory statements, we may see that they reveal legal ideologies. Sacco R., argues (1990, p.31), for example, that "*Statements, which can be seen as legal formants, may be propositions about philosophy, politics, ideology, religion.... declaratory propositions have a particular danger of encouraging a false understanding*".

This is the basic problem of the European law having, as its basic premise, the positivist approach to law. If one cannot recognize the reasons for the diversities in social practices, one tends to reregulate the situation, until it is properly covered. This leads to conflicts between regulatory systems, and to pathological forms of regulation.

This idea is connected to the instrumentality of law.

<sup>516</sup> Kropholler, J., 1992, p.705, Heldrich, A., 1970.

<sup>517</sup> For an example of this type of approach, Husa, J., Comparative research and the research interest in law [Vertaileva tutkimus ja oikeudellinen tutkimusintressi]. In: Kunnallistieteellinen aikakauskirja, 1996, p.326, and Husa, J., 1996, p.96.

<sup>518</sup> Drobning, U., 1971, pp.503-504.

It was discovered, in the course of the study, that Drobning's proposed questionnaire was relatively similar to the questionnaire used in this study. However, no "modeling" had taken place.

Heldrich, A. (1970) has also maintained that, vice versa, the verification of the impact of different social structures to legal frameworks and creation of law, in social sciences, is not possible without comparative legal approach.

<sup>519</sup> As we have seen, in this study, the (discursive) linguistic approach is assumed.

For some analysis and criticism of the common sense approach to language in comparative law, see Friedmann, L.M., 1990, pp.49-50. Problems of translation, see Terré, F., Brèves notes sur les problèmes de la traduction juridique. In: Rev.Int.Dr.Comp., 1986, p.347 ff (349). However, legal translation is a form of practical translation (ibid., 347)..

<sup>520</sup> For example, Jescheck, 1974, p.772. For problems of the positivist comparative law, see Mössner, J.M., 1974, p.203.

<sup>521</sup> Also, Mössner, J.M., 1974, p.241.

Many methodological ideas in comparative law are related to this premise of the state paradigm. One may contend that typical to this approach is the 'consolidating' method, which has, as its explicit objective, an idea of the common core (i.e. assertion, no doctrinal improvement)<sup>522</sup>.

*Praesumptio similitudis*. *Praesumptio similitudis* is the working rule of comparative law. It is a heuristic principle dealing with the sources of comparative law ("legal life"). It has been claimed that it has no use in fields of law, which are attached strongly to political and moral views (and values).<sup>523</sup> Laws can be meaningfully compared only if they perform the same task and the same function<sup>524</sup>.

**Foreign law.** Comparative legal studies have been divided into presentations of foreign law<sup>525</sup> and examination of methodology or specific institutions<sup>526</sup>. This may include also presentations of legal culture, legal actors, and forms of "legal life".<sup>527</sup> The study of foreign law can be considered as a preliminary stage in the comparative process<sup>528</sup>. However, study and description of foreign legal system(s) is considered separate from comparative law having evaluative aspects in it<sup>529</sup>.

**Culture and ethnocentrism.** The legal culture can be claimed to be one of constant identity building.<sup>530</sup> This is related to the traditional cultural comparative law idea of widening cultural

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<sup>522</sup> See, Schmitthoff, C.M., 1968, p.565.

The limits of contemporary comparative law seem to be connected to conceptualizations in the national legal systems. Comparative law cannot accept any other element as part of the legal discourse than those elements which appear in national legal systems.

For the idea that contemporary comparative law would not be restricted by the premises related to national state, see Husa, J., 1996, p.85.

For some analysis of the constitutional-state comparative law, Suksi, M., 1993, p.267 ff. He seems to understand the comparative constitutional law study as based on a kind of "structural-realist" approach, prevailing also in political sciences. For different "constitutional" classifications of legal systems (ibid., p.269). That constitutional systems should be studied "as a whole" relating different institutions with each other (internally) (ibid., p.271).

<sup>523</sup> Zweigert, K., Kötz, H., 1987, p.36.

<sup>524</sup> Drobning, U., 1971.

<sup>525</sup> For this distinction, see Winterton, G., 1975.

<sup>526</sup> See in particular, Zweigert, K., Kötz, H., 1977, p.5.

<sup>527</sup> Fix-Zamundo, H., 1990, referring to works of Merryman, J.

<sup>528</sup> Brusiin, O., 1953, p.437, de Boer, Th.M., 1994, p.16.

Modern comparative legal science include the presentation of foreign law, analysis of foreign law, analysis of methodological problems, and the study of specific institutions (Fix-Zamundo., p.30-31).

<sup>529</sup> Kropholler, J., 1992, p.707. That the study of the law of a single country is not even possible, see Gordley, J., 1995, p.555 ff. That comparative law is study of two or many systems, Lambert, J., 1959, p.271.

<sup>530</sup> Clark, D.S., 1990, pp.11-23, referring to works of Merryman and to David, R., Brierly, J.E.C., 1978.

horizons, of understanding the scope of the law, legal problems, and legal evolution<sup>531</sup>, of creating greater sensitivity in resolving legal problems, of improving legal instruments through experience and knowledge, and furthermore, of the perfection of legal language and understanding<sup>532</sup>.

Despite the lack of clarity surrounding the idea of culture<sup>533</sup>, the translation of comparative legal material is often made on the basis of this cultural comparative law.<sup>534</sup>

There has also been discussion on legal rules based on comparison as "*ius commune denationalise*"<sup>535</sup>.

It could be claimed that the prevailing paradigm of comparative law is a kind of a realistic paradigm based on cultural, national, linguistic, ethnological elements, which does not emphasize the political discourse as the basis of comparative law.<sup>536</sup>

*Tertium comparationis*. The *tertium comparationis* the common denominator of the compared ("*similitudo minimum*", "*minimum commune*"). In modern comparative law, the *tertium comparationis* is historical and ideological in nature<sup>537</sup>.

The *tertium comparationis* is, however, the legal dimension of comparative law. The common denominator is the decisive step in the entire comparative process. It is also the

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<sup>531</sup> Watson, A., 1974, p.16

<sup>532</sup> See also, Bogdan, M., 1990, p.28, David, 1978, pp.6-8, Kahn-Freund, O., 1966, pp.59-60, Rheinstein, 1974, p.191, Summers, R.S., 1991, p.461.

<sup>533</sup> Smith, R.J., 1989.

<sup>534</sup> For a study of this phenomenon, see Fedynskyj, J., 1975, p.550, Dainow, J., 1975.

<sup>535</sup> Trindade, A.A.C., 1977, p.273.

<sup>536</sup> See, Bermann, G.A., 1990, Frankenberg, G., 1985.

<sup>537</sup> *Tertium comparationis* is a point of departure for all comparisons (for example, Zweigert & Kötz, 1971, p.43). It has been maintained that the *tertium comparationis* is the *superior* common notion (une notion commune supérieure, Knapp, V., 1973, see also, Constantinesco, L.-J., 1972, p.88).

This is a quite dogmatic idea. It is based on the assumption that there should be *a priori* something to be compared, clearly defined, and rational. However, the idea is associated with a kind of historical necessity. Why compare something if it is already defined? Comparison seems to be more a confirmation and reproduction of the historical forms (in many respects), than a sincere attempt to understand what is going on.

One could claim that the tendency is separate from a clear historical *tertium comparationis*, towards more "factual", "sociological", and scientific *tertium comparationis*. This type of functional approach is explicit in the use of comparative arguments in legal decision-making.

In a historical sense, the *tertium comparationis* is related to a kinship or derivative relationship (pattern of resemblance?) (Wise, E.M., 1982, p.365). For a strongly historical approach, see, Legrand, P., 1996, pp.279-280.

For an theoretical economic and situational construction of the "ideal model" as *tertium comparationis*, see Tolonen, J.P., 1974 (for analysis of this, Klami, H.T., 1981, pp.127-134).

criterion for the categorization of systems and legal families.<sup>538</sup>

The basic distinction between the structuralist and the functionalist method<sup>539</sup> relates to the different judgments regarding the *tertium comparationis*.<sup>540</sup>

**Roman law as *tertium comparationis*.** "Unification" usually accords with some criteria within a concrete discipline. In the western legal tradition, Roman law has functioned as a fundamental legal criterion for comparison and for attempts at unification.<sup>541</sup>

The role of Roman law as *tertium comparationis* was decreased considerably, however, after the great codifications in the turn of the century. The utility of Roman law was replaced by its elegance in legal thought.<sup>542</sup>

The significance of Roman law seems to be historical.<sup>543</sup> It can be considered more as "a law" than "the law", something with which many experiences can be gathered. Furthermore, it is declared to be a representation of continuity<sup>544</sup> and a symbol of harmonious interaction.<sup>545</sup> However, as a dead legal language, Roman law guarantees for its user an unvariable point of reference.

Nevertheless, Roman law is not without practical significance in practical institutional legal argumentation and justification<sup>546</sup>.

**Style.** It has been argued that "style" is one of the decisive feature of legal systems.<sup>547</sup> This distinction has been divided to five factors claimed to be relevant for making of the distinction between groups of legal systems: origin and evolution, characteristics in legal reasoning (legal thought), institutions characteristics to that system, the concept of legal sources and their use,

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<sup>538</sup> Eörsi, G., 1973, p.182. On the functions of the *tertium comparationis*, see Zweigert, K., Kötz, H., 1987, p., 42. For its criticism, Blakojevic, P.T., 1973, pp.32-33.

*Tertium comparationis* and different cultural distinctions seem to function as dialectical principles of comparative law.

<sup>539</sup> See, for example, Schlesinger, R.B., 1968, p.74-75. For a structuralist approach, see, Mössner, J.M., 1974, p.227.

<sup>540</sup> Kokkini-Iatridou, D., 1986, p.166, and Drobnič, U., 1984, p.243 (on optimism and scepticism).

<sup>541</sup> Lambert, É, 1978, p.40.

<sup>542</sup> Zimmermann, R., 1995, pp.22-23. Also, Lambert, J., 1959, p.275.

<sup>543</sup> Yntema, H.E., 1978, p.163. Zimmermann, R., 1995, p.22 ff.

<sup>544</sup> Yntema, H.E., 1978, p.176.

<sup>545</sup> Roman law as *tertium comparationis* seems to be clearly applicable in the realm of private law. However, the Roman law as *tertium comparationis* does not function in the same way in connection to public law.

<sup>546</sup> Some Advocate Generals in the European Community system, for example, often relate the examination of a legal situation strongly to the analysis of Roman law (see below, Advocate General Mancini in the European Court of Justice).

<sup>547</sup> Zweigert, K., Kötz, H., 1987, Constantinesco, 1981, p.161.

ideological factors.<sup>548</sup>

No doubt, style seems to be one of the distinctions, which applies, for example, to the differences between analytical and more formal approaches to law and legal justification.

#### 4.5. The function of comparative law

**General remarks<sup>549</sup>.** In theory, the function of the information gained from comparative law studies relates to the ability of comparative law to illustrate legal possibilities.<sup>550</sup> These types of possibilities can be discovered in an academic discipline, or in a study of one or more legal systems. This way comparative law can propose "new" methods of thought, "new" systematic conceptualizations, "new" methods of posing questions, "new" discoveries, "new" standards of criticism.<sup>551</sup>

However, it has been also argued that comparative law has suffered from a self-inspectorial nature as a method of law<sup>552</sup>, that it has a modest role in all legal work,<sup>553</sup> and that it is impractical.<sup>554</sup> Nevertheless, counter arguments prevail as well.<sup>555</sup> Comparative law functions, in reality, as a relevant source of information based on practical experience<sup>556</sup>. For this reason, comparative law seems to have its function in legal education, legislation, and judicial interpretation.<sup>557</sup> In practice, the scope of the emphasis of the information depends on the legal

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<sup>548</sup> For some analysis, Zajtay, I., 1973, p.212-213, Kropholler, 1992, p.706.

<sup>549</sup> For some general remarks, see Zweigert, K., Kötz, H., 1977, p.12.

<sup>550</sup> Tur, R.H.S., 1977, p.246, Zweigert, K., Kötz, H., 1977, p.12.

<sup>551</sup> Zweigert, K., Kötz, K., 1987, p.44.

<sup>552</sup> Kahn-Freund, O., 1966, p.59.

<sup>553</sup> Hill, J., 1989, p.102.

<sup>554</sup> Shapiro, M., 1981, p.vii

<sup>555</sup> Zweigert, K., Kötz, K., 1987, p.15, Watson, A., 1974.  
Frankenberg, G., 1985., p.420.

<sup>556</sup> Drobnič, U., 1972, p.115. Comparative law can be defined as a normative source of law, Capelletti, M., 1973, p.70. Mössner, J.M., 1974, p.242.

<sup>557</sup> Zweigert, 1949-1955, p.21, Kamba, E.J., 1974. Benos, G. (1984, p.244) speaks about the use in formation, interpretation, and implementation.

For some contemporary discussion concerning education in the realm of comparative law, see Bell, J., 1994, p.30.

The idea of a harmonizing construction in the comparative interpretation has been proposed (Kisch, I., 1981).

The "harmonizing construction" has been claimed to make freer the determination, as to which foreign law is to be used, whereas the historical construction is seen to be bound to features which are common. When it comes to borrowing, the historical construction seems to be freer, and the harmonizing construction is attached to foreign law as it actually stands. These approaches have a different type of rationale (ks Kisch, I., 1981, pp.165-167).

One could also assert that where the historical connection has been found, one is freer to use foreign

system in question.

**Education.** The function of comparative law in legal education can be divided into its practical, sociological, political, and pedagogical functions. The emphasis may vary in different social systems.<sup>558</sup> For the purposes of the current discussion, it has been extensively agreed that comparative law is an important part of legal education, and its role in education has been discussed in many connections<sup>559</sup>

The discussion on the role of comparative legal teaching is a controversial subject. Traditionally, it has been seen as an important part of education, because it extends knowledge as such, and maintains interest in law in general.<sup>560</sup> The main idea is that comparative law is interesting and increases knowledge.<sup>561</sup> It makes education more lively<sup>562</sup>. On the other hand, it may also liberate from the borders of other systems, and show different possibilities<sup>563</sup>. Here, the interest is pedagogical and educative, in both the general and particular sense.

In addition, it may make international understanding possible<sup>564</sup>. The teaching of comparative law may create a basis for legal and cultural communication between lawyers from different countries.<sup>565</sup> It is important in educating international lawyers<sup>566</sup>.

Furthermore, comparative law has, as we have seen, its connections to general

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law and to determine the nature of the foreign element in the context of the borrowing system. On the other hand, the historical approach seems to emphasize systematic autonomy, where the harmonizing construction is related more to ideas of reflexive evolution. Furthermore, it appears as if the harmonizing construction concentrates on the role of comparative law from the legal order's point of view, and neglects the relatively autonomous history of comparative law.

It may also be noted, that different types of analysis may derive from these different approaches. The harmonizing construction may orient itself more to the analysis of the foreign system, whereas the historical approach may direct its attention to the suitability of the foreign element to one's own system. In reality, however, these two approaches may not deviate greatly. The analysis of foreign law is still determined by its "own system" conceptualization. The differences may appear at the "translation" level; the harmonizing construction may be only a stage of the translation, i.e. it leads to further analysis of the adoption.

<sup>558</sup> Winterton, G., 1975, p.81. Some discussion, Constantinesco, 1972, pp.367-368.

<sup>559</sup> For example, Fix-Zamundo, H., p.38, Friedmann, W., 1973, Kropholler, J., 1992, p.705.. Development of comparative legal teaching, Kötz, H., 1997, p.10.

<sup>560</sup> Tur, R.H.S., 1977, p.237 ff.

<sup>561</sup> Tur, R.H.S., 1977, p.238.

<sup>562</sup> Brusiin, O., 1953, p.435.

<sup>563</sup> Kropholler, J., 1992, p.704.

<sup>564</sup> Tunc, A., 1978, p.291.

The idea that law is a discursive system, and a matter of a best argument deriving from a bunch of different legal sources, suggests that comparative law is a relevant part of education.

<sup>565</sup> Schlesinger, R.B., 1980, p.40.

<sup>566</sup> Blanc-Jouvan, 1996, p.347 ff.

For example, in European law, the main task of the functionaries is to analyze comparatively different legal systems. Some analysis of this point is provided below.

jurisprudence. In this sense, the teaching of comparative law can prepare the ground for comparative legal studies<sup>567</sup>.

In practice, however, comparative law has been included in many countries' curricula as an option only.<sup>568</sup> As a university discipline, comparative law does not have an important role.<sup>569</sup> Furthermore, it is not clear what type of context the comparative law curriculum should contain. The question has been asked, for example, whether it should include the teaching of foreign languages, computer sciences etc.<sup>570</sup> It has also been maintained that teaching should prepare for the post-university career.<sup>571</sup>

The basic obstacle for its inclusion in programs of legal education is the idea of legal education in general: the learning of binding systems of law.<sup>572</sup> It has been contended also that in comparative law education one should stress the cultural differences between nations, and,

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<sup>567</sup> Kahn-Freund, O., 1973, p.328. However, one may notice that in different universities and institutions comparative law is related to different subjects. At the formal level, there are jurisprudence-comparative law combinations, but also social sciences-comparative law combinations.

<sup>568</sup> Fix-Zamundo, H., 1990, p.38.

<sup>569</sup> For Wales and England, see, Hill, J., 1989, p.114.

Some examples may be mentioned. The teaching of comparative law in United States has appeared European centered. This was so, at least in the second half of the century, because there were many Europeans in United States' law schools (See, Hazard, J.N., *Comparative Law in Preparation to Statesmanship*, Rotondi, p.359). Some of these Europeans include: Rheinstein, M., Neumann, F., Ehrenzweig, A.A., Riesenfeld, S.A., Schlesinger, R.B. (ibid. p.360). For the post-war situation in the United States (see Zweigert, K., Kötz, H., 1977, p.16). Teaching is many times based on translations. Comparative law courses are not obligatory, and they are often considered marginal. It seems that effectiveness demands have resulted in this. The Federal system is a separate comparative law sphere in itself. Internationalization has increased the interest in comparative law (Moore, R., *Le droit comparé aux états-Unis*. In: *Rev.Int.Dr. Comp.* 1994, p.758).

In Japan, comparative law has had an extremely central role, especially in the construction of education and legal culture in the 19th century (See, Mitsuta, Y., 1973). See also, Takizawa, T. (Pp.871-876), Atsushi, O. (pp.877-883) *Rev.Int.Dr.Comp.* 1995.

For the situation in Italy, see Sacco, R., 1996, pp.273-278. The organization of comparative studies in France after the second world war (Zweigert, K., Kötz, H., 1987, p.16). It has become more general.

West-Germany before 1977, see Zweigert, K., Kötz, H., 1987, p.17.

For Switzerland Stoffel, W.A., 1994, p.762 ff. European law is also "comparative"(?).

For the Netherlands, see Hondius, E.H., 1977, pp.560-577.

An extensive study of the role of comparative law in educating "domestic" lawyers, see *Rev.Int.Dr. Comp.* 1988, pp.703-751 (Great Britain, Belgium, Italy, Switzerland, Greece, Japan, France) and "foreign lawyers, see *Rev.Int.Dr. Comp.* 1993, pp.9-79 (Germany, England, Italy, Switzerland, France, Europe in general, the United States). There are internal and external differences. These differences seem to relate to the structure and effectiveness of education in general, and to the general "homogeneity" and the "orientation" of the educational and socio-political thought in these countries. Europeanization seems to have a strong impact to the orientation.

For the comparative law teaching and legal professions, see *Rev.Int.Dr.Comp.*, 1994 (pp.725-807).

<sup>570</sup> Bogdan, M., 1990. On some problems, see Capelletti, M., 1973, p.73. Also Hondius, E.H., 1977, p.562.

<sup>571</sup> Capelletti, M., 1973, p.71.

<sup>572</sup> For problems regarding the comparative law curriculum, see Winterton, G., 1975, pp.97-99, 116-118.

The role of comparative law as a part of the University curriculum has been discussed extensively.

The role of comparative law is seen mainly in scientific and political discourses, rather than in legal discourses. Comparative law has been regarded more as a professional-scientific and professional-governance issue.

for that matter, the problems of language.<sup>573</sup>

It has been argued that the "Europeanization" and "integration" in Europe has changed and will change the styles of legal teaching.<sup>574</sup> This is related to the teaching of comparative law in the future.

#### 4.6. Some thoughts on traditional comparative law in general

**General remarks on the characteristics of traditional comparative law.** As we have noted, traditional comparative law examines contemporary forms of legitimation in law and legal systems. It tries to reveal the structure and functions of law in different societies, and seems to be able to deduce legal dogmatics from it, to a certain extent.

Ultimately, one can observe positive law and conceptual underpinnings of one system on the basis of the "law" of another system. Furthermore, one can, and one usually does, reveal the customs of the one's own system in the process of selection and choosing customs, institutions, concepts, and structures from the other systems. All discovered elements can be used in argumentation within the "internal" discourse.<sup>575</sup>

As we have maintained, comparative legal research parallels every discipline, and can contribute concepts and ideas to the legal discourse. In this sense, it is part of legal systematization. It opens up systemic possibilities for the legal discourse. It brings legal arguments to the legal discourse of a system.<sup>576</sup> The more analytical, the better.

In this sense, comparative law seems to be the purest form of empirical legal research in general. Basically, it is not bound to practicality in any "normative sense", apart from its attachment to a political theory. Furthermore, it departs from the idea of social sciences in many ways.

On the other hand, comparative law research, if done properly, is burdensome, as it requires much time and dedication. It is linguistically and methodologically problematic, and irritating because of "cultural" barriers.<sup>577</sup> This is why comparative law has problems being "living comparative law", and why it tends to be only a professional matter, an issue for those who are obliged to undertake it or who are dedicated to it. This, on the other hand, may lead to a

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<sup>573</sup> Winterton, G., 1975, p.81.

<sup>574</sup> See also, Moccia, L., 1997, p.800 ff.

<sup>575</sup> This is the phenomenological side of comparative law. This dimension has been identified by the tradition of comparative law by "understanding" and "developing" one's own system.

<sup>576</sup> For the idea that comparative law is a source of arguments (dialectic), Kekkonen, J., *Legal research in changing Europe*. In: Oikeus, 1992, p.345.

<sup>577</sup> Frankenberg, G., 1985, p.420.

relatively superficial and frivolous comparative law discourse. Comparative explanations appear in rather abstract forms. Moreover, the contemporary professionalization and institutionalization has caused strong "stereotypical" observations of foreign legal systems and legal "cultures". This seems to lead more to misunderstandings than to understanding.

Traditional comparative law seems to be based on a 'rationality' assumption of legal systems. It takes it as given that legal systems are a guarantee of the rationality of law<sup>578</sup>. Contemporary comparative law has taken, to a certain extent, many system distinctions for granted. This has, it may be claimed, affected the emphasis of the research of comparative methodology and comparative legal cultures.<sup>579</sup>

In addition, the comparative law discourse, based on these cultural spheres, has, as an autonomous branch of law, fallen into an internal crisis as a discourse. This can be seen especially in the spheres of law, where development is fast<sup>580</sup>. On the other hand, attempts have been made to establish the authority of comparative law by a massive endeavour to discover the system of the systems, a cultural classification of legal systems as a cultural endeavour. The result has been a kind of legal-cultural-political science<sup>581</sup>, based on legal material, which is attached, on the other hand, to the basic structural characteristics of the traditional nation state.

At the same time, comparative law seems also to be bound to the general rationality assumption. It assumes a separate rationality of the comparative legal discourse.

Consequently, the role of comparative law has been, in the sphere of legal systems, that of an imaginary and independent "legal systematic discourse", in which different influences appear at the back of one's mind, or in which comparative observations may be used in extremely abstract way! One may say that the practical value of the systematic interaction has been hidden within a scientification of system relationships, which has resulted, on the other hand, in an internal rationality problem for comparative law. It has failed to establish its own authority as an authoritative source of inspiration.

In this work, the functions of comparative law are evaluated and described more thoroughly in connection with the study of institutionalized European law. One could claim that

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<sup>578</sup> The basic feature of modern comparative law is the closing up of legal systems and the reduction of existing complexity of socio-legal systems to simple, legal formalism (Frankenberg, G., 1985, p.437, Sacco, R., 1991, p.401, Legrand, P., 1996, p.59 ff.).

The closing up of systems in comparative law enables instrumental uses of the legal systems as arguments. In this sense, modern comparative law is based on a closed system conception. On the other hand, the use of comparative observations in open legal discourses may open these closed systems.

The clear problem of comparative law is its the inability to recognize different levels of conflicts between different socio-legal systems (Loussouarn, Y., 1981, p.134).

<sup>579</sup> Zweigert, K., Kötz, H. claims, however, that comparative law has not concentrated extensively upon its methodology (1977, p.24). This statement sounds quite odd given the contemporary context.

<sup>580</sup> It is not sufficient to say that comparative law should go to case law to find its practical importance, see Mar-kesinis, P., 1990.

<sup>581</sup> For example, David, R., Brierly, J.E.C., 1978.

the legal function of comparative law appears there more clearly. The abstract description of the functions of comparative law remains more or less ritualistic, until the normative targets and aims are revealed.<sup>582</sup> This makes it seem also instrumental in theory.

**Quantitative and qualitative dimensions, and structuralist and functionalist approaches in comparative law. Is there something more?** As maintained, comparative law assumes the qualitative and quantitative dimensions of law. The quantitative aspect refers to the quantity of legal systems required for comparison. The qualitative aspect seems to refer to the extension of the analytical approach in the comparison.<sup>583</sup>

Traditionally, the quality of comparative legal studies has been associated with the examination of traditional legal systems from the point of view of the traditional theory of legal sources. While more value-based comparison refers to more restricted sources, the instrumentalist approach takes into account the law as a social instrument, and in this way orients itself towards political, sociological and other "contexts" of the traditional legal sources.

Traditional comparative law has concentrated on the establishment of the function of certain legal institutions in different societies. On the other hand, its scientific aim is to find essential, similarities, and differences, and the comparability or incomparability of these structures.<sup>584</sup>

This may be related to the structuralist and functionalist approaches in the tradition of comparative law.<sup>585</sup> The first approach aims at confirming the structures, forms and "figures" of legal institutions, while the latter, on the other hand, stresses the importance of the functions of law in certain concrete situations, and laws' ability to adapt itself to changing situations. In this latter sense, its aim is to study the functions of law in different systems as a resolver of conflicts of interests.

On the other hand, the structural and historical approach of comparative law stresses the importance of the ideal dialectics of certain concepts. The restricted idea of the relevance of the context-bound discussion may leave essential features of the phenomenon in the background. In this sense, the value-based nature of the structuralist approach encourages the strong functionality of the study itself. These types of studies are easy to use in legitimating functions, because of this lack of context. The comparative-contextual (and the socio-historical) approach, on the other hand, in stressing the importance of the context, maintains the autonomy

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<sup>582</sup> Jamieson, M., 1996. This "*suits the pedantic frame of mind* (ibid.).

It is quite generally recognized that until we claim openly what we want and what is our aim, we are, in a discourse, trapped in a ritualistic use of words and sentences. Every form of "translation" is based on this fact (ibid., p.124). For the view that comparative law is essentially instrumental, see Pizzorusso, A., 1987, pp.79-84.

<sup>583</sup>Some analysis of the qualitative aspect, Schmitthoff, M., 1941, p.98 ff.

<sup>584</sup> Rozmaryn, S., 1973, pp.581-583.

<sup>585</sup> Rozmaryn, S., 1973, p.580.

of historical discourses, and becomes closer to the scientific study of comparative history of law.

Both have their merits. The object of the study of comparative law is evidently some kind of confirmation of structures of law. All the same, one has to look also into the functions of these structures as social phenomena in real life, so as to be able reasonably to "instrumentate" them both in theory and in practice. Functionality is the necessary aspect of the comparative study of the legal phenomena.<sup>586</sup>

Nevertheless, rarely in comparative law, is the attention paid to the actual "legal" effects of these differences and similarities, comparabilities and in comparabilities. This may be due to the fact that legal effects of the similarities and differences function at the limits of law. They are functioning in a sphere which is determined by political theory and the self-evident primary rules of systems. These effects, however, are part of the comparison as an argument, and may have further legal consequences.<sup>587</sup> Comparative legal studies, which concentrate on the legal functionality of comparative law itself, take, in other words, the study further.

**The autonomous and substantive nature of comparative law.** As we have noted, somehow the idea of the relative autonomy of the discipline of comparative law had been inherited in 20th century.<sup>588</sup> This idea puts emphasis upon the idea of developing the comparative method, i.e. for arriving at a method of comparative law which would best serve scientific interests, i.e. the objective inquiry into knowledge. As we have seen, it has been claimed that comparative law is more a method and activity rather than a substantive discipline in its own right. This perspective has led to the study of the autonomous purposes and uses of comparative law in theory.<sup>589</sup> It can be said that this resulted in an impractical orientation of scientific comparative law<sup>590</sup>.

However, the postulate that comparative law reveals patterns, developments and concepts common to all nations reflects the idea that 20th century comparative law tries also to be a substantive subject. This interest in "substantive" comparative law has, to a certain extent, grown on the theoretical level, resulting in works attempting to connect comparative law to the

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<sup>586</sup> Rozmaryn, S., 1973, p.581.

<sup>587</sup> Contemporary comparative constitutional law, for example, could be an attempt to study these aspects. Comparative historical approach concentrates on these aspects, but is more based on the general idea-historical approach than on the legal discursive approach. This latter approach stresses the importance of the larger (social) context within the discursive functionality.

<sup>588</sup> For some discussion on this autonomous scientific nature, see Constantinesco, L.-J., 1971, p.203 ff., pp.272-273. In the 19th and 20th centuries, comparative law has increasingly maintained its "autonomy" as a distinction in law (Ancel, M., 1973, p.9). Some analysis, see Neumeier, K.H., 1973, p.521).

<sup>589</sup> Baxter, L.G., 1993, pp.86-88.

<sup>590</sup> Where medieval and early modern comparative law emphasized the idea of Roman law as a *tertium comparationis*, the 19th and 20th century comparative law seems to be based on the national state legal system as a *tertium comparationis*. On the other hand, while 19th century comparative law had its political and ethnological forms of state, the contemporary paradigm seems to be "political".

development of law in general, i.e. more closely to social scientific research.<sup>591</sup> It can be claimed that the focus on more sociologically determined comparative law is a step away from the traditional conceptual-analytical comparative law.<sup>592</sup>

On the other hand, the underscoring of the substantive dimension can be seen in more detailed and specialized comparative research in both the private and public sectors, developing in the fields of specialized legislation, international unification, and the everyday practice of international commercial transactions (for example in the coming of the new mercantile law). This internal segmentation of legal systems has had effects also on comparative legal research.

Contemporary comparative legal research has a substantive character also in the form of inter-university activity.<sup>593</sup>

One of the problems connected to the idea of the autonomy, or to the independence and distinctiveness, of comparative law is the relationship between comparative law and law in general. Certain remarks may be made against the idea of autonomy and independence.

The legal institutions studied in the realm of comparative law are determined by formal and positive law. In this sense, comparative law has to have a direct relationship to the branches of law studied. Comparative law has its own material basis. For the same reason, comparative law can be claimed not to be a method in the study law, but rather a scientific orientation or a form of legal discourse.<sup>594</sup>

For that matter, the idea of the relationship between general jurisprudence and comparative law seems to be relevant to the question of "autonomy". Namely, we may maintain that comparative law does not, in a jurisprudential legal discourse, really "establish" any conceptual framework. All legal systems, as with comparative law itself, belong within the sphere of the general jurisprudential discourse. In this way, the comparative discourse may be, in a sense, analogical to general jurisprudence, but not really a distinctive or a special "part" of it<sup>595</sup>.

On the other hand, even if one could claim that comparative law is relevant only for legal science, one cannot avoid the fact that it is used also in practical decision-making in law as an argument, to whatever audience it is directing itself.<sup>596</sup> In point of fact, it is quite problematic

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<sup>591</sup> Zeitschrift für vergleichende Rechtswissenschaft (1878-), Ernest Rabels Institute of comparative Law, University of Munich, Kaiser Wilhelm (Max Planck) Institutes for private law (Hamburg), and for foreign and international public law (Heidelberg).

<sup>592</sup> Rheinstein, M., 1968, p. 207. A similar "cross-scientific" development can be seen in the United States.

<sup>593</sup> The inter-subjective and communicative approach has been claimed to have impacted upon the comparative legal research in future (Schwarz-Liebermann von Wallendorf, H.A., 1973, p.615).

<sup>594</sup> Rozmaryn, S., 1973, pp.590-591.

<sup>595</sup> For some discussion, see Bell, J, 1994. For some ideas on the relationship between jurisprudence and comparative law, see Schlesinger, 1980, p.42.

<sup>596</sup> De Boer, Th.M., 1994, p.24.

to think that no value or instrumental interest would be involved in comparative studies.

Furthermore, the illusion of autonomy seems to be connected to the belief that in particular (closed) legal discourses, comparative considerations do play an enormous qualitative role.

Consequently, comparative law may maintain its "autonomy" only within a systematic framework, but not in a "free" legal discourse as such.<sup>597</sup>

**Analysis of the relationship between comparative law and other social scientific disciplines.**

It is quite evident that any fundamental "naturalization" of comparative law, by introducing, for example, factors such as climatical dimensions - tends to turn comparative law into a merely contrastive process. On the other hand, some contrastive naturalization is needed for the discipline to even exist. Law viewed only as a matter of systematic political discourse tends to universalize any argument, and consequently, to show law as an unnecessary distinction between different societal discourses.

On the other hand, as we have seen, sociologizations in contemporary comparative law, where they are made, tend to be constructed upon extremely general conceptions. Sociologically-oriented comparative law has a character of being a "program", a teleological discipline. The idea that sociological observations are part of the discipline is repeated in the theoretical research time and time again, without any real attempt to start to really "sociologize" the discipline.

Because some natural relativism must, and can, scientifically, be established as an *a priori* idea, comparative law can be claimed to have relevance as a feature of and a distinction in legal discourse. Comparative law is, accordingly, based on some cultural relativism within reason. On the other hand, even if the sociologically oriented approach to comparative law stresses the differences between law in books and law in action<sup>598</sup>, it has to take into account the distinctions between legal systems to be able to maintain itself as a legal scientific discipline<sup>599</sup>.

Consequently, we may say that behind the subject of comparative law, there is an assumption of an already existing conception of law, and as well a political theory, which assumes that certain processes of law creation are legally valid. It seems that in more sociological appro-

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<sup>597</sup> In this sense, the claim that general jurisprudence would be empty without comparative law is not convincing (contrary to Tur, R.H.S., 1977, p.249). There is a fruitful interaction between these two relatively "distinctive" spheres of law, but comparative law, as a discipline related to the positivist tradition, is still only one argument within the general jurisprudential discourse.

On different systematic connections, see Klami, H.T., 1997, p.6-7

<sup>598</sup> See, Drobning, U., 1971.

<sup>599</sup> The problem of the sociological approach to law is embedded in the aim, characteristic of this type of approach, to reduce the law to social systems. These reductions, in the context of the state paradigm, lead unavoidably to disparate conceptions. Consequently, comparative generalizations seem to be difficult to make.

On the other hand, one must be critical of the claim that sociology can assist comparative law by explaining "social facts" (?) (Zweigert, K., Kötz, H., 1977, p.10).

aches to law, one sees law as a product of social practices, but does not merely stress the centrality of specific political processes as a basis of law creation.

This means also that the pure sociological, plurality-based, approach to law is not so central to comparative law. Comparative law, in order to exist as a balanced subject, has to assume a political conception of law as its basis, and not only as a plurality-based sociological approach to legal formations.

This does not mean, however, that the sociological approach would be completely useless. Its use merely has to be regarded in a political context, that is, all alternative processes of law creation must be reflected within the prevailing political theory. This means, for example, that what would seem to be an extremely "sociological" approach in one society, could be regarded as fundamentally political in another society, and, accordingly, to be legally relevant.

Consequently, as one may understand, under the comparative approach the roles of political, legal, and social science become mixed. One really does not have to make a clear distinction between these different approaches any longer. The central idea in comparative law is rather the philosophical and historical interpretation more than is true in any other legal approach. Features such as comparison and culture and all conceptions of comparative law become "weak" conceptions as anthropologic-cultural conceptions. However, this does not mean, as we have maintained, that law should be seen as a necessarily pluralistic and polycentric concept. This idea would suppose another type of political theory.

In conclusion, even if the role of the sociology can be seen as crucial in comparative law, its role is restricted.<sup>600</sup> Comparative law is a legal discipline. Within the contemporary paradigm, state systems function as possibilities for comparative legal studies as sources of legal norms, and different types of "scientific" generalizations. Too much sociology closes these systems as normative social systems.<sup>601</sup> This may pose unbearable burden upon the entire concept. Absolute sociologization could mean deconstruction of the ethnological state paradigm of comparative law, and the basis of the dynamic would disappear from the discipline. This would also entail problematic consequences for the idea of law in general. Comparative law should, in other words, recognize the political nature of legal communities, and in this way restrict itself both scientifically and argumentatively to the traditional sources of law. It should not freeze the

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<sup>600</sup> See also Klami, H.T., 1997, p.9.

<sup>601</sup> Example of this, Kulla, Oikeusvertailu ja eurooppalainen hallintooikeus. In: Comparative law: what, why, and how? [Jämförande juridik, vad varför hur?] Meddelanden från ekonomisk-statsvetenskapliga fakulteten vid Åbo Akademi, Åbo) 1996, p.40. Kulla maintains:

*"Occasionally some have been skeptical about the possibilities of comparative law because of the cultural, political, and economic differences behind the legal systems. This type of scepticism does not seem to be justified in relation to research on the European legal systems. Even social scientific research has shown that European countries are largely similar, for example, by their industrial structure" (emphasis added).*

social systems on the basis of general practical statements, unless it recognizes the possibility of system change. This is achieved by the use of traditional legal sources, and by following closely the legal discourses in legal systems. If legal systems were not seen within comparative law paradigm as dynamic and evolutionary systems, this would mean a problem for the integrity of these systems as legal systems.

To a certain extent, the comparative perspective is related to the critical analysis of legal systems.<sup>602</sup> When using the comparative method, one is able to accord with the cultural heritage of one system, with all and its peculiarities, its political and social philosophy. At the same time, one has an analytically legitimate perspective upon it, which is not based on hypothetical situations. In this sense, comparative law is a means of using law as a conceptual framework for social observations. Comparative law appears to be legal sociology.<sup>603</sup>

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<sup>602</sup> An indication of this type of idea, Capelletti, M., 1990a, p.2. Schlesinger, R.B., 1980, p.41.

<sup>603</sup> The function of comparative law appears to be problematic from the point of view of the discursive concept of law. This is related to the problems of affiliation between comparative law and sociology. Namely, so called sociological studies may "normativize" forms of behaviour, even if these forms do not appear in political or legal discourses, which, on the other hand, result in legal forms and their interpretations. This way sociology generates the identification of phenomena of regular social behaviour, which cannot be grasped necessarily in concrete discourses of law and politics. The question consequently, concerns the bringing into light forms of behaviour, which persons may consider normatively binding.

Now, essentially, we may say that it is up to the legal and political discourses to choose normative societal values. "Sociologically identified forms of behaviour" may, evidently, function as a healthy source of alternatives, or confirmations, to be used in the dialectics of politics or of law. One could even claim that sociological observations are extremely effective, because they have a distance from any "self-referential" forms of politics and law, and may indicate a need for a change in the normative "planning" taking place in the political and legal spheres. In fact, the customary, non-discursive, forms of behaviour have always functioned as a "natural" basis of change. This is why modern law is obliged to take these types of observations into account so as to be able to follow the tendencies in societal discourses, which are effected in a form other than that suggested by "official" and "formal" discourses (similar types of ideas (for similar types of ideas, see David, R., Brierly, J.E.C., 1978, p.13).

Now, comparative law, as such, does not depart from this too far. The professional and institutional idea of national, regional and international orders has immense instability, if they do not take into account the deviating forms of discourses in national and other legal systems in relation to each other. Sociologized comparative law may grasp phenomena which the self-referential institutional discourses cannot master. It is a way to avoid fundamental conflicts between different legal orders and to maintain their discursive integrity.

On the other hand, we may identify a peculiar problem in the sociological comparative law.

If the sociological approach to law would prevail, we could start to evaluate also deviations from law in other societies as comparative legal material. Namely, traditionally sociology in law has identified forms of behaviour in societies in order to help legislators form positive legal rules. In this way, sociology is a discipline which produces data for interpretations "outside the legal".

However, in the comparative legal approach, sociology appears tempting because the peculiarities of one society are often related not only to legally-acceptable behaviour, but also behaviour outside the law. We may often identify specific features of one society by referring to deviations from legally acceptable behaviour. Furthermore, because comparative law is often phenomenologically oriented, legal diversity catches the eye, and may appear relevant to the legal analysis of another system.

Now, in this sense, comparative law is frequently oriented also not only to "non-law" in some acceptable way but also to "illegal" behaviour, which may, to a certain extent, be "acceptable" according to its customary basis. In fact, whereas in the traditional legal approach one feels bound to forms of behaviour, which are normatively regulated and categorically binding, in the comparative approach, however, one has lost the conventional "relevancy" distinctions, and many regular, even illegal forms of behaviour may seem to be relevant "from the legal point of view".

This somehow gives even more importance to the "legality" approach to comparative law. Because of

**Some problems within the distinctions of comparative law.** As we have maintained, the basis of the modern idea of comparative law is the nation state paradigm of law. The nation state is the object of classification.

Modern comparative discourse has been characterized by distinctions such as sources of law and principles regarding their treatment, legal families<sup>604</sup>, leading systems<sup>605</sup>, legal traditions, style, historical background, development, "modes of thought" in legal matters, distinctive institutions, ideologies, religions, the "great" or "main" systems of law, common core/radically different countries<sup>606</sup>, and furthermore, by distinctions such as mature/immature (affiliated), developed/developing, modern/primitive, parent/derived etc.<sup>607</sup> These are the distinctions of the macro comparison<sup>608</sup>.

The typology or classification of legal systems is one of the crucial questions in comparative legal science. It is the basis of the whole idea of legal comparison.<sup>609</sup> All these distinctions give rise to possibilities of different types of approaches to the relationship between legal systems.

One can claim that the basic distinctions directly parallel different conceptions of law. We may speak about fundamental values, or even about reflexive relationships between the basic concepts of "private and public", within the realm of these distinctions. "Families" refer to the "archaic" basis of systems, and the analogy is taken from the concept of family (in the "ethnological" and "geographical" sense)<sup>610</sup>. The idea of main systems, for example, has to do

the lack of traditionality, one has to remember that everything, which seems to be allowed, is not legally allowed in some society. On the other hand, because one cannot learn everything from law books, customs appear important. Nevertheless, they function, for a comparative lawyer, only as preliminary steps for understanding the legal-non-legal distinctions in some societies.

The sociologization of comparative law is to do with this phenomenon. Without the traditional context, the comparative lawyer may sometimes identify legal customs, which are strongly opposed to more "traditional law".

<sup>604</sup> David, R., Brierly, J.E.C., 1978, p.1, pp.17-29.

<sup>605</sup> See, analysis by Kirsch, I., 1981.

<sup>606</sup> Schlesinger, R.B., 1968, also Frankenberg, G., 1985, p.42.

<sup>607</sup> Malmstrom, Å. (1969) notes on the problem of classification in comparative law. See, Frankenberg, G., 1985, p.422. For some comments on classification, Friedmann, L.M., 1990, p.50 ff. The Modern/primitive distinction relates clearly to the premises of the classical anthropology ("they' could be accurately described in 'our' terms") (see, MacCarthy, Doing the Rights Thing in Cross-cultural Representation. In: Ethics, 1992, p.637).

<sup>608</sup> See, Bogdan, M., 1990, p.82, David, R., Brierly, J.E.C., 1978, and Sanders, A.J.G.M., 1990, p.63, Zweigert, K., Kötz, H., 1977, p.33 ff.

<sup>609</sup> Rozmaryn, S., 1973, p.585.

<sup>610</sup> The idea of David, R., Brierly, J.E.C. in this matter is highly complex (1978, pp.19-20). David, R., explains that "the idea of a legal family does not correspond to biological reality: it is no more than a didactic device" (teaching legal families?). The idea of legal family seems to be an ideal and non-normative criterion:

*"and in that light, almost any systematic classification would serve the purpose."*

On the other hand, the classification of legal families does not seem to be connected to any particular

legal rules:

*"The classification of laws into families should not be made on the basis of the similarity or dissimilarity of any particular legal rules, important as they might be. This contingent factor is, in*

with the modern utilitarian criterion of the importance of these systems (an idea- and political-historical criterion)<sup>611</sup>. The modern/primitive" distinction, on the other hand, stresses the (modern) rationality of the system.

"Style" and "technique" can be associated with the argumentative aspects of systems, and the "philosophy" criterion seems to stress the importance of the internal discourses and some kind of closed evolution. Style seems to be strongly connected to the "persuasiveness" of justifications, and, in this sense, it has to do with the "self-maintenance" of the system of law as a "cultural" system. Consequently, styles may be important for the "maintenance of cultural law", and to the existence of the legal system as a cultural system. Nevertheless, at the same time, the discourse on law seems to resemble more like a discussion concerning stereotypical "identities" and the stressing of cultural distinctions rather than a discourse on law<sup>612</sup>.

*effect, inappropriate when highlighting what is truly significant in the characteristics of a given system of law".*

The general and connecting factor seems to be based on a universalistic category more than a complex of particular legal rules (a *tertium comparationis*?). This non-contingent idea seems to be the idea of a legal system as a subject of classification:

*"We are attempting no more than to underscore the similarities and differences of various legal systems."*

On the other hand, the whole idea of classification seems to be strongly context dependent:

*"The matter turns upon the context in which one is placed and the aim in mind."*

In other words, it appears as if the classification of legal families takes place in the context and of highly specific aims, where non-normative criterion is applied to an *a priori* idea of a legal system. Any particular legal rules are considered to be irrelevant to the distinction.

This idea is interesting. We may say that we are left with a strongly-established link between categories of legal families of legal systems as idea-historical categories with a subjective aim and context. The acceptability of the results of this classification, on the other hand, seems to be dependent on the "universality" of the perspective and some legally relevant distinctions:

*"The suitability of the classification will depend upon whether the perspective is world-wide or regional, or whether attention is given to public, private, or criminal law."*

In this sense, clearly some legal normativeness is involved (as a structural assumption). Namely, Markesinis, for example, observes how the possibility to move beyond the criminal law/private law distinction is typical to comparative lawyer (193, p.630).

For some further analysis, see Friedmann, L.M. (1990, pp.50-51) who attaches the family distinction to coherence. Pizzorusso, A., on the other hand, maintains that distinctions of legal families is based exclusively on rules concerning the application of law by judges (1980, p.301).

<sup>611</sup> For some problems concerning the "families" distinctions, see Bell, J., 1994, p.19. Earlier, Zajtay, I., 1973, p.211 ff.

<sup>612</sup> For an example of this type of legal discourse, see Legrand, P., 1996, p.282.

This type of discourse - it may be claimed - is typical of the period after the second world war.

One may ask, what difference does style make to the hard core of law. Style seems to be one of the distinctions of "cultural" comparative law, which, as noted, pays more attention to the "identity" of the system than to its discursive and normative functioning.

For the distinction based on style, see Zweigert, K., Kötz, H., 1977, pp.61-63. This is a "modernist" distinction:

*"The concept of style which originated in the literary and fine arts has long been used in other fields. Style in the arts signifies the distinctive element of a work or its unity in form. But many other disciplines use this fertile concept to indicate congeries of particular features which the most diverse objects of study may possess".*

The criteria of a style include historical, philosophical, institutional, legal source and ideology based

In modern classification, "political" resemblances have also played an important role. This type of distinction is the distinction between the socialist and western systems. Here the criterion has been the political nature of the system. These types of "political" criteria have been taken from socioeconomic theories. Furthermore, some "mixtures" of this idea have been also presented ("social types of systems").<sup>613</sup>

It has been suggested that the "*variable criterion according to different branches of law*" is the idea to apply.<sup>614</sup> This would be based on the fact that the object and the methods of regulations differ considerably. Systems should not be classified entirely according to basic "holistic" criteria, but according to different branches of law.

In the field of private law, the distinction between "common law" and "civil law" is quite strongly established.<sup>615</sup> The common law/civil law distinction refers, for example, with the help of institutions such as trust, to different conceptions of property, but also to other which elements have been seen as important in this distinction<sup>616</sup>.

On the other hand, some "substantial" distinctions have also been proposed, which are based on the "legal" qualities of certain systems. For example, a distinction between "legal types" or "typical solutions" seems to belong to this category.<sup>617</sup> This is a step away from the "political realists'" solutions to more "legal idealists'" solution, and it appears as a change in the comparative paradigm.

As we may see, the idea of basic distinctions and classifications has remained fairly controversial, and may be said to be unresolved. The problems surrounding different distinctions are connected to the lack of "social" dimensions and functionality of systems in a meaningful sense. Furthermore, classifications seem to give a justification for peripheral countries being able distinguish themselves from the "hard core countries".<sup>618</sup> Furthermore, political changes seem to

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features (ibid., 1977, pp.62-66).

An example of the geographical distinction is the "*Rechtskreise*" by Zweigert, H., and Kötz, H., (1971) (See, Zajtay, I., 1973, p.212 ff.).

<sup>613</sup> Rozmaryn, S., 1973, p.586. For a comparative study with an extensive analysis of differences, Mattila, H.E.S. 1979 (for example, p.47 ff.).

The comparison of socialist and Western systems has been divided to comparison of "system-conditioned" (administrative law and the law of state organization) and "system-neutral" (family law, criminal and procedural law) institutions (Kropholler, J., 1992, p.706..

<sup>614</sup> Rozmaryn, S., 1973, p.588.

<sup>615</sup> Rozmaryn, S., 1973, p.587. Analysis, Schlesinger, 1980, p.222 ff. An "epistemological" analysis, see Legrand, P., 1996, p.62 ff.

<sup>616</sup> I consider this distinction as one of the most challenging distinctions in contemporary comparative law, especially when it is related to different conceptions and functions of property and discursive differences

Schlesinger gives the emphasis upon the procedural differences (Schlesinger, R.B., 1980).

Some analysis is found below related to the examination of legal reasoning in some legal systems.

<sup>617</sup> Drobniq, U., 1972, p.124.

<sup>618</sup> Frankenberg, G., 1985, p.422.

be capable of "reconstructing" socio-legal systems fairly quickly. The basic distinction within leading systems and legal families connected to the socialist group of law shows how problematic these "ideological" and "cultural" distinctions in comparative law can be.<sup>619</sup>

Distinctions correspond also to ideas concerning legal history. In its analysis of historical forms, comparative law is between two poles; firstly, it has to maintain the dynamics of systems, and secondly, their integrity. We may say that historical connections between legal systems, in the form of similar rules, are not always proof of connections between contemporary legal systems. There can be differences, and usually there are differences, even in spite of the easy adaptation of a system or part of a system to another system. This may be due to the fact that the doctrinal and legal cultural "context" gives the same rules a totally different content.<sup>620</sup> Moral and social views can vary extensively. The more real circumstances and discursive processes are focussed, the more historical aspects (positive and negative) lose their importance. Here comparative interpretation becomes a matter of argumentation, and the balancing and weighing up of different methods of interpretation included in comparative analysis<sup>621</sup>.

In the end, it has to be asserted that different basic distinctions are not ends in themselves<sup>622</sup>, though it sometimes looks as if they are.<sup>623</sup> Some "realists" appear even to even oppose any basic distinctions<sup>624</sup>. On the other hand, it is clear that distinctions such as the legal family distinction, for example, function as justifications for certain restrictions upon inquiry, or for pedagogical purposes.

**Education.** One could say that the importance of the use of comparative law in education is based on the need for non-dogmatic teaching.<sup>625</sup> That is a value in and of itself. Lawyers do not usually have experience of the real-life functioning of law in their own, or in some other country.

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<sup>619</sup> This demonstrates a connection between comparative law and political certainty.

<sup>620</sup> Kisch, I., 1981, p.167. He gives an example by referring to the differences between French and German legal doctrines of causality, culpability, mistake and evidence.

<sup>621</sup> Comparative observation of another system has to be there connected to three dimensions of a legal system: substantive, formal and functional. This means asking the following questions: what is the law in practical terms? what is it in formal terms? and how does it function in society? Systems are interconnected on all these levels.

<sup>622</sup> Bogdan, M., 1990, p.85.

<sup>623</sup> For an excessive amount of discussion on purposes, see Kahn-Freud, O., 1978, p.327.

<sup>624</sup> See, for example, Drobnič, U., 1972, p.123. Gutteridge, H.C., 1949, p.74. For some critical analysis, see Zweigert, K., Kötz, H., 1977, p.35.

To a certain extent, it is problematic to speak of similarities and differences in the realm of law, because law is a political and ideal construction of discourse. In more a concrete nominalist context one may, naturally, speak about an *a priori* identification of similarities. However, systems are, in their application and discourse context, necessarily dissimilar. One should, therefore, speak about relative generality rather than similarity or disparity.

The argument from generalities and similarities seems to create a secondary level of law. The disparity argument, on the other hand, confirms the original legitimacy of the system.

<sup>625</sup> On this function of comparison in general, see Sacco, R., 1980, p.307. That comparative law is not, and should not be seen either, necessarily "anti-dogmatic", see Dölle, H., 1970. Also David, R., 1981, p.200.

The objective is to avoid dogmatic idealizations of law, and to maintain the ability of lawyers to evaluate different possibilities. This can be achieved through comparative legal education.

In this sense, by reproducing the state-paradigm of law and by maintaining certain alternatives of perspectives, comparative legal education is a fruitful and comprehensive form of legal education. Comparative legal education serves positive and critical functions, and can be claimed to be a form of critical positivism.<sup>626</sup>

Furthermore, it is quite evident that comparative law is a good pedagogical tool, because it claims systematic generality with regard to law and legal systems. It shows that law is applicable in other societies, and that there may be *a priori* similarities, whatever they may be. On the other hand, because comparative law still claims the relative autonomy of laws and legal systems, it can be characterized as a discursive form of legal culture.

**Some thoughts on the *tertium comparationis* and comparative legal cultures.** The idea of comparative legal cultures is derived from the generalities existing within different legal systems. These generalities are identified by the difference principle, the contents of which on the other hand, is dependent upon the *tertium comparationis* or the prior similitude (as a practical criterion). The *tertium comparationis* is, in the sense of comparative legal cultures, both the internal connector and the external disconnecter of different legal cultures. Furthermore, the *tertium comparationis* determines the sphere of comparative research in its attempt - in a comparative discourse - to maintain coherence between these different legal cultures and legal systems. The *tertium comparationis* is the "cultural possibility", the discursive "blind spot" of comparative law.

However, one may claim that what takes place in the explanation by culture is a kind of "over-intentionalization" of societal practices<sup>627</sup>. Practices are seen as being holistically intentional. This idea posits the possibility of taking into account all practices and interpreting all

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<sup>626</sup> Comparative law seems to be extremely conservative idea. It seems to reproduce the traditional legal forms by having alternative perspectives to law. On the same time, it gives some dynamics to them. In its modern form, it seems to be kind of a critical positivist approach to law (Zweigert, K., Kötz, H., 1977, p.12. critical capacity and better solution).

It has been maintained that all valuations connected to the positive functions of comparative law belong rather to the realm of legal criticism ("Rechtskritik"). This may be contrasted with legal politics ("Rechtspolitik"). See also, Schlesinger, R.B., 1980, p.41.

A more "universalist point of view is stated by (Zweigert, K., and Kötz, H., 1977, p.16):

*"But it is the general educational value of comparative law which is the most important: it counteracts positivism, dogmatism and narrow nationalism, and thereby points to the universality of legal science and transcendent values of law; by rising above mere technical specialization it leads to legal thinking at a higher and more general level, and it offers the mind thus induced to be critical and provides a world-wide supply of solutions"* (emphasis added).

In contemporary law the situation, however, seems to be the converse. The institutionalization and professionalization of law is a contemporary phenomenon. The world-wide supply of solutions has led to the instrumentalization of legal discourses to a large extent.

<sup>627</sup> For some analysis, see Smith, R.J., 1989, p. 425.

the acts as social. In this sense, the idea of comparative legal culture could be described as an idea of legal phenomenology. Comparative law, in terms of culture, seems to be based on a method of understanding the nature of the phenomenon of law in general.

On the other hand, explanation by "culture" is usually not analytical, but refers instead to the self-referential sphere of language, which seems also to be quite problematic.<sup>628</sup> On the other hand, explanation by "culture" is part of the political integrity, and in this sense a political act in itself. It seems to be problematic to view this as a coherent explanation in a legal scientific sense<sup>629</sup>. On the other hand, the premise of cultural relativism is connected strongly to the idea of ethnocentrism<sup>630</sup>

*Legal tertium comparationis?* Consequently, we could claim that the *tertium comparationis* is one aspect of the self-referential description of law, whatever form it takes. *Tertium comparationis* has to be a somehow "internal" element for any of the systems compared. Further-

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<sup>628</sup>For criticism of "culture" as explanation, see Brusiin, O., 1953, pp.441-442, also Frankenberg, G, 1985, p.439.

It seems that a legal system is basically open to its environment in cases, where it has to "homophonically" refer to itself. Here a legal system constructs its legal evolution by seemingly contingent factors, such as by sociological claims. That is the basic feature of comparative cultural reasoning.

This opening up takes place, sometimes, in the form of open reasoning, especially in a value-based manner, but in many cases substantive evolution is hidden to within concrete closeness of a system. Even if a system is opened up, *a posteriori*, in public discourse, substantial issues remain unclear. Closure is one of the methods for a system to reproduce itself as a social actor.

<sup>629</sup> It looks like comparative law is, and has been, a backdrop for legal cultural vanity. Many products of comparative law can be characterized as endeavors to gain recognition of a particular legal system or legal culture. Furthermore, by means of comparison, discourses aim at maintaining their coherence and at achieving "comparative recognition". The process of comparison seems to be a process of political integrity seeking, without any particular practical role.

The striving for "comparative recognition" can be a sign of the inability of discourses to maintain their coherence or to sustain themselves as valid forms in society.

<sup>630</sup> It also seems to be that where the scientist explicitly neglects ethnocentrism, certain presumptions on ethnocentrism are still made (For example, Derrida, J. Structure, sign, and play in the discourse of human sciences [Rakenne, merkki ja leikki ihmistieteiden diskurssissa]. In: Niin&Näin, 1/97, p.39 ff.

"Culture" also looks like an argument via a system of beliefs. If understood as part of the instrumental rationality, religions, languages, or more "secular" cultures have a integrative function.

All the same, "culture" also tends to have an "expansive" function in cases, where it is already functioning as a means of socializing, but where this function cannot be seen ("clear, but enigmatic"). Namely, where one aims to keep alive and reproduce "culture" or a system of beliefs, there takes place a creation of new, "occupying" functions which are seen as valuable in a very primary sense. Only in this way can "culture" reproduce itself.

Consequently, culture in its essence is blind, and every adoption of arguments based on culture seem to be as well.

In contemporary legal contexts, the use of legal arguments concerning culture in the form of principles - based on this blind function - seems to correspond to the cultural "symbolic" development of law (modernism). Expansionist development takes place in a culturally principled way. One could say, for example, that principles cannot be based on culture, but culture can be based on principles. They may be derived from different genuinely discursive contexts. Only in this way can any symbolic expansion of culture be avoided.

In the context of European law, as a larger dimension of legal discourse, one can easily recognize, how the breaking down of the legal audiences and dogmatic discussions does not result in proliferated discourses and reflexive relationships between these systems, but stronger attachment of principled and cultural law of the institutional arrangements, and an orientation towards more and more closed ideas of legal discourses.

On legal culture as culture in comparative law, see Friedmann, L.M., 1990, pp.51-57.

more, whenever we are speaking about the *tertium comparationis* in comparative law, we are speaking about a legally relevant *tertium comparationis*.

In this sense we must ask, for example, whether a binding legal order or a system, function can as a *tertium comparationis*? This seems to be related to the question of whether comparative observation could be based on a common international treaty, for example.

At first glance, the answer must be negative. The legal system binding all systems is a common system, from which the legal orders of the parties cannot be separated. In this sense, we are speaking instead of a study of a particular international legal order rather than a comparison of the laws of the parties. The legal assumption is that the implementation and the application of international norms are uniform.

All the same, the common system can be an indication of the existence of *tertium comparationis*. This may be a feature of the contemporary internationalization and regionalisation of law. Systems become increasingly comparable because of their common international features.

On the other hand, even if the legal *tertium comparationis* may be problematic because of its legally binding nature, we may say that because of changes within international norms in the systematic discourse of legal systems it may be applied as a *tertium comparationis* or at least as a scientific starting point.

**“Culture” as a restriction or as an inspiration?** It can be claimed that comparative law and recognition of other legal systems as analogical systems create possibilities for other types of analogies. Ultimately, these possibilities are “formative” ones (they form the legal system).

On the other hand, if the results of comparative law are presented as types of strict rules of (cultural) incomparability or comparability, the necessary nature of this distinction introduces a static dimension to the “cultural” sphere. The strict rules of incomparability and comparability create cultural obstacles, which might be later difficult to remove. In practice, they may become unavoidable distinctions in the legal and general cultural discourses (popular “stereotypes”).

Accordingly, comparative law makes it possible to find not only traditional legal arguments, but also the legal quality of different types of arguments, which were previously not considered to be particularly relevant. On the other hand, in this way comparative law creates possibilities for making the distinction between legally relevant and irrelevant arguments and considerations.

“Cultural” based comparative considerations, not really part of the systematic dimension of deductive decision-making in law, on the other hand, is a “cognitive” approach towards other systems. This generates an inspirational and sources-of-ideas type of phenomenon within the traditional processes of state legal systems. This is a peculiar means of opening up the legal and social environments of legal systems.

Consequently, there are basically two dimensions to consideration of the "inspirational" use of comparative law: the consideration as to how society is seen in general, and consideration of the norms of the legal system in general and in particular.<sup>631</sup>

In practice, however, the interest in comparative observations seems not always to be determined only by these above-mentioned dimensions. A comparativist may also be interested in also developing her argumentative expertise in a particular or general scheme. This kind of "instrumentality" is a phenomenon occurring in many fields of legal practice, but especially in the scientific realm of comparative law. Furthermore, the phenomenon can be visible in different types of organizations involved in normative decision-making. Comparative considerations, even systematic ones, enable the decision-maker to reflect alternative possibilities (as alternative as they appear to him). As we may understand, these kinds of comparative considerations are, in many ways, hidden from the public and explicit legal discourse.

**Foreign law.** Comparative law has been seen, traditionally, as distinct from practical studies of foreign law. Comparative law is claimed to be an academic discipline which studies the relationship between different legal systems, and the rules of different systems. In this sense, it seems not to have a legal interest as such, but a historical and/or sociological interest.

This distinction has been challenged, to a certain extent. A study of foreign law involves evaluations of relationships, and the study of comparative law involves the study of foreign law. On the other hand, one may claim that comparative law, if stressing the separation between foreign law study and comparative law study, is not discursive because it has a tendency to interpret other systems based on some internal "objectivization"<sup>632</sup>. Thus, the main problem in "comparative law" and the study of foreign law is that the system, against which the norms and practices of the foreign system are reflected, tends not to be the normative premises of recognition and interpretation of the foreign system, but one's own system - with its aims and objectives. Furthermore, no critical method of comparative law is applied.

It is true that there is some importance in an attempt to interpret foreign law from the point of view of its own aims and objectives - from the genuine legal point of view. Only by revealing basic aims and objectives, and the context of selection and choices, it is possible to consider as valid the evaluation of the foreign law. On the other hand, only in this way one does establish possibilities for further analysis, and takes part in the traditional discourse. This is one

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<sup>631</sup> The process of comparative consideration seems to be inspirational. On the other hand, because it is determined by an "intuitive" sense of "cultural comparability", it can be claimed to be also a "reproductive" operation.

<sup>632</sup> Here we come to the question of the relationship between the comparative law method and jurisprudence in general. It seems that the comparative legal method could actually have a similar function to general jurisprudence. Studies on the methodology of comparative law have the flavour of general jurisprudence.

However, theories of comparative law are "realistic" theories of law because of their attachment to concepts such as "legal system", "legal culture", and the "political and economic system". Their problem is that they are not analytical in relation to these concepts, though they make generalizations based on practical legal observations.

of the principal benefits of comparative reasoning. Comparative law - traditionally and conceptually - seems also to belong to a sphere of law, where "one's own law" is already known, and where comparison takes place in relation to one's own law.<sup>633</sup>

Indeed, here we may recognize that the difference between foreign law studies and comparative law studies disappears.

Now, one may say also that the examination of the reference system belongs to the comparative process. This has not been sufficiently emphasized. Nevertheless, it ought to be so. Pure comparative (and foreign law) studies based on the structuralist approach function only for the purposes of modelling (or substantive reaffirmation).

Consequently, we may ask, what is the *ratio* of the distinction between foreign and comparative law?

One could claim, against many comparative scholars, that the study of foreign law seems to be the only real form of comparative study, and that - in the scientific sense - there is no difference between comparative law and the study of foreign law. The difference may lie only in the terms of restrictions of the audience and the argument, which we will analyse later.

Nevertheless, one could claim that the distinction between the study of foreign law and comparative law can be justified, to a certain extent, because it corresponds to the description of different functions of the 'comparative study'. The study of foreign law seems to be aimed at dogmatic alternatives or inspiration (and understanding), with the view to practical legal decision-making and planning, whereas the study of comparative law seems to strive more toward establishing causal and historical relationships and to create culturally systematic knowledge. The difference disappears, however, in this practical use<sup>634</sup>, within legal orders, and especially in their uses at the international level.

The distinction between foreign law and comparative law studies can also be justified also, because it makes clearer the idea that there is some difference between the study of one, and, on the other hand, several legal systems. Namely, in the study of many legal systems, there is a tendency to increasingly adopt a stock of reflective concepts, which seem to make the study "polycentrically" reflective. In comparative law processes, based on a study of many legal systems one is able to make a more analytical evaluation of different legal systems. In this sense, the comparison may be a more discursive exercise, because more alternatives can be considered.

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<sup>633</sup> On the distinction between "we and "others" in comparative law, see Tunc, A., 1978, p.285.

This applies, to a certain extent, to the relationship between national, regional, and international systems.

<sup>634</sup> The problem of the distinction between foreign law and comparative law uncovers certain typical problems of modern comparative law. It necessarily assumes that a "foreigner" undertakes the study of law as a study of foreign law, and furthermore, that there exists one's "own" law and "foreign" laws in the strict sense of the word. In other words, the type of research into a legal system, and its norms, depends, somehow, on, for example, the "ethnological" origin of the researcher himself, and on some kind of a "cultural determination" or even on nationality.

The analytical assortment is larger<sup>635</sup>.

Reference may be made to the characteristics of foreign legal systems as legal systems, in comparative law studies. This may be helpful for the development of the idea of comparative law as a legal source.

Foreign law is assumed to be legally rational. That is to say, it is assumed to have rules, which are applied logically (rationally). Furthermore, and most importantly, it is assumed, that these norms are applied correctly. This assumption of correctness makes a comparison a priori a legal comparison.

Furthermore, in the study of foreign law one attempts, or should attempt, in the most extensive way possible, to follow the "internal" rules and logic of the system studied by assuming the integrity of the foreign law. In other words, one is treating the system as binding (in some systematic context), even if its norms are not binding as such in the process of comparison. Foreign systems are seen as legal systems, even if the normative assumptions of the comparativist are not legal in the same sense as they could be when considering ones "own" legal system. There is some difference between the 'legal' in the foreign and in one's "own" law.

On the other hand, we can note that the legal nature of foreign law is tried to achieve by applying the legal analytical devices to the foreign legal system. The legal integrity of the foreign law is maintained - and all "conflicts" sought to be resolved - as conflicts between legal principles rather than conflicts based on the systems "natural characteristics".

In conclusion, there is not - and nor should not be - an intent, in comparative analysis, to make the mistake of the structuralist anthropologists and to apply the structural rules of ones own system, or some other system, to the analysis of a foreign system. This is the "internal point of view" of comparative law, which transforms any comparative observation into a legal comparative observation, though this approach differs, in some ways, from the traditional "internal point of view" of a legal observation.

We could claim that this same idea applies to the analysis of international law and national systems in international law. If one is to look into the rules of international or regional organization, one studies those systems and their rules in a particular context, and does not, or should not, apply the source rules and principles of one particular legal system to the analysis. It is admitted, however, that the study of international and regional systems differs from the study of foreign law. These studies are studies of "legally" binding orders, or systematically binding systems, and their binding quality, as such, does not have to be examined once again. Those obligations are incorporated into national systems in one way or another<sup>636</sup>. However, the study

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<sup>635</sup> One could claim that in the process of comparison, there takes place a construction of analytical networks.

<sup>636</sup> When it comes to the legal nature of the decisions of international courts, one should perhaps be careful. Where the interaction between international and national, in many ways, looks more reflexive than traditionally regulating, one may claim that the legal nature of the decisions of regional and international systems is dependent on the nature of the analysis in their decisions.

of these systems is "comparative" in the sense that there is a difference between 'legality' on these two levels.

The same idea may apply to the interpretation of national systems by international judges, for example<sup>637</sup>.

**The problem of "understanding".** One could relate the previous analysis to another question of comparative law, namely, to the idea and aim of "understanding". This idea makes clearer what could one mean by a discursive form of comparative law.

It has been claimed that comparative observations have a double function; they function in the creation of the better understanding of one's own law, and the explanation of the law. The idea of better understanding seems to be connected to the theoretical aspects of law, to the ideas of legal sociology and legal history or legal phenomenology. "Practical" law is, on the other hand, part of the legal explanation in normative decision-making and dogmatics, and in normative discourse in general.

Now, the traditional idea of comparative law, which suggests that comparative studies deepen the understanding of one's own legal system, seems to be more or less correct. Comparative study conspicuously refers to hermeneutic processes, to a prior understanding based on one's own legal system, with regard of an understanding of its structures, forms, interpretation, and context.

Nevertheless, when this "better" understanding is part of legal decision-making, there is necessarily a slight shift towards "new" aspects of the interpretation of the system's rules and dogmatic framework. The tradition changes. If some harmony or integration existed between different systems, it is at this point broken.<sup>638</sup>

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For example, the decisions of the International Court of Justice are binding only the parties (Article 59 of the International Court of Justice). Furthermore, when we speak, for example, about regional orders, such as the European Court of Human Rights and the European Court of Justice, one has to remember that norms from these institutions are usually transferred to various contexts, not only in another factual-context (as are normal precedents), but also to another legal context. In this sense, the mere application of these decisions, analogically in domestic courts, is not 'legal' in the traditional sense, but "legality" has to be created case by case by means of an extensive analytical discussion. The same applies to every change of law enacted by the legislature relating to a supranational legal sphere.

Accordingly, because it is exactly the character of the analysis, which transfers the comparative observation to "legal" sphere, the discipline of comparative law should turn its attention to the nature of the comparative analysis in practice rather than to the study of methodology as such.

<sup>637</sup> We may easily recognize this problem within the legal framework of European-level legal orders. On that level there does not really take place the interpretation of national systems, but it is instead the task of the international or regional lawyer to provide "normative formants" for the national lawyer, interpreted in the regional or supranational context, to be used and "connected" in the national context. We may speak about some kind of a instrumentalist polycentrism and reflexivity (see, analysis below).

<sup>638</sup> Bogdan, M. (1996, p.2) relates this idea of "understanding" to the increase of "possibilities.

In fact, this idea seems to be the mechanism of comparative law as such. The "non-existence" of similar types of regulation lead to "stronger" cognition of one's own rule, or to cognition of the "functional" situation in the other "systemic" spheres. From the positivist point of view, it is clear that the "own" system gets emphasized.

In this sense, it definitely leads to [re?]evaluation" of one's own legal system (for this, see Jyränki, A.,

In this sense, comparative argument within discourse does not seem to necessarily generate any "integration" or "harmonization", but it directs systems (or the discourses) in different "directions". This is so because the role of comparative argument is determined more by the prior understanding of the system than by the social and legal context of the another system, especially in its applied form. Where the understanding of one's own system is facing a change which is not, nevertheless, supported by any systematic interpretation, the disintegration in the adoptive (discursive) system causes general disintegrative tendencies within the (discursive) systems.<sup>639</sup>

In this sense, the idea of better understanding (even in its theoretical dimension) seems to refer more to instrumental possibilities (stable deviation, for example) and to the disintegrative discourse. The traditional argument based on increasing understanding, on the whole, thus seems to be actually about disintegration<sup>640</sup>.

Because the issue is, however, also about a heuristic function of interpretation of another system, we may argue that what takes place in this process of understanding also the deepening of understanding of another system. Depending of the extent of the study of the other system, comparative considerations may make it possible also to "understand" another system. The distinction between the understanding of one's "own" and "another", however, becomes unclear<sup>641</sup>.

Finally, the distinction between one's own and another system is made on the practical level. This practical (discursive) act does not, however, usually take place in relation to the other system. Here we may speak about "understanding" in a truly abstract sense.

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1996, p.12).

<sup>639</sup> Legrand, P. (1996, p.76 ff.) has attempted to grasp this phenomenon. Nevertheless, he stresses the (cultural) "understanding" dimension, and does not enter into the discursive side of this "understanding". Legrand assumes "*shared epistemological premises*" as a basis of a conversation, and maintains that "*there can be no conversation among people unless they are bound by shared presuppositions, that is, common assumptions (something, which has, of course, little to do with the truth and falsity of their beliefs)*" (idem., p.76).

This idea seems to be controversial. What are common assumptions - if they are to have any real meaning - than beliefs upon falsity and truth? On the other hand, even if we would necessarily be "foreigners", this does not mean that we could not take part of the conversation as "foreigners" (unless there is some kind of coercive reasons). Are we "epistemologically" foreigners? In other words, the differences in basic knowledge or premises cannot, in my opinion, create any obstacles for discursive relationship in theory.

Legrand extends his postulates towards the discourses between ontological legal units: "*In the absence of shared epistemological premisses, the common law and civil law worlds, cannot, therefore, engage in an exchange that would lead one to an understanding of the other, if only to a virtual understanding*" (idem.).

In describing the differences between legal systems, he makes analogy to difference between men and women (ibid., 78).

<sup>640</sup> This disintegrative tendency can be, on the other hand, itself instrumentalized.

<sup>641</sup> Now, it seems that, fundamentally, every coherent system of law is relatively autonomous and incomparable. However, when we enter the material and substantial levels, we start a process of systematization. In this type of systematization, systems lose their coherent and systematic natures, and become *a priori* comparable. In every partial examination and consideration of the legal system and its institutions and rules, systematic connections are lost. Here the examiner enters into the examination of his premisses also on *the basis of a priori* similarity too.

Consequently, comparative considerations serve a double function: they deepen the understanding of one's own system, but also the understanding of another system, although the argumentative and the functional results can be seen only in one's own system (and discourse). Only there is the use of comparative considerations transformed into a discourse. Only in the adaptable (discursive and practical) system has the argument a normative role.

Nevertheless, it seems that in order to be correct, there is always at least a possibility for the instrumentalization of an argument in the system of origin. This may take place by making a claim that now there exists argumentatively integrative tendencies<sup>642</sup>.

In this sense, comparative arguments can have changing and confirming, dynamic and static, functions<sup>643</sup>.

Modern comparative legal science seems to be in a difficult situation. This may be the basic reason why it uses concepts such as understanding. Comparative law has to maintain the "centrality" of the paradigm of states, but at the same time it has to explain itself, why the study of comparative law still serves valuable purposes. By the idea of "understanding", one is able to justify this involvement in the definition of national legal systems and discourses. One does it by broadening redefining the narrow scope of the national legal system and by constantly reminding oneself of the narrowness of comparative legal study.<sup>644</sup>

One may say that comparative law, by aiming towards an increase in understanding has thus "come to grips with law" in many ways.

**Nominalism and conceptual functionality.** Here we come, once again, closer to the ingredients of the discursive idea of comparative law.

It has been argued that it is nominalism which presents a problem for comparative law. The basic problem of nominalism is the philosophical problem of comparability of nominal forms. One may say, for example, that "freedom of expression" is nominally the same in different

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<sup>642</sup> This can be seen in any "tendency" reasoning.

<sup>643</sup> In this sense, every result of comparison is, normatively, a fundamental element of culture. As a legitimating or validating ideal, and as an ideal system of beliefs, it has a strong social impact. This is, perhaps, the reason why comparisons and all analogical idealizations and similar types of processes of idealizations, are somehow problematic as subjects of research, interpretation and argumentation. This is why, usually, it is only the result of this process which is explicitly expressed. Comparison, as such, seems to be, both in the factual and ideal senses, and as a legitimating process, speculative and unnecessary, and even undermining. The deconstruction of the elements of the original ideal, and the analytical approach to it, seems to problematize the original legitimation. The social system of beliefs is questioned. At the same time, there is a questioning of the whole process of the original idealization.

This seems to be the reason why comparison in law has been understood as an integrative process of the creation of understanding and as a practical discipline. If comparisons are made, they are usually not reproduced in normative decision-making, for in the ultimate social sense, these reproductions do not tell us clearly or directly anything regarding the belief-system in society. Rather, they open up normative and factual differences, and show the gap, or the step, between the comparatively-interpreted and the originally-"interpreted" norms, and, furthermore, they reveal the "in-built" pluralism and controversies of the presumably-simple normative principle or rule.

<sup>644</sup> Zweigert, K., Kötz, H., 1977, p.27, Fix-Zamundo, H., 1990, p.32.

legal systems, but that two forms of this law are basically incomparable because of the respective systematic (and functional) connections.

The problem of nominalism is related to structural and formal comparability. Nominal comparison is an argument by formal analogy. It is a question about the structural preconditions and identity of the comparative discourse, which we have in many ways.

The nominalist approach may have problems of "superficiality". On the other hand, the impossibility of finding the "*tertium comparationis*", in the conceptual sense, for example, may pose a problem for the traditional nominalist way of approaching the legal comparison.

All the same, the discursive verification principle of discourse theory may liberate the strict conditions of incomparability.<sup>645</sup> In this sense, one could turn to the nominalist approach as the main and the most rational approach to comparative law. It can be seen as a starting point to the hermeneutic interpretation of texts, and as a starting point for a selective process of reading, which functions as a source of information in itself.<sup>646</sup> One could say that the nominalist approach is the basic starting point of comparative law.<sup>647</sup>

If one could maintain, on the contrary, the *a priori* problematical character and the incomparability of the nominalist approach, one would not be utilizing the scientific benefits of comparative law at all. This would mean closing oneself only to the possibilities available and reproducing of the certain distinctions rather than taking advantage of the discursive qualities of comparative law.

One may say that in the nominalist approach to comparative law, there are no *a priori* aims of integration and understanding in any material sense. Comparative law, having as its starting point the nominalist form, but being discursive, augments the understanding of law as a discourse, by revealing the conditions, limits and perspectives of law. It exposes the possible different and similar meanings in different legal systems given over to this nominalist concept. This enables, on the other hand, the use of these different perspectives on law in further discussions on law, legal systems (and their rules and norms), and to debate the normative qualities or acceptability of a model in different contexts.

This nominalism and radical empiricism has been linked one with the other on several occasions. It is actually one of the characteristics of so-called "mediational" law.<sup>648</sup> In terms of mediational law, every case is seen as being essentially unique rather than as an instance of a universal scientific law or a substantive normative ethical commandment or rule.<sup>649</sup> The problems of nominalism are revealed only in the light of strict deductivism, which does not seem

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<sup>645</sup> See, Schwarz-Liebermann, H.A., 1973, p.616.

<sup>646</sup> Von Wright, G., 1983, p.202: "*Non est ponenda pluralitas sine necessitate*" (Ockham).

<sup>647</sup> Klami seems also to have this kind of opinion (see Klami, H.T., 1981, pp.76-77).

<sup>648</sup> Northrop, F.S.C., 1960, p.620.

<sup>649</sup> Northrop, F.S.C., 1960, p.620.

to be the case with interpretative and discursive law.

In this way, criticism levelled against the nominalist approach to comparative law seems to be exaggerated<sup>650</sup>, and an over-emphasis upon the philosophical question embedded within it.<sup>651</sup>

**Comparability and social functionality.** As we have maintained, in the tradition of modern comparative law the relationship between legal systems seems to be based on the state paradigm of law. Every comparison of law is a comparison of the laws of state legal systems. The "state", "system" and the "legal" have been seen as the key conventions of this relationship in the socio-functional sense. Into these ideas has been built the idea of comparability *a priori*. Contemporary comparative law is, evidently, bound to this modern tradition.

The main problem of comparability in the modern tradition is related to the comparability of functional legal systems. This has now been fully recognized in the comparative sciences<sup>652</sup>. In this sense, it is the different or similar functions in certain social situational contexts which determine comparability. Functional incomparability and comparability are forms of functional analogical argument. They are the scientific preconditions of functional identity.<sup>653</sup>

It should be noted that this type of functional state paradigm of comparative law did not disturb the structural state-paradigm.<sup>654</sup> Law was still state law, seen as a political-historical fact. It was only the functioning of these systems which was to become the problem. By neglecting the formal rational basis of the comparison of laws, one was able to hold on to the form of law, state law, as a legitimate source of law. At the same time, comparative law was able to claim that systems were not alike, autonomous, and incomparable on a functional basis.

The adoption of this type of functional state-paradigm in comparative law had two

<sup>650</sup> It appears as if the question of comparability could be answered by an idea of relative analogy. This way the question would be about "degree" of comparability. Consequently, the main doubt would be regarding the character of similarities and differences, especially from the point of view of the social function of the compared institutions in different legal systems (Rozmaryn, S., 1973, p.584).

The answer seems to be satisfactory, but, however, certain predicaments remain. How should the assessment of comparability itself be made? Is comparability already an answer to the legal relevancy of the comparison? The answer to this latter question must be negative. Comparability does not, from the legal point of view, provide a basis of legal comparison, even if comparison could be made. The question must be answered from the point of view of the functional discourse.

<sup>651</sup> Markesinis, B. (1993, p.627) explains, how nominalism may lead to the discursive legal rationality:

*"... what started as a translation problem, was quickly turned into something more complicated and more significant, requiring a background explanation before it could be used by an English practitioner"*

The confirmative, inspirational, or guiding use of comparative law is based on this "creative translation" (ibid., p.632).

<sup>652</sup> On the notion, see Rozmaryn, S., 1973, p.584.

<sup>653</sup> Zweigert, K., Kötz, H. (1977, p.4) say that "*comparison can be useful only if the legal institutions under investigation are naturally and functionally comparable*" (underlining added).

<sup>654</sup> A good example is Zweigert, K., Kötz, H., 1977, especially at pages 18, 23, 25-31.

consequences: legal systems remained under the concept of state law, connected to the state and only to the state. At the same time, international law, from the point of view of comparative law, became a function of political states, not a function of a "legal" actor in any general sense. Only some *ad hoc* elements of law developed their autonomous spheres of international law on the side of the political state paradigm<sup>655</sup>.

Because the problem of comparative law was to be found in the functions of systems, the solutions to functional incomparability were also to be founded on research into equal functions. However, functionality remained the theme of comparative law as an independent discipline of science, rather than a matter for practical legal work in general.

One may say that this resulted in the institutionalization of comparative law in many ways. One could claim that the functional approach to law maintained more the "functionalization" of comparative law, contrary to what the scientific approach to comparative law suggested.

All the same, the problem of comparability in comparative law is still embedded in the theoretical comparison, in the traditionally "descriptive" approaches to comparative law. Only these theories seem to be capable of explaining, why certain comparisons, for example the comparison between different courts, are possible at all. This is why the problem of comparability still forms, and should form, the largest part of comparativist studies in the realm of the traditional science of comparative law.

**The institutional functionality of comparative law.** During decision-making and practical comparisons, normative choices of comparability are based on a legal-cultural and educational prior understanding, and comparability as such is hardly analysed. There is a claim to understanding in the choice of the compared. This is why one is able to reveal the basic cultural attitudes of the decision-maker.

In the decision-making context, the ultimate question seems to be the comparability of the institutional decision-makers. If a legal decision-maker considers certain "comparative" aspects, he is actually asserting the comparability of the decision-makers he is referring to. He is thereby claiming that the institution in another system, which has chosen certain normative

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<sup>655</sup> For example, the new "Lex Mercatoria".

The paradox of a comparative argument is that it is confirming the authority of the legal system in general, but at the same time it is challenging the authority of a (national state) legal system by going beyond the national state-paradigmatic idea of sources of law. In other words, the comparative argument is confirming the authority of the general idea of the state legal system as the source of law, but it undermines a particular state as an authoritative source. In this sense, the comparative argument is, by definition, moving from the idea of state law, as a basis of law, towards a more general level of legal thinking.

At this stage, law is declaring its independence from the particular state system. Furthermore, the legal system becomes relatively independent from politics and does not appear any longer to be the instrumental means.

premises as the relevant premise in certain situations, is comparable to it<sup>656</sup>.

This nature of the decision-making comparison makes it an "institutional" argument, i.e. an argument based on the qualities of the chosen external reference rather than on reasonable factors. Here comparative reasoning becomes problematic. Basically, the argument should not be based on a choice of authority (or "self-authority"). It has to be rationally based. The decision-maker cannot rationally use its own choices as a basis and the premise of a legal decision<sup>657</sup>.

**Some conclusions: the problem of normativeness.** The main problem arises, as we have seen, in the value-based nature of functionalized and institutionalized comparative law.<sup>658</sup> The evaluations in comparative law involve strong value judgements of a horizontal and vertical nature.<sup>659</sup> Namely, even if one could claim the generality of applied legal norms, this does not guarantee the normatively binding character of the forms created. This problem is related also to the logical problem of comparability and nominalism, as we have seen. Scientific abstractions cannot, as such, be part of valid (democratic or discursive) law. It has to obtain this quality from somewhere else.<sup>660</sup>

Consequently, the criticism of "normative comparisons" can be based on the idea that practical comparative law does not take into account the reproductive elements of modern law. Namely, the comparison is a comparison of legal systems. Because legal systems are either state systems or subsystems within the sphere of the state paradigm (international, regional or particular), the question of values is not only in the value choice of the correct, good, or just norm, but also in the "legal generality of practice" within the legal practices of certain systems.

Nevertheless, this seems to make comparative legal reasoning a restricted value

<sup>656</sup> In this type of functionalist comparison, one claims comparability in many ways. The choice of a "comparable" argument is combined with the choice of a comparable decision-maker.

In non-decisionist comparisons, there is, naturally, also a claim of comparability, but the comparability is not claimed to exist between the comparativist and the actor whose (legal) acts are compared but between those several institution whose decisions are compared.

This establishes, for example, the relationship between national legislatures and supranational courts (as a matter of political integrity).

<sup>657</sup> A problem exists in the fact that in comparison, an institution interprets another institution, which it is basically incapable of doing. The decision-maker assumes that he understands that particular system perfectly.

This way we come to the demand that comparative reasoning has to be either systematically analytical or practically analytical in order to comprise a valid argument, i.e. to be transformed from an intuitive choice to a reasonable choice, and to be discursive rather than "analogical".

<sup>658</sup> This can be related to the idea of "deriving ought from is" (see, for example, von Wright, G., 1983 p.3). Wright uses the concept "inference" to characterize the importance of the "is" in "ought", and "means to an end" (ibid., p.1).

<sup>659</sup> Zweigert and Kötz propose the criteria of "*purposive and just*" application of comparative solutions (1987, p.46). They also employ terms such as "*equity, justice*", "*fairness*", and "*common sense*" (1987, II. p.255). See Hill, J., 1987, p.194.

<sup>660</sup> See, on this problem, Bentham, J, *An introduction to the Principles of Morals and Legislation*, 1823 [1789], pp.325-326, and Hill, J, 1989, p.103.

International law, relying on comparative aspects, reflects this same idea.

judgement, and consequently, rational in the sense that the sources of values can be, to a certain extent, identified *a priori*.

**Comparison of functional systems?** At this juncture, the main question within comparative law seems to be: can one really compare functional systems? As we have seen, the functionalist approach has been associated with the institutional legal framework.

If one is to compare law in functional terms, one has to establish, first, the comparability of the legal institutions, and then compare their function in society. This type of functionalist comparison has to take place according to a "extralegal" conceptualization. In comparing, for example, functional law related to the administration of social security systems, one has to identify, first of all, criteria other than purely legal criteria. One has to consider the historical, political, sociological and socio-philosophical contexts. On the other hand, it is the broadness and procedural nature of the conceptualizations which define the nature of this type of legal 'acting', which poses problems for the comparativist.

Furthermore, because the application of law is often autonomous and dependent particular situational and holistic considerations, and as the relevant actors, premises and results are difficult to identify *a priori*, comparison seems to be an impossible exercise.<sup>661</sup>

Moreover, by selecting the key concepts of comparison from sphere other than from traditional "legal sources", one ends up at the question as to whether an abstraction, deriving from this sphere of "law", really is law in the traditional sense. Nevertheless, while in the realm of the traditional idea of the rule of law, these types of observations do not appear as "law", however, we know that many types of institutional acts may be characterized as law even though they tend to base their authority only on procedural norms.

This causes problems also for the consideration of the validity of traditional legal rules, which are connected to these more functional rules. It seems to be quite problematic to investigate this connection in an integrative way and to consider legal systems in general.

One of the main problems of valid comparison and comparative legal analysis seems to be related exactly to this question; namely, the functional features, which sometimes remain hidden, and which are the "main" questions of law of in social system, cannot be in as integrative sense connected to the comparative legal discourse. As a result, comparative law seems to be used mainly in the fields of law where nonfunctional forms of law can be identified. While comparative reasoning tries to avoid any functionalist point of contact in relation to these types

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<sup>661</sup> For example, the comparison of the administration of social benefits is difficult, because it is, in many countries, delegated to the lower administrations (regions etc.), and is procedural in nature. On the other hand, the procedural idea of law would allow us to examine problems common to all societies.

of legal rules, it is exactly this feature which makes comparative law itself functionalist<sup>662</sup>.

#### 4.7 Conclusions; Do we need comparative law at all?

Comparative law is based strongly upon the modern paradigm of positive state law<sup>663</sup>. However, comparative law is disconnected from the informal rules of a political and sociological nature because they cannot be generalized within the contemporary comparative law paradigm. Only a comparative approach which would not have as its basic distinction a distinction between (national) legal systems could be able to also compare the socio-legal subsystems of national legal systems<sup>664</sup>. On the other hand, if comparative law could function at the level of social sub- or supra-systems, it would challenge the basic state paradigm of comparative law.

The contemporary idea of comparative law moves on the level of values by putting itself above the legal discourse. Comparativists seem to make generalizations, whether within legal institutions or in academic debate or scholarship, which are above any genuine jurisprudential discourse. Contemporary institutionalized comparative law has become an obstacle for a genuine form of legal discourse by closing it up. The problem of comparative law seems to be that it has lost sight of social distinctions, which are used in actual legal discourses in order to make distinctions between different cases, and in order to be to facilitate reasonable distinction-making. The analysis in traditional discourses is directed to the sources of law, interpretative techniques, etc., in a value-based manner. Contemporary comparative law cannot recognize these forms. It is thus blind to the analytical capacity of the actual (genuine) legal discourses.

On the other hand, even if comparative law practitioner (judges, for example) may take into account the dogmatic discourses and different political analyses (eg. travaux préparatoires) and other contextual material in their decision making, they would still have only a very restricted idea of the integrity of law. In using this type of comparative approach, they are not able to take part - genuinely - to any dogmatic discourse and do not really aim at any adherence

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<sup>662</sup> It looks as if the functional approach in comparative law remains a form of justification of the real functional analysis. The functional approach appears as a "good intention" within comparative law. At the same time, however, this feature causes problems for the consideration of comparative arguments as "valid" legal arguments.

Comparative law seems to appear as a form of 'legal pathology'

For the concept of social law and its characteristics, see Ewald, F., *A Concept of Social Law. In: Dilemmas of Law in the Welfare state*, 1979 (40-75).

<sup>663</sup> It has been claimed that the idea of comparative law, based on the state paradigm of law, can easily cause "optical illusions" (Sacco, R., 1991, pp.345-346). See Jescheck, H-H., 1974, p.772.

All the same, one may say that a shift in the paradigm is taking place. The segmented "sub"systems of law may be treated separately and, on the other hand, some dynamics may become visible. This question, however, is treated after the analysis of the "European" material, which can perhaps shed light on certain questions.

<sup>664</sup> For "Extra-national bodies", see Davis, F., 1969, p.628.

of the dogmatic audiences.

In this sense, contemporary comparative law does not, in reality, aim at the preservation of the discursive integrity of law. On the contrary. It refers to the "social" without being able to refer to anything else but "substance".

On the other hand, institutionalized comparative law seems to be based on the premise that the reproduction of law takes place on the basis of an ideal comparative discourse. However, by neglecting the importance and in a sense by usurping the role of actual legal discourses, it actually functions in the opposite way.<sup>665</sup>

Consequently, we may ask; do we need comparative law within the legal discourse?

Now, one could formulate this question in another way. Should comparative law studies start to compare its premises (*tertium comparationis*) with the contemporary ideas appearing in the theories of legal discourses? This would mean, in practice, that institutionalized and instrumentalized comparative law could and should be compared with particular legal discourses. Consequently, through an examination of these means of using comparative law in modern law, one may be able to reveal the prevailing idea on rational audiences of law.

We will come to this question after examining some theories regarding the use of comparative law information.

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<sup>665</sup> One may ask, whether this could be the basic, even intentional, strategy of contemporary comparative law? Is the primary idea of current comparative law theory to make distinctions between different audiences? Does the basic idea of comparative law refer to audiences, which are seen as basic and "rational" audiences within the legal discourse?

#### 4.8. Some theories of comparative law: the theory of legal transplants and the theory of legal formants

##### 4.8.1. The theories

**Introduction.** As we have noted, in the realm of comparative law, one speaks of an "understanding of law" in general, an "understanding of ones own law", and an "understanding of legal development". These "understandings" seem to include ideas concerning the historical and sociological role of legal innovations (resulting from comparative practice), the conditions for legal innovations and legal adaptations, and transplantations and reform as a whole.<sup>666</sup>

Here an attempt is made to briefly look into some theories related to these legal innovations and transformations.

The analysis of these theories serves the purpose of defining so-called "discursive standards" for comparative legal reasoning.

**The theory of legal transplantation.** In legal history, the spirit of the people, as a basis for law, has been contested:

*"History of system of law is largely a history of borrowings of legal material from other legal systems and of assimilation of materials from outside to the law."*<sup>667</sup>

One of the most interesting theories of comparative law related to this idea is the theory of legal transplants<sup>668</sup>. It is a theory examining historical relationships between socio-legal systems and their circumstances, and, in a concrete legal form, the relationships between legal systems<sup>669</sup>.

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<sup>666</sup> Watson, 1974, p.16

<sup>667</sup> Pound, R., 1954. See also, Lowie, R.H., *Primitive society* (N.Y.) 1947 [1920], Watson, A., 1978a, p.321, Jackson, P., 1968, p.372, 382-385. The latter recognized adaptations related to general cultural patterns. Also, markesinis, B., 1993, p.635.

It has been claimed that usually the parent legal systems are imitated, Zweigert, K., Kötz, H., 1987, p.39.

For some analysis, see Koopmans, T., 1991, p.507.

For some analysis of the "legal imitation" in modern comparative law, see Yntema, H.E., 1958, p.498.

In contemporary discussions very practical and radical ideas on comparative receptions in interpretation have also been expressed (In the field of environmental law, see Seidl-Hohenveldern, I., 1997).

<sup>668</sup> Watson, A, 1974. Some analysis, see Ewald, W., 1995, who recognizes the strong Roman Law background of the theory (ibid., p.490, 498 ff.). The basic philosophy of the practical comparative is that "we must always remember the possibility that some other legal system may have found a better remedy for the problem than our own" (Graveson, R.H., 1958, p.655).

<sup>669</sup> Watson, A., 1978a, p.321.

Legal transplants can be defined as pieces of law of one legal system transferred systematically or unsystematically, on a smaller or larger scale, to another legal system. Transplants are artificial constructions without any necessary connection to the (legal) culture itself. Transplants are part of the historical process of the development of a legal system, and they are one "source" of law or for a legal system.<sup>670</sup> Transplanting is an easy way of adopting new rules<sup>671</sup>.

The circumstances in which legal transplantations (as all "political" and "legitimizing processes") occur are usually connected to new situations in economic, political or legal life<sup>672</sup>. It has been claimed that the moment of the reception of foreign influences is usually the moment when the legal provisions are examined closely (e.g. when there is pressure for modification or refinement of a law).<sup>673</sup> It has also been argued that reception is easier if the recipient system is "*less advanced from the material and the cultural point of view*"<sup>674</sup>.

One of the possible motives for "transplantations" may be, in modern law, international pressure.<sup>675</sup> Legal receptions have become commonplace because of the expansion of the modern economic system. The "correct" law becomes a matter of political and economic credibility. This may be related to the tendencies of modern law toward 'materialization'<sup>676</sup>

The adaptation of legal material can be direct or indirect. Direct transplantation creates a system or a part of a system. Indirect transplantation occurs, for example, in the form of adaptation of different techniques and theories. Indirect adoption has been seen to result from the fact that transplants (adaptations) have been made first to the common language.<sup>677</sup>

Transplants have also been divided into so-called voluntary and non-voluntary

<sup>670</sup> Watson, A., 1974, p.95.

It has been maintained that the results of transplantations can be disastrous. When custom and positive law are in conflict, it is positive law that tends to fail. This failure shows itself either in rebellion or in a corruption of legal and political officials, "*which turns the positive law into something worse than a dead letter*", Ehrlich, *The Fundamental Principles of the Sociology of Law*, 1936, p.493

<sup>671</sup> No particular part of private law has been extremely resistant to change under foreign influence (Watson, A., 1974, p.25).

Constantinesco, L.J., makes a distinction between adoption or reception of a whole complex of statutes ("*die globale Übernahme eines ganzen Gesetzbuches en bloc*"), partial reception and adoption of elements, and eclectic reception (1972 II, p.413).

<sup>672</sup> Watson, A., 1974, p.28.

<sup>673</sup> Watson, A., 1974, p.99.

<sup>674</sup> Watson, A., 1974, p.100. Also Schlesinger, 1980, p.17. On the problems of reception, see Watson, A., 1978a, p.313.

<sup>675</sup> Hill, E., 1978, p.298.

<sup>676</sup> For some historical examples, see Hill, E., 1978, p.299.

<sup>677</sup> This means that the spirit of the people instead rather in the details rather than in the system (Watson, A., 1974, p.97).

Indirect methods of transplantation seem to indicate that the process is focussed more upon the preservation of the coherence of the legal system.

transplants:

- geographical legal transplants; people moving to a different territory with no civilization, taking their laws with them, or moving to areas with their own civilization,<sup>678</sup>
- voluntary acceptance of a large part of another peoples' system,
- imposed transplantation,<sup>679</sup>
- other forms of transplantation (solicited transplantation, penetration, infiltration, crypto-reception, inoculation etc.).<sup>680</sup>

Legal transplants could be found as far back as in antiquity and the Roman legal system.<sup>681</sup> Many countries, such as Japan, Turkey and Ethiopia, have borrowed complete parts of legal systems from other countries<sup>682</sup>. However, the phenomenon is not unknown in any contemporary legal system.

Some contemporary comparative lawyers do not encourage transplantation activity, while others do not have a clear point of view regarding this question.<sup>683</sup> However, the general

<sup>678</sup> See also, Schlesinger, R.B., 1980, p.11 ff.

<sup>679</sup> On some results of imposed "coercive" transplantation in India, see Annousamy, D., 1986, p.57. He identifies a lasting change of law, amalgamation, upsurging revival of the old law.

<sup>680</sup> Watson, A., 1974, Rheinstein, M., 1956, p.31.

<sup>681</sup> Watson, A., 1974, pp.24-25. Quoting Wieacker, F. *Privatrechtsgeschichte der Neuzeit unter besonderer Berücksichtigung der deutschen Entwicklung*, 1967.

Discussion concerning this is indirect (Watson, A., 1974, p.25). Indeed, some have reservations concerning this influence (see for example Arrangio-Ruiz, *Storia del diritto romano*, 1957).

<sup>682</sup> For different adaptations, see for example in the Middle East, the Ottomanian Empire adaptations of the French Commercial Code 1850, 1875, 1883, and further adaptations in Iraq in 1870-1877 (see also receptions into the Turkish law in 19th century, Andersson, J.N.D., *The Significance of Islamic Law in the world Today*. In: *Am.Jour.Comp.Law*, 1960, p.188), French law to the Magreb countries in colonial period, Algeria in 1834, and in Tunisia (see also, *Islamic law in Tunisia*, Andersson, J.N.D., and in *The Tunisian Law of Personal Status*. In: *International and Comparative Law Quarterly* 7, 1958, p.263), and Maroc. Sudan; English law in 1898 in India. On the "blending" of these laws within local systems and the context of adaptations, see Hill, E., 1978, p.286 ff., 288, 299. Schlesinger, R.B., 1980, pp.11-12 (for example, concerning Eastern Europe after the second World War).

For example of the colonial context, Egypt and the British occupation, 1822, and the British Civil, Commercial and Penal Codes (see Hill, E., 1978, p.290). British case law influences also in Palestine, Pakistan and the Sudan development.

For adaptations in England based on economic, cultural and political factors (see Kahn-Freund, O., 1974, p.4).

In concrete form, comparative legislation or legal transplantation can be seen in the history of seventeenth century states in Northern America. The adoption of English common law was adapted, with transformations, in many states (Friedman, L.M., *A History of American Law*, 1973, p.30-41). The historical drafting of English model statutes was many times word for word, and it seemed to be common professional practice. The reception was also taking place through the doctrines of common law (Zaphiriou, G.A., 1982).

Provisions, practices, approaches methodologies, and styles were also adopted from Roman, French, Mexican, and Spanish "systems" (for example the Code Napoleon). These adaptive practices took place during the 19th century in many part of the United States.

Regarding German private law adoptions in Turkey, Japan, Norway, Greece, and the Soviet Union, and constitutional law influences in Greece, Spain, and Portugal in the 20th century, see Koopmans, T., 1991, p.494.

<sup>683</sup> Kisch, I, 1981, p.168 studying the opinions of Arminjon, Nolde, Wollf, David, Gutteridge, Schlesinger and Von Mehren.

idea seems to be that borrowing should take place only after a careful examination of the prevailing social, cultural and legal conditions.

It has been asserted that different transplantations can be examined by viewing the adaptations and changes in legal systems in relation to the concepts such as the sources of law, pressure forces<sup>684</sup>, opposition force, transplant bias<sup>685</sup>, the role of law shaping lawyers, discretionary factors<sup>686</sup>, generality factor, inertia<sup>687</sup>, field needs<sup>688</sup>. With these concepts, for example, one is able to identify the dynamics of law. This way there could be a creation of possibilities, and a pointing of a way toward better reform<sup>689</sup>. In other words, one could identify models for legal change in relation to law and society.<sup>690</sup>

The study of transplantation can have thus "predictive value". One can, for example, anticipate what the possible future influences of certain "transplants" would be.<sup>691</sup>

**The theory of legal formants.** A second theory, which grapples with similar questions, is that of the theory of legal formants. This idea could be associated with an instrumental and formal theory of legal discourse (as opposed to a traditional or value-based one).

The theory of legal formants is a theory concerning the elements in practical legal discourse which shape legal interpretations, and which are removable, to a certain extent, from their context<sup>692</sup>. This theory does not stress the centrality of the transplantation of legal rules, but rather the essentiality of extra legal elements<sup>693</sup>.

**The difference between legal transplantation and the theory of formants.** The theory of legal transplantation regards the legal influences which have taken place within a quite arbitrary and

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<sup>684</sup> I.e. groups, which advocate the change. The emphasis of lawyers' role in society is remarkable in Watson's theory (see also Ewald, W., 1995, p. 497 ff).

<sup>685</sup> This includes ideas such as receptivity, linguistic tradition, general prestige, and accessibility.

<sup>686</sup> I.e. the law as it is applied.

<sup>687</sup> A good analysis is provided by Klami, H.T. (1981, p.152) with reference to the ideas of Perelman.

<sup>688</sup> See, Watson, A., 1978a, p.322. For a critical analysis of those concepts, see also *ibid.*, pp.330-331.

<sup>689</sup> Watson, A., 1978a, p.324. For a quite extensive analysis of these factors, see Klami, H.T., 1981, pp.147-158. For a view visualizing the relationships between these factors, see *ibid.*, p.154.

<sup>690</sup> Watson, A., 1978a, p.332.

However, comparative modeling is not modeling as such, where the legal institution is taken as such to the legal system. The model is taken through a variety of legal and social analyses, and in this way transformed into the internal discourse. This type of modeling is dependent upon on the discursive culture of each community. It is important to make this distinction between the normal idea of modeling and the comparative legal modeling.

<sup>691</sup> Bates, F., 1981, p.273.

<sup>692</sup> They have "*life of their own independent that of the conclusion they supposedly support*" (Sacco, 1991, p.30). This idea seems to be based on the fact that similar solutions can be based upon different reasons.

<sup>693</sup> See Sacco, R., 1991.

contingent sphere. One is not really able to construct any principle from that theory for the study of law<sup>694</sup>. The theory of transplants seems to refer to non-discursive transplantation. However, in an analytical study of the processes of transplantation, one may draw distinctions between discursively rational and non-rational transplantations.

The theory of formants is better suited to the analysis of legal influences in legal discourses, and adaptations of the concepts, doctrines etc. in the adjudication.<sup>695</sup> The legal formants theory seems to proclaim that there can be an element of a legal quality within these influences<sup>696</sup>. Consequently, the theory seems to indicate the possibility for discursively rational implementation. Nevertheless, the "hidden" instrumentality embedded in the legal formation theory could be more problematic, from the discursive point of view, than the instrumentality connected to the open legal transplantation, as we shall see below.

One of the qualities of the theory of legal formants is related to the fact that one may also identify anti-formants, i.e. formant, which are not functional (such as formants not belonging to the realm of the discursive integrity of law). In this sense, the theory is more "normative".

In conclusion, one could say that the theory of legal formants may be, to a certain extent, associated with comparative discourse as an idea of modern comparative law.

Both theories can be used also in the examination of "normative" transplantation (in vertical normative relationships).

#### 4.8.2. Some problems concerning transplantation theory

**The nature of transplantation theory.** It is fairly obvious that legal systems develop, to a certain extent, through borrowing. On the other hand, these legal transplantations take place most readily during periods of forceful historical transformations, as we have already indicated. These

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<sup>694</sup> Unless one adopts a principle of "imitation based on imposition of prestige" (for this concept see Sacco, R., 1991, pp.398-399). Prestige seems to be, however, a problematic explanation.

<sup>695</sup> Some studies can be characterized as studies of legal formants, see for example, Roman and Germanic legal influences in Swedish case law in the 17th century (Jägerskiöld, S., 1967, p.178). These adaptations took place often on the basis of conceptions of "civilized systems" (ibid., pp.186-187). In the mid-17th century there was a growing influence of Corpus juris, Ius Gentium, etc. (ibid., p.203). By the end of 17th century the respect of statutes arose (ibid., p.203). This seemed to be the end of receptions. There were also, in the 1734 law, some directives for judges.

It is interesting that these uses were sometimes "hidden" because of the obligation to use one's own terminology (ibid., p.178). Furthermore, the uses did not necessarily lead to any substantive changes (ibid., p.202). Influences contained concepts, principles, rules of interpretations, modifications, and legitimate source of law (ibid., p.205). *Ius Romanum* used, when there was a *lacuna* (idem.).

Legal policy was motivated indirectly by the adoptions of legal scholars.

In addition Law Reform Commissions [*Lag Kommissionen*] also used "foreign" models. There are no travaux préparatoires on this. Laws appeared "national", though historical influences are easy to reconstruct (ibid., pp.208-209).

<sup>696</sup> See Sacco, R., 1991, p.390.

are situations where profound changes take place in society.

However, transplantation theory does not thoroughly consider thoroughly all aspects of these borrowings.<sup>697</sup> Functionality is one of these aspects. In this sense, the problems of the theory can be identified with respect to the idea of the reflexivity of law. According to this theory the legal relationship between systems is reflexive. This idea applies, with modifications, also to the idea of legal formants.

We will come to this question after making some remarks concerning other problems connected to these theories.

**Identification, holism, system assumptions, and the external/internal distinctions.** The most pressing problem of the transplantation theory is the same as that found in legal history in general. This is the problem of "identification". One of the problems of this type of study is, for example, that frequently legal formalism is seen to be something meaningless. This causes a lack of attention to the legal systems in their proper context.

The "external" point of view is connected to this aspect. The transplantation approach stresses the "historic-logical" nature of transplantations. Transplantation theory seems to start from the fact that transplantation takes place from an external to an internal sphere. It does not emphasize the possibility that transplantation could reflect internal conditions (and interests) in society.<sup>698</sup> This leads to the idea that transplantation theory does not take adequately into account all relevant societal factors. Transplantation from the internal to an external sphere seems to be the preliminary starting point for the process of transplantation.

On the other hand, legal transplantation theory assumes that a body of law is transplanted to another system. The following assumptions are embedded within this idea: firstly, there is a body of law somewhere, and secondly, that there is the possibility to transplant, via some process, this same body of law to another system.<sup>699</sup> Accordingly, the theory does not stress the fact that the law is discursively systematic. Law is a process of systematization. As and when a certain body of statements is adapted to a system of law, the systematic, and consequently, the legal nature of these statements remains a part of the legal discourse. In other words, there are no normative legal rules or norms transplanted. Rather, there is an adoption of a body of descriptive statements, from the point of view of particular receiving system. The statements achieve their meaning and normative content within the discourse of that system.

Consequently, we may perhaps speak not about legal transplantations, but about cognitive transplantations of ideas, which become "legalized" within the particular discourse of a system. In the context of the discursive concept of law it is problematic to maintain the idea that

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<sup>697</sup> For some criticism of the imaginative conception of legal transplants, see Klami, H.T., 1981, p.76.

<sup>698</sup> See Sacco, R., 1991, p.400.

<sup>699</sup> Regarding holism in theory, see Klami, H.T., 1981, p.147.

a norm or a part of a system is easily seen as a whole (with all its institutional, historical, sociological and other dimensions).

We may conclude by saying that one cannot really see any "mechanical" or "organic" transplantations in law. One could, in the realm of theory, speak instead of different "degrees" of adaptations<sup>700</sup>.

The theory functions well in the context of the "objectivised" transfer of ideas. Nevertheless, because it seems to undermine the internal political and discursive elements of law<sup>701</sup> it cannot be regarded as a "legal" theory, and, consequently, as having normative value<sup>702</sup>. On the other hand, it seems to be problematic also in relation to legal historical study. It may easily create a need for the "purification" of influences.

**The functional transplants.** One of the ideas that the theory of transplantation may be neglecting is the idea that the most instrumental and effective way of transplantation is in the creation of a functional institution. This may be called a functional transplant. Its effectiveness and instrumental nature derives from the fact that the identification of a functional transplant, its aims, role and its relationship to the social system, is problematic for legal theory and legal discourse in general.<sup>703</sup>

One can also maintain that transplantation may result in a certain degree of comparability, and the comparative legal discourse may start after these transplantations.<sup>704</sup> This is the aspect which should be taken into account in the theory.

**Hidden transplants and visible parallelism.** There can also be "hidden" (comparative) sources of law in a functional situation. For example, where normative and political systems are covered by "oppressive" and "official" normative premisses, the normative "subsystem", which endeavours to maintain its normative culture (continuity), may come to refer to another comparable culture in order to maintain the coherence of its interpretations. This is so in situations, for example, where the "official" system is considered arbitrary or problematic for some reason. These kinds

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<sup>700</sup> Kahn-Freund, O., 1974, p.5.

<sup>701</sup> Jackson, P. (1968, p.385) religious factors, social factors, personality etc. See also, Kahn-Freund, O., 1974, p.21. Watson, A. (1978a, p.315) identifies this as "arbitrariness".

It has been claimed that, for example, European receptions have not been forced reception (Sacco, R., 1991, p.398).

<sup>702</sup> Similar type criticism, see Abel, Law as Lag: Inertia as a Social Theory of Law. In: Mich.L.R., 1982 (785 ff.) (Referred by, Ewald, W., 1995, p.505. His defense of Watson's theory, *ibid.*, 505 ff.).

There has been some discussion on the normative aspects of the theory, see Watson, A., 1974, p.317.

<sup>703</sup> It is interesting to note, how the analysis of a functional institution means the transfer of the conceptualization of legal research to the "origins" of the transplant. In this sense a functional transplant remains a functional transplant.

<sup>704</sup> Walton, W., Egyptian Law of Obligation. A Comparative study with special reference to French and English law, 1920.

of cases may be identified, for example, in legal systems where the traditional system is replaced by another system via some historical incident, usually connected to occupation or some other type of "invasion". The traditional identity is maintained, in this situation, by "unofficial" reference to another comparable system, without maintaining it as an "official" source of law. This practical usage determines, in such a situation, the material content of norms and rules<sup>705</sup>.

On the other hand, many times transplantations have not been integrated thoroughly into the adapting system, but the outcome has instead been a system with "parallel jurisdictions". This may generate, for example, not only separate institutions but also separate law for those institutions (so-called mixed systems).<sup>706</sup> The idea of transplantation does not seriously contemplate the possibility that integration is incomplete, even though disparities are obvious.

**Conclusions: transplantation in relation to legal and political theory.** Adoption or legal transplantation do not seem to be only the issues concerning legal norms and rules, but also legal theories and pieces of dogmatics.

One has to make a distinction between two aspects of legal transplantation. The first aspect of legal transplantation is the identification of legal transplants in the history of comparative law. The other aspect may be related to the discursive situation of the adoption of legislation from one system to another. These aspects related to different types of governance, and they complement each other, to a certain extent.

Even if we are here mainly focussing largely upon the historical approach to legal transplantation, one could make some remarks concerning the relationship between political theory and "legal" transplantation.

One may profess that transplantation theory is rather a theory on, and an identification of, political processes expressed in terms of "legal" arguments deriving from the sphere of comparative law. The question may not be about virtual legal transplantation, but

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<sup>705</sup> This seems to indicate that transplantation theory does not take into account the instrumental side of law as an object of study.

Granger, R. (1979, p.37 ff. (116-125) has made very interesting and persuasive study on the tradition as a limitation for legal reforms. He classifies social fields, where resistance occurs (traditions, irrespective of the field of law in reform): politics (power), the state and administration functions, economic relations, urbanization, rural exploitation, work relations, education, freedoms rights and liberties. The resistance results in the ignorance of law, also by the lawyers ("inflation"), bad conditions for the elaboration, application of law, and teaching of law, and transformations of the functions and the alteration of the nature of law. The limitation of the reforms has resulted different transformations in the environment, consequences of the impact of science and technology, deepening and quickening of social mutations, intention to exaggerate the rationalization of the social life, crisis of the socialization of groups (young), population crisis etc.

He seems to suggest that there has been a change in the function and nature of law. Lawyers have also a tendency to see law apart from social conflicts. On the other hand, he seems to suggest that the power of law has been limited it too extensively (ibid. p.121-123).

I see this part of the institutionalization and ultimate positivization of law.

<sup>706</sup> Development in Egypt, see Hill, E., 1978, pp.290-291. Mixed systems have been seen as "non-systematized" systems.

rather, the political transplantation of norms which have their separate legal history. In this process, even the "legal" character of transplanted norms can be contested. Namely, as explained before, the law requires a certain degree of systematization within a legal discourse - within a legal tradition - whereas the legal nature of transplanted rules is legally distinctive. The "transplanted" norms do not sufficiently satisfy the criterion of legal systematization.<sup>707</sup>

One could claim that "legal" transplantation is a form of comparative adoption, typical of a certain type of "governance". Namely, the adoption and legitimation of actions by transplanting may be associated with a system which is not stressing the need of general public discourse. "Legal" transplantation belongs to governmental systems where the public discourse is not considered to be the basic "transforming" social activity and important as such. This type of governance is based instead on the authoritative adoption of legislation. This type of "governmentalist" law, in this category of system, is based on adaptations of large bodies of law from authoritative sources without a discourse.

Conversely, in a system based on the "democratic idea of law", on the other hand, one uses comparative information as an argument within a discourse. Here the main initiatives and the line of discussion are determined by the relative continuity (integrity) of the social system and its forms of discourse.<sup>708</sup>

#### 4.8.3. A special problem of transplantation and adaption of formants; the equalization effect

**General remarks.** Here an attempt is made to explain the idea of the equalization effect, which is, or can be, a part of the transplantation or adoption of formants.

We may claim that legal transplants and formants may be accepted passively within

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<sup>707</sup> In the context of discussion of middle Eastern Law, see Hill, E., 1078, pp.284-285. One could call this as an "incomplete system imitation" (Sacco, R., 1991, p.400).

<sup>708</sup> This may be related also to contemporary discourse. It can be maintained that industrialization, urbanization, and development in the field of communication have reduced the obstacles to legal transplantation. This is connected directly to the features of the post (or high) modern society. There are no resources for discursive legislation, but institutions are transplanted because of the increasing need to stabilize the general discourse.

Concerning the general impossibility of a theory of legal change, see Klami, H.T., 1981, p.156.

In the end, we may notice that also Watson A. (1995, p.342) notices the integrative formulation of doctrines in legal systematization (by comparative law). He does not, however, seem to be willing to build up a legal theory on these basis. He maintains:

*"When law is created by judicial precedent it has to wait on the course of events. A doctrine may emerge from a line of cases over a considerable period of time; and the judges in the first cases may be quite unaware of the parameters of the resulting doctrine. What is not so easy to perceive is that a jurist, too, may fashion a doctrine in stages, unconscious of what his final result will be. This may be especially the case when a jurist is operating within a system that builds up its own law on the basis of another system" ... "the inventive himself may not at once see all the hidden possibilities that will justify his approach".*

a general normative framework (for example, on the basis of an international arrangement, or even as part of an obligation), or actively and "voluntarily". This latter idea refers to the observation of social development elsewhere, and consequently, the introduction of legal measures into internal political or legal processes. In other words, legal transplanted can take place either formally or practically. The motives for and the nature of the processes of transplanted are, generally speaking, legitimatizing and/or practical.

On the other hand, within these processes, transplants can be taken from an authority, or from a system, having the same problems, and can, also, a practical legal solution to such problems. The reasons for the adoption are embedded, in the latter case, in the nature of rules themselves. There is no relevance attached to them by any common and existing legal framework. Thus, rules are seen as tools or pieces of legal technology.<sup>709</sup>

The reasons for the latter type of adaptation may be related, for example, to the similarity of traditions. On the other hand, adaptation may be also based on the fact that one piece of legislation was codified first and formulated in an explicit form, thus rendering it easy to borrow or transplant.

Now, both comparative law and transplanted theories are based on an idea of comparative processes. In both cases, one is bound to have certain observations concerning positive rules, in one form or another. In both processes, one observes something, which seems to be "external" to the system in the substantial and institutional sense.

However, one could define a reflexive (transplanted) adaptation as an adaptation of an "external" rule whereby the "external" rule is observed from the point of view of some internal principles or processes within the adapting legal system. If this is not done, according to the theory of reflexive law<sup>710</sup>, the internal regulation becomes incomprehensible and no real justification for it exists.

Comparative law transplanted, on the other hand, differs from reflexive transplanted, because within this process the rule observed is somehow generally and formally binding (i.e. a source of law). This means that the reflexive relationship is systematically regulated, and, in a way and to a certain degree, obligatory. This idea may be explained in the following way.

Differences between these two types of transplants are connected to the binding nature of the process. In reflexive transplanted the process is not binding as such (i.e. comparative law is not viewed as a source of law). In other words, comparative law has not been formulated as a general source of law in legal discourse. With regard to comparative law transplanted, the process is relatively binding, because comparative law is considered a normative (reasonable) source of law *a priori* (at least in some circumstances or with certain

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<sup>709</sup> On these concepts, see Friedmann, L.M., 1975, p.195.

<sup>710</sup> On reflexive law, see Teubner, G., 1993.

qualifications).

In both cases, one is not able to transplant anything to the internal discourse, but one is obliged, to a certain extent, to take into account the internal premisses of the system. Nevertheless, in comparative law transplantation the idea of comparative law as a source of law has been discussed, and comparative law has been accepted as a source of law, under certain conditions. On the other hand, with comparative law transplantation, a more analytical discourse concerning the acceptability of the transplant is possible because of the existence of a theoretical framework, and also because of the possibilities for drawing substantive comparisons. Transplantation is not based solely on the existence of an internal principle which makes transplantation possible, as is the case with reflexive transplantation.

The differences between these types of processes may be associated with the difference between the transplantation theory and the theory of legal formants. It appears as if, in traditional transplantation, one assumes that transplants somehow automatically result from the similarity between the transforming and the receiving systems. On the other hand, in the formants theory, the similarity of the forms - as between the transferring and the receiving systems is also assumed. However, in this latter theory, it is also nevertheless presumed that the form is a formant, that is to say, that it also forms the system.

The idea of formation, which may be connected to the formants theory is interesting. However, the essential question is; how does the legal formant form the system? Indeed, can it do so at all?

Let us return here to our ideas concerning reflexive and comparative law transplantation, and to the different types of internal justifications for a transplant. We may maintain that in comparative law transplantation one is able to observe analytically different types of formations in connection with legal formants themselves - i.e. in the process of the transplantation of these legal formants. This may inform us about the intentions of the adaptor. On this basis, one may conclude, for example, that the forms stay as they are, and that no "external" elements are attached to these formants. Here the formants do shape the system, but, for example, only to the extent they have their "original" meaning. On the contrary, in some cases one may observe that the formant includes additional elements which did not originally belong to it. Here the difference between the original and the derived version of the transplant becomes problematic.

In comparative law transplantation, the essential point is, consequently, the observation of different types of "couplings" in the transplantation process, whereas in the case of reflexive transplantation we may only observe the process of transplantation, where the normative quality of the basic principle of the receiving system may be used instrumentally for different types of "adaptations". Here the legal and political aspects, for example, can become mixed up.

Consequently, in the active and voluntary application of formants, regulated by the

comparative law discourse, one can more easily examine the rationality of the transplantation (formation process). One may, for example, criticize the suitability of this transplant to that particular social system by taking into account discourses of systems and discourses on comparative law source theories. One may also attempt to make evaluations of their persuasiveness from the analytical point of view of one's own socio-philosophical standpoint. Furthermore, one may examine the extension of the formation in relation to its additional elements. In general, there are many possibilities for an examination of the communicative qualities of the "transplantation" process.

With regards to reflexive transplantation, and with normative framework transplantations, these aspects are more difficult to observe. The external and internal elements cannot be easily distinguished, if the idea of "self-operating reflexiveness" prevails. In these cases, the normative (principled) relationship between systems alone determines the presumed substance of the reflexive application, i.e. the application of the legal formant. Here the normative quality of the relationship prevents any discourse concerning this automatic process<sup>711</sup>.

In this manner we come to the idea of comparative law discourse.

**The "equalization" effect.** Related to transplantation we may, accordingly, speak of an "equalization effect". The equalization effect means that in the formation process, i.e. in the adaptation of a formative proposal (legislative or adjudicative), the original formant and the additional elements, which contrary, take upon the equal significance and are deemed to have the same legal value as the formant alone.

To conclude, this means, for example, that if the adaptations and transplantations are one of the essential features of the political or legal functioning of society, or comprise sources of norms in non-systematic way, we are speaking of instrumental systems. The instrumentalization takes place by connecting some other external social-political element and aim to the transplanted element. One uses "objective" and "authoritative" models as tools in implementing various elements, and not only the elements directly connected to the transplanted element. In other words, one "reads extra factors" into comparative arguments. We may even claim that one adds "non-comparable" elements to the transplanted proposal. As maintained, this, on the other hand, may be based only on the basic principle(s) of the system (reflexivity). In such cases, the socio-phenomenological observations and the observations of the political or legal discourses in

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<sup>711</sup> We may apply the so-called autopoietic theory to the analysis of the phenomenon (Teubner, G., 1993).

One may claim that the systems meet in terms of factual interactions. This means, in legal terms, in argumentative trials (cases). Every comparison is empty on the phylogenetic level. No direct cognitive relationship exists between them, but the "co-evolution" is determined by the self-reflexivity of the system. It is selective according to the ideas internal to a particular legal system.

Every comparison, in other words, if it is openly argued, reveals the internal elements of selection: countries involved, types of norms and sources, the form of adaptation. The environmental analysis reveals many characteristics of the system, which is comparing.

the social system are disregarded, or the observation is done in an extremely restricted way.

We may claim that the equalization effect takes place in legally "weak" yet politically "strong" systems (i.e. governmental systems). The weakness is related, for example, to the inadequacy of the discourse on comparative law and sources of law in general but also of the legal discourse in general. In these types of systems, the idea prevails according to which internal norms may be changed according to external premisses. The comparative-discursive relationship between systems is thus lacking.

On the other hand, it is important to note, in this connection that if the receiving, equalizing, and transforming system is in a normative relationship to the system(s) from which the formants are derived, the formative processes may be used to accelerate changes in the system quite effectively.

**What are the "equalization effect" studies?** The rationality of the comparative formants may be evaluated by the study of the analytical quality of the formative discourses. On the other hand, this may take place in the realm of the discussion on comparative law<sup>712</sup>. We may call this a comparative law discourse in a normative sense.

As we have seen, the rationality of the reflexive formants can be evaluated by the analysis of the formants' quality in relation to the distinction between original aims and the "additional" aims, and the "dogmatic" (comparative law) content of these norms in the system they are derived from. On the other hand, it is clear that the influence of the study depends on the possibility for distinguishing between the formative proposal, the original idea, and their aims. A successful analysis may help one to find out whether these different aspects are mixed up, for example, in the legislative or adjudicative processes. One can find out, for example, whether the original aims are used in the normative application of the transferred rules as means to achieve purposes other than the original ones. This means, consequently, that one should be able to study the dogmatic contents of norms in different systems.<sup>713</sup>

#### **4.8.4. Some conclusions**

**General remarks.** As we may see, the original type of legal transplantation is fairly easily recognized, when the study concentrates on traditional historical phenomena. There the main focus is in the historical circulation of legal ideas. The intentions and discourses and the socio-

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<sup>712</sup> In this sense, the discussion on comparative law may also function as a method for discussing on legal formations in the realm of binding international systems, and not only in the realm of traditional comparative law. As we have suggested, normal international rules may also be called, to a certain extent, legal formants, though their nature is "legal" as a binding rule. Cultural aims may be seen as premisses for the equalization effect.

<sup>713</sup> This seems to be exactly the problem we face, for example, in relation to regional and international organizations.

political contexts remain outside the study, and the transfer of legal idea may be easily recognized as a transplant. In a way, the theory of transplantation remains beyond a legal approach, because of its distance, both in its practical theoretical and in historical dimensions, from the social and integrative discourse.

However, transplantation theory, in its developed form, could be a study of legal discourses with the help of some socioeconomic conceptualizations. This way it comes quite close to political history. This way one could attempt to recognize legal events, and explain their occurrence in those particular circumstances. With the help of the theory, one may be able to find out the reasons for the forms of law, and the absence of particular pieces of forms of law, in some systems. On the other hand, the problematic features of the transplants can be avoided by examining the role which has been played by "legal transplants", if any, in each system, in the systems' development from a legal mosaic to a legal system.

**Transplantation, comparative law, and the study of the comparative legal arguments.** As we have seen, comparative and reflexive transplantations involve quite different forms of implementation. The former can be seen as a systematically (and legally) "binding" form of implementation. The second cannot necessarily be qualified in this sense.

On the other hand, these different types of implementations were divided also into discursive-rational and instrumental types of comparative and reflexive implementation. This distinction identified the quality of the comparative legal reflexivity for further discourse.

The study of comparative reasoning and argument is reminiscent of study of transplantation, because, essentially, we are speaking of the adaptation of "foreign" discourses and reasoning to another discourse and form of argumentation, and, furthermore, we are discussing the possible abandonment of those arguments which have been already considered arguments in the legal discourse of that system in some context. However, a study of comparative arguments and reasoning does not stress the finality of the reception of the legal formation, but attempts rather focus upon the continuing process of equalization, its rationale, and normative implications.

We will come later to this question of the comparative legal discourse and its relation to other types of legal discourses.

#### 4.9. Conclusions; toward a redefinition of comparative law

**Contemporary critical comparative law.** Critical movements in contemporary comparative law stress the failure of ethnological comparative law and its former distinctions in general<sup>714</sup>. This

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<sup>714</sup> Frankenberg, G., 1985, p.415, Pöyhönen, J., 1992, p.62 ff.

kind of "postmodern" criticism of traditional modern comparative law stems from the insistence upon a more theoretical, methodological and in the normative sense, ethical approach to comparative law. This criticism claims that comparative law has been too greatly relied upon "common sense".<sup>715</sup> This phenomenology of comparative law has attempted to grapple with those issues speaking of the metaphorizing of comparative law as "travelling", or by seeing it as a "learning process".<sup>716</sup>

The critical approach goes back to basics, and seems to neglect any systematic component of comparative law<sup>717</sup>. This may be a result of the frustration caused by the contemporary institutionalization of the law and comparative law. The critical approach recognizes the dynamics of this neo-institutional law, which the "normal" lawyer does not dare or bother to recognize so explicitly.<sup>718</sup>

One could say, consequently, that because the "modernist" comparative lawyer has gone beyond the traditional legal discourse, the integrity of law has to be maintained by a different type of discourse. This is the reason why contemporary comparative law must orient itself differently.

The critical approach to comparative law, especially in the terms of the political theory of comparative law<sup>719</sup>, would be a helpful approach in understanding the need for a new

<sup>715</sup> Frankenberg, G., 1985, p.420.

One could call 20th century comparative law "intellectually isolated" (for good analysis, see Maine, J., For some critical reflections on contemporary comparative law, Mayda, J., 1978, pp.361-378.

<sup>716</sup> Frankenberg, G., 1985, pp.412-413. For problems concerning this, see *ibid.* p.441. One of the problems is naturally that the comparative discourse is part of the legal discourse (*ibid.*, p.441).

The problems of comparative reasoning are connected also to its legal-phenomenological nature. The comparative argument would need - in order to be rational - go through the systematic and cultural study of its relationship to the system where it is adopted so as to be systematically understood. This is so, because the argument does not carry with it, as a normal legal premiss derived from the systemic legal discourse, the relationship with the system. Or, it does so in a negative sense (as a relationship with another system).

These problems of foreign connections bring also interpretational problems into the picture. Here the argument should be interpreted from the foreign premisses, which makes the arguments more difficult to understand.

The comparative argument should be, in this sense, understood with its restricted relationships with both systems. The system holistic approach should not be taken.

<sup>717</sup> See in this regard, Frankenberg, G., 1985, pp.452-453). He, however, seems to recognize ideas regarding the integrity and coherence of public discourses, and the distinction between the public and private etc.

The inability of the postmodern critics to combine comparative reasoning with the discursive attitude, undoubtedly embedded in the method of comparative law, results in unjustified criticism against the use of comparative law. For example, Watson strongly claims that comparative law is unsystematic almost by necessity (1974, p.11). This kind of criticism belongs to the non-discursive paradigm of law, which fails to see the rationality of comparative law based on the traditional restrictions of the sources of the comparisons.

<sup>718</sup> Frankenberg G., recognizes the problem, and that it might easily result in more ethnocentric interpretations of law (1985, p.421, and 428 ff.). The comparative lawyer is in a different position than the "normal lawyer", because he has to separate himself from the dominant legal consciousness (*ibid.*, p.446).

Frankenberg has, in his presentation, some problems with ethnocentrism and "domestic legal consciousness" (*ibid.*, p.442) and culture based language (*ibid.*, p.443).

On the frustration in general, see Goodrich, P. *Reading the Law* (Oxford) 1986, p.210 ff.

<sup>719</sup> Frankenberg, G., 1985, p.452.

type of discourse. One could also propose new classifications for comparative law in the "high" modern paradigm of law. This would entail changes in two respects: in the object of the classification, and in the criteria of the classification. This idea could be connected to other phenomenon in "high modern" law: material and procedural segmentation. Nevertheless, as we have maintained, the nation state paradigm is still the modern basic unit of comparative law.

Another criterion of the classification could be found also in the "discursive" aspects of these systems. One could classify different systems according to their openness and orientation towards their environment. This essentially means the classification of different legal systems as either value-based, traditional, or instrumentally discursive<sup>720</sup>.

**Comparative law as a "historical legal accident".** In the end, one could claim that comparative law has rather a direct phenomenological basis instead of any preexisting "legal cultural" or "legal systematic" one. Negative disturbances, caused by the cultural mis-match of normative practices, generates the general or particular interest to comparative law. This means that the idea of comparative law is based on prior differences in some realm of social life<sup>721</sup>.

In this sense, comparative law does not seem to be based on any "rational" and predictable theory.<sup>722</sup> Issues of comparability do not necessarily derive from rationalistic consi-

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<sup>720</sup> The problem of the state paradigm of comparative law is in it's strong idea of the homogeneity of national legal systems.

<sup>721</sup> For example, comparative law would appear quite meaningless to persons, who do not have national legal education. They would not be able to understand the differences between different socio-legal systems. Furthermore, comparative law seems to be strongly connected to contingent factors such as the availability of information, resources in the terms of time, etc. This is the basic feature of comparative law.

The problem of every analysis, which includes sociological and phenomenological observations, is the "revelation" of "oneself" and "ones own". Especially in the field of comparative law and international discourse, the extension of the argument towards the factuality reveals "systematically" contingent factors. In these fields, the arguer comes to the value-based or of though affective side of the reasoning, which, nevertheless, reflects his "form of life" and traditional features of thought.

This entails certain problems from the point of view of law. First of all, equality of application, the basis of modern liberal legal systems, comes into question. Secondly, integrity is at stake. However, from the point of view of the general integrity of law, this case has only positive features. Namely, it helps one to establish the division between different spheres of integrity in analysis.

<sup>722</sup> It is, instead, a form of "legal curiosity" (de Boer, Th.M., 1994, p.16).

Comparative law is primarily a heuristic method of legal science, Zweigert, K., and Kötz, H., 1987, p.45.

The subjective element in comparative law, Eörsi, G., 1973, p.182, de Groot, G-R., Schneider, A., p.59, Bogdan, M., 1990, p.68. On the "attitude" element in restrictions, Hill, E., 1978, p.284. Markesinis, B., has spoken even with methaphors like "feeling" and "love" about another system (1993, p.625 ff.). Similarly, Legrand, P. (1996, p.78) making analogy to the relationship between men and women when speaking about the difference between legal systems. He tries to analyze the subjective element (ibid., pp.77-79). From this, there is not a long way to distinction of family as the basic distinction between the legal systems (David).

The idea of *Tertia Valutatio*, Kokkini-Iatridou, D., 1986, p.180, Constantinesco, L.-J., 1971, part III.

derations.<sup>723</sup> Choices made with regard to comparison are not made according to any formal "law in books", but according to "law in action", or rather, according to "law as it is observed and experienced".<sup>724</sup> One compares learned patterns of behaviour and normative practices are felt to be binding to the deviating patterns of behaviour, and becomes involved in the "understanding processes". Choices are made in the realm of "prevailing" patterns" of behaviour, which are not necessarily the same as the learned patterns, but are instead distinct.

In this sense, every comparative law abstraction, whether based on law in books or law in action, remains an abstraction. This abstraction has to be reconstructed and "found" with reference to social behaviour or to the experiences deriving from meaningful practical discourses.<sup>725</sup>

Consequently, in the end, it seems that the "intersystematic" actors are the basis of comparative law.<sup>726</sup> One could say that comparative legal research is determined by the systematic interests of the comparative lawyer<sup>727</sup>. Accordingly, every comparative law study, as a systemic approach, starts from a particular question regarding a legal institution of a particular law, goes on to make comparative reflections, and comes a full circle by evaluating the discoveries made, and in making remarks concerning the starting point of the process with regard to a particular legal institution within system. In this sense, there is no difference between national and international comparative law. The question is basically about which systematic framework the comparator is operating within?

Comparative law may be defined, in this sense, as a study of law as a form of life, or the phenomenology of law. In the ultimate sense, its methodology seems to be based on the concepts of logic and the idea of coherence which are in fact, the basic premisses of the

<sup>723</sup> See regarding comparability, Kokkini-Iatridou, D., 1986, pp.157-158, Kahn-Freud, O., 1978, p.327.

One could refer, for example to the Hartian "internal" point of view, which assumes a pre-existing understanding of the relevant divergences (Hart, H.L.A., *The concept of law*, 1961). The main question seems to be, not the "acceptance of the internal point of view", but, rather, the idea of the "relevant normative point of view".

<sup>724</sup> This means that academic comparative law remains more or less a technical exercise.

Pöyhönen, J. (1992, p.61) has asked, who's law in action and who's law in books the comparative lawyers law is.

<sup>725</sup> Comparative law seems to be by definition a way of finding the positive law (Bogdan, M., 1990, p.68).

<sup>726</sup> *"The intelligent study of foreign legal system is difficult if not impossible without, at least sub-consciously, referring to one's own law comparing it to one's own"* (Winterton G., 1975, p.70).

The interest in comparison must be based on the idea of finding out the "reasons" behind these differences, and, furthermore, the general implications of these differences. This results in the idea of comparative legal research.

<sup>727</sup> The idea of the subjectivity of comparative law has led to a "*Cinderella complex*" (Gutteridge, H.C., 1949, p.23, also Frankenberg, G., 1985).

The Cinderella complex can be explained also in another way. Subjectivity, and its *a priori* orientation to a legal system as a "coherent" legal system, results, in a "comparative situation", and leads readily to the "romanticizing" of one's "own" system. This may be due to the discursive and interactive problems in relation to "another" system. This leads to pathological features from the point of view of the concept of law, and the legal system is thereforth not based on social discourse, but upon contrastive idealization process.

contemporary discourse theory of law. Comparative law studies legal logic in the sphere of legal phenomena and life worlds. Here law reveals itself in different static and dynamic constructions. Comparative law confirms both the deterministic and indeterministic basis of law, and is not relativized and reflected within different questions of legitimacy and validity or with regard to political theories. In comparative law, even political theories can be studied with reference to comparative legal observations, as we have seen.<sup>728</sup>

This idea could explain, for example, why comparative legal reasoning in different socio-normative systems is *a priori* considered to be an "effective" argument. This effectiveness is measured not by the quality of the reasoning and its connection to different dogmatic frameworks but rather by its "correctness" in general. In this sense, it may also come closer to a scientific argument than to a dogmatic legal argument. However, this type of legal "correctness" seems to be related instead to political and cultural theory rather than to any dogmatic theory of law. The persuasiveness of comparative reasoning is transparently based on its relationship to politically and culturally prevailing features. The "generalities" and "disparities" in comparative reasoning are related instead to the socio-political generality than to the legal scientific generalities.

The problem in this is that the more we enter into the field of socio-philosophical phenomena, the greater number of different factors enter into the discussion<sup>729</sup>.

In conclusion, there seems to be a fundamental conflict between comparative law as a science, and the use of comparative information in legal reasoning. The interest of scientific comparative law seems to be in the eternal process of learning different forms of social behaviour and their legal counterparts, and in this sense we have some basis for providing genuine explanations of values and traditions. This seems to be beyond any form of instrumentalization. This is where comparative law seems to approach its phenomenological essence. The utilization of these comparative observations, on the other hand, establishes arguments for some purpose beyond this explanatory (phenomenological) interest. That utilization is in conflict with pure forms of "meditation" regarding the possibility of difference. The instrumentalization makes forms of life necessity, a dogma, and not a possibility. This, on the other hand, seems to be connected to strict disciplines of ideological power<sup>730</sup>.

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<sup>728</sup> David, R., Brierly, J.E.C., 1978, p.6.

<sup>729</sup> The more a comparative lawyer chooses concepts of reflection from the sphere of some other social phenomena, the more he bounds himself to those particular values which have a place in those spheres of social life. Every time comparative law is practical, it in itself to these other spheres of social life, and relativizes itself with regard to certain traditions.

<sup>730</sup> It seems that it is the conceptualization of organicistic and closed systems which has made it possible to, in theory and in the realm of phenomenological empiricism and psychology, to arrive at these kind of speculative and derivative discourses of a comparative nature. The speculative nature of these discourses assumes a superior level of existence (form of life) and it neglects the plurality of genuine discourses.

**The self-referentiality of comparative law.** Traditional comparative law can be also characterized by its self-referentiality. The law refers to law, or to the premises of the institution itself. This is contrary to the traditional discourse and reasoning of law in general, where one refers to the "best legal argument", among pre-selected legal arguments, as the basis of a normative decision, and which turns and is capable of turning one's interest in interpretation to other spheres and discourses than the legal rule or system itself. In comparative law, one refers to many "best legal arguments and legal systems" as legal arguments in the interpretation of a "better" legal argument, but the step to any legal factuality and practicality does not seem to be there<sup>731</sup>.

The use of comparative law in legal reasoning could be, consequently, called the "justificatory interpretation" of law (in contrast to "genuine" reasoning, which could be described rather as "interpretative justification")<sup>732</sup>. Comparative reasoning is never as such a reference to a legal system, its rule and its interpretation, but a reference to legal systems and their interpretations. It is a reference to different legal discourses. This is why it is a justificatory interpretation of law in general rather than the law of a particular legal system.

In this sense, we come again to the idea that the use of comparative law is, in its contemporary form, instrumental. Legal systems, their norms, principles legal constructions, etc., are used in political, social and legal discourses despite their "comparability". This type of use has even resulted in features such as private law doctrines and constructions being used "inspirationally" in the sphere of public law in order to produce "new" types of approaches, and in the adoption of the legal doctrines of one country into the doctrinal argumentation of another country. There does not seem to be any "right answer" to the use of comparative law in legal reasoning.<sup>733</sup>

In this sense, the contemporary approach to comparative law can be claimed to have abandoned the strict methodological and scientific ideas of the traditional comparative law.

**The comparatively reflexive systems.** The fact that the legal discourse on comparative observations is a derived discourse means that these can always be brought down to some system with a "genuine" discourse based on a social form of life. This means that legal systems using comparative observations are comparatively reflexive systems.

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<sup>731</sup> The idea of autopoietic theory that the normative closure of law is a precondition for any possibility of being cognitively open seems to explain this phenomenon (Teubner, G., 1993). All the same, we may say that law's self-referentiality is more in its general nature than in its autopoietic self-referentiality; in law one speaks about law, and not about legal systems and their norms.

<sup>732</sup> Aarnio maintains that where legal dogmatics, for example, uses the interpretative method (and systematization), comparative law method is an interpretative method supplemented with empirical methods and those of history (Aarnio, A., 1997, pp.77-78).

<sup>733</sup> On eclecticism, see Eörsi, G., 1973, p.186. The fact is that comparative law instrumentalizes law as much as it is functional in certain discourses. This is reflected in the traditional forms of comparative research. Only those rules and elements which do appear relevant for the legal discourse are considered.

In this sense, if one claims a relative autonomy and practicality for comparative law, one is usually referring to a strongly instrumental socio-legal community, for example to a regional and international organization, which is instrumentalizing comparative law in its internal and external discourses. Genuinely, however, as we have seen, the autonomy of these practical comparative discourses is relative. Furthermore, these types of comparative discourses usually reflect the values of an "particular institutional form of life".<sup>734</sup>

It must be asserted that genuine discourses are always normatively superior, in general or in particular. However, an institutional discourse cannot be decisive from the point of view of value decisions and legitimacy as such.

**The study of comparatively reasoning as a study of argumentative strategies.** As explained above, in comparative law legal systems are often used instrumentally with the aim to persuade and convince, and not with an objective of establishing any legal norm in the genuine sense of the word. The comparative adaption is not in the adoption of legal norms and rules, but in the search for convincing arguments<sup>735</sup>.

On the other hand, as we have maintained, reasoning through comparative legal arguments does not have to function necessarily in the field of law. It may be that comparative observations only start as legal observations, and end up as extensive analyses of a social, political, economic, or some other type of situation in general. Afterwards these observations may be added to the justification or, as often happens, used in the internal persuasion within institutions. The instrumentality of comparative law may accordingly be seen not only in the instrumentalization of the legal systems, in the selection of a better legal argument - i.e. in persuading of the legal dogmatic audience - but also in providing arguments for the persuasion of the general public or other type of audience, and any distinctive social group it may be important to persuade.

This idea may explain, for example, why the attitude towards comparative observations and studies in legal institutions is so controversial, and apparently, why comparative observations are seen to be so "inspirational" and somehow belonging to the "personal" side of legal considerations. This may explain why comparative arguments are hardly seen in public justifications, even if they appear in the work of legal institutions. They may appear in the form of arguments, translated via the institutional-heuristic processes, into arguments describing some context for the legal decision, but they do not appear as self-evident adaptations of legal norms or legal arguments.

One of the greatest "strategic" functions and forms of instrumentality of

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<sup>734</sup> This is connected to the question of "professionalization".

<sup>735</sup> This means that the basic feature of comparative observations is often its aim to find legal arguments for certain interpretations, and not only to fulfill assumed *lacunae*.

comparative law arises in connection with systematic studies internal to institutions. Comparative studies, made within an institutional framework systematically strive to eliminate the possibility for the decision-maker to explain the law on the basis of his own systematic assumptions. Within this type of strategy, national legal systems are objectivised by institutional comparative research ("restricted"), and the "law" of the system is translated into the language recognizable for the legal institutional decision-makers and its target audience. This constitutes the institutional comparative discourse, but it abolishes, on the same time, the possibility for comparative law reasoning within an open institutional framework and within a general legal discourse. This forces the institutional discourse to concentrate to arguments other than arguments deriving from some particular legal system(s). It renders the institution capable of focusing on arguments by values instead of analysing values.

One can claim, consequently, that the main purpose of comparative observations is to establish certain argumentative strategies<sup>736</sup>, and that the contemporary study of comparative law is, for that matter, a (comparative) study of strategies of comparative reasoning.<sup>737</sup>

On the other hand, because the question is about the adoption of different arguments from other discourses, we do not, in fact, have to necessarily speak of an adoption of legal rules or legal norms at all. The question is rather about the comparability of distinctions used in "other" systems. Then it must be asked whether these "derived" distinctions "suit" the discursive context of the adapting system, and if so, whether they have any analytical quality.

This suitability depends upon the satisfaction of certain conditions.

## 5. General conclusions: toward a theoretical framework for comparative legal interpretation and comparative legal reasoning

### 5.1. Introduction

As we have seen, it is the philosophical approach to comparative law that has resulted, firstly, in the speculations concerning the independence and autonomy of the science of comparative law<sup>738</sup> and, secondly, its institutionalization. The independence idea was related to the idea that

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<sup>736</sup> To a certain extent, comparative law could be more scientific than legal dogmatics as such, and methodologically usually it is so. In the application and dogmatization of law one barely considers political, stylistic or sociological perspectives. However, a good comparative study explicitly discusses these aspects. In this sense, comparative law can be more discursive on the subject than legal dogmatics.

Comparative arguments seem to function as transcended considerations. The decision-makers move to the level of legal speculation by taking into account many practical solutions in socially binding systems.

<sup>737</sup> Watson, A. (1995, p.335 ff.) has spoken, for example, about practical utility and need of authority etc.

<sup>738</sup> One can easily challenge the nature of comparative law as a distinctive legal discipline (Watson, A., 1974, 1-9).

comparative law somehow functions outside the law and legal system.<sup>739</sup> The independence idea is also connected to the fiction that one is really able objectively to "govern" the relevant questions of law, and able to close the system by means of interpretation.<sup>740</sup>

One may claim that in contemporary jurisprudence there is a lack of examination of comparative reasoning in the realm of the legal discourse theory of law. Consequently, its role has not been seen clearly<sup>741</sup>. This has necessarily isolated comparative law from its legal social-phenomenological sphere. However, because one takes part in some legal discourse, comparative law must be seen part of the legal discourse in the legal systems of systematized rules. To avoid the problems of legal transplantation discussed earlier, one has to see comparative transplants or formants as comparative arguments within discourse of law.

Accordingly, comparative law must be understood rather as comparative legal and as comparative legal arguments in the realm of comparative legal sources. Comparative law discourse contributes arguments to the practical legal discourse. This comparative law discourse uses legal systems and their systematized rules and seems to be a reproduction of legal arguments in context other than the original context of those rules<sup>742</sup>. That is to say, it takes place in a context other than in the social, political, and philosophical context of the discourse, where the legal arguments were originally defined as legal. Comparative law "reconstructs" legal arguments. In fact, it has also been maintained elsewhere that any "theory" of comparative law seems to be a theory of reconstruction.<sup>743</sup>

The idea of reconstruction results in peculiar features connected to the study of comparative reasoning in a legal discourse. The study of comparative reasoning is, consequently, a study of how comparative law (and the theory of comparative law), as a description of how

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<sup>739</sup> A good example can be found in David, R., Brierly, J.E.C. (1978, p.5): "*The historical classifications known to any system, the relative character of its concepts, the political and social conditioning of its institutions, all these are really understood only when the observer places himself outside his own legal system, that is to say, when he adopts the perspective of comparative law*" (underlining, MK).

<sup>740</sup> For problems of understanding foreign law in the traditional sense, see Marsh, N.S., 1977, p.662.

<sup>741</sup> One could say that comparative law, which claims superiority over practical usage, takes its political premisses too seriously. This is more problematic in the situation where comparative law has not been able to explain its own rationality after its establishment as a legal scientific discipline, and where its political premisses are clearly visible.

<sup>742</sup> The reconstruction takes place in relation to the premisses of the comparator and his legal system. No system or rules of a system can be reconstructed by means other than by legal means of the original system. The legal system, its rules and norms should be seen in connection to the social, political and philosophical spheres, where the legal system is generally constructed and reconstructed. This is the idea of the "integrity" of law.

Comparative law seems to violate the "integrity" principle of law. This is because the rules are taken from its context and interpreted in context other than their "own".

We may maintain that in the study of these reconstructions of law we can identify the basis upon which the system claims to be competent to reconstruct another system, and, at the same time, itself. This means the identification of the principles of rational comparative reconstruction, the rational reconstructions of legal systems.

<sup>743</sup> See for instance Watson, A., 1978. Any theory emerging from comparative law would be "*about the legal change, about the legal structures and rules, and about the society in which they operate*" (ibid, p.321).

structures and their change in a society determines a change or maintenance of the legal structures, rules, and the normative dimension of a society. On the other hand, this idea of the theory of comparative reasoning does not necessarily seem to be a study of legal change but also a study of the "maintenance" of law in its present form<sup>744</sup>.

Now, as has been claimed in connection to transplants and formants, comparative observations become attached to a particular system or some legal institutions on the basis of the internal principles of that particular legal system. In other words, comparative law arguments are included within the reasoning in cases, if the regulative principles or the institutional rules of that legal system so determine. These regulative or basic principles seem to be the principles effecting the maintenance or change of the law as such. However, within a choice of a "foreign" argument on those bases, they do not function in this way, because they "expand" the legal discourse by introducing "non-contextualized" arguments. The contextual validation takes place within the practical legal discourse. This seems to result in a kind of autonomous discourse regarding the type of change.

On the other hand, we have also maintained that comparative studies, to a certain extent, close the systems observed as legal systems.

All the same, contrary to any systems theory, the opening and closing of a system - in relation to comparative observations - does depend, as argued, on some rules which regulate the form of comparative reasoning. These rules must also be part of the legal discourse.<sup>745</sup> These rules or premises regarding the opening and closing up of a system become apparent when the comparative observations, their restrictions, and their results are examined.

Consequently, we may say that it is the use of comparisons in connection to other arguments, which reveals the internal contextual principles and premises of an institutional order or system. Furthermore, we may - from the open comparative reasoning - interpret the counterfactual legal choices of the contextual processes.

In this sense, the study of comparative reasoning is also a study of the limits of the openly discursive law<sup>746</sup>. Comparative reasoning defines its own limits, and laws<sup>747</sup>.

Furthermore, one may start to investigate certain qualitative "types" of comparisons related to certain types of legal structures and norms. Here the study could claim to establish

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<sup>744</sup> We have noticed that comparative law functions in the state paradigm of law. In this realm, a comparative discourse is effected. The uses of comparative observations are, on the other hand, reflected in the conceptualization of each legal system they are used in. In the ultimate sense, it is the conceptualization of the general jurisprudence which is decisive in terms of its use.

<sup>745</sup> This we may show by the use of qualitative methods of social sciences.

<sup>746</sup> In Dworkinian terms, an attempt to find out the basic principles of the adjudicative side of the integrity (Dworkin, R., 1986, p.217).

<sup>747</sup> Furthermore, if the arguer posits the generality and similarity of systems, the adoption of this generalization determines the limits of the law (what is "general" law). On the other hand, if the "generality of law" is neglected and another argument chosen, we can observe another side of the legal value, the limit of law.

something about the different types of dynamics of different types of legal rules.<sup>748</sup>

Next, there is an examination of the nature of comparative legal discourse in relation to other types of legal discourses. Consequently, the idea is to look into comparative law as a source of law and to connect comparative law to other types of sources (interpretation), and to establish some theoretical criteria for the use of comparative law as a source of law (comparative reasoning). In the latter examination, we have to focus upon different types of comparative reasonings in the realm of comparative law as a source of law, related to the interaction between different types of arguments and corresponding audiences.

Finally, some conclusions are drawn to prepare the empirical study of comparative legal reasoning.

## 5.2. What is comparative legal discourse?

**Types of comparative legal discourses.** Previously we have studied the tradition of comparative law based on the traditional distinctions, aims, and ideas concerning methodology. Comparative legal discourse seems to be a reproductive discourse having a partly separate function in modern legal discourse.

As we have seen, legal discourses can be classified on the basis of the quality of the discourse. This quality has been related also to the general societal discourse in the realm of values. However, on the basis of legal discourse theories we may distinguish three types of discourses: value based, traditional and instrumental discourses. These distinctions can be applied to the classification of the comparative discourses as well.

We may say, that every comparative aspects introduced into systemic discourses involves a value decision from the systematic point of view. In this sense, in the introducing of comparative aspects into the discourse, one establishes a genuine relationship with the general legal discourse. Furthermore, if the comparative aspects remain only synthetically discussed, the adaption is genuinely value based. Here the comparative discourse is not founded on an attempt to evaluate analytically the relationship of the comparative observation and the general legal discourse in whatever form the latter appears. On the other hand, a more evaluative comparative

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<sup>748</sup> This way one could claim that the study concerns legal identities.

Modern comparative law does not seem to challenge the existing legal identity, but in modern legal discourse a process of "re-checking" the existence of this legal identity, on whatever level it is. Comparative law is consequently not law, but a method of re-establishing the identity of law. The modern "ahistorical" comparative law starts from the presumption of a legal identity.

This is exactly the reason why modern comparative law functions as an argument and not as law as such.

When comparative legal arguments are taken to be the object of a study, one steps out of the idea of re-examining the ahistorical legal values and identities as the modern comparative legal studies do (Verheul, J.P., 1994, p.143). One starts to identify the values of legal justification.

discourse in the public legal discourse is based on an attempt to "traditionalize" the comparative aspects, concepts, rules etc.

The distinction between the value-based and traditional comparative approaches to the legal discourse are, consequently, based on the attitude of the comparative approach towards general legal theoretical assumptions concerning sources of law. The traditional type of comparative discourse seems to evaluate its relationship to the general discourse by focusing on the legal-sociological, legal-cultural, legal-philosophical, and legal-political connections of comparative observations. However, this takes place, as may be seen, not at first hand, but via the relationship to the value-based discourse of law, i.e. in the realm of legal sources.

Moreover, the instrumental type of comparative discourse is available, when the comparative formant is adopted within a discourse not in order to sincerely establish discursive coherence but with instrumental purposes concerning the legal discourse. This type of comparative discourse uses the formant for purposes other than indicated by its legal nature as a source of law. Basically, all uses of comparative reasoning are like the same, as we have maintained. Nevertheless, the difference lies in the type of traditionalization which takes place. In an instrumental comparative discourse, the formant is intentionally given an independent context in a separate discourse, for example, by strongly "sociologizing" it. On the other hand, instrumentalization may take place by not revealing the observations in the legal discourse in general (i.e. by the maintenance or creation of a separate audience). This does not "traditionalize" comparative discourse on a larger scale, and maintains possibilities for critical evaluations other than that of the particular "value" discourse. This indicates an abandonment of the principle of the discursive integrity of law<sup>749</sup>.

**The relationship between the comparative law discourse and the general legal discourse.** As we have indicated, the general legal discourse refers to the "genuine" practical legal discourse. The comparative discourse - which serves to conclude the genuine legal discourse - is a secondary discourse.<sup>750</sup>

On the other hand, there is a dynamic and interactive relationship between these two types of discourses<sup>751</sup>. Where the comparative discourses take place, for example, to

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<sup>749</sup> In this type of reasoning and comparative discourse, comparative reasons are used in order to maintain the internal institutional coherence or consensus between the participants within the closed discourse. One also attempts to formulate a convincing justification only towards the public audience. The rationality is based on the value of the institutional actors as such. At the same time, the direct relationship of the comparative discourse to the general legal discourse is not established. Indirectly this may take place, for example, *a posteriori*, between different actors within the same institution. There is no sincere relationship between the institutional comparative discourse and the legal discourse in general.

<sup>750</sup> Klami, for example, maintains that the generalizations of comparative law have a wider scope than those of a general theory of law (Klami, H.T., 1981, p.125).

<sup>751</sup> Analogically - in relation to general and legal discourse - see Alexy, R., 1989.

establish the generality of a norm, the results of such comparative discourses may be used in the general legal discourse. Here comparative law seems to function as a legal source, however, although regulated by the terms of general legal discourse theories (the ideas of sincerity and saturation, for example). On the other hand, the adaptation of the results of comparative discourses can take place on the basis of different conceptions of sources (allowed, obligatory, etc.). As we will see, the fundamental conceptions of legal sources are the connecting elements between these two types of discourses.

In reality, adoptions seem to be based on the legal conception of the sources of law of the particular legal system making the adoption.

This idea applies also to the functional situation in which the influence of the comparative discourse is internal to the legal decision-making institutions. Namely, if comparative law has a role in a particular closed institutional discourse, and this is legally accepted, the comparative discourse would be a permitted (allowed) source (even as a closed operation). In this form, it has a relationship to the general legal discourse. All the same, in modern legal theory, this, nevertheless, does not seem to be the case (the idea of open legal discourse).

This seems to indicate that open comparative discourse has only dialectical and interpretational value *a priori*, and it may be relevant, as an open discourse, only in terms of the history of law, legal philosophy, legal sociology and legal dogmatics.

In this sense, one could claim that the role of comparative discourses in a genuine legal discourse is increasing, where the relationship between the general legal discourse and comparative discourse has been established *a priori* in the general legal discourse. On the other hand, where the socio-legal systems seem to differ radically from each other, and it is not accepted in the general discourse comparative law as a source of law as such, the comparative discourse tends to emphasize the analysis of fundamental differences and possible similarities in the legal discourse without any qualitative analysis - or remain a matter of closed interpretational value. On the other hand, if the general discourse is emphasizing common, ideal or factual features based, for example, on the history of law, comparative law may comprise only a confirmation of the general legal discourse.

**Some remarks on the comparative law discourse and the legal theoretical discourse.** We have maintained before that law is not really capable of "observing itself". Only the theory of law may do so, and even then, it has to be based on some values. We have proposed that the basic value may be in the ability to be communicative (the so-called discursive integrity of law).

In the theory of law, as a part of the general legal discourse, we can "close" the legal systems to a certain extent (in terms of sources of law), whereas in applied practical "law" there are only relationships, priorities and hierarchies of legal norms, and different discourses concerning them. Shifts from law as applied in practice towards a concept of a legal system

involves shifts towards theoretical, political or socio-philosophical arguments of law.<sup>752</sup>

Comparative law discourse is in this sense an eccentric phenomenon. It claims to have as one of its central concepts the idea of a legal system and general theory of law. Nevertheless, it does not, as does the legal theoretical discourse in general, reflect its results and abstractions traditionally. However, it strives towards theoretical explanation by liberating itself from the value-based attitude towards tradition. On the other hand, it takes legal systems for granted, where, in its contemporary form, as we have maintained, it is strongly connected to the modernist state paradigm. At the same time, however, it moves away, in various ways, from any theoretical, sociological, or political considerations, even if the theory of comparative law recognizes this connection<sup>753</sup>.

It seems as if comparative law discourse really seems to be a special case within the theoretical legal discourse. In its "descriptive" sense, it claims to be a special case within any legal sociological or philosophical study. It seems to move "between" all the possible sciences and disciplines of law.<sup>754</sup> However, this seems to be a value-based idea.

What could this value behind comparative law be? How could comparative law discourse be feasibly separated from the legal theoretical discourse? What could the communicative character of comparative legal discourse be?

The value of the comparative legal discourse seems to be related to some kind of natural law and political thinking. However, it has also a strong modern positivist flavour because of its "single methodology" and because of its established ideas upon sources of law (the idea of legal system). On the other hand, because it seems to accommodate itself easily within many alternative perspectives and an discourse concerning them seems to be eternally interesting and flexible, there must be some qualities to it, which make it quite neutral from the point of view of any *a priori* classifications.

Comparative law seems to be an empirical, but theoretically oriented, perspective on law, not aiming, and being incapable of aiming, at a universal discourse on law. It remains

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<sup>752</sup> It has been claimed that the 19th century idea of hierarchy was based on statutory positivism, where the legal system was monolithic, system of norms of the same rank, and found at one and the same level (Paulson, S.L., 1990, p.143). This corresponds strongly the ideas of nation and sovereign, which were the only ways to determine the hierarchy in a practical sense. This may be related to the idea of the will of the legislator. Also the form of legislative acts during that period corresponds to this type of idea. They were constructed so that first the purposes were explained. This was followed by the explanation of the norms (rules). Interestingly, this is the same structure, within which contemporary European norms are constructed.

The alternative means of viewing the hierarchy is related to the idea according to which norms are hierarchically related as forms (as a system, Kelsen, H., 1992, §31a).

<sup>753</sup> An example of a strongly "nationalist", cultural oriented, point of view, and the depth of the roots of the national-linguistic approach has, see Legrand, P., 1996, pp.284-286. For the importance of this to European integration, for example, see *ibid.*, p.286.

<sup>754</sup> For some problems, Brusiin, O., 1953, p.440.

somewhere "between" legal theory and practical (positive) law.<sup>755</sup> However, because it does not fully relate to the "total preliminary system" (in this case, to the theory of legal discourse), it does not maintain the same level as the legal theoretical discourse in general.<sup>756</sup>

**Some implications: the comparative legal discourse and national dogmatic discourses.** As we have seen, the comparative discourse appears functional from the point of view of the socially, culturally, and/or economically contextualized dogmatic discourses<sup>757</sup>. The functionality of comparative law is not, however, related only to its "fresh approach" in the genuine dogmatic discourses, but also to the fact that comparative reasons must be evaluated from the point of view of the national dogmatic discourses.

This can be explained in the following way. The comparative legal discourse is usually designed for some discourses other than the particular system discourse. National legal systems are instruments in that discourse. At the same time, in order to be convincing in that comparative discourse, comparative observations have to be presented in a form which ensures that the law itself is functional. This is why comparative reasons do not only appear in a form of systematic sources (traditional legal discourse), but are usually always supplemented by comments on social contexts, or, by reference to "national lawyers" (professionals) representing the legal cultural knowledge of that particular system<sup>758</sup>.

More may be said about the "closed" comparative discourse in this connection.

An institutionally closed comparative discourse is based on the normative self-referentiality of the legal institution. In this case, an institution can be considered open, when we speak of the "cognitive" adoptions deriving from the dogmatic discourses, but, at the same time, it is normatively closed. It does not reveal its premises within the comparative discourse, and nor does it openly declare its premises to the general legal discourse. In this case, however, "comparative" reasons may perhaps be reconstructed *a posteriori*.

One may ask, whether this phenomenon results in a kind of a general normative closeness of legal systems and their dogmatic discourses. Namely, the fact that comparative observations are not revealed means that solutions, which are based on these comparative observations, are "order from noise". Without an accessibility to the context of the institution,

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<sup>755</sup> See similarly, Tolonen, J.P., 1974. He argues that it has an intermediate position. For some analysis, Klami, H.T., 1981, p.126. These authors, however, speak of this characteristic in a different theoretical context than to that discussed here.

<sup>756</sup> On the idea see Brusiin, O., 1962, p.44.

<sup>757</sup> On ideologies, see Kokkini-Iatridou, D., 1986, p.181.

<sup>758</sup> It is especially this "double" functionality, which the regional and international systems, using comparative observations, attempt to avoid. They exhort national lawyers or international institutions to make comparative studies. This way they may claim certain "objectivity" from the point of view of the second type of functionality, though the phenomenological functionality is still there. The second functionality is avoided by the qualitative approach to these systems as authorities (being represented by highly qualified persons).

the observer cannot be in the same situation as the original interpreter of the norms, and she is not able to openly evaluate the premises which form a part of national legal systematization. This also generates, to a certain extent, instrumentality of the systematization discourses (i.e. they also have to make a distinction between different audiences). In this type of situation, we cannot be sure, whether the genuine dogmatic legal discourses really interact with institutional discourses<sup>759</sup> or whether the proposal regarding this point are merely suggestive.

### 5.3. Comparative law as a source of law

**The nature of comparative law as a *loci* of arguments within the state-paradigm.** One should keep in mind that comparative law is not a jurisprudential source or an argument as such (*causae iuridicales*) because the issue does not seem to be about a selection of a criterion for the evaluation of the legal correctness of an action in a genuine sense. Nevertheless, we are still dealing with some kind of formal legality.

In terms of modern legal discourse theories, comparative arguments seem to comprise value-based and traditional arguments instead of being neither of these types of arguments.<sup>760</sup> This strange phenomenon is due to the fact that even if the comparative *loci* as a source is external, for example, to any particular state-legal system, the state-legal system is its only *loci* in the abstract sense. There is a kind of a state paradigmatic circle here.

Because of this, one may speak of the comparative *loci* as a reproductive phenomenon from the point of view of the state paradigm, for example. We may also say that it is this state-paradigmatic circle that must be broken up on the basis of generality (traditional), value (value based), or intuitive (or affective) rationality, or that it has to be instrumentalized (be hidden) to avoid circular explanations. This seems to be also one of the reasons why comparative law has been attempted to establish as an independent discipline outside the traditional legal framework. The independence claim is kind of a "self-purifying" operation of legal discourses.

Furthermore, this seems to be exactly the reason why comparative law has been maintained as part of jurisprudence, and as part of the general framework of legal dogmatics. This can be done, because comparative discourse has reproduced the state-paradigmatic law as

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<sup>759</sup> In this sense, we may ask whether European norms, based on comparative perspectives examined institutionally, are really a contribution to the genuine legal discourse and to the development of the discursive European law. Something from the dynamics is missing. This may cause a fundamental problem for the communication of laws.

<sup>760</sup> On the definitions used, see Maclean, L., 1995, referring to several authors (for example, Martin, J., *Antike Rhetorik : Technik und Methode* (München) 1974 p.29, 36-37,44).

*Causae legales* deals with questions of the spirit as opposed to the letter of law, conflicting laws, ambiguity, definition, *rationatio* (argument from similar laws), and *translatio* (arguments on process, jurisdiction, and the appropriateness of a given law for a given case). (Maclean, L., 1995, p.78). These matters involve interpretation and further argumentation.

a valid paradigm of law, and because comparative jurisprudence, on the other hand, has reproduced state paradigmatic law by providing a source of inspiration and invention for dogmatics and decision-making in difficult cases.

The comparative jurisprudence is, however, asymmetric to the general jurisprudence of the state paradigmatic law. Comparative jurisprudence does not aim at systematization of the law of socio-legal systems. Its basic aim is, accordingly, achieving general consensus (at the level of general principles), and the maintenance of the systematic autopoietics of modern law.

**The "other" legal system and its discourse as a source of law.** The question of whether comparative law is or can be a legal source results insoluble problems.

The principal problem is that in considering comparative law as a legal source, one actually declares, in the context of a state paradigm of comparative law, and in the realm of the discursive concept of law, that state legal systems and their discourses are legal sources. This creates immediately some communication problems, and the idea of comparative law as a source of law becomes obscure.

We have already mentioned the foreign law and otherness in previous chapters. In the case of otherness we came to the question of what comprises the basic and decisive distinction between legal systems?. We instinctively abandoned the theoretical perspective and identified, instead, the need for a concrete description of the distinction between different legal systems and their discourses. The theoretical and general descriptions of a legal system were not enough. We also spoke about different state-paradigmatic divisions. These seemed to function, at the same time, as common connectors and disconnectors of culturally oriented comparative law. The idea and distinctions of comparative law became unclear.

In this connection, we can make the following remarks.

In reality, state legal systems and their discourses do function in relation to each other as reserves of justificatory reasoning, and even as alternative justifications in certain situations. Even if any formal source theory of comparative law should not exist a realist would say that comparative argument is a legal argument deriving from comparative law as a source of law, simply because it is used in the institutional and dogmatic legal discourse, and it has, *a priori*, certain legal characteristics. Namely, a person undertaking a legal comparison - whether a scholar or a legal decision-maker - is working within a legal system. He is taking part in a legal discourse. By making comparisons to another system, or by taking comparisons tailored to his own use, and by deriving "essential" information from a system other than the one in which she is working, she is treating the other systems as relevant material for the interpretation of the law of the system in which she is working. She is treating the other system as a source of legal

arguments<sup>761</sup>, which has some kind of a legal quality. Consequently, the comparative law discourse, from which the comparative arguments derive, could be classified as a practical legal source. However, it seems that one could make a distinction between legal and nonlegal arguments deriving from another legal system only on *ad hoc* basis.

On the other hand, a legal idealist may claim that comparative law is a source of law if it satisfies the rationality demands of general legal discourse theories and theories of legal reasoning. In this sense, it does not seem to be capable of being a legal source. It does not satisfy the requirements of legal sources. That is to say, it does not assist the achievement of clarity within the law, but, on the contrary, seem to confound matters further.<sup>762</sup>

We are in a paradoxical situation. An argument, which evidently derives from the context of comparative law seems to be "legal", though agreement on the legal nature of comparative legal studies and the nature of comparative law as a genuine source of law cannot be reached. Consequently, one could say that the nature of comparative law as a source of law must be examined on the basis of the nature of comparative reasonings, in addition to the examination of its source nature according to traditional comparative law theories, which we have already done. Then we may question the reasonableness of comparative law as a legal source, evaluated on the basis of the nature of the arguments deriving from that source<sup>763</sup>.

In this sense, it seems that only practical reasoning can be presented in support of the idea of comparative law as a legal source. The nature of comparative law as a legal source seems to be, consequently, a "non-systematic" source, in the sense, that no general theory looks possible concerning its source nature, at least at this stage. Comparative law appears to be a non-systematic and autonomously practical source of quasi-legal arguments, based on the prudential considerations of the legal actor. Comparative interpretation is a "legal choice" rather than a "legal interpretation", a kind of an interpretation by a legal authority.

This has certain consequences. It seems that when one is considering comparative law (other systems) as a source of law, one does not have to, and usually one does not, attempt to treat that particular system and its rules as generally binding and as correct systematic rules, but instead, as in the case of legal sociology, one may describe them as a source of patterns of intentional behaviour in one social system. There is no need to stress the relationship between all the rules and discourses (general systematic integrity or coherence). This is the reason why

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<sup>761</sup> Within the idea of comparative argument it is interesting that it is not completely removed from the social environment, i.e., sociological knowledge as such, but it is already legally rationalized in some systems. Even if we could claim information used in the interpretation is some sense rational, the comparative information is legally rational.

This refers basically to two features of comparative legal information. Theoretically, it has a legal quality, but no systematic character. It is information within the law, law in general, but not within the legal system in particular.

<sup>762</sup> "If all the constitutive rules are lacking, the interpretation is not a legal one fundamentally. ... In this sense, at least some procedural rules of interpretation are necessary for genuine legal reasoning." (Aarnio, A., 1986, p.96).

<sup>763</sup> See Watson, A., 1974, p.18.

comparative law arguments are extremely weak arguments by example. They are not necessarily supported by systematic connections.<sup>764</sup>

The difference between comparative law and legal dogmatics as a source of law, for example, seems to be connected to this feature. One is unable to establish the generally binding nature of the normative systems studied. This seems to be, both scientifically and philosophically, problematic from the point of view of the legal discourse in general (sincerity problem)<sup>765</sup>.

**Comparative law and dogmatics as sources of law; a comparison.** As we have maintained, comparative law is, in a way, comparable with the legal dogmatics (scholarly opinions) as a source of law. It looks actually to be continuation of the legal dogmatic discourse. As in dogmatics, we have different possibilities of interpretation. One presents hypothetical suggestions for rules and interpretations. All the same, in the comparative "dogmatics" the interpretation is more imbedded in the process, and the justificatory aspect is needed due to legal, political, and cultural reasons, and because of the lack of systematic connections.

How does comparative legal dogmatics, then, differ from traditional dogmatics, and what is the principal characteristic of this relationship?

The basic idea is that both the comparative and the traditional dogmatist use the idea of sources of law. However, the understanding of these and their use can differ, especially in the case of an ordinary legal academic or practitioner, who does not have a theoretical "comparative" legal education. In practice, comparative arguments are usually presented by a person, who is not educated in another legal system. He is, *a priori*, considered not to have knowledge of the social rules existing in that society. This makes a difference also to the "socio-political" validity of the dogmatic argument.

Furthermore, a comparativist may be unfamiliar with other types of arguments and rhetorical and non-rhetorical elements which may be somehow relevant elements (even if non-legal) within a (discursive) system.

These are some of the reasons, why the comparative lawyer is not considered to be an authoritative expert. There seems to be an idea that one cannot be a master of many social systems. This is based on the assumption of "life formative" homogeneity. The stability of interpretations is not backed up by firmly established ideas deriving from societal discourses, but the comparative dogmatist is considered as one who is doomed to compare constantly different

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<sup>764</sup> Comparative law, on the other hand, as a systematic method to achieve information from other legal systems, is not a real *a priori* method of law. Because comparative law includes also considerations of the factuality, context, and the functionality of the law, comparative argument may be an explanation of the law of a social system without being necessarily an attempt to have any normative impact upon it.

<sup>765</sup> One can claim that the discourse theory assumes two ideas that are taken seriously: the rules studied must be considered binding. On the other hand, the claim of the bindingness cannot be based on the description of the particular features of a another system (or a discourse), but has to have general normative status.

societal forms of behaviour. This might render his statements unpredictable and unreliable<sup>766</sup>, and problematic from the legal point of view.<sup>767</sup>

One of the characteristics of comparative dogmatics is that when the political, general and legal dogmatic contexts cannot be strongly emphasized, one has to rely more on practical legal statements on the interpretations of certain types of situations rather than upon general statements concerning the meaning of particular rules. This may be one of the reasons, for example, why comparative dogmatics is oriented more to case law and concrete decisions as sources of its interpretation, than to statements in the traditional legal systematic dogmatics.

Consequently, socio-cultural expertise is the main argument which distinguishes the comparative and traditional dogmatics from each other<sup>768</sup>.

We return to this question in relation to theories on audiences in comparative reasoning.

**Comparative law and "custom of the land" as a source of law.** Comparative law seems to be related to the "custom of the land" as a source of law. Namely, these two spheres seem, in theory, to qualify each other. This custom seems to be also a "substantial source of law"<sup>769</sup>. In some situations, it can also be an "unprivileged" source<sup>770</sup>.

Custom of the land seems to relate to comparative method of interpretation, because essentially, it seems to need some "reasonability".<sup>771</sup> This reasonability may be provided by comparative observations. This may be motivated also by the fact that custom of the land is sometimes more general (or also restricted) than the borders of modern state legal systems. In this sense, the criteria of "the legal convictions of citizens" (presented by the historical school) or

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<sup>766</sup> This is definitely also the problem in international and regional organizations. The phenomenon is related to the polycentric qualities of the institutions. In other words, matters concerning some states and legal systems are dealt with by the persons coming from those "systems". This is seen as the solution and actually one of the major characteristics of the daily functioning of regional and international organizations.

Towards the outside, however, this polycentrism is manipulated to look homogeneous (as we can see in justifications of the European Court of Justice, for example). The question is a matter of the combining specialist knowledge and institutional authority.

In this sense, traditional comparative law seems to be more universal in nature, because, as a scientific approach, we cannot recognize strong cultural distinctions as in legal institutional arrangements.

<sup>767</sup> Values in legal dogmatics, see Aarnio, A., 1997, pp.83-86 (especially, pp. 83-84).

<sup>768</sup> This is reflected in the instrumentalization of national lawyers in international legal interpretation. (For some analysis, see below.)

<sup>769</sup> See Aarnio, A., 1986, p.93.

<sup>770</sup> Aarnio, A., 1986, p.98. This means that if the question concerns only the "gap" in a statute, other sources of law become decisive, even if the "custom of the land" is given strong priority in general and in filling the "gap" in the law.

<sup>771</sup> Aarnio, A., 1986, pp.80-81, referring to the writings of Alanen, A., *Jurisprudence and private international law*, [Yleinen oikeustiede ja kansainvalinen yksityisoikeus] (Vammala) 1965, and to the Finnish Code of Procedure, Chapter 1, Section 11.

of the tacit acceptance by the legislator do not apply.<sup>772</sup>

Custom of the land, on the other hand, seems to counteract the arbitrariness of the comparative observations to a certain extent.<sup>773</sup>

**The binding character of comparative source of law.** The pertinent question within the idea of legal source theory is the principled obligatoriness of the use of a source and arguments deriving from it<sup>774</sup>.

In the case of comparative law, there does not seem to be such an obligation. The obligation is based on a practical discourse in the comparison itself. On a contrary, one could say that there are even systematic and practical obstacles to the use of comparative analysis as a basis for a justificatory decision, as we have maintained. On the other hand, if the exception is made, it should be explicitly justified<sup>775</sup>. This is due to the fact that if the comparative derivations were to become the central issue of the system, as one may imagine in some situations of legal transplantation<sup>776</sup>, comparative law would no longer function as a rational source of law, but as a source with no *a priori* defined possibility for a rational choice. The increasing use of comparative aspects abolishes the possibility of achieving a balance in a legal discourse, which is fatal to the rationality of the system, as explained.

We could thus maintain that there cannot be a general obligation to use comparative law in legal reasoning. We may say that if comparative law would be capable of being a source of law, it belongs to the category of "allowed" legal sources.

**The choice of comparative arguments: the "internal" doctrines of sources of law and comparative law as a source of law; the structural determinants.** Within the comparative considerations and interpretations, one may recognize the structures of the sources of law embedded in the process. Some type of higher-order rules of recognition are reflected in the choice of comparative reasons.

Whenever, in an interpretation, one is considering relevant comparisons for the interpretation of certain positive rules, one usually uses automatically the same criteria of relevance for the choice of the rules or norms from the other system as in a "normal" choice of relevances. As we have maintained, for example, the comparator is likely to use legal judgments

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<sup>772</sup> On the idea that the custom has been instrumentalized in order to govern the native cultures, see Pöyhönen, J., 1992, p.67 (referring to Said, E., *Orientalism*, 1978).

<sup>773</sup> As we will see later, the "customary" borders of law seem to correspond strongly to the scope of comparative observations.

<sup>774</sup> See Aarnio, A., 1986, p.89.

<sup>775</sup> This can be seen in connection to many legal systems.

<sup>776</sup> This is so also in some international legal systems.

as relevant material, if this would most likely have occurred in his own system. In the same way, if the interpretation is made only with reference to the positive rules of that foreign system, this is usually due to the fact that the sources of law and structures in interpreters' system stress the importance of written statutory law.

This type of structural determinacy is, however, only one example of the influence of the form of the adoption of comparative reasoning. One may recognize also other structures which determine choices. All the same, the source of law ideas are the basic legal determinants.<sup>777</sup>

As noted previously, the adaption may be determined also by substantive systematic problems. However, the filling up of *lacunae*-idea seems to be due to systematic gaps. The gap is determined basically by social problematization, which determines the substantive nature of how the *lacunae* is to be filled<sup>778</sup>. The adaption may be also determined by the linguistic and conceptual translatability. This is due to the fact that it is impossible to adopt statements which do not have any cultural-linguistic meaning in that system. In this sense, any adaption is based on a minimum nominalist correlation.<sup>779</sup>

What this means, theoretically, is that it could even be possible to adopt statements from discourses of other social systems, which, in that "transferring system", do not have the status of a legal source or which are not seen to be legally relevant material for the interpretation of a positive rule within that system. This means that the logical structure of the foreign system (i.e. for example the hierarchy of norms) does not necessarily have an influence within the cognitive adaptations from other systems<sup>780</sup>.

In conclusion, structural determinacy seems to reflect the systematic nature of the adopting system. The adaption of arguments from another system of law is basically determined by the systematic relationship between structures in the adaptive system<sup>781</sup>.

These examples show how the systematic structures (and discourse) may influence the selection (and use) of comparative material. The legal system, being determined by its own structures for determining the relevance of norms, does not adopt norms of another system in a

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<sup>777</sup> For some discussion on the structure of law and comparative law, see David, R., Brierly, J.E.C., 1978, pp.14-16.

<sup>778</sup> In this connection it is interesting to note that the *lacunae* has to be "systematic". Namely, unless there are no "systematic gaps", no gaps can be reasonably be assumed to exist. Some systems, like the European Union system and the European system of Human Rights, seem not to be based on empirically verified systematic gaps.

This is actually one reason for the problems in speaking about gaps in a legal order (which claim has been presented in the context of "Community legal order" by the European Court of Justice). (For some analysis, see below.)

<sup>779</sup> On the problems of translation, see de Groot, G.R., Problems of legal translation from the point of view of a comparative lawyer. In: Netherlands Reports to the XII International congress of Comparative law (The Hague) 1986.

<sup>780</sup> For example, if one system is using the norms of another system dealing with the regulation of bioethical questions, it does not necessarily consider the validity of the source of these norms as related to the structure of the legal system but considers only the material questions dealt within these systems.

<sup>781</sup> The systematic relationship between the arguments are considered in the adaptive system's regulatory framework, i.e. the legal consequences (adaption questions) are determined by the characteristic of the adopting system.

form of complete systematic rules, but rather as cognitive models or types of law, which interpretation remains open. This is the reason why comparative reasoning can be said to open the structures of the legal system, as we have explained above.

This is also reason why one must compare not only normative statements as such but also legal theory related to the idea of sources of law.

**Recognition rules for comparative legal considerations?** As we have already maintained, comparative law is based upon the identification of legal rules and legal systems, but this identification, as with the identification of legal norms in general, is not necessarily based upon secondary norms in any general sense, due to internal structural determinants and practical considerations.<sup>782</sup>

It could be claimed, however, that strict forms of recognition rules could be found in the form of secondary norms of application<sup>783</sup>. This means, that some generalizations could be made concerning the basis of the study of justifications for these restrictions ("comparative dogmatics"). Furthermore, some directives for the choice of a norm of comparative law could be found within the ideas of the study of the methodology of comparative law<sup>784</sup>.

We may note that in comparative law justifications, traditionally, the rules governing the choices were justified with reference to ideas such as generality, relative generality, or the goodness or badness of the example, which have descriptive and normative, qualitative and quantitative dimensions. These ideas are, nevertheless, strongly based upon the values of the decision-maker and rules of rhetoric. In this sense, it does not seem very likely that we could find any general regulative principles within the justificatory sphere.

Choices based upon generality, relative generality or goodness/badness should be based, consequently, on some legal ideals, if it is to be assumed that the comparative legal rule is to comprise a rational legal normative argument. On the other hand, the criteria for the choice of comparative legal rules should be based also upon their quality as legal rules as such (clarity etc.).

In this regard, what could these secondary norms be? How could "generality", for example, be regulated?

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<sup>782</sup> On the rule of recognition in an theoretical context, Hart, H.L.A., *The concept of Law* (1961). Some analysis of the problems, Raz, J., 1971, p.805 ff.

<sup>783</sup> The recognition of comparative arguments is not necessarily based on rules of recognition, but rather on "customary" recognition. The other system tends a legal identification of other system. Furthermore, because this takes place in the realm of the integrity principle, it maintains the legally integrative nature of that system.

Furthermore, it also appears as if the legal quality of the legal systems does not disappear following this recognition. On the contrary, this recognition creates a customary legal status for the system as a practical source of law in general.

<sup>784</sup> As we may note, comparative law is a secondary stage of legal identification, not necessarily regulated by secondary legal norms of identification. At the same time that choice of laws restricts the scope of law, it also creates legal possibilities within the law.

The answer to the question could be found directly in the theories of legal discourse, albeit in an altered form. The rules of legal discourse can be applied to the choices of comparative arguments for the legal discourse. Consequently, we have to examine how the rules of discourse could be applied to the use of comparative legal arguments<sup>785</sup>, taking into account their peculiar nature of these types of arguments.

**Conclusions: the rationality of comparative law as a source of law; why comparative law is an acceptable source of law?** As we have seen, it is difficult to imagine the role of comparative law as an *a priori* established legal source in systematic decision-making context<sup>786</sup>. Even the basic ideas on comparative law as an argument for integration, understanding, etc. do not appear convincing.

As has been maintained, in practice, arguments deriving from comparative law seem to be merely some unsystematic arguments without any *a priori* status as legal, used in the legal discourses for any purpose, with the ultimate aim of establishing a connection between legal systems and in confirming the authority of legal systems and orders, in general, as a source of law. In this sense, comparative reasoning could be seen as a symptom of a one-sided practice of adaption of a legal statement within relatively autonomous legal systems (and discourses). Furthermore, the comparative discourse does not seem to exist, as such, in the discourse on the discourses, but it only seems to be a process of learning which takes place in a one-sided fashion<sup>787</sup>.

Nevertheless, the comparative argument could be defined as a relatively consistent (and even quite static) argument because of its political-traditional context<sup>788</sup>. This is so despite

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<sup>785</sup> However, these types of secondary rules of application contain certain problems.

If discourse principles should be applied to the choice of a comparative arguments as such, the secondary rules of application could be easily violated. A certain efficacy is demanded from legal argumentation and justification. This is why "comparative legal rules or arguments" are mainly constructed in realm of the legal sciences.

<sup>786</sup> Basically the legal system functions as a ultimate source of legal norms. All these "legal" arguments derive from this legal system based on the ""Grundnorm"". The law, *de lege lata*, is traditionally interpreted by legal arguments based on systematization discourses. Comparative law does not basically systematize anything, at least not traditionally, if we do not consider it systematizing tradition as a subject in the discourse itself. Then the comparative argument seems to be capable of systematizing anything connected to the discourse, also the discourse itself. This seems to be problematic.

<sup>787</sup> In this context, we should actually speak of legal learning instead of legal transplantation. The learning processes takes place internally within the law, and there is no other instance, which would be capable of "transplanting" legal institutions into a legal system than the one-sided legal discourse itself.

Transplantation refers to a political-authoritative process of adaption of legal ingredients, and to the relationship between political and social systems in general, which is only reflected in legal systems. It does not refer to the relationship between legal systems (comparative law).

<sup>788</sup> The question concerns rules and interpretations of rules, which have been openly argued and justified in one system, and then adopted within another system. Comparative arguments, despite their nature as learning processes or external systematic arguments, have, in other words, gone through a democratic process, and interpretations on the validity and correctness have been tested in a legal audience. They belong to some discourse, though they would not be part of the particular discourse in which they have been used.

of the fact that one cannot ignore the legally non-systemic and autonomous nature of comparative law as a source of law. Comparative law gives discursive dynamics to the law and legal systems, by still keeping the discourse in certain limits of rationality.

It also makes legal discourse more general. It is strongly connected to the internationalization and regionalisation of law, which, in contemporary society, seems to be more law than any other form of law. Furthermore, the use of comparative law may be even extremely important, because it is used in the cases, where one has to react "to serious needs of the community"<sup>789</sup>.

Thus, one could suggest that comparative law is, at this stage, an additional source of law<sup>790</sup> - with qualifications. Because comparative analysis is difficult to classify as a normal source of law in domestic legal systems, one could make a hypothesis that it is a critical source in law. It reflects certain aspects of the "common law" of more general legal community, and it serves as a reflective, unsystematic and critical model of argumentation in decision-making, requiring, however, also constant critical reflections regarding itself.

In conclusion, nevertheless, we claim that comparative law should be considered more seriously as a source of law than any other form of legal source in the contemporary discourse of law. Indeed, we assert that it's "source" nature is more evident than that of any other types of legal sources because "comparative" observations and arguments, theoretically, assume an "existence" of an (institutional and positive) legal system. In other words, where there is a strong assumption of an existence of a legal order that is applying rules and creating norms, we can justify a need of a possibility for an alternative and affirmative argumentation (relating to the need of clarification and criticism). In fact, in the application of comparative observations in legal discourses we are speaking about qualitative systematization of a legal system and its rule and norms, contrary to a "quantitative" idea of creation and institutional ordering (by institutional authority) without any motives for systematization.<sup>791</sup>

This is why the application of comparative rules and norms have to be justified by some "qualifying" criteria. When studying comparative law as a legal source, we have to observe the motives for their application in particular context and focus upon the discursive nature of these arguments.

**Comparative law as a source of law and other sources.** In the realm of discourse theory, one

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<sup>789</sup> Watson, 1978b, p.522.

<sup>790</sup> As Koopmans, T., 1996, p.550.

<sup>791</sup> In fact, we could claim that comparative law is already a legal source by definition. In the history of legal positive law it seems to be - in addition to "jurisprudence" - a "primary" legal source, whereas in contemporary state-paradigm it is a secondary source due to the institutional-contextual discourses which have transferred "finer" distinctions for our legal-analytical stock of instruments. However, in the discursively democratic system there does not seem to be any obstacles for its use except some qualitative restrictions.

has spoken of interpretative standards.<sup>792</sup> These standards refer to the order of preferences of legal sources, and to the applicable standards for legal reasoning. Here we concentrate to the former idea.<sup>793</sup>

In the context of comparative law and the order of preference of sources of law, one could propose the following:

- Authority (sovereign)  
Direct reference/ binding  
(and weakly binding) material:
- supranational norms
  - laws
  - precedents
  - preliminary documents  
*(textes préparatoires)*
  - customary law (custom law of the land)

Indirect reference/  
"non-binding" material:

- a) material recognized  
 by authority in precedents  
 or in draft documents:
- policy statements
  - analysis of economic and  
 social data
  - international or foreign  
 material referred to  
 in drafting

b) material recognized as part  
of legal culture and general  
development

- opinions of scholars
- opinions in the realm of comparative law

In a concrete sense, comparative law, as a source of law, has been merged into different interpretative methods in the following way.<sup>794</sup>

It has been claimed that if a court cannot rely on express statutory law or unanimous judicial interpretation, the interpreter may look to traditional methods of interpretation and to the law developed prior to the codification of the subject-matter. If a historical interpretation does not provide an answer to the question, it is also possible to use

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<sup>792</sup> Aarnio, A., 1986, p.97. Discussion on them, see *idem.*, pp.95-107.

<sup>793</sup> The latter will be discussed in the chapter below.

<sup>794</sup> Kisch, I, 1981, p.262 ff.

methods of teleological interpretation, and to consider the reasonableness and rightness of results. If the result does not seem to be reasonable, there is the possibility of using comparative analysis.<sup>795</sup>

In comparative interpretation, reference may be made to foreign laws with or without links to that legal system. This reference may support a solution by giving substance to the solution (norm-content) or by illustrating solutions, and in this way giving support to the interpretation made by the court with other interpretation methods. Comparative interpretation is usually not the sole substantiating method<sup>796</sup> (such as is the case with other methods of interpretation); it is "transcategorical".

As mentioned before, a distinction can be made between the comparative historical interpretation method and pure comparative interpretation.<sup>797</sup> What is typical for both methods is the use of a plurality of legal systems. In the former model, comparative considerations form a part of historical interpretation and describe the relationships between legal systems (historical evolutions etc.). In the latter case, there is a use of foreign law beyond a historical analysis. Here one is more free to choose the systems to which refer. These two methods can be mixed. When there is a historical connection and this is analysed, this may lead to the use of the contemporary case-law of foreign systems (mostly the parent system).<sup>798</sup>

Integrative or unifying reasoning in interpretation can be based on historical interpretation, but also for that matter, upon teleological interpretation. The former takes into account the will of the legislator and history of the legal system, and this leads to an integrative or unifying result. The latter takes into account the possible differences between the results of decisions in different legal systems.

These ideas may be connected also to the application of provisions of international agreements by national courts.<sup>799</sup>

<sup>795</sup> Kisch, I., 1981, p.262 ff.

<sup>796</sup> Kisch, I., 1981, p.62.

<sup>797</sup> Kisch, I., 1981, p.162 and 168.

<sup>798</sup> Reasons for the use of comparison are different in these approaches. Historical interpretation emphasizes history and pure comparative argumentation the "instrumentality" of foreign solutions.

<sup>799</sup> Kisch, I., 1981, p.163. See concerning disparity of interpretation, Gutteridge, H.C., 1971, p.111 ff.

One of the problems connected to the study of legal system(s), comparative law and comparative argumentation is the extension of the analysis. How far should we go in analyzing different systems. Some preliminary remarks can be made.

In examining legal systems we evidently arrive at some differences. The first question is how far these differences determine the nature of the legal system or a norm as a whole. A second question has to do with the role of the interpreter; how competent is the comparative interpreter to explain the nature of a legal system or its norm? For example, how competent is an international judge (or an administrator) - as a normative actor - to interpret national legal systems? What kind of possibilities does a legal scholar have to draw extensive conclusions on the nature of a particular legal system?

The first question is more interesting, because it has to do with the ideal character of the discourse. This has to be explained more thoroughly.

Some consequences. What would be the result of the fact that comparative law would be classified as an acceptable legal source as described above?

Firstly, one could maintain that the dogmatic "obstacles" its relevance would disappear. On the other hand, it could be used more in justifications and legal reasoning. This could lead to more vivid comparative dogmatic discourse. In this sense, the question of the source nature of comparative law is connected directly to legal rationality.

However, even if we could claim that comparative law may be, in some situations, an acceptable legal source, and that it may be used as an argument in legal interpretation in relation to some "rules of priority", we do not know how this should be formulated in an open reasoning.

In the next chapter, the idea is to make some summarial remarks on the nature of comparative arguments and reasoning in critical terms, to analyse the connections between other arguments and comparative arguments in "comparative reasoning", and to connect these ideas to consultation of different audiences as a regulative idea of legal discourse. This way one may come to some ideas on the "rules of comparative reasoning" (in the realm of the standards governing reasoning procedure). This examination attempts to identify why it is insufficient to look only to the "rules of interpretation" and accept comparative law as a legal source, and also to find some regulative ideas of reasoning. It is argued that only in this way can the discursive integrity of law be maintained.

## **5.4. Comparative legal reasoning**

### **5.4.1. The analysis of the structure of comparative reasoning**

**Preliminary remarks.** As we have seen, the use of comparative law arguments in the realm of "general legal considerations", as system-analogical arguments internal to law in general, is

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An interpretation of a norm and a legal system could be determined also by the "integrity" of the legal system and its norms in general. This means that the interpretation of norms of a legal system are not maintained on the basis of the "internal" systematics of the legal system, but their interpretation can be attached to the common core and general considerations also from the point of view of the development of law in general (national law, European law). In this case, a comparative lawyer is not, necessarily, able to maintain the "content" of the norms of a system only by observing the internal determinants of a some kind of a "autonomous" legal system. The relationships of the system with other national and supranational legal systems has its relevance. These features, on the other hand, are strongly attached to the systems "legal" ideology. This way the systematic study of a legal system does not necessarily tell us all the truth about laws truth in that particular legal system, and the interpretation of it may be extremely difficult.

Consequently, the fact that there can be various and changing "audiences" for the interpretation of a legal system results in difficulties for the traditional national paradigm of comparative law, and for the construction of a comparative argument.

characterized by value rationality. Comparative arguments are "external", and their choices are determined by relative contingencies. The use of these observations is determined by the legal value rationality, and the general type of rationality. Comparative considerations fit within legal arguments as "special cases", as special arguments<sup>800</sup>, but not within the traditional sphere of sources of law. Comparative reasons can be composed of legal theoretical, dogmatic, system-structural and norm application (case), legal-historical, legal philosophical, legal sociological etc. observations. They may belong to the context of discovery, or to the factual closeness of the system (or the order). Comparative considerations may serve as "inspiration" for legal actors.<sup>801</sup> In a open comparative discourse and reasoning, on the other hand, one uses comparative observations as illustrations of acceptable or non-acceptable norms etc. The critical analysis of different types of norms is the discursive means to argue comparatively.

These forms of uses takes place so as to achieve some specific aim.<sup>802</sup>

Both aspects of comparative reasonings can be studied in the realm of legal discourse theories<sup>803</sup>. We can apply in the legal analysis certain regulative ideas of discourse theories.

In the value-based theories we find rules based on idea of saturation<sup>804</sup>, demands of principled and special arguments presentation in every hard case, special justifications in relation to canons of reasons (for example, comparative methodology)<sup>805</sup>, openness of the justification (when used in interpretation), demands of the analytical approach, etc. However, because we are examining the use of traditional "legal discourses" as instruments of reasoning, these rules of legal discourse should be applied to legal reasoning rather than to different types of arguments.

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<sup>800</sup> See, Alexy, R., 1989.

<sup>801</sup> As maintained above, the uses of these different sources can vary considerably from one legal system to another. Foreign systems can be used in many ways:

- by referring to similar legal development in other systems, as evidence;
- as a confirmation of the results achieved by the primary system,
- when filling a gap in the primary system (with unsystematic and systematic knowledge) (Watson, A. 1974, p.18).

<sup>802</sup> The problem of comparative research is the non-explicitness of the aim concerned. This way the comparative research seems not to be value-loaded. However, the "aims" of the comparative research can be reconstructed also by considering the "reproductive" features of the comparative research, which function as "autopoietic" aims of the scientific system as such.

How conscious these aims are is not a matter of legal research. However, the identification of the features of this "self-understanding" reveals the characteristics of the legal cultural and basic values embedded in law.

<sup>803</sup> We could claim that the national legal systematic dogmatics, judges' justifications, and comparative lawyers' reasoning should all function according to the theory of the legal discourse. In this systematization of law based on the practical legal discourse, comparative lawyers function in the realm of the same demands as the other legal arguers and actors.

<sup>804</sup> Alexy, R., 1989.

<sup>805</sup> This is connected to the fact that the presumptions of the tradition of comparative law are included in the contemporary forms of comparative reasoning.

This would suggest, as the traditional theories of legal reasoning maintain, for example<sup>806</sup>, that the consistency of discourses at different levels must be respected, and that a certain degree of "transitivity" of auditories must be assumed<sup>807</sup>. On the other hand, no linguistic disagreements can be assumed (efficiency) At the different levels of discourses (audiences), every level of discourse must be taken into account, no authoritative justifications are allowed, contrary discourses can also be presented, and most essentially, no contradiction between discourses can be allowed in justification, or if this would be the case, further justifications must be presented.<sup>808</sup>

We will deal with these ideas more closely below. In the end of this chapter, the idea is to examine the relationship between the standards of the traditional theory and the theory of comparative reasoning presented in this work. The rules of the value-based theory are taken up in the end of this work, after the examination of the value-based reality of the European law.

**Different types of comparative reasoning and their relationship.** Comparative reasoning, as the all discursive legal instrumentalizations, as we have already maintained in connection to the comparative discourse, can be divided into the instrumental, value-based, and traditional instrumentalizations according to the quality of the reasoning as a social communicative action. The distinction between these different types of uses can be associated with interests (or principles) of interpretation the user is having.

By traditional comparative reasoning we mean the use of comparative legal information in an analytical way. This means consideration of all elements which may be relevant according to the tradition of comparative law. Traditional comparative reasoning entails the analytical presentation of general and particular features of the legal phenomenon in question. These types of presentations are traditionally analytical (legal or legal-sociological) studies, which refer to all systematic features relevant to the legal audience. Traditional comparative reasoning can be claimed to be a neutral use of comparative observations, an attempt to maintain the legal

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<sup>806</sup> Aarnio, A., 1986.

<sup>807</sup> On the diversity of audiences and different arguments, see Perelman, Ch., Olbrechts-Tyteca, L., 1969, p.474. In legal context, Bell, J., 1986, pp.53-65, esp. p.56 ff.

This is one of the questions connected to the modern legal systematization discourses and the comparative legal discourse. One could be considered to be part of the legal systematization discourse of a system if one uses rules, norms, and interpretations deriving from the comparative legal discourse.

The distinction has to be made on the basis of the aims of the argumentation, reasoning and justification. Practical legal reasoning (also in its dogmatic form) aims always at a justification of a norm's interpretation or a decision. In this sense, the argument of the comparativist may be connected to the legal systems of norm under consideration.

All the same, comparative reasoning can have relevance, as comparative law itself shows, also in various legal systems. It is not clear that each argument and justification is connected only to a particular interpretation etc. Comparative reasoning in any discourse can have effects in the historical discourse on law.

In this sense, the distinction between different comparative reasonings has to be made according to the audience it is directed to.

<sup>808</sup> For example, if comparative discourses (comparative opinion) generally state something, institutional reasoning and the general principles cannot be contrary to this.

"balance" and the existing structural arrangements. It also reveals the basic values of the legal decision-maker in the comparative legal discourse and legal discourse in general. It functions as a basis for further discussion (the idea of discursive integrity). It is based on communicative rationality.

By value-based comparative reasoning is meant the use of comparative information in a non-analytical, strongly principled way. Comparative information is determined "auto-poietically", i.e. only by reference to the "internal" conceptualization of the legal system (or order) concerned, which is assumed to be understood by the audience.<sup>809</sup> Value-based comparative observations are characterized by disregard of comparative generality or disparity as premises of the discourse.<sup>810</sup>

The instrumental approach means the use of comparative information in the internal reasoning processes of the institution in a manner which is invisible for the general legal (dogmatic-scientific) audience. This instrumentality of comparative law can be related to the search for forms of argumentation *a priori* by way of justification. This is why one may call it, in the ultimate sense, institutional reasoning. In various ways, comparative legal studies help the decision-makers find persuasive and convincing forms of reasoning (arguments), and to achieve aims which are not directly part of the interpretation of a rule ("system maintenance"). The instrumental use of comparative law leads to instrumental reasoning in general.

This instrumentality is apparently connected to the teleological intentions or to the internal coherence of the institution. By looking into individual systems, in particular and general, one may design such norms and reasons, which make flexible interpretation of law possible. In this way the system may implement its norms in a prudent way, depending on all particular circumstances.

The aim of internal comparative reasoning is the justification as such, not the adherence of the legal audience in a value based or traditional way. In this case, the premises of reasoning are based on the aim of achieving the adherence of the "internal" interests of some audiences, which also means, in fact, that a distinction between different comparative and general audiences is reproduced.

The instrumental use of comparative law and instrumental reasoning can be divided into following concrete types.

The first type of instrumental (comparative) reasoning is the individual action type, which is connected to the contextual heuristics of the individual decision-maker as a person. This can be defined as an inspirational type of comparative reason search and reasoning. It is basically the comparative interpretation as such. It is determined by the personal qualities, characteristics,

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<sup>809</sup> Generality, etc. This type of "internal" value based distinction seems to be based on "good/bad" distinctions as criterion of relevance, instead of the legal/illegal distinction used in the systems theory.

<sup>810</sup> This value-based reasoning can be called the restructuring of a comparative argument.

interests, and the social context of an individual. These types of "reasons" could be found only by interpretation of the heuristics of a person<sup>811</sup>, but also by examining different internal discourses.

The second type instrumental argument is the affective one, where comparative observations are used extremely situationally within a closed discourse. The basis of this use is rather the emotional affection toward certain arguments. In the same way as the former type of use, it is strongly connected to the basic values of the user, and argumentation is characterized by argumentation "*ad hominem*". These types of instrumentalizations are not rationally directed toward any genuine audience.

Both these forms may include extensive analytical observations and be "traditional" from the point of view of comparative law.

The third type of instrumental (comparative) reasoning is systematic institutional reasoning. This takes place in the internal, institutional, and contextual discourse. It is connected to the context of the discovery of the justification by the institution. It is usually made in the form of systematic research internal to the institution, resulting in the systematic formation of the legal justification. This can also be made in the traditional or value based comparative law form.

Instrumental uses of comparative law lead usually to argumentation and justification by means of general features or disparities without any analytical quality. On the other hand, instrumental comparative reasoning can depart from strict general features, or disparities, and remain on the traditional level of reasoning. Here the method for analysis of the generalities or disparities is related to traditional methods of legal sources and arguments.

Furthermore, if one goes to the deep analysis of systems by stressing the particular features and problematizing the whole idea of the comparability (strong systematic "polycentrism" as its ultimate form), we are dealing with strongly value-based forms of comparative observations in the instrumental sense<sup>812</sup>. Here the general reasoning usually results in coherence - or similar kind of - reasoning.

In the case of traditional analysis, legal theory and comparative law meet in the concept of legal sources. With reference to legal systems as general or disparate, comparative reasoning implies values of the legal system as a basic form of value.

It can be maintained that an explicit reference to a particular legal system as a source of legal argument is not a necessary condition for the rationality of comparative reasoning (an original source).

A special type of phenomenon must also be mentioned.

Instrumental reasoning takes place also in a case, where reasons are revealed in an open justification, but only as institutional "additional" material (value based or traditional way).

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<sup>811</sup> For certain problems in this regard, see Aarnio, A., 1986, p.22.

<sup>812</sup> From the general legal theoretical point of view, deep analysis is instrumentalization of the legal system as a form of legal argument.

Many "opinion" types of comparative observations are of this type. As we will come to see, they may function in guaranteeing the convincing force of the "main" reasoning. This type of instrumentalization, as a kind of contextual justification, may also attempt to guarantee the integrity of a legal order and an institution. However, from the point of view of value based and traditional reasoning, these additional comparative observations may be relevant also to the development of the system.

**Comparative reasoning and the discursive integrity of law.** Comparative reasoning traditionally consists in descriptions of law, whether general or disparate. As maintained, generality can be absolute or partial. Disparity can be absolute or relative, or may entail a type of special case, whereby the legal system is, on the basis of its internal structure, considered as a special case (coherence or integrity). Absolute disparity maintains also the coherence or integrity of different legal systems in terms of comparative law.

Description, on the other hand, has, as its counterpart in reasoning, a prescriptive (critical?) part.<sup>813</sup> The prescriptive part differs according to different types of descriptive parts. Where the descriptive part of (comparative) reasoning consists of the generality of the legal systems or their norms in a value based or analogical sense, the prescriptive part can either be an acceptance of a corresponding norm or principle, or it can ignore this generality as a basis of the decision. The first type of reasoning is related to the openly value-based comparative reasoning, the second to the openly instrumental use of comparative law (comparison by opposites).

The value based and the instrumental uses of comparative law do appear normatively integrative in the realm of the state paradigm of comparative law, but in a strongly adjudicative sense.

Traditional comparative reasoning is characterized by the working hypothesis of comparative law, namely, the disparity of legal systems. However, it is legally analytical. Traditional comparative reasoning maintains the traditional integrity of legal systems in a discursive way. It reveals the basis of the prescriptive evaluation. In this way the integrative discourse can proceed.

**Sincerity, efficiency and linguistic conventionality.** In traditional comparative reasoning, one starts always from the "external" vantage point to the legal system. This "externality", on the other hand, does not mean the point of view of each foreign law under comparison, but a "third"

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<sup>813</sup> Schmitthoff M. (1941, p.99) for example maintains that "the ... problem connected with the descriptive phase of a comparative legal study is the question how far critical analysis should be applied at this stage. Even the pure description of facts cannot, it is believed, achieve a scientific standing [MK: legal scientific standing] without methodological classification".

point of view, the legal point of view,<sup>814</sup>, as we have maintained.

This third point of view, the legal point of view, reveals the value based (normative) choices on the limits of one's conception of legal system (and law in general). This is due to the fact that, in this case, the legal point of view comprises a bunch of choices, which have to be articulated and reconstructed. The legal point of view operates in the open space (context) of the tradition of comparative law. Even if it moves inside some kind of tradition, it reveals the choices inside this open tradition quite clearly.

In this sense, it appears interesting that traditional comparative reasoning seems to be, in point of fact, sincere from the point of view of the legal discourse theories. This is due to its open-endedness. Furthermore, it also seems that there is no room for real instrumentality, even if the legal systems and national legal discourses are instrumentalized in a particular reasoning. The justification moves in some ways within the legal sphere, but is characterized by elements of so-called "deep-justification"<sup>815</sup>.

On the other hand, because in comparative reasoning one refers to rules, decisions, etc. which frequently are claimed to have a "transcategorical" nature, there is a strong assumption of a "common sense" understanding of these rules (or, in other cases, they are used authoritatively).

**Conclusions.** What follows is an attempt to undertake critical analysis of the nature of value based, traditional and instrumental comparative reasoning. Furthermore, the idea is to consider the relationship between comparative arguments and other arguments, and the interaction between arguments in relation to the consultation of different legal audiences.

#### 5.4.2. Analysis of the types of comparative reasonings (arguments)

##### 5.4.2.1. The value based nature of comparative reasoning

**Its homophonic nature, and the idea of a minimum requirement.** Comparative reasoning (as well as analogical reasoning) seems to be a "minimum requirement" for the legal meaningfulness

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<sup>814</sup> Tur, R.H.S., has explained how comparative law moves between the mechanical jurisprudence and judicial intuitionism (1977, p. 247).

<sup>815</sup> This is exactly the reason why comparative considerations are left out from the justification. They are hidden within the generality and disparity statements, which give only a sign of what has been concluded in the internal discourses of a system, or what might be the values of the decision-maker.

All the same, because in comparative considerations, as we already maintained, are genuine legal arguments, one may conclude that the "contextualization" instrumentalizes law or is at least a sign of the instrumentalist approach to law.

of a legal sentence. Namely, comparative legal reasoning looks to create meaning for a legal sentence by a reference another legal sentence. In this sense, it constitutes an ultimate meaning-creation process in law.<sup>816</sup>

We may say that comparative legal reasoning is legally a "homophonic sentence". It provides the ultimate "correctness conditions" (meaning condition) to another legal expression. Comparative reasoning is a confirmation of a meaning in the legal paradigmatic context. Argumentatively, it is a form of "linguistic systematic" meaning-creation instead of a phenomenological (or, for example, an ethical) one.

In legal terms, it is the ultimate form of use of state-paradigmatic positive law. This feature is connected to the legal "qualitative" relationship, which comparative reasoning establishes between arguments within a legal sentence. The qualitative aspect is based on the fact that legal arguments are arguments from "legal systems" or more from general "legal arguments".

Here we understand, why the demand for further argumentation applies to comparative reasoning. A conditionalization a legal sentence by another "similar" argument leads to demands for further conditionalization. Consequently, the qualitative relationship assumes, in its explanation and reasoning, also the quantitative aspect. We have to prove the similarity of the two "legal" arguments in the absence of a theory of intensional dimensions (meanings) of these sentences. This absence is due to the fact that even if the comparative argument has a legal "quality", this legality does not itself prove its legal practicality.<sup>817</sup>

In this way the "application context" becomes emphasized.

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<sup>816</sup> For these ideas and concepts, see, Davidson, R., 1984.

The nature of a comparative argument, as an ultimate argument, can be looked at from the point of view of the studies on general meaning and use theories.

A typical feature of all analogical and comparative statements seems to be that they are somehow "on the border" of the system. They come into play every time the system is incapable of resolving the legal problem in its own terms. There seems to be a "gap" in the system in a case comparative (or analogical) arguments are used.

<sup>817</sup> The interesting feature of these "system-border" arguments are, in certain sense, the minimum requirements of the "meaning" of the system so that the system still remains a system, a separate identity. Comparative arguments are homophonic sentences, by which the system explains its own meaning. They are the minimum requirements for the meaning of the systems norms and texts. They are the minimum "explainers" in the reasoning, where the reasoning still has a "legal" character.

The meaning comes from the idea that a comparison borrows the systemic quality of a sentence from another system. This quality comes from the systemic nature of that sentence as such. Because the "other" has been already been recognized "in tradition" as a legal system, it is possible to "borrow" this sentence by thinking of it as having already legal systematic quality. It has "legal intensionality".

It is not very convincing to use "adaption", like homophonic sentences, in the legal rhetoric. This is why comparative considerations have to be "transformed" to be general features of another form in order to be convincing and persuasive, but on the same time explanatory.

We may say that the absence of the intensional theory, on the other hand, is based on the fact that interpretation is needed in general, i.e. the legal sentence seems not to be sufficient in itself.

One can connect this to the idea of audience. We could claim that the lack of the intensional theory is due to the heterogeneity of the ideal audience. To be able to convince the audience one has to use all arguments which are relevant for convincing.

**Its inspirational nature.** As we have seen, the design and substantive content of foreign legal rules and the rules of ones own system is based occasionally on an intuitive and spontaneous comparison. This is not considered to be part of comparative law as such, as it is understood as a scholarly work. Nevertheless, one can include this type of use of "comparative law" within the idea of comparative legal reasoning. In this "inspirational" sense, comparative reasoning is loaded with values and affective attachments.

One could claim that it is the unsystematic nature of comparative law and comparative alternatives which provides the decision-maker with the intuition of *inventio*. This *inventio* seems to be the basis of the self-reflective certainty of the decision-maker arriving at a solution. This may also be an explanation for the basic and general idea of the persuasiveness of the comparatively "invented" legal solutions. These types of solutions seem often to be compromises between parties in a difficult dispute.

This "inspirational" nature is a problem from the point of view of the legal discourse theory. The question arises, for example, as to what extent "inspirations" can be allowed, and to what extent one should reveal the sources of inspiration<sup>818</sup>. This is connected also to the explanatory quality of the comparative argument.

**Its situational nature.** Comparative reasoning seems to be, consequently, situational (topical). This seems to be related to the fact that situation which put "law against law" or "legal systems against legal systems" situations, in the realm of comparative observations, lead to choices or confirmations; to a necessity for legal selection. Where in the "descriptive" comparative law one is not obliged to draw any conclusions, in a case of comparative reasoning, on the other hand, one is closer to having a choice of law. However, it also appears as to, in comparative reasoning, one only confirms the choice of a particular normative solution in a extremely restricted context.

Comparative reasoning thus seems to a matter of situational confirmation.

**Its marginality, complete nature, and explanatory function.** It is rare that a lawyer constantly refers to the texts dealing with foreign law or comparative legal method in order to find a solution to a legal problem, though there would be the possibility for an "inspirational" use of comparative material. On the other hand, if this is done, it is rarely acknowledged. This makes comparative reasoning quantitatively marginal.

Whenever the "inspirations" are revealed, however, this seems to lead to a "complete" phenomenological consideration of the issue in general. This, on the other hand, leads to qualitative marginality<sup>819</sup>. Nevertheless, we have to remember that there is always the

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<sup>818</sup> This has been asked, for example, in the context of Community law by Pescatore, P., 1980, p.358.

<sup>819</sup> Also in its analytical form this could be called "complete" rather than closed. Comparative reasoning seems to be self-referential in the sense that comparative legal information is complete from the systematic point of view.

possibility that it is exactly this complete "phenomenological" characteristic, which is the basic idea which guarantees the "integrity" of the societal and legal discourse<sup>820</sup>. However, one could say that comparative legal reasoning is usually, also from the point of view of its "explanatory force", an extremely weak and marginal legal phenomenon.

Moreover, comparative reasoning seems to be directed toward a professional and uniformly educated social group of lawyers, which have extremely dogmatic point of view regarding law. Consequently, from the point of view of the legal discourse, comparative reasoning seems to be reasoning for the maintenance of the internal discourse of law, in which the basic principle is self-persuasion concerning the coherent professional rationality and the ideal phenomenon of law as a form of legitimation. This "self-persuasion" may be associated with a kind of marginality of the "unknown sphere" of legal possibilities, which functions as a reproductive element of the socio-organized law. Comparative reasoning in a legal discourse seems to be "cryptic" reasoning, which is, nevertheless, important for that particular socio-legal audience<sup>821</sup>.

In this sense, comparative reasoning seems to be directed toward the adherence to the legal audience or, alternatively, to the general audience in the socio-political and socio-scientific discourse, which is oriented to support the social and institutional status of lawyers or their argumentative abilities.<sup>822</sup> Comparative reasoning is the heart of the value-based self-maintenance of institutionalized law.

This idea could explain, for example, why comparative reasoning does not seem to be relevant to the "genuine" and general social discourses; that is, to the legal dogmatic or political discourses of social systems. Where the relevance of value-based comparative reasoning is in the maintenance of legal possibilities, in these types of discourses, explanatory force and communicative abilities are more relevant. Comparative reasoning seems to be irrelevant to them. However, as we have maintained, the genuine legal discourse is, in the final analysis, socially and not merely legally-oriented.

This may be the reason why lawyers, taking part in genuine legal discourses, hesitate to use comparative observations.

Comparative reasoning may be important whenever the reasoner is ready to undertake the difficult task of translating comparative observations and of integrating them into

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<sup>820</sup> In this sense, "dogmatic" comparative reasoning, for example, seems to be always extremely mechanical.

<sup>821</sup> In this way it seems to be one of the most important of all materials or arguments from the internal point of view of law. This is connected also to the use of the "gap" argument in law.

<sup>822</sup> The characteristics of any translating system appear interesting. The idea seems to be that one should not necessarily translate well, but convincingly. All the same, the characteristics of the conceptualizations deriving from these translations is abstract, and their convincing character is based on their abstractness. The more abstract they are, the better they can be utilized in a discourse. Their character as "order from noise" is the basic condition of their potentiality as legal arguments aiming at the legal regulation within other systems.

the internal discourses prevailing in the genuine discourses. Here we may find the socio-instrumental role of the comparative dogmatists, and value-based comparative reasoning.

**The contextuality of values.** Comparative reasons seem to "keep up appearances", to function as a "cover" for value (or even morally) loaded issues.<sup>823</sup> This idea may be explained in a following way.

One may claim that different types of "cognitive" arguments enter into legal reasoning, whenever the question concerns value issues. In value-based comparative reasoning, the traditional forms are tested. The "value-loadedness" tends to "expand" the considerations, and in reasoned form, to reveal more and more basic assumptions embedded in the thinking of the decision-maker.

Comparative reasoning is one type of cognitive expansion, even if it is a "legal" type. Here problems may arise, for example, concerning the rationality of the reasoning, as we may see. The "sensitivity" of the issue often causes the closeness of the comparative reasoning, or a tendency towards greater abstraction. Comparative generality and disparity are these types of abstractions.

Consequently, whenever comparative closeness is revealed, by analytically stating the comparative observations or by neglecting any comparative "generalities", we may enter into the realm of the study of the basic (legal) values<sup>824</sup>.

**"New situation", and its practical nature.** Because the role of comparative reasoning in law does not seem to be related to its *a priori* acceptability as a legal argument, but rather to its practical relevance (i.e. to its factual acceptability in a legal discourse) comparative legal reasoning appears whenever the situation seems to be new and when no traditional normative guidance is found.<sup>825</sup> In this sense, traditional legal analogical arguments and comparative arguments seem to be, in a way, alternatives. Where analogical arguments operate in the systematic framework of a legal system, the comparative argument is based on the idea of a legal

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<sup>823</sup> Comparative reasoning, as a legal systematic generalization, is an extremely effective way to "cover" the main value standpoints and aims in a "referential" form. It takes place by reference to the legal quality and status of law.

<sup>824</sup> As we have claimed, comparative arguments seem to function as solutions for the value-loaded questions of legal systems. However, the fact that their internal and external premisses are "legal" (referring to the premisses of the legal actor, but also to the premisses of external legal systems) make them "legal" arguments.

Despite their legal nature, one can identify the value issues by observing the questions, in which comparative legal arguments are used. By observing the different types of criteria connected to the comparative legal argument, one can identify the value premisses of the decision-maker in relation to the "legal questions".

<sup>825</sup> This phenomenon may be associated with, for example, the legal activism of courts.

It is interesting to note how the academic objection to the activism of courts seems to be connected also to the activism of comparative reasoning. The objection may be explained by the fact that the academic approach to the law is often based on a more historical approach (emphasizing different sources of the rules or principles) (Watson, A., 1974, p.96). However, one should, consequently, concentrate, in an academic objection, upon to the extensions of the reasoning, and not upon the activism as such.

framework in general. However, we may ask, if this is so, why then to turn to another system and learn from that system new ways of reasoning in relation to a particular situation?

This resort to another system may be due to the fact that in a particular observed system, a particular legal and political discourse has been already effected with regard to a particular problem. In addition, the problem may seem to be relatively comparable, as a factual problem, within the observing system. This may be the result of the idea that the factual nature of the social world is considered relatively similar in general or that the process of rule-creation and application, in historical terms, for example, ensures that certain issues have been discussed and that some kind of discursive rationality has been achieved. In this sense, a comparative argument may be preferable to an analogical one.

Two factors are connected to this issue. The system, which works as a transferring system is, to a certain extent, to be trusted. It is considered authoritative in the sense that the discourse which has taken place in it is considered meaningful and rational *a priori*. Even if the rationality of the rule or the norm is not established by the social discourse in the receiving system, there seems to be some rationality guarantees.

On the other hand, the observance of another system may be associated with the idea that there are some problems in the rationality of the political discourse or "informal channelling" in that society. On the other hand, the explanatory force of the systemic analysis may not satisfy, as such, the needs of the reasoner in particular decision-making<sup>826</sup>. The legal decision-maker may find it necessary to regulate and clarify certain issues at the moment of decision-making.<sup>827</sup>

The legal system may interact with other legal systems also because it finds it necessary to stress its relative autonomy from the political rule constructing, or because political decision-making is considered relatively autonomous from the legal system in general. In this case, there seems to be no general discourse relationship between the legal and the political system. As a result, the legal discourse or learning process is considered to be more rational.

As we may see, it is possible to find many common elements between comparative and practical(-finalistic) reasoning. As practical(-finalistic) reasoning, comparative reasoning should not have a decisive role in legal justification because of its ingenuine nature as legal justification. We may say that if comparative argument should be used in these situations, it should be used as a final consideration after all the genuine legal reasons, after the arguments deriving from *prima facie* legal sources have been considered. This way the decision will

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<sup>826</sup> This may be a reason for the adoption of reasons of fact rather than reasons of law.

<sup>827</sup> This is typical of highest courts, for example.

facilitate the internal coherence of the legal system<sup>828</sup>.

Comparative reasoning also differs in many ways from pure practical reasoning. Namely, it is reasoning by certain legal systems recognized as political-legal systems. Interpretations by foreign law, on the other hand, are based, for example, on a valid body of statute law<sup>829</sup>.

**Its "ultimate" character.** As we have maintained, comparative reasoning has a tendency to stretch the legal system and law to its limits. Some remarks have been already made on this issue. In traditional international private law and criminal law, for example, the ultimate limits can be seen in the form of "ordre public", which is the expression of the limits of the system, and which calls for a return to the norms of one's own system of law. Here the "comparison" of laws has a role. The legally rational relationship with other systems is defined. In these choice-of-law types of regulatory acts it is usually explicitly mentioned that the ultimate premise for the choice of the public order rule should be determined on "moral grounds"<sup>830</sup>. Consequently, comparative reasoning seems to be connected to the questions of the ultimate foundation of legal rationality in a formal sense.

As we have maintained, the fact that it is exactly comparative legal reasoning that is used in the hard cases instead of practical and moral reasoning means that attempts are made to resolve these cases via traditional forms of law, not by new forms of arguments. Indeterminacy in general is solved by some kind of traditional form of legal security.

In conclusion, one could claim that the value based (and also instrumental)

<sup>828</sup> This idea is interesting, if one thinks about the persuasive nature of the comparative reasoning in the legal discourse. Where comparative reasons are usually seen as ultimate and final reasons in the decision-making of national discourses, it is no wonder, why some cases where the supranational systems use comparative observations appear as "hard cases" from the point of view of the national discourses.

However, in supranational regional systems the comparative observations are everyday practice. The attitude towards comparative perspectives appears different. From the point of view of the supranational systems, these cases are not necessarily "hard cases".

<sup>829</sup> Nevertheless, many problems exist. Comparative reasons are legal, and not only cognitive. Comparative reasons are part of another social discourse.

It is quite interesting to note, empirically, that comparative arguments are used in justifications more or less the opposite way than an analogical argument.

This can be explained in the following way. When the legal systematic rationality is at its limits (i.e., the internal system arguments are exhausted with an internal analogy) one has to go beyond the system, and use arguments (and considerations) external to the system. This takes place via comparative considerations. The whole system of legal decision-making, from legally internal point of view, turns out to be a reflective attitude towards its environment. This way the system constructs "itself" as a normative system in the internal processes of the system of decision-making.

The comparison creates, in other words, context for the system itself. The context is then the linguistic, procedural, jurisdictional, and sometimes even the rule context. This context helps the legal system to construct itself as a kind of a legal teleological system.

<sup>830</sup> This is often seen in the order public clauses.

The same applies to regional organizations when they determine the content of the concept of subsidiarity.

comparative reasoning - established via an unanalytical generality or contextual translation of the traditional conceptualization - cannot prevail in hard cases in general. Hard cases should be justified by traditional analysis. A hard case must be approached in an analytical and intensive manner. Only by means of convincing reproduction of this tradition one is able to establish the acceptability of the solution.

**The pathological potentiality.** One of the problems in comparative legal reasoning, as well as in comparative law itself, is the loss of the social context of the systems studied and the arguments used. This may take place for many reasons. It may lead to the "isolation" of the interpreting system, and, in the end, comparative reasoning may appear pathological. This is connected to the "equalization effect" discussed earlier.

This phenomenon is a problem of legal interpretation in general, but the problem emerges more clearly in the case of comparative reasoning, where the starting point is a strongly generalized form (or well established methodological status of comparative law), and where one does not necessarily have any attachment to any contextual factuality. In comparative reasoning the problem is extremely complex, because the final results of comparative legal considerations are also generalized legal forms.

Here the problem of legal reasoning becomes a communicative problem in a highly uncovered manner. There seems to be no possibility, especially if the reasoning is non-analytical, to find out the ideas prevailing in the context of the discovery of the arguments used. The communicative act seems to be acceptable, but the real problems do not emerge or their resolution is postponed.

#### 5.4.2.2. The traditional nature of comparative reasoning

**Generality, "openness", and the secondary nature of comparison.** The generalization contained in comparative reasoning can be considered almost always to be implicit<sup>831</sup>. On the other hand, the comparative argument may be also an explicit generalization.

All the same, even if comparative reasoning may be explicit, the comparative argument remains an "open" argument in the sense that it leaves open different possibilities. This type of open argument is an argument, whereby the authority often replaces the reason, and where values enter into the argumentation<sup>832</sup>, as we have seen.

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<sup>831</sup> For example, Abel, R.L., 1978, p.221.

<sup>832</sup> On open arguments, Honoré, A.M., 1974.

Comparative considerations confirm decisions belonging to a larger context than to the systematic context. Having a nature of being a combined argument, reflecting many dimensions of social activity (sociological, philosophical, legal etc), it refers also to spheres other than legal systems (and discourses). Comparative considerations

On the other hand, because of its character of "generality", comparative reasoning is "secondary". Its legal premises derive from secondary sources<sup>833</sup>. This is so especially in cases where no traditional analysis (comparative argument) is used.

These features must be balanced with the analytical approach to comparative reasoning (traditionality).

**The supportive and practical legal nature.** Comparative reasoning is mainly a supportive illustration in justification. It helps the interpreter to transfer practical considerations, already taken, into legal language. As mentioned, this may take place in cases where no satisfactory legal solution is found ("gaps"). In this sense, comparative reasoning is not a practical statement as such, but a practical statement in a legal form. This latter phenomenon could be explained more thoroughly.

As we have maintained, the function of comparative law may be understood either as a "widening of an intellectual horizon"<sup>834</sup> (kind of a "self-conviction") or/and, in the social sense, as a search for a reasonable (legal) argument for purposes of a legal audience. As we may see, comparative reasoning is, in this sense, related to the general practical argument, but is a kind of a "mirror" reflection of it. However, comparative reasoning seems to function also in testing the basic rationale of the legal interpretation, in the hard cases within legal systems<sup>835</sup>, and furthermore, as a premise for the evolution of legal cases (legal language as such, or even common language)<sup>836</sup>. In this sense, it may be, and many times is, more easily understood in the

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do, accordingly, open up the system in many ways.

This is the reason for comparative reasoning being extremely problematic: it causes insecurity not only legally, but in the general systematic thinking. It reflexivizes the system. Consequently, it forces the system to maintain strongly formal closure to be able to be opened up cognitively. This causes also the factual closing up of the system in an argumentative (justificatory) and discursive sense, as we have claimed. To maintain its systematic nature, the discourse cannot open up the external and unsystematic features. If this was so, it would be incomprehensible as a form of a social discourse, and it would break the self-productive features of the system (and legal discourse).

<sup>833</sup> Brusiin, O., 1953, p.437, Koopmans, T., 1996, pp.548-550.

<sup>834</sup> Marsh, N.S., 1977, p.661.

<sup>835</sup> See also, some analysis, Marsh, N.S., 1977, p.650.

<sup>836</sup> It is interesting to note, how the analogical, or comparative argument, functions in this sense.

For example, one takes up a comparative observation ("in system S: if one maltreats a person, one has to pay compensation and fines X"). Then one identifies the legal system relationship (F, S), the norm in a second system and the comparability (F: "causing physical injury an individual, leads to compensation" is a same as S "if one maltreats a person, one has to pay compensations and fines X"). Then one extends or restricts the interpretation of the norm as much as the comparative observation allows, makes the transformation ("actually the interpretation in F should be that the 'maltreatment' is 'causing physical injury', and the consequences should include the fines"). Afterwards, the application of this transformation to a case can take place. Subsequently, the change, taken place in the reinterpretation of the rule in the comparative process determines the interpretation of the norm (for example, more consequences: fines X).

Now, consequently, one starts to define the similar situations this way too - based on the idea of systematic coherence. The "maltreatment" enters into the legal vocabulary, and a conceptual change takes place, and the case, where it has been used, starts to determine the legal discourse.

Furthermore, if in a system F there would not be a concept of "maltreatment", the adoption of the concept would be determining not only the legal conceptualization, but also the common language. This becomes more

general practical legal discourse, though it is a legal systematic argument.

Comparative reasoning seems to move, accordingly, both within the border of legal systems, but also at the border of general practical rationality and legal rationality in general.

**The inter-systematic nature and legal linguistic conventionality.** Comparative reasoning is reasoning by arguments deriving from systems of arguments, i.e. general conceptions of legal systems. Comparative arguments are adaptable, not on the basis of general philosophical conditions of discourse, but on the basis of their inter-systematic nature. Comparative reasoning starts, or at least should start, from the legal (systematic) linguistic conditions, just as the tradition of comparative law starts its research, and not from the general linguistic conditions prevailing in the general normative discourse or the legal systematic conditions prevailing in a legal system. Legal linguistic conventionality is assumed.

The comparative argument in this sense has two sides: it is an independent legal argument as an argument within that system, but at the same time, it is an argument which has lost its systematic nature, and is taken from the actual and concrete legal discourse of another system. It serves its legal and social explanatory aims in one legal system and it is claimed to be doing so also in another legal system, even if in disparate way. This way the comparative legal reasoning refers, basically, to two socio-legal systematic coherences. It has to do with a general normative social consensus and legal consensus in two systems and it connects, in a peculiar way, two systems together: if it is successful in both systems, it actually integrates these two systems at the explanatory level, even if not necessarily on the level of legal order.

On the other hand, the fact that comparative argument has been adopted within a system as explanation may encourage another system to do the same. The comparative argument, in other words, may be an argument in some discourses between legal systems, valid as an explanation, but not as a binding normative argument.

**The horizontal and vertical nature.** Comparative reasoning has been seen traditionally as horizontal legal reasoning. This suggests that it does not function in relation to the hierarchical vertical structure of the system using it. This is why it usually requires the establishment of the comparative relationships to the whole system, or a stress upon the importance and centrality of the "common" aspects. This is also why it is taken under a critical and practical evaluation in the realm of both the factuality and validity of a system.

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effective when the reconceptualization is connected to cases which have a strong general social interest, and affective nature. The legal language starts to strongly determine the common language. To a certain extent, the idea seems to be also that the more abstract a legal rule ("a principle") with a strong normative power ("validity") we have, the more it starts to determine the legal system to which it is compared, and the common language via the legal language.

This is connected to the professionalization and the idea of integration through law, and to the traditionalization effect of law.

However, it seems that the comparative legal reasoning is often composed of two traditional comparisons. Firstly, a comparison is made between different legal systems. On the other hand, the generality or disparity, which results from this comparison is compared to (reflected with) the systematic presumptions, the internal principles, of the system, especially within "institutional" principles. On the other hand, if the question involves the application of these generalities to the factual situation, there would be a third type of comparison. However, because of the "external" nature of the comparative observations, they usually function as supporting arguments in the interpretation of the legal norms of the system.

We could say that comparative reasoning can be either one or two of these processes and analogies in an explicit form, or it can consist of all of these. Nevertheless, whether we are speaking about comparative reasoning in education, legislation, negotiation, or any form of legal decision-making, we may claim that all of these elements are embedded within the reasoning process, in one form or another.

**The interactive nature (I. Legal principles, II. Legal sources).** Comparative reasoning seems to reduce the importance of the question of the independence of legal systems and comparative law in general, as we have maintained. On the other hand, if comparison is not related to any basic "systematic" and principled arguments, one may begin to see the legal system as a self-evident legal construction of legal institutions. Here, however, the ground seems to be clear also to different social determinations, as we have seen.

There is a connection between legal comparison and legal principles, as the inclusion of the vertical dimension to legal comparison has already suggested. It can be claimed that the connection between analogical (horizontal-comparative) reasons and legal principles is based on the idea that it is the basic legal principles which give the analogical and comparative arguments their "internal" connection to the system. These principles transfer the pure modelling or imitation process to the internal aspects of the system, in which process the external arguments become modified by some basic internal premises.

In a more value-based form, the interaction consists only in the "positive" principles of a system. On the other hand, a "discursive" principle of legal sources transfers the comparative reasoning to more traditional and analytical spheres, as we have explained above.

**The "self-restrictive" and material nature, and the effectiveness.** Comparative observations and transformation processes are determined by the idea of a "suitable legal curiosity", which the arguer and his audience (can) explore. The choices reveal also the idea of what may be assumed to be the legal audience. In the choice of the extension of the reasoning one is faced with a problem of, how far one thinks it is reasonable to go in the study of socio-legal systems in

general<sup>837</sup>. This determines the practical legal reasonability.<sup>838</sup> Comparative reasoning is strongly related to the daily life of socio-legal systems and their existing structural conditions.

On the other hand, because, in the argument transformation, one is investigating enormous amounts of possibilities, choices have to be made also in the realm of time and resources. This may be associated with the effectiveness problem of comparative legal reasoning. "Effectiveness" is determined by the internal principles of the arguer and the institutional and systemic determinants. They may have a normative role.

Restrictions on time and resources make the comparative argument a "material" argument. It is bound to material conditions. This relates to the fact that comparative reasoning is empirically inductive.

**The identity and conservative nature.** We may maintain that behind every comparative legal argument there is an idea of an identity. In legal terms, this means a kind of a theory of legal identity, or, in practical modern terms, *tertium comparationis* and the state paradigm of law. This identity (or *tertium comparationis*) is related to the idea that every trans-systematic comparison must function in a transsystematic conceptual framework.

All the same, this is not sufficient. Because of the controversial nature of comparative reasoning, the identity is not only an *a priori* identity. It is also an attempt to reestablish an identity for law in concrete legal terms. This is connected to the comparability in substance. This identity-seeking is translated into the terms of the legal discourse as far as possible<sup>839</sup>. The internal and external interests of stability come together. For example, the filling up of *lacunae* is connected to the stability of the system as a stable system among other systems.

In this sense, where the comparative reasoning involves the revelation of *lacunae*,

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<sup>837</sup> Where the comparative legal argument, as a practical generalized and applied argument, only assumes the social context and generalizes the scope of a linguistically explained norm, it becomes only a norm in a practical context without any general application. Consequently, it does not have any general legal quality beyond its application-context. Its scope in analysis has to be restricted to that particular context it has been used in, unless it consists in explaining the social context, where it is applied in general.

This type of comparatively reasoned norm reminds us of moral norms in the social sense, because it has no other specific context but the application context (on the context of moral norms, see Aarnio, A., 1986). However, because it has the legal quality of being legally restrictive, it remains a comparative legal abstraction based on the context and choices and reflections of the legal institutional actor. In other words, as long as the social context of the compared norms are not connected and used as elements within this comparative abstraction, it remains only a heuristically (or perhaps "culturally") interpretable legal abstraction. It seems to be strongly connected to the believe systematic reasoning and to institutional authority, and it assumes a strong instrumentalist idea of language. At the same time, and because of its poor discursive quality, it is part of an oppressive language, and in the long run, it may reduce the authority of the system.

<sup>838</sup> The arguer "*can never transcend society's self-image or go beyond its own concepts*" (Tur, R.H.S., 1977, p.245).

<sup>839</sup> This can be seen in different evaluations concerning the relevance of comparative law. Where the traditional balance, in legal terms, is broken up, the comparative argument loses its legal relevance, and it turns out to be a matter of a sociological or political approach to comparative law. In the ultimate sense, it becomes a matter of philosophical speculation.

the systematic identity is also involved. On the other hand, this type of *lacunae*-filling seems to be also a matter of general interest, and is of interest of not only the dogmatic discourse. Open reasoning is a sign of the intention to persuade the audience of the general stability of the system. In this way it is directed to all possible legal "audiences".

This type of open comparative reasoning is part of a general and traditional theory of law. It is an explanation of the global legal structures in a traditional way. In this sense, it also tries to confirm prevailing attitudes of the global level on the structure of the legal order<sup>840</sup>. Consequently, it has a conservative nature.

**Conclusions on the traditional and analytical nature.** Analytical comparative reasoning relates to traditionality from two different perspectives, as we have previously maintained. First of all, the deep analysis emphasises the contextual features of the system, and secondly, the values of the actor (who argues within some discursive sphere (to an audience) of a system) are visible in the contextual choices she makes. In both these ways the traditionality of the system prevails.

The objection against comparative reasoning's emphasis is usually the impossibility of adopting a norm from another system because of systematic differences. This objection claims that systems are not alike. The objection is based on the claim of *a priori* understanding of the differences between these systems. In this sense, it fails to recognize the value of comparative reasoning in the legal discourse.

Consequently, in reality, the evaluation of comparative reasoning is connected rather to its rhetorical force than to its nature in a legal discourse. One does not usually concentrate on the "correctness" of comparative reasons from the point of view of the theory of comparative law, for example, but one is interested rather in its persuasive quality, that is to say,

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<sup>840</sup> It is in new fields of law, where one makes use of comparisons.

One could approach this issue from two perspectives.

First of all, by comparison systems create their identities with a help of same types of functional systems in the global sphere, instead of traditional legal systematic validity considerations. On the other hand, the traditional state-paradigmatic premisses force the comparing system to maintain its legitimacy. The solution is the closing up of comparative considerations to the internal processes. If these comparative sources or premisses would become part of the open justification, as sources of legal arguments, this would reveal the comparative identity of a socio-functional system, and it would seem to be outside the basic control over validity. In this way, the normative closeness serves, for example, the functional purposes of state legal systems (and supra-national systems as state-paradigmatic systems as a such).

The second feature seems to be, that by too analytical comparative considerations these functionally differentiated systems could fall out of the premisses of the ethno-state paradigm. In other words, comparative considerations, whether we are speaking about the comparisons of state systems in reasoning of national or international courts, or the comparison of separate functional fields (systems) of law, would reveal the contextuality and the social connections embedded to the legal issue in question. This would make it a matter of the general discourse and controversial considerations in general, and the professional expertise of law would lose its legitimacy to more open social considerations. As a consequence, the reproduction (interpretation) of the system itself could end because of the shift of importance.

These considerations reveal interesting way, how the argumentative closeness functions as a means of maintaining the reproduction of the importance of the legal system.

how well it can achieve the adherence of the hearers.

Accordingly, one can concentrate on the distinction between analytical and non-analytical approaches to comparative reasoning.

In its extensive and analytical form, comparative argument also refers explicitly or implicitly to the general environment it is functioning within. Contrary to systematic and positive normative propositions, it is obliged also to say something about the society within it functions. The discursive quality of comparative reasoning is in its analytical quality, and in the quality of the additional arguments used with it and their interaction. The quality of comparative reasoning is based on its ability to explain deviations from the clear wording, traditions in other discourses etc.

The analytical form stresses the importance of the isolation of the reasoning in concrete cases, whereas the non-analytical approach takes for granted the systematic connections in the legal cultural and legislative sense, and may be oriented towards instrumentalism.<sup>841</sup> On the other hand, where this cultural approach stresses the importance of an idea of culture, and the "institutional" facts of law, the analytical approach stresses more "inspirational", open, and affective side of comparative law and comparative reasoning. On the other hand, in the legal cultural approach to comparative reasoning, it is the cultural nature of the arguments, which establishes the "persuasive" nature of arguments. In the more analytical approach the idea of "culture" is connected, by and large, to decision-based reasoning, to the comparative and general legal discourse as a dynamic process.

Different types of comparative reasoning relate also to the way in which the legal system is seen as a professional system, as we have already maintained. The cultural and non-analytical approach stresses the importance of a professional type of legal system; a legal system as comprised of lawyers. This type of system creates a façade argumentation. This professionalization, on the other hand, refers also to the transfer of political law into the system of closed "contextual" politics taking place within institutional interpretations and interpretational processes of law. This may result in a dysfunctionalization of the law at the primary level, where by the reasonings (and interpretations) are not understood. The other side of this phenomenon of the closed interpretation is the closed application of law.<sup>842</sup>

The practical persuasiveness of a value-based and unanalytical comparative

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<sup>841</sup> On the analytical approach (evaluative comparison), see Drobning, U., 1984, p.243.

For example, different European legal systems and their main "identity" could be typologized, to a certain extent, according to this distinction.

This is the basic problem of the non-analytical nature of comparative arguments. Even if comparative studies could be attached to the dogmatic writings, they may appear in rather non-analytical form. Just as in the case of using, for example, precedents as sources of law, reference to comparative law have only the quality that the original studies carry.

<sup>842</sup> See also Shapiro, M., 1980, p.537. Professionalization can be associated with the passive acceptance of the system.

reasoning is quite obviously connected to the fact that it can "hide" the counter-factual choices of the normative argument, and in this way it seems to be more "objective". It refers to a law, even if to "another" type of law.<sup>843</sup> Furthermore, its persuasiveness may be also based on its "actuality". In comparative reasoning one is choosing traditional authority, but, however, by doing it in a quite affective or value-based manner<sup>844</sup>.

All the same, this "objectiveness" seems to be a fallacy. A reference to "legal systems" (in general) and their general features do not have same connotations as a genuine reference to the "legal system". The reference to "legal systems" avoids all objections in a discourse situation, because it assumes certain "considerations" beforehand. Only further argumentation can reveal the nature of these considerations<sup>845</sup>.

The reference to "legal systems" indicates also professional or other types of "knowledge" on the basis of reasoning, as we have maintained. The comparative argument, in other words, is inclined to reproduce the authority of professionalist correctness, and is directed to an audience, which is believing more on the professionalist capability than to common sense.<sup>846</sup>

As we will see next, the persuasiveness of the instrumental use of comparative law may be associated also with the interaction between different institutional actors, in open and in closed form. Advisory comparative reasoning may emphasize the compact nature of the main justifications. The mere knowledge of the existence of contextual studies may give, on the other hand, institutional expertise to the legal decision-maker.

#### 5.4.2.3. The instrumental nature of comparative reasoning

**The self-referentiality and the "evolutive" nature of non-analytical comparative reasoning.** As maintained, where one reasons on the basis of "generality or disparity in legal systems", one refers to the legal systems concerned, but also to the criteria of comparability, to the *tertium comparationis* or systematic principles. In this sense, the *tertium comparationis* or principles, attached to the acceptance of the comparative arguments, is determined, whether in a closed or

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<sup>843</sup> Tur, R.H.S., 1977, p.239.

<sup>844</sup> Tur, R.H.S., 1977, p. 241.

<sup>845</sup> One could claim that the comparative legal argument is instrumentally the most rational argument from the rhetorical point of view (only). It cannot be analyzed or used *a priori* similar way, so the dogmatic discussion is not able to criticize it. On the other hand, it uses the ultimate validity basis of modern positive law, legal system, as a basis of the argument. It is, in this sense, never open for discussion on a priori basis yet still it is an ultimate form of generality, which can be substantiated ad hoc basis.

One could also think, that this is the basis of its real and value based substantive rationality. It may reveal the values for one which are embedded in it. In this sense, it leads the analyzer to the basic value decisions, and makes it for one possible to reconstruct the values of the decision-maker. Consequently, one is able to enter into a value discussion in the realm of law.

<sup>846</sup> The emphasis upon the judicial audience in comparative law.

open way, by the comparative reasoner.

Comparative reasoning is basically self-referential legal reasoning; the criteria of selection are internal to the system, while the selected generalities derive from the external premises to the legal system. This fact makes the legal actor relatively "autonomous" in his reasoning. This phenomenon is also connected to the fact that comparative premises have to be reconstructed and checked all over again. We have already analysed this phenomenon.

This is the reason why comparative reasoning does not seem to be genuine "legal" reasoning. Legal arguments demand relative stability in order to be capable of being legal arguments. The comparative argument does seem to satisfy the internal premise of law - predictability - because of its value-loaded and self-referential nature. This type of comparative argument has the character of being "evolutionary" and instrumental.

**The "legalizing" nature.** Comparative legal observations may enable their user to "legalize" some existing norms in a social system. In other words, comparative legal observations may give a legal quality to a social norm, which is based on one's own observations or on a general type of observation regarding a societal norm. Moreover, legally systematic, intransitive, transfers can also take place. Comparative reasoning can be, in other words, a method for the "legalization" of a social norm or a social argument within a legal discourse<sup>847</sup>.

On the other hand, as maintained, as and when a legal institution uses comparative aspects in its decision-making, it does not derive the reflective elements necessarily from the systematic nature of the "original" legal system. The comparative aspects do not derive from the dogmatic and substantial systematic discourse internal to any legal system. In this sense, the adaptor of comparative aspects functions as an ultimate systematizer of the legal system in which he is acting. A court, for example, takes part in the legal discourse by way of arguments, which could not be classified *a priori* as legal arguments. In this sense, by using comparative legal arguments, the arguer may also "legalize" his justification in general, though the premises of the institution would belong to a sphere other than the sphere of legal discourse.

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<sup>847</sup> This is one of the reasons, for example, why comparative law is difficult to explain as a legal norm, but is rather a method of law.

The use of comparative arguments, as a sole means of justification, seems to be typical of socio-legal systems where no real principled discussion and tradition of value-based discourse occurs. The comparative discourse fills this gap, and provides occasional possibilities for the legal and political decision makers to fill up these discursive lacunae by some means of justification. Comparative aspects are adopted so as to abolish the insecurity in historical interpretation, where the legislative integrity does not appear integrative, but rather based on peculiar pathological decisions contingently reflecting societal interests, or where in terms of legal integrity in general, legal decision makers or the legal sciences are unable to identify basic principles from the law.

Here we may note why one should demand "sociological and analytical" observations in relation to comparative arguments. This makes it possible, *a posteriori*, to establish a connection between the "comparative" and the social norm, or to study the legal nature of the equalization effect and the "formant".

**The contextual nature.** The nature of comparative law, as a study of similarities and differences, takes one to the context of justification, as has been argued before. The strongly subjective elements and phenomenological deepness of the analysis of the legal systems involved tends to stress the particular features of legal systems. This is why comparative reasoning tends to be included in the institutional framework, and to be absent within public justifications<sup>248</sup>. The reason for this bracketing could, however, also be due to the fact that the substantive analysis is at the core, whereas references to comparative sources may be considered irrelevant.

The "inspirational transformation" takes place when the comparative observer excludes from comparative reasoning any indication of the sources of the arguments. Any indication to the legal analysis (inspirational or systematic) is veiled and we are left with a purely intellectual analysis, which is connected, in the end, to prevailing ideas of the internal legal audience of that system.

This transformation (in façade) can take place also at an institutional level. The reference to other legal systems may be consciously or unconsciously left out of open considerations. These considerations can be, however, admitted later, or they could be previously known, as notorious professional facts, by the audience. This idea applies also to organizational transformations of the comparative law information.

These instrumental transformations take place on the basis of some prior relevancies prevailing in the minds of the audience, whose adherence is sought.

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<sup>248</sup> The use of comparative observations in non-argumentative ways is a matter of a "self-convincing" concerning the correctness of the solution. Here the normative solution itself functions as a persuasive part. This way of using comparative law is one form of a strongly value-based idea of law.

Comparative reasoning in the internal institutional framework, on the other hand, is an attempt to convince internal audience of the stability of that institutional arrangement and other connected institutions.

The problem of deep analysis is naturally connected to the nature of the comparative audience. If one goes into particular features of one system, which one knows extremely well, there is a danger, that one steps out from the comparative perspective, and enters into the discussion of particular features in a particular audience.

In other words, the problem of the comparative arguer is the determination of the extension of the argumentation in relation the audience, the determination on what one is able to speak about. However, this determination is not, as in the traditional discourse, based on the question of how far one can go in analysis, but how far one can go in comparative analysis. There is a difference. It means that the nature of the comparative analogy has to be examined at the same time. This is due to the fact that one, presumably, is not moving in the same social sphere. One has to take into consideration that values might be fundamentally different and that the political integrity of the social system (audience) may differ. The traditional legal discourse is based on the fact that the values and political integrity is more or less the same. In comparative reasoning one has to maintain not only the coherence of the argumentation in positive way, but also in negative way. One has to be more careful in the choice of the lines of arguments and check constantly as to whether the line of argumentation is understandable. One searches, at the same time, for an extension of the political integrity and substantial argument which can be accepted as common. One has to determine which inductions are politically and socio-philosophically correct, and which not.

Usually this leads to a step out from the comparative perspective, or at least, argumentatively, as will see, a support of the argument by other legal means.

We can make following conclusions. When we recognize pure comparative arguments, we are moving in a sphere of political integrity. The comparative arguments combined with other types of arguments such as principles are "hard cases" of the law on its limits. The step out of the comparison by neglecting it is a step out of the political integrity, and aims to achieve the adherence and acceptance of the decision by means of socio-philosophical and institutional authority.

The use of comparative material seems to be directing the analysis to a larger audience than to the more restricted (formally conditioned) one. In the instrumental form, however, one departs from legal generality as a main aim of the analysis, and the reasoning may be conditioned by extremely particular forms of rationality.

If the arguer sees the reference to comparative law as unnecessary, even if there could be such a contextual examination (of generalities or disparities), the reasoning is increasingly defining the institutional idea of coherence of law, based on the presumptions prevailing in the institution. In this type of legal reasoning, one goes beyond the systematic coherence of law, and the reasoning is determined by socio-philosophical premises. At the same time, because the justification calls for an alternative general point of view, it gives rise to demands for the examination of the rationality of the institutional system using them. Consequently, we arrive - in the examination of this type of institutional reasoning - to considerations of the general functions and methods of an institution.

**The institutional and contextual analytical quality.** It is a fact that one of the indispensable motive for using comparative observations is the search for a necessary level of analytical quality in legal justification. This is so even if the use takes place in a limited form. In other words, comparative observations seem to be devised every time there is a need to deepen the analysis, i.e. in cases where traditional analytical means and concepts do not seem to result in a sufficiently analytical justification.

This can be linked with the choice of countries and legal systems for comparison. In the practical use of comparative law, countries and legal systems are not chosen on the basis of quantitative demands, but based on some *a priori* knowledge on the analytical qualities of these systems as legal systems. Furthermore, this explains also, why comparative arguments are not necessarily included in the justification. The contextual analysis forms the counter-factual context for the decision; material for the further discussion on the subject, after the decision has been made (i.e. to be used in connection with subsequent judgments, or to be taken up within further interpretation of the related questions etc.). From comparative observations knowledge is derived to such an extent, that material irrelevant for the case under consideration, is included. When this material remains behind the scenes, the decision-maker is, in future cases and situations, able to change his approach ("evolution"). On the other hand, no counter-argumentation based on the counter factual material produced by the decision maker can be referred to. That is to say, the closed institution is beyond reasonable criticism, and it maintains its self-referential integrity.

**Conclusions; the indirect nature of value-based and instrumental comparative legal reasoning, and the validity of comparative legal reasoning.** Where comparative arguments

may be used in reasoning concerning the interpretation of a rule of a system, this does not seem to create any discursive qualities in the realm of the original systems' values or norms, as we have maintained. Furthermore, this cannot, in a legal sense, directly create tradition in the applying system either. This is also connected to the value-based and situational nature of comparative legal reasoning. On the other hand, we may notice that the more comparative reasoning is "untraditionalized", the more useful it is.

Consequently, the context for the use of comparative reasons, the situational context, determines the direct nature of the value-based and instrumental argument. In this sense, its legal nature seems to remain indirect. This means that no prior legal evaluation, apart from the quality of the "institutional rewriting", can be undertaken. Moreover, the legal solutions associated with this kind of reasoning appear "weak".

One may thus question the basis upon which the comparative interpretation of systems could be done. It seems to be clear that in closing up the interpretations of a system - without an attempt to take part of the interpretative systematization discourse - comparative reasoning is not based directly on its legal discursive validity. Furthermore, one does not seem to be able to make real legal evaluations concerning the nature of comparative reasoning, because it does not seem to involve genuine statements concerning the content of a norm in a particular legal discourse. It only instrumentalizes law.

The question on validity of the comparative reasoning seems to be quite difficult and problematic to formulate and to answer. However, we may proceed to the examination of the instrumental dimension of comparative reasoning in relation to interactions between arguments and legal auditories<sup>849</sup>.

#### **5.4.3. The interaction theory of comparative legal reasoning; the factual persuasive nature and the ideal persuasive quality of comparative legal reasoning**

**Preliminary remarks.** The structure of comparative reasoning in relation to other legal arguments may be described in the following way:

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<sup>849</sup> In this sense, the use of comparative arguments in supranational institutions, for example, must be based on an acceptance of comparative, general, or institutional opinions, but not directly on national opinion.

<u>argument</u>	<u>context</u>	<u>coherence</u>
strict principles -----	institutional premises	institutional coherence
(+) generalities and disparities in legal systems	value based premises	comparative law coherence
(+) legal sources with legal norms -----	traditional premises	general legal coherence
legal norms with socio-legal deep analysis	institutional premises	legal order coherence

**How should one see the consultation of different opinions?** The rationality of comparative observations should not be connected only to the openness of the sources of inspiration and its formal and traditional quality, but also to the rationality of the audience.<sup>850</sup>

The problem for comparative lawyers (and arguer) is the following one. In comparative reasoning, one does use arguments already established within a systematizing legal dogmatic and legal theoretical discourse. Comparative law is not an independent legal source, but, in practice, as we have maintained, is subordinated to the legal systematic discourses<sup>851</sup>. On the other hand, comparative reasoning does differ from the traditional dogmatic discourse to the extent that it does not aim, as such, at taking part in the national discourse. It seeks to make generalizations on the basis of these national discourses.

However, in the same way as practical reasoning in national discourses has to be a systematization of a conflict (a decision) or of a legislative norm (an interpretation of a statutory rule), the comparative lawyer may also be oriented toward the systematization of legal systems. This idea can be associated with the function of comparative law, as maintained by comparative law theory, of increasing knowledge and understanding as some kind of a subordinate systematization in general (education etc.).

The question arises: how can the lawyer, in arguing comparatively in relation to a particular normative decision or a dogmatic proposal, be considered also as a systematizer of

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<sup>850</sup> As it has been maintained, to the legal argumentation is taken forms, which are to be shared in the discourse on law (Watson, A., 1995, p.471)..

<sup>851</sup> We can make a distinction between systematization audiences and legal order audiences.

legal systems or a developer of legal theory?<sup>852</sup>

As we have seen, he is not oriented toward any systematization in any general sense. All the same, these features can be reconstructed from her comparative reasoning. In the study of this comparative reasoning, we can reconstruct ideas, how the lawyer "conceives" the relationship between legal systems, and of legal systems individually, though his aim is to convince a particular legal audience. We may also see certain theoretical assumptions emerge in connection with the comparative reasoning.

On the other hand, it seems that the explicitness of the comparative reasoning can be based on an attempt to take part, to a certain extent, within national legal discourses. This is characteristic, for example, of supranational orders, to systems normatively connected to national legal systems. The abstractness of the reasoning, on the other hand, may be an indication of the reluctance to get involved with systematization processes. Also, the absence/presence of these types of arguments in different cases can be an indication of the approach. For these reasons, one could say that comparative reasoning, presented by institutions, can be seen as aiming at convincing different national legal audiences in some situations.

However, we can maintain, in the end, that usually comparative reasoning is directed at a separate comparative legal audience in the realm of the legal discourse, and its relationship with the national legal discourses may be seen only as transitive<sup>853</sup>. This is so, because general comparative observations are, as general observations, based on the empirical analysis of different systems, but to a more limited extent than the analysis of a national system according to all specific features appearing in doctrines of the sources of law<sup>854</sup>. In other words, general and comparative opinions differ because their sources differ. General legal opinion is based more on socio-philosophical and legal theoretical observations, whereas comparative opinion is more interested in national opinions in a compact form, and it is limited in professional sense.

Consequently, in its relationship to general legal opinion, the comparative view has distinctive features. We may say that their relationship is transitive. The audience of the comparative reasoning is included in the general legal audience, but not necessarily *vice versa*. On the other hand, it can be said that the relationship between national and general legal audiences

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<sup>852</sup> See, Mössner, J.N., 1994, pp.212-213. In the inductive argumentation by comparative arguments the search for the correctness of premisses and problem solving in general get muddled.

<sup>853</sup> This is related to the hard cases of law. It means that the national opinion is assumed to be on the basis of the institutional comparative framework, but that the observations are made in the cases where problems occur, where the adherence of the national opinion must be achieved.

We could say that the consultation of national opinions are related to the use of linguistic, systemic, and teleological evaluative arguments ("in the genuine sense"). Some analysis of these arguments in statutory interpretation as the basic arguments, see MacCormick, N.D., Summers, R.S., 1991, p.531.

<sup>854</sup> The discursive relationship between national and comparative generalities is transitive. The national generality is not a necessary condition of an "ideal" comparative rule, but the question is characterized by qualitative analysis. This way the automatic comparative modeling is not correct expression of comparative rule.

must be identical. Theoretically, general and national opinions have to be logically the same, even if they may get materialized in different types of forms. This is due to the genuine nature of the national legal discourses according to the contemporary paradigm of law.

To conclude, one may say that the best situation seems to be the situation, in which the arguer, using comparative reasons, attempts to maintain the adherence of all possible audiences by referring to the coherence of general principles (and concepts), and where he uses limited analytical observations of the national systems in accordance with the comparative opinion (tradition of comparative law). We will come to this idea and the idea of transitivity later on, after examining some rhetorically technical ideas of persuasive comparison.

**Convergence in comparative reasoning; the horizontal interaction between state legal systems and their rules.** One may make some observations on the interaction between different types of arguments defined as "comparatively legal"<sup>855</sup>.

It is clear that state legal systems and their rules are used when they lead to relatively same conclusion in the same type of situation,, i.e. where there is convergence. On the other hand, in a case where the interpretation is supported by comparative considerations, even the argumentation by one system and in terms of its rules is more persuasive.

Furthermore, it is more persuasive to use shorter examinations than extensive studies, and to use only some, and not all the examples. Furthermore, too explicit argumentation would be rhetorically counter-productive. This can fragment the argument too strongly.

One feature of comparative reasoning is the grouping together of arguments (i.e. legal systems). This includes features such as: in what order arguments are used, what are the main and what are the "supportive" legal systems etc.

It may also be possible that, in some comparative reasoning processes, one legal system functions as a source of a principle, and other systems as sources of comparative legal rules, even if in the open justification the systems may be compared and analysed with the same legal method and terminology. A principle may be derived or supported by one system, and other systems have been used as additional material.

Because the backgrounds of the decision-makers do in many ways determine the "principled" opinions, it might be difficult to determine the source of the principle. However, ideas such as "coherence", "morality", "necessity", "aims", "culture", and "substance" give indications where the principles deriving from the arguer's background are at stake.

**The interaction between arguments and audiences.** As we have seen, the reasonableness of a comparative argument is not dependant only upon "additional" arguments, such as the

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<sup>855</sup> See on this issue, Perelman, Ch, Olbrechts-Tyteca, L., 1969, p.471 ff., 487 ff. The interaction between different arguments is examined more closely in connection with empirical studies.

analogical argument depends upon, but for the whole range of additional arguments based on the prevailing doctrines of legal sources. In this sense, the question of reasonability is related, for example, to the legal theoretical discourse in the realm of "general legal opinion".

Where comparative observations are combined with general principles, the interpretative system links the horizontal and vertical dimensions of comparison, and the logical step of interpretation is made. If the system uses only horizontal comparative observations, it considers it possible to reflect these observations within the basic ideas of the system itself. In these cases we are dealing with a logical interpretation of the system with the help of comparative analysis.

Where comparative reasoning is explicitly combined with principled argumentation, there seems to be a search for the adherence of the general legal audience. On the other hand, it seems that reference to general principles is made sometimes so as to avoid a more analytical approach towards "national opinion"s and "general opinion" in that sphere (which we have considered to be identical). One may seek to satisfy the criteria of transitivity of discourses this way.

The general principles - to which we refer to here as genuine principles - must be the principles deriving from the legal systems, in other words, they cannot be general principles forming part of any institutional framework. If the generality is derived from comparative observations, it must reflect some principles, which are relatively general in these observed systems. Namely, there is a difference between the institutional principles described above, and legal theoretical principles. Legal theoretical principles are measures attempting to guarantee the communicative character of the reasoning (legal sources, standards of their uses), whereas institutional principles refer directly to distinctiveness of institutional opinion from any other type of discourse. We may claim that usually, in practice, general principle type of reasoning is always based on an institutional principle.

It appears as if every time one argues on the basis of comparative arguments, one has to support the justification by principled argumentation of some type (whether general or institutional). This may be due to the fact that comparative law considerations do modify, to a certain extent, the traditional law. This transformation must be supported by some internal principle of the interpretative system. This is the reason why comparative reasoning looks many times like "constructive" argumentation.

The disparities between the "legal" (law of legal systems) is often asserted on the basis of non-existent comparative studies, or on the basis of socio-philosophical arguments and observations. Socio-philosophical arguments are used also in connection with the rejection or abandonment of comparative legal opinions. On the other hand, where some principles are applied in connection to socio-philosophical arguments, this seems to be a matter of a radically autonomous interpretation by that institution (this way it is a type of disparity argument, but in vertical sense). In this sense, socio-philosophical argumentation seems to be used in testing also

general legal opinion.

Every form of disparity argument seems to be related to the "institutional" principle. Namely, there is no possibility to base the disparity upon any "legal" principle common to the national systems, except on the state paradigmatic assumption of the separation of legal systems, which, on the other hand, cannot be analytically stated by the comparativist. In those cases, no generally accepted principles are there in that particular field of law. The principle must be either a matter of principle for institutional opinion, or it must be based strongly on the principle of a particular system influential in the interpretation (and in this sense, on the general traditional comparative law principle stressing the plurality of systems). Nevertheless, the interpretation of this principle seems to be exclusively a matter of interpretation by the institution.

One could claim that where principles are combined with comparative observations, the systemic decision-maker sees the fragility and the arbitrary character of the comparative observations as a problem to be avoided. Strong institutional opinion is used to persuade one as to the acceptability of the solution. On the other hand, one could maintain that the lack of principled argumentation, in connection with comparative observations, does represent some kind of strong agreement in the context of the justification. Namely, because the principled argumentation does represent the institutional "general opinion", the lack of an argument for this "general opinion" does reveal the fact that no generality has to be discussed, and that one is able, in terms of national positive law, to determine the solution for that particular case (based on a comparative consensus internal to the institution, institutional opinion).

These types of cases are interesting, because one could predict, *a priori*, that the lack of principled argumentation in connection with comparative observations means the relative instability of the case law. Namely, the comparative generality has to be examined all over again. Furthermore, one should take into account comparative aspects in determining the nature of this type of judgment, and in analysis of that particular judgment, one should analyse carefully the use of legal sources or general principled opinions prevailing in national systems.<sup>856</sup>

On the other hand, the (institutionally) principled comparative opinion means that the comparative observations are weak, though the institutional opinion seems to be discussed on "general basis". This is especially so where the genuine, non-institutional, opinion has not been considered in the form of analysis of legal sources and their generality. In this type of case, we may assume that there is a disparity between the general and institutional legal opinion.

**A special case I: the relationship between comparative argument and the coherence argument (consistency, cohesion).** Argumentation by coherence has a connection to comparative observation. The idea of coherence refers to the internal "equilibrium" of a legal system (or

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<sup>856</sup> At the same time comparative argumentation is connected to "hard" cases of facts, it is also connected to "weak" cases of justification.

an order) as a legal value as such. Coherence may be connected to comparative law (or has been connected, implicitly or explicitly), because, in the cases where it is used, one stresses the "special case" nature of the systematic arrangement (in relation to other types of arrangements). In these cases, one usually claims the "non-comparability" of this system relative to some type of *tertium comparationis*.

Furthermore, we may say that comparative observations, in relation to coherence-type reasoning, are usually considered irrelevant, because the basic principle, directly determining the result of the case, is the institutional principle. Usually institutionally principled opinions - other than coherence type principles - do not appear in connection to coherence reasoning.

On the other hand, in a case of reasoning by consistency or cohesion of a system, the general comparative law principle (separation of legal systems) and, furthermore, the general legal opinion may be satisfied (i.e. legal sources and general opinion are considered from the point of view of the particular system only).

**The traditional structure of the legal audiences and their consultation processes.** The relationship between audiences and the exclusiveness of their consultation may be summarized as follows:

<u>The nature of the relationship</u>	<u>The audience consulted</u>	<u>Sources</u>
	institutional audience <-----	social philosophy
disparity	general legal audience <-----	social philosophy
identity	comparative legal audience <-----	national opinion
transitivity	national audience <sup>857</sup> <-----	social philosophy

Some explanatory remarks may be made.

Socio-philosophical reasons, which seem to form the basic source of arguments for the institutional, general, and national opinion, are reasons deriving from any social scientific data. The data for the comparative opinion seems to be consisting of national law (opinion) only.

On the other hand, the national opinion and general legal opinion are transitively identical, which means that the general opinion is taking into account all the generalities existing in national and comparative levels, but it differs from the comparative opinion in the sense that

<sup>857</sup> The a dogmatic legal audience in comparative studies, , see, Watson, A., 1978a, p.325.

it also considers sources other than the national law. The identity of the national and general opinion is in the open character of the sources of reasons. However, even if these both are "genuine" auditories, the national opinion is traditionally satisfied only by the dogmatic statements, which, all the same, are based on the general legal discourse.

The disparity of the institutional opinion is based upon the fact that the institutional opinion is an institutionally restricted - a closed - audience. This way it is necessarily separate from general and national opinions, even if reasons in this consultation may derive from any type of socio-philosophical sources.

We may identify certain consequences of this theory.

If the institutional audience is consulted only, it means that there is a genuine conflict with all the other audiences in speakers mind. Namely, if the conviction of the institutional audience - concerning the acceptability of the comparative observations or reasoning in general - is sought only (as in the case of closed institutional discourse), the general, comparative, and the national audiences are neglected as a relevant audience<sup>858</sup>. In an institutionally restricted consultation, general and national opinions are necessarily excluded, because, according to the general opinion, the reasoning must be open.

On the other hand, if there is only the use of general principles of reasoning (thorough analysis of legal sources, consultation with general legal audience, i.e. legal theory), the assumption is - due to the identity and the transitivity principles - that the implicit consultation of the comparative and national opinions is at stake too.

Furthermore, if the user of comparative observations is directing his reasoning explicitly toward comparative and national audiences by referring analytically or in a value-based manner to comparative legal observations, without any institutional restrictions, the situation is the same. The general legal audience is implicitly consulted too.

However, if the arguer is analytical in his comparative reasoning, he evidently attempts to get adherence of the national audience(s). In this case, where the analysis is solely based on the analysis of the legal systems - without reference to general principles, concepts or results of comparative legal opinion - a relationship is sought between the institutional and the national audiences, and the comparative and general opinions are identified with the institutional opinion, and in this sense, neglected.

**The special case II: social philosophy as a source of arguments; can there be a conflict between different opinions?** We start this analysis by examining a genuine conflict between institutional and comparative opinion.

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<sup>858</sup> One could claim that this disparity is autopoietically recognized by the institution in its internal observations. Comparative argument is used exactly because of the basic problem between the legal systems. The basic distinction of comparative law between legal systems is taken as a basic "method" of argumentation because of the identified differences between the representatives of these legal systems in the decision-making institution.

We have noted, that pure institutional comparative law observations have to be supported, at least, by some legal analysis (i.e. of the basic legal sources). We may say that the pure institutionally centred comparative rule interpretation is not sufficient (institutional comparative law). One may demand a deeper analysis in relation to the national opinions.

On the other hand, if the institutional opinion is casting off the comparative law opinion explicitly, without including this analysis of the systems on the basis of legal sources or on the basis of comparative law opinion, the interpretation seems to be based on socio-philosophical reasons. Here we may face a genuine conflict between national and institutional opinions (including the general legal opinion)<sup>859</sup>.

One may claim, however, that in this type of genuine conflict between comparative law and institutional opinions, national legal systems are actually not considered generally to be in conflict with institutional opinion (and, accordingly, not in conflict with each other or general in any sense). This is related to the idea of transitivity. If the legal (source) analysis of the comparative opinion is not made in justifying the general conflict between institutional opinion and the comparative law opinion, the general legal opinion is not considered either, and consequently, the conflict seems to be only a matter of a conflict between institutional comparative law and institutional socio-philosophical opinions. In other words, here the general legal opinion, transitively identical to the national opinion, is dissociated from the comparative opinion (even if there is a claim of generality of/in legal systems). The fact that general legal opinion is not consulted in these cases (lack of source analysis) means that the institutional opinion prevails. Consequently, the conflict between institutional and national-comparative law opinion becomes actually a matter conflict between general legal and national opinions in relation to the institutional opinion.

**Rule I: the "ideal" rule of open consultation of all legal audiences.** The procedural and persuasive nature of comparative reasoning seems to be connected. This idea can be explained in the following way.

Comparative reasoning is as persuasive, as the ability of its user to create a bridge between the system from which the argument is deriving and the system in which it is used. This is related to the reasoner's ability to apply the idea of the "discursive integrity of law". In this sense, the original context of the rule, including the sociological, historical or other socio-political "bridges", are, or should be, stated in the reasoning<sup>860</sup>.

In this sense, we may parallel "normal" legal reasoning and comparative legal reasoning. In traditional legal reasoning the context is taken, in many ways, for granted because

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<sup>859</sup> This is why the analysis of these types of hard cases can be made by concentrating on the nature of these socio-philosophical arguments.

<sup>860</sup> This assumption is extremely holistic.

of social systematic assumptions, or because the context is a possible source of further distinctions within a discourse. The context seems to be part of socio-legal systematization directly. In the case of comparative legal reasoning, this is not necessarily so. This discourse has to be explicitly reconstructed.

On the other hand, in traditional rule application (as in the comparative interpretation as well) the decision maker has to create the link between the decisional norm statement, and the legal sources deriving from sphere external to that institution and from the legal systematic "framework". For example, if socio-political considerations have been traditionally seen as valuable for decision-making, by examining them one attempts to connect the existing social practice to the norm proposed. If the *travaux préparatoires*, for example, have been traditionally considered as a valid source, the reasoning is merely an expression of the linkage between this material and the norm applied.

In this sense, there seems to be an interesting difference between comparative interpretation and traditional legal interpretation.

In traditional comparative law research, the comparative legal sources (foreign law etc.) have been seen only as a process of constructing bridges between the legal systems, without any *a priori* idea of systematization or norm interpretation. However, for example in adjudicative comparative interpretation, the linkage should be made between two norms in two systems and between their contexts.

Now, because we understand that this latter bridge cannot be made in any "genuine" sense (because of the different socio-systematic ontologies of these norms), the bridge building has to be based on qualities other than in the traditional common (discursive-social) system-framework decision-making. It has to be based on the framework of the comparative perspective itself, or on a system of systems (a substantive legal theory).

The fact is, however, that these types of frameworks and substantive theories do not seem to exist in the traditional sphere of law. A value decision seems to be meaningless to an audience, which is not directly involved, and which is not affected by the decision, as in the case of comparatively-reasoned norm. This is due to the fact that the comparative reasoning is not reasoning concerning a norm in the transferring system, but rather in the adopting system. There is no reciprocal interaction in the legal sense. No systematization takes place, and no systematic framework is created, or maintained, as we have observed before.

Consequently, we can maintain that the comparative reasoning cannot be based on any genuine value similarity in different systems. The analysis of the comparative reasoning has to be seen in its "own" context, i.e. based on its quality as a process. However, at the same time we lose any "correctness" dimension, and the formal evaluation becomes a matter of legal "aesthetics" or moral perspectives.

The problem could be solved by some kind of ideal legal audience theory. Namely, we may imagine, that although the comparative reasoning nearly always lacks, as we have

indicated, the general audience (lack of reciprocal communication, influences, and genuine relationships), we can maintain that if the reasoner is using comparative arguments, he has to at least ideally try to orient himself towards audiences which do not, in the traditional comparative or systematic framework, appear important. In other words, the reasoner has to keep in his mind the ideal audiences of the national systems in general (their dogmatic and legal theoretical framework), in addition to the situational and systematic audience composed of parties and participators in the particular and general institutional processes. Even if this seems to be problematic, we have to assume this construction as a regulative idea of comparative reasoning.<sup>861</sup> This is the "ideal comparative perspective" of comparative reasoning in legal decision-making.

This means, in the end, that, even if the audience of the foreign legal system is not an audience in the genuine sense of the word, the arguer has to approach the foreign legal audience mainly on the basis of the "correctness" of the interpretation of the foreign norms, but not by trying to interpret the norms of the system. The audience of the sincere legal interpretation is, on the other hand, the genuine audience in the institutional and legal discursive (dogmatic) nature. The comparative audience, on the other hand, appears relevant only to the extent of "correctness".

This idea leads to the second rule, to the "material" rule of transitivity.

**Rule II: the "material" rule of logical transitivity.**<sup>862</sup> As we have maintained, the function of comparative law, and arguments deriving from it, is to bring into a system an external norm. On the other hand, other "external" elements connected to that particular foreign norm, may also follow. This makes the comparative argument, as such, a source of new elements. This means

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<sup>861</sup> This discursive opening up means, at a minimum, that even if the reasoning is not explained the material has to be public.

<sup>862</sup> Transitivity has to do with the "large" and "strict" application of the comparative method. As explained above, the more strict one is in the comparison, the more one comes into the field of conceptualization, which is connected to the particularities of one's own system. This leads to instrumentality. This is why transitivity is a condition for the existence of a traditional and value based comparative argument in its modern form.

In mathematics and logic the transitive law means that if A bears some relation to B, and B approximates some relation to C, the A bears it to C ( $A=B, B=C \rightarrow A=C$ ).

This means, in our context, that if a norm B is a comparative law argument in the justification C, and if, originally, A belonged to this rule, A belongs (explicitly or implicitly) to C.

We may continue with the analysis. If A is essential element of B, we may say that it has to be considered in C. If it is a minor point, it may be considered. On the other hand, if A is in conflict with C, we have a fundamental problem of transitivity.

Intransitivity exists, when, for example, an element x is attached to B (and C), though x does not belong to B. This means that the situation is intransitive if A's relationship to B is determined by different qualities that B's relationship to C. This kind of situation may exist, as explained, if, to the relationship between  $B=C$ , is attached x, even if it is not in the relationship  $A=B$ .

The transitivity can also involve modified transitivity (conditional transitivity). However, from the point of view of the discourse theory, this is a matter of discourse. This brings a dynamic character to the transitivity relationship.

that the comparative argument may open up the legal discourse to the structures, forms, and practices of "another system" in general. It actually reveals a new sphere which needs to be clarified and taken into account.

As maintained, as much comparative observations create clarification, they may create confusion and misunderstandings in an explanatory sense. In the context of reasoning, this may be the situation where the comparative aspects contain both general and particular elements. Contrary to the idea of comparative law as a way of arriving at legal solutions - in which sense it could be even be called comparative law - one should stress the fact that comparative law is rather a collection of legal information from which inventive arguments can be derived. It is, in other words, a collection of arguments as such. This is so, however, not in the sense of the traditional doctrine of the source of law, as we have seen. Comparative arguments, as sources of arguments, are heterogenous arguments. As much as there seems to be a coherence presumed in connection to normal legal argument, there may be possible generalities, as well as disparities, embedded in a comparative legal argument.

In this sense, comparative law must be considered to be a transitive source of arguments. The nature of the argument in the transferring and the receiving systems is not identical. However, if an element belongs to the "original" argument (original rule or norm) which is derived by comparative means, it should be adopted also in the application of the argument (by the "receiver") or it should be at least be considered. On the other hand, no additional elements should be connected to the application of the argument in the receiving system (as arguments belonging to the original argument) if they were not originally part of it. This concerns also arguments which may seem to belong to the original arguments, but which actually are not general arguments at all<sup>863</sup>.

It seems that transitivity is the logical and formal "material" rule applying to the uses of comparative arguments (comparative reasoning).

**The application of the rules of comparative reasoning.** Comparative reasoning is as analytical in as much as it supports certain functionalities. This means that the extension of the argument to particular and general features is determined by the functions of the user of the argument. On the other hand, distinctions between irrelevant and relevant features are made on the basis of the audience to whom one is speaking. One chooses arguments which are accepted by the reasoner's legal audience. Furthermore, because in the case of comparative reasoning arguments are generalizations of legal systems, one can satisfy the legal audience with lesser analytical observation than in the case of genuine national discourses. All the same, the comparative opinion concerns the individual systems has to satisfy the national legal audience, and it has to be based,

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<sup>863</sup> This phenomenon is visible especially in cases, where the "main" generality derives from many legal systems and from one legal system.

consequently, on national discourse and opinion. It has to be transitive.

In this sense, when one does not use analytical comparative observations as a basis of comparative generality reasoning, one could claim that the normative issue is disputable. On the other hand, where generality is foresaken absolutely and explicitly, the normative issue seems to be very unclear.

The justification for the non-analytical approach can be that one attempts to avoid the claims of irrelevancy or inefficacy. These claims are allowed according to the discourse theory. When this is assumed, there is lack of relevant information, or one expects inefficacy claims to be made on the basis of a too deep analysis<sup>864</sup>.

Nevertheless, in case comparative law reasoning is effected, we may say that the comparative legal analysis must be supported at least by the traditional analysis based on the idea of the main and generally accepted legal sources and standards of reasoning. This way one may satisfy the ideas of legal efficacy in the audience, but also maintain the coherence of the reasoning. On the other hand, here the general legal opinion and the comparative opinion can be reasonably connected.

Because, in this type of reasoning, we also speak of the "method" of comparative law ("canons of interpretation"), some consideration has to be given to the issue of selection of legal sources<sup>865</sup>. This means that there is a consultation of the general legal opinion. Furthermore, if the arguer wishes to depart from the legal sources-approach in the comparative "generality" argumentation, for example, by deriving arguments from non-general sources of law, she has to justify the departure, if she wants to maintain the approach and to be seen as reasonable<sup>866</sup>. On

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<sup>864</sup> In this case, one usually would depart from the idea of legal sources. However, the problem of the lack of information is not a genuine problem, because the dogmatic analysis could be made, and the comparative and national audiences consulted.

The justification by generality approach seems to be only a rhetorical device.

The claim of irrelevance of the information based on the lack of information cannot justify the "generality in legal systems" approach.

The autonomous legal actor and the comparative self-referentiality of law are interconnected. We can identify one with a help of the other. If the legal decision-maker is referring to the generality or disparity in legal systems, it has to have a *tertium comparationis* as its premiss. It defines the criteria for common features, and this way its premisses. In this sense the system is self-referential. Where the generality or disparity argument is used, the legal decision-maker is relatively free to determine the *tertium comparationis*, because it is not legally regulated. This is where the relative autonomy of the legal actor is visible.

<sup>865</sup> This is where comparative dogmatics comes into play (comparative legal sources). In this type of reasoning, the comparative reasoning is legally self-referential also in the way that it has to satisfy the ideas of legal sources in order to be acceptable.

What is claimed here is that if one uses "generality in legal systems", one should also reason and consider also the question on what type of legal comparative generality the substantive generality is based (comparative legal sources). Naturally, one could claim that the reference to an established idea of comparative legal sources could also satisfy this demand. In dogmatic sense, one can abandon further analysis on the basis of the self-clearness ("generally accepted opinion").

<sup>866</sup> Practice also seems to confirm that these argumentative models are used interchangeably. Namely, one either uses the traditional legal sources analytically, or one justifies the non-analytical approach by introducing principles or philosophical arguments (general opinion) in connection with comparative observations.

the other hand, if one argues on the basis of allowed and non-obligatory sources, one has to do it in general, i.e. in relation to all systems used. One cannot use only some systems as obligatory, and other merely permitted, etc. One has to apply the rule of generality also in the choice of different types of sources. If departure from this idea occurs, it must be justified. This idea may guarantee also the visibility of the "transitiveness", which has to be maintained in relation to foreign legal systems and comparative law opinions.

On the other hand, we may make some concrete concluding remarks related to traditional standards of reasoning<sup>867</sup> regulating the grammatical, extending and restricting, analogical, and *e contrario* approaches in reasoning. These aspects seem to be at the centre of comparative reasoning.

It could be maintained that one should interpret comparative law observations by taking into account the text as it stands. All elements of the text should be given significance. On the other hand, if the same text appears in different connections, it should be given the same meaning, unless sufficient reasons are given to justify a departure from this presumption. This applies also to the assumption concerning the ordinary meaning of words. Nevertheless, if technical or special expressions prevail, one should interpret the text according to them. These are the standards of reasoning which appear also in relation to "normal" legal reasoning.<sup>868</sup>

However, one can maintain that all "modifying" ideas related to comparative reasoning cannot be applied. Accordingly, any extending, restricting, or analogical modes of reasoning referring to the "internal" systematic interpretation do not seem to be applicable. This can be related to the fact that a comparative interpretator may - commonly - lack the idea of the "analogical key"<sup>869</sup> which prevails in the system.<sup>870</sup> This idea applies also to any transformation of the sources of law doctrine. One should not be able to challenge the prevailing idea concerning the preferences of the sources.

Nevertheless, in any *e contrario* reasoning by comparative means one may be able to stress the "systematic" coherences and even historical integrity of interpreted systems and their rules. Namely, if one is able to identify the systematic coherences and historical continuity by some analogical key, one can do it. This may be related to the stress upon predicability in legal decision-making in general. However, this type of reasoning seems to apply more to comparative legal science than to practical reasoning by use of comparative source of law.

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<sup>867</sup> See Aarnio, A., 1986, p.101 ff.

<sup>868</sup> See Aarnio, A., 1986, pp.101-103.

<sup>869</sup> Aarnio, A., 1986, p.104. "*The key is not objective*". Analogical relationship seems to be a matter of values.

<sup>870</sup> This seems to relate also to Alexy's rule that "*different speakers may not use the same expression with different meanings*", and that "*every rule must be universally teachable*". Furthermore, comparative rules, attached strongly to value (or even moral) standpoints, may be evaluated by the rule that they must "*stand critical testing in the terms of their historical genesis*". (Alexy, R., 1989, p.193.) For problems on formulating these types of "interpretative" reasons in relation to comparative arguments, see *ibid.*, p.301. In this sense, other arguments take also "*precedence over*" them.

As far as the technical form of the reasoning is concerned, one could maintain that comparative observations should be kept separate from the analysis of one's "own" laws, and the other legal systems to be studied in separately.<sup>871</sup>

In conclusion, we may state that comparative reasoning seems to be justified when the question is about quite "new" laws and exceptional rules. This may related to the fact that social situations, not supported by internal systematic and integrative interpretations, may be balanced by comparative observations.<sup>872</sup> We may say also that in introducing interpretative methods and rules of procedures, the modes of comparative reasoning depend strongly on the discursive qualities of the procedure and legal development in general. This is related more to the justificatory dimension of comparative law uses, and will be discussed more thoroughly in the general conclusions of the work.

### 5.5. General conclusions: towards the "real nature" of comparative law and comparative legal reasoning

**The audiences and the paradox of weakness and persuasiveness of comparative reasoning.** Comparative reasoning is an extremely paradoxical phenomenon. It seems to be the most persuasive form of legal reasoning and to be connected always to the hard cases, though it is clear, in theory, that it is an extremely weak and problematic form of reasoning.

Nevertheless, we know that in every type of reasoning there is always a lack of a syllogistic model as a normative premise in hand - *a priori*. The choice of arguments takes place in some "sphere". The rationality of legal reasoning does not seem to be based on the idea of "one possible answer", but there is instead a range of possible reasons for which decision-makers can choose and which are, on the other hand, reasonable in relation to a particular context.

On the other hand, it may be correct that comparative argument is one of the most powerful and misused arguments in law. As contended, it can be hidden within the institutional context without granting any possibility for further development and analysis. If this use is conscious, the system and its actors are communicatively manipulating the discursive audience in the most problematic way possible.<sup>873</sup> On the other hand, because, in comparative reasoning, one is simultaneously referring to the functionality of social institutions and because one is also directly

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<sup>871</sup> In fact, however, if comparative analogical argument is used as a "conclusive" argument in a legal discourse it may reveal some problems in the communicative situation, and this sense lead to an "*e contrario*" solution in very fundamental sense. On the other hand, by revealing value problems it may also stimulate the discourse.

Aarnio maintains that "*as an interpretative doctrine, it follows the same principles of reasoning and uses same type of source material as the domestic legal dogmatics. The distinction is that comparative study of law considers foreign legal rules instead of the national legal order*" (Aarnio, A., 1997, p.77).

<sup>872</sup> This seems to be contrary to the "analogical" interpretation, see Aarnio, A., 1986, p.106 (referring to Alexy and Petczenik).

<sup>873</sup> On the misuses of comparative law, see Kahn-Freund, O., 1974, p.20.

searching for the acceptance within the legal discourse without prior "relevance" - having been accepted in advance - the "legality" is searched all over again. Its relevance is, in this sense, determined mainly by its "practicality" and "functionality", and its results and aims and teleological qualities. Its persuasiveness is related to choices and acceptability, and to the interpretation it produces (or is supposed to produce).

One could also argue that it is actually untrue that comparative reasoning is persuasive. The persuasiveness of comparative reasoning can be a fiction, which will be revealed by comprehensive analysis concerning comparative reasoning itself. Furthermore, one could think that comparative law considerations do not result at all in "just" and "equitable" solutions in relation to state paradigm of law. One could profess that comparative reasoning is directed to the ultimate general legal auditories, for which the national legal systems provide the ultimate forms of legitimacy (including national dogmatic, comparative, and general legal opinions). By comparative reasoning, international institutional actors, for example, seem desire the support of this type of legal audience in order to justify only the institutional opinion. However, they do not necessarily try to maintain it as a genuine tradition. Comparative reasoning does not really seem to be reasonable in social context (a critical "high"-modern argument).

Furthermore, the claim that modern comparative argument is not rational at all could be based on the claim that modern society is increasingly segmented through its normative systems (a critical "post"-modern argument). Moreover, it seems that when comparative observations are employed, in different contexts and within different systems, the discourses on legal systems and their rules seem to become ever more differentiated. The homogeneous nature of the legal discourse in a legal system gets heterogenized. There is an increasing number of interpretational possibilities for the consideration of the legal system, its rules, and its processes.

It seems that comparative law fails to provide, as an autonomous discipline, value criteria for the choice among competing alternatives.<sup>874</sup> Consequently, comparison in contemporary world is highly unpredictable and is forced to rely upon sources of norms and rules connected to systems which have no democratic political character.

Subsequently, this type of postulate would mean, for example, that comparative reasoning within international institutions, as some system and sociological theories of law seem to suggest, actually decreases the legitimacy of these legal arrangements, although the reasons for this would not be visible in the legal discourse. On the other hand, we may say that the strongly principled and value-based comparative justifications are related to these questions in international and regional law, which comprise the most problematic cases from the political and legal point of view. Namely, in these cases one is confronted with question to which one seems to be unable to find a suitable solution in regional and international levels - and where many

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<sup>874</sup> Hill, J, 1989, pp.104-105 criticizing the conclusions of Zweigert and Kötz in the case of comparative law and contracts (1987, II, pp.42-43).

problems remain in and between different state legal systems of law. On the other hand, "comparative cases" may be the possible cases causing drastic institutional changes.

**Discursive integrity and comparative legal reasoning.** Reasoning by way of comparative argument appears in different levels of adjudication and legislation. What seems to take place in comparative argumentation and justification in legal decision-making is the process of moving from the legislative integrity to the adjudicative integrity in the context of the general political action. Whenever this analogical move is made, expressed and analysed, the political integrity is possible to assume. In concrete terms, only when the comparative analysis is expressed in a reasonable way, can one assume that marginal legal systems, not belonging to the general sphere, can be integrated into the majority systems.

We may say that if one could argue according to the principle of discursive integrity the discursive tradition and evolution would be respected. This would maintain the discursive integrity of different levels (adjudication and legislation) of law. Decisions would be made in a way that (political) integrity would not be unbalanced. This postulate may be combined also with comparative law research.

It is evident that this type of idea of integrity of legal systems is problematic, for example, for an international judge. She is, by making a normative decision, in the process of "developing" the system. Accordingly, a strict application of the idea of discursive integrity works better for a comparative lawyer making a "descriptive" analysis, because its employment results ultimately in maintenance of the system status quo.

All the same, there may be also some room for the development of law in an integrative sense. This would demand, as generally coherent argumentation always entails, an extensive of preunderstanding of different national histories, philosophies, styles, and social conditions - just as the tradition of comparative legal theory suggests. This involves a move away from the phenomenon of institutionalized comparative law.

Consequently, we may ask, why comparative observations are used in contemporary legal orders, and why the study of comparative law could be also relevant from the non-critical point of view - from the point of view of the positive law? Can there be "comparative dogmatics" of law?

As we have noted, the use of comparative arguments has traditionally been justified by a need to fill lacunae, integrate legal systems, etc. On the other hand, we have seen also that comparative law is an essential element of regional and international legislations and adjudications. However, what are the why's and wherefore's of its use in contemporary national legal systems and orders?

The fact that law has become positively "internationalized" and "regionalised" during this and the previous century (ultimately in the form of international orders) the role of

national legislation has decreased. Parliaments are not presently the sole or the main sources of law, at least, not if one looks at the origins of different international and regional rules.

This has brought national adjudication to a peculiar situation. The national courts actually have to strike a balance between different valid norms. Namely, regional systems and their norms can be a source of valid arguments before national courts (even if national courts cannot usually interpret the content of these regional norms!)<sup>875</sup>. Furthermore, these regional norms can be used as arguments, even if they may be contrary to valid national norms (thus creating internal conflict). On the other hand, because national norms are *a priori* contestable and can be invalid the substance of the decision of the court may depend on the "right choice" of norms. In fact, it seems that it is the possibility for a valid interpretation of a regional norm which is sufficient to establish the rationality of the decision.

We could claim that the fact that parliamentary (or governmental!) legislation has a strong international and regional character has forced the courts to seek support from "external" sources to enable them to deal with the task they are entrusted with: to function as a balancing of power. We may say that courts seek to find the best arguments at the same rationality level as the legislator. Only these arguments can compete with the regionalised and internationalized national legislation. In this sense, there would be no objection to the use of comparative observations, if we wish to maintain the traditional modern idea of balance of power in a political system.

Consequently, it is the breaking-up of the modern and traditional state system rationality, which has brought, and may bring, comparative law into the centre of national legal practice. When using comparative law, adjudication can go beyond the strict formal validity of the decision, and, to a certain extent, attempt to find the best interpretation. This way it could reasonably persuade the legal audiences by reference to the rightness of the choice of a norm.

Nevertheless, as noted, here the adjudication no longer functions within the traditional modern rationality of the systemic thinking. Furthermore, the adjudication no longer necessarily reproduces the traditional validity of the system, provided that we think of the system

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<sup>875</sup> See, for example, the operation of Article 177 (the new Article 234) of the EEC Treaty, and the EC system in general. On the other hand, national courts do add additional arguments to the discourse by having recourse to competent European institution. It balances these European interpretations with other arguments deriving from national systems in coming to a concrete decision. To a certain extent, Article 177 (the new Article 234) functions as a legal basis for the arguments, but not for norms as such.

The basic idea, however, seems to be that the European arguments direct the choice of norms in national legal systems. Some norms are valid, some not in relation to European law. The European Court extends or restricts the interpretation of European law on an *ad hoc* basis in relation to the national systems and its norms (in the national context) depending on what result is desirable. Because this interpretation is of an *ad hoc* nature, i.e. it is related to the legislation in that particular system, it must usually refer to the basic principles of constitutional type so as to legitimate the general application of law in European context. At the same time, the decision tends to reinterpret national constitutions (the constitutionality of a norm) in relation to the norms of the system. Article 177 (the new Article 234) provides basically for the reinterpretation and "resubstantiation" of national constitutional law in this way.

This one can claim that the European law in many ways functions as a legal basis and an argument for a open constitutional control of the legislation by the national courts.

as a formal coherent and discursively integrated national legal system. This applies also to the reproduction of the political integrity etc.<sup>876</sup>

On the other hand, this sense the adjudication is not absolutely independent of the national legal system. The national legal system and its discourse function as alternative possibilities for the adjudicative system.<sup>877</sup> In other words, the question is about, what kind of generality one is seeking.

The problem of the expansion of all types of legal sources and possible arguments is that it may result in communication problems. Functional arguments cannot justify the use of special professional language rules in law.

The ideas presented above seem to be visible in reality. Some courts do refrain from public analysis, and use contextual comparative law. Some do demonstrate, via sweeping statements, why analytical reasons can be ignored. On the other hand, some use comparative considerations as inspirational material and these considerations may be discussed within closed discourses. Furthermore, pure "translations" take place between all these methods in some form or another.

As we may see, we are inclined, for example, to enter into an institution-centred system of, for example, European adjudication, whereby the legal discourses encounter difficulties in producing the relevant material and analysis required for reasonably justified legal decision. The traditional systematization via the genuine legal discourses is comprehended secondary exercise in many ways. This leads to the professionalized and institutional interpretation of law<sup>878</sup>.

**Conclusions.** Next our aim is to set forth and interpret comparative reasoning mainly within "legal" institutions.

This study, henceforth, analyses and connects two types of knowledge. The first type of knowledge consists of open comparative reasoning, and the second of comparative considerations in context and in some dogmatic opinions in different fields of law. In this way one may explain the forms of the use of comparative law in contemporary European legal decision-making.

Many different institutional "legal actors" and their opinions are taken into account in this inquiry. This idea is related to the claim that legal borrowings take place through

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<sup>876</sup> In the light of the doctrine of sovereignty and the enlightenmentian tradition, we may say that where in the traditional doctrine (Bodin, Montesquieu) the governments and courts had functional, if not even direct, relationship with the parliamentary legislator, in the Europeanized law the separation of these spheres of sovereign powers has taken place. Courts, by having their relationship with European level, have got more independent, as well as the governmental bodies are increasingly attached to the European Council as an "autonomous" bodies.

<sup>877</sup> As we have maintained, it is the national legislator, who has produced such a system in contemporary Europe.

<sup>878</sup> This is typical of European-level legal adjudication.

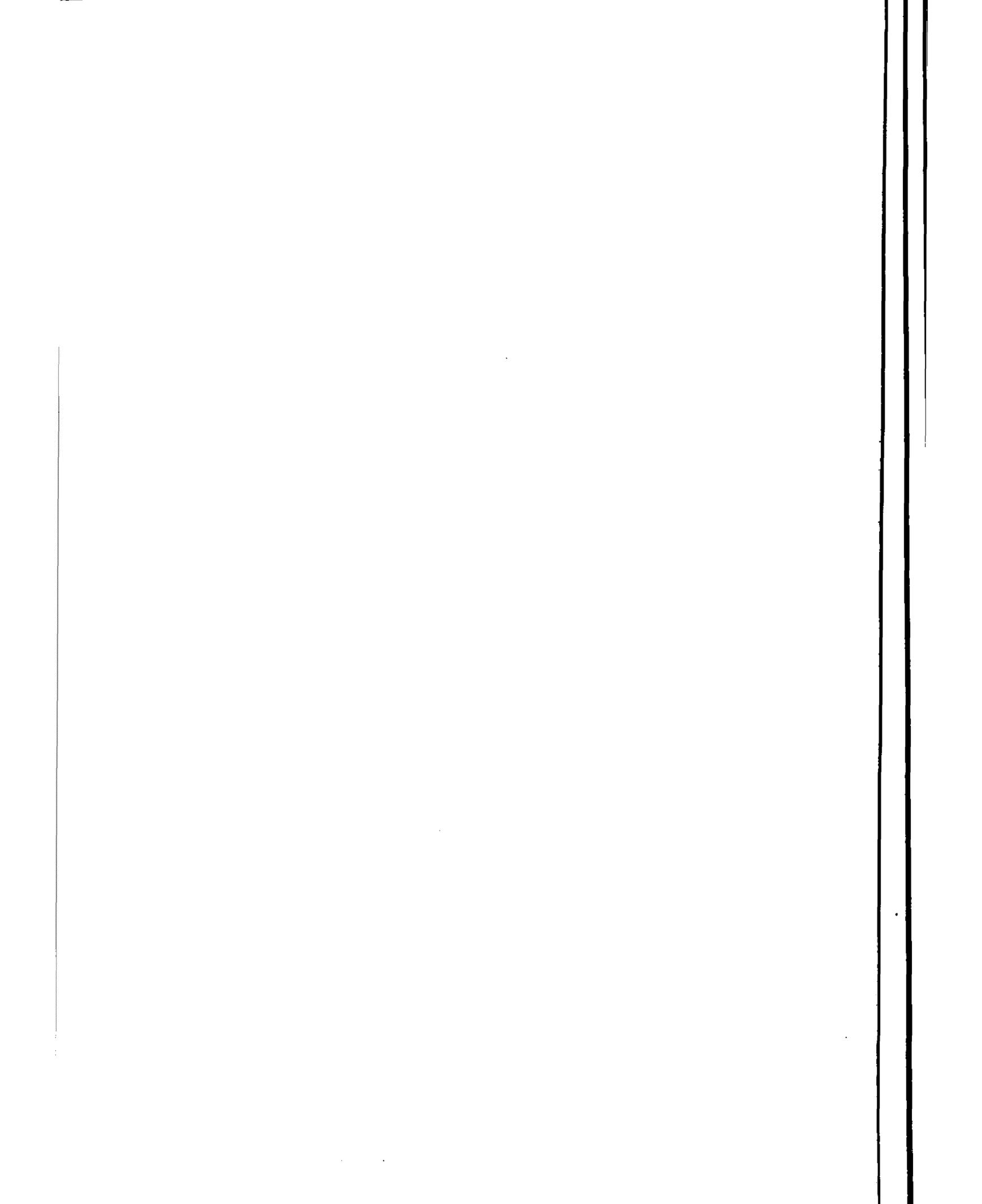
intermediaries in highly complex reflexive processes, and that many of these institutional actors "play second fiddle" to the final decisions-makers<sup>879</sup> and to legal development, in general terms. The argumentation by parties, interlopers, individual judges, administrators, judges etc. are all relevant for the study of comparative reasoning within a particular legal institution. Through all these intermediaries comparative aspects are filtered, until they appear, if they appear at all, in the institutional justification.

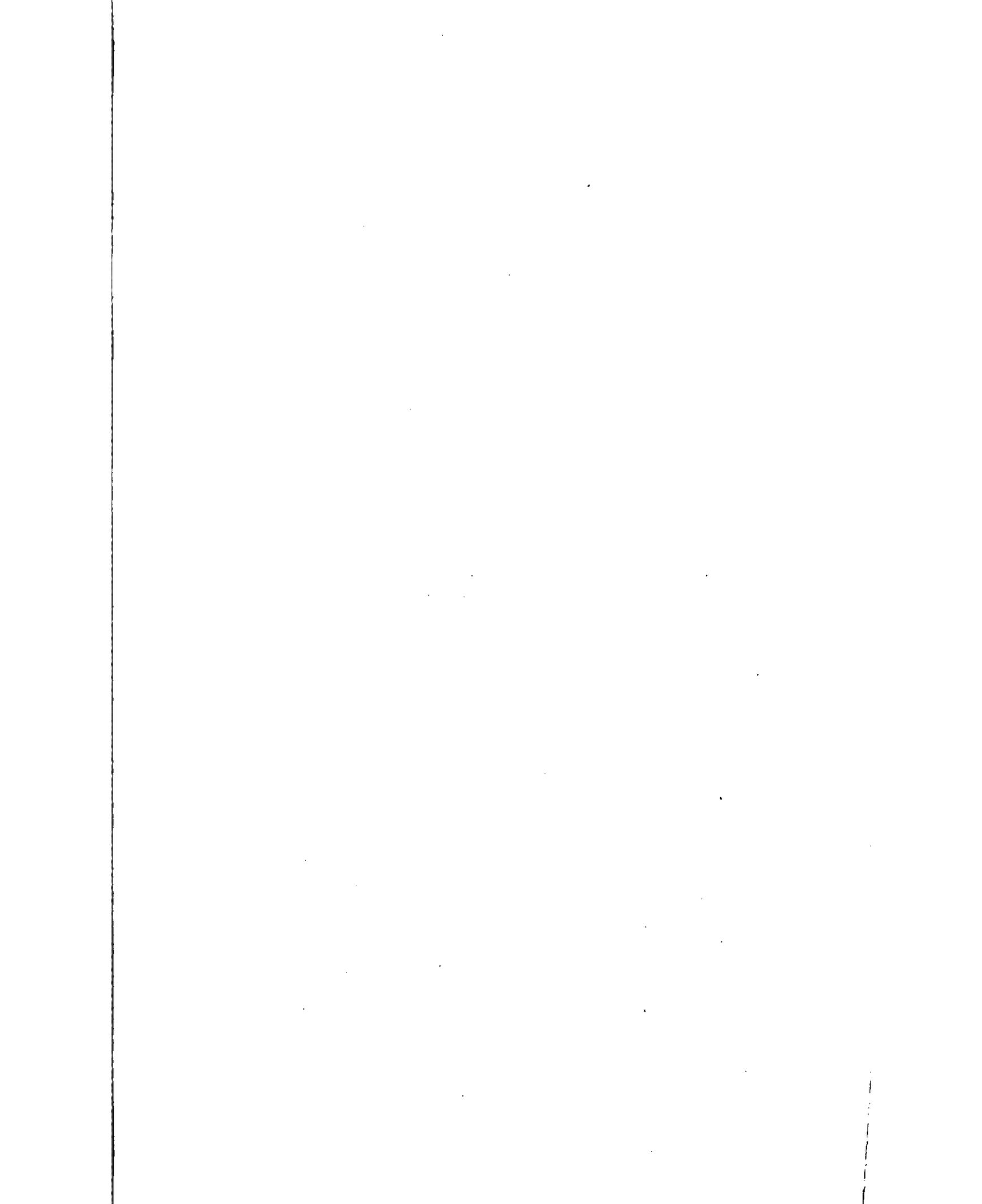
Consequently, the next part comprises an analysis of the actual relationships between legal systems and orders, different normative solutions, and the role of institutional actors in terms of the ideas presented above. The study moves towards the examination of legal reasoning in more a "value-based" and instrumental sphere. In a legal sense, the question of "how" institutions think is combined with the question "what" they think.<sup>880</sup> Finally, some remarks are made concerning "how they should" think, both in legal dogmatics and legal adjudication.

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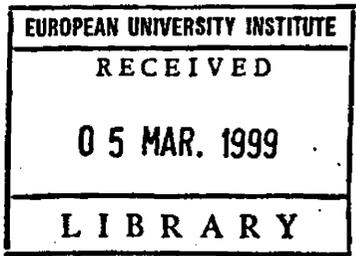
<sup>879</sup> Sacco, R., 1991, p.395.

<sup>880</sup> "What" means here the audience, the solution etc. in the legal context.





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Vol 2



**THE THEORY AND PRACTICE OF COMPARATIVE LEGAL REASONING**  
**From Inspiration to Rational Legal Justification**

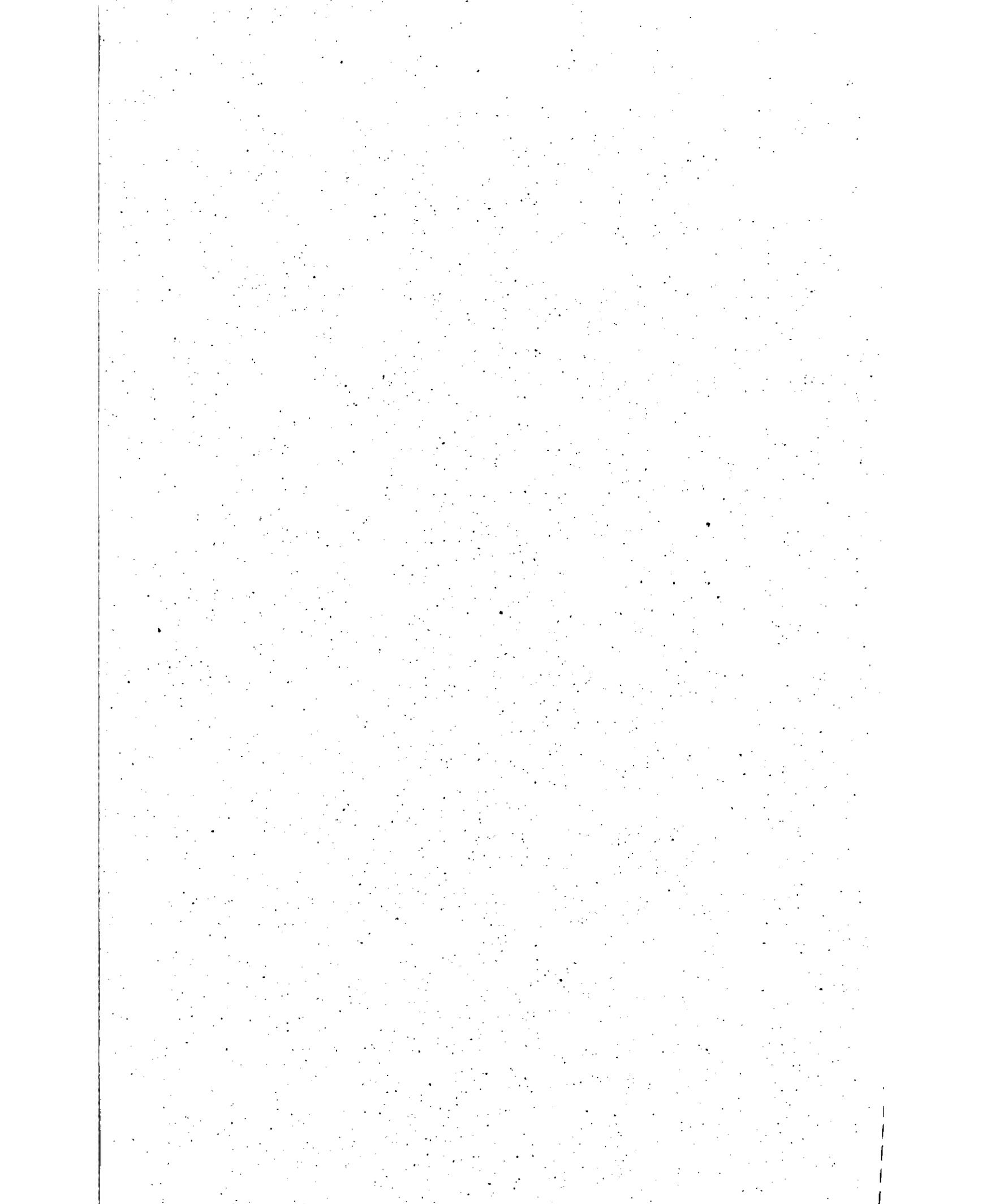
by

*Markku Kuikeri*

*Thesis submitted with  
a view to obtaining the Degree of Doctor of Laws of  
the European University Institute*

**Florence,  
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**VOLUME I:** Law and the Concept of Comparative Legal Reasoning  
**VOLUME II:** The Practice of Comparative Legal Reasoning and European Law



European University Institute



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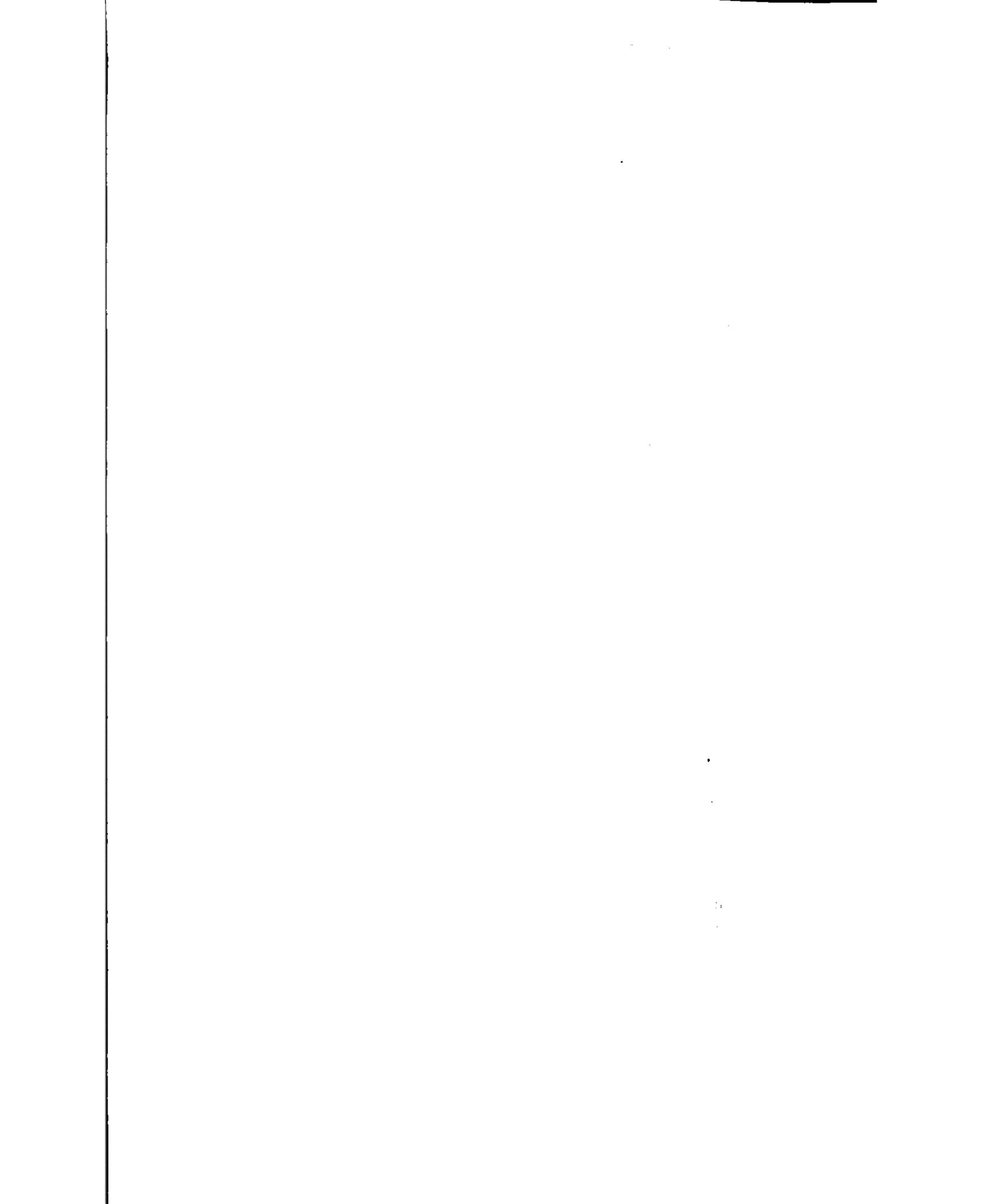
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**VOLUME II**

**The Practice of Comparative Legal Reasoning  
and European Law**

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## SUMMARY

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## LITERATURE AND INTERVIEWS



### III. THE PRACTICE OF COMPARATIVE LEGAL REASONING

#### 1. Comparative legislation

##### 1.1. General remarks

The beginning of the 20th century; legislative intent and the comparative legislation. We may say that the idea of legislative intent was at the beginning of this century, in many ways, a relic of view which saw the head of state as a legislator. The will of the legislator was an artificial construction deriving from the idea of personal governance. The idea of "will" remained a theoretical construction within legislation and the interpretation of law.<sup>881</sup>

On the other hand, we may claim that this type of thinking was strongly attached to the idea of the rule of law as a method, around which political balancing took place, and which one could use as an instrument<sup>882</sup>. "Intention" and the "will" were attached to the form of legislation.<sup>883</sup> In the realm of this construction, the ideas on undivided sovereignty prevailed (eg. Bodin), and, for example, the idea of political balancing (Montesquieu) was not taken seriously. These features may be associated also with the post-enlightenment interpretation of the "*bouche de la lois*" (role of courts) and with the concept of democracy based on the "ethnic" and the

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<sup>881</sup> For some remarks, see Schmitt, C., 1997, p.76. Foucault, m., 1990, pp.87-89.

The distinction between the government and legislation is sometimes unclear. In the Anglo-Saxon tradition the concept of legislation seems to be associated stronger to governance than in so called continental thinking: "*Basically, the common law attitude reflects the belief that the legislator is inherently a political agent interested furthering his interests at the expense of true law, somehow related to "natural law", of which the judge is the guardian, whereas civil law thinking has resigned itself to the acceptance of the legislator as the foremost exponent of the law*". (Akzin, B., 1968, pp.221-231, especially p.230).

The theory of comparative legislation may be associated, for example, to the Benthamite idea of the science of legislation; it is part of the "*art of finding the means for realizing the true good of the community*" (Bentham, J., 1972, p.1, and An introduction to the Principles of Morals and Legislation, 1823 [1789], p.311). The Benthamite seems to be quite close to the continental ideas. A knowledge of other legal systems and their ways of dealing with certain problems serves as a model for good legislation (see, analysis of Bodin, J., 1945). In this context, comparative legislation may refer to the phenomena of legal transplanting.

Legislation discussed in the context of this work, on the other hand, refers more to modern democratic legislation in its discursive form (on legislative integrity, see Dworkin, R., 1986), whereas the comparative interpretation refers to the use of comparative law by the courts and other legal bodies (adjudicative integrity).

On the concepts, see Gutteridge, H.C., 1949, pp.1-10. For analysis of continental legal systems, see Lambert, É., 1931, p.126 ff.

<sup>882</sup> Weber, M., 1969, p.301, for some remarks, see Schmitt, C., 1997, p.72-74.

<sup>883</sup> For some analysis of this, Schmitt, C., 1997.

spiritual idea of a political nation.

From the point of view of comparative law, this had certain consequences, as has been maintained. The strong attachment to the "democratic" and "positive sovereign" generated contrasting and imitative tendencies in the realm of comparative law as comparative legislation. Consequently, in the application of law, it was hard to conceive of the law of "another nation" as a source of legal interpretation. Because the transformed will theory idea essentially no comparative interpretations could be made. It was difficult to explain the function of interpretation based on something other than the formal and unique source which was derived from the legislative will. No other sovereigns could be substituted so as to provide an interpretation of a positive rule.

### Modern comparative legislation.

*"Legislators all over the world have found that on many matters, good law cannot be produced without the assistance of comparative law"*<sup>884</sup>

This statement refers to the ability of modern comparative law to offer "reservoirs of solutions" and to act as a critical tool of the legislator.<sup>885</sup> It is based on the idea that even the most imaginative jurist or legislator is unable to find, single-handedly, technical solutions to legislative problems. This idea is the basis for comparative legislation.

Comparative legislation may be defined as the utilization of the experience gained in other systems of law for the purpose of law reform.<sup>886</sup> The value of comparative law relates to the drafting of legislation *de lege ferenda*. This applies also to scholarly studies in law.<sup>887</sup>

We may say, however, that the main importance of the comparative method in legislation is related to the ease of the adoption of solutions<sup>888</sup>. Comparative law is utilized mainly

<sup>884</sup> For example, see Zweigert, K., Kötz, H., 1987. In general, see Kropholler, J., 1992, p.704.

<sup>885</sup> Zweigert, K., Kötz, H., 1987. See, as well, Hill, J, 1989, p.105, and Wilson, G., 1987, p.833, Zaphiriou, G.A., 1982, p.71.

<sup>886</sup> Gutteridge, H.C., 1949, p.2.

In ancient times, one went to the place, where - according to the common knowledge - there were certain types of legal institutions (Livius and Cicero have written of this, see for instance Wenger, L., *Die Quellen der Römischen rechts*, 1953, p.361. Jolowicz, H.F., *Historical introduction to the study of Roman Law*, 1952, p.108).

Comparative legislation, in the history of law, has quite evidently been based on the spread of social-philosophical ideas (Zaphiriou, G.A., 1982, p.80).

<sup>887</sup> This recalls the general doctrine of the 16th and 18th century, according to which the theoretical and practical role of jurists was also to establish the *communis opinio totius orbis, consuetudines generales or mores Europae, or praxis totius Europae*, and in this way to prove that municipal law was not the product of arbitrary decisions, as it conforms the common reason and experience. The "Common Law of Europe" ("droit commun européen"), for example, is only a neologism of these ideas. On the other hand, this has to be separated from the "ius (romanium) commune" of Justinian's *Corpus Juris*. (See, chapter on Bell above).

<sup>888</sup> The use of comparative law in legal drafting is part of the governmental efficiency. Comparative observations are a cheap and easy way of finding good solutions and for achieving easy compromises.

as a helpful means of legal drafting in modern law.

The role of comparative law in legislation differs from country to country, and the reality is often difficult to determine.<sup>889</sup> This concerns, for that matter, international law<sup>890</sup>. The possibility for determining the scope of its use is different in relation to different types of legislative drafting and legislation. The openness of the legislative drafting and its publishing techniques also varies.

**Forms of comparative legislation.** The possibility exists also to adapt legal rules or a larger body of rules or systems into another social system, as we saw in relation to the analysis of legal transplantation. Furthermore, comparative observations are also used as political arguments for convincing the legislator to adopt a piece of legislation. This is perhaps the most common way of using comparative law in modern legislation. Comparative considerations serve as a support for political proposals. Contrary to the idea of an adoption, this may be seen as a more discursive way of using comparative law in legislation. Pure adaptations may be related to more strict governmental legislative systems, or they are a matter of the history of law.

Consequently, comparative legislation may be associated, in this sense, with the "democratic" decision-making processes. In narrowest sense, comparative legislation entails a discussion of the alternatives among legislative proposals and committees, and - in a wider sense - in the public discourse in the public sphere<sup>891</sup>.

Comparative legislation may appear to be a technical and reformatist type. In its technical form, it is used to give alternatives for the discussion on technical points of legislative

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<sup>889</sup> Tur, R.H.R., 1977, p.238, Yntema, H.E., 1978, p.174. For the ancient forms, see for example, by Perikles, XII tables from Code of Solon, etc. (Marsh, N.S., 1977, pp.662-663, referring to the Conference of Law Faculties at Strasbourg, 1976).

In some systems comparative law does not seem to have any function (Lando, O., 1977).

<sup>890</sup> For domestic law, see Winterton, G., 1975, p.75. See, for example, Seidl-Hohenveldern, I, for comparative law concerning the international protection of the environment (1997, pp.195-196) concerning international modelling by international treaties. This generates an interesting question about the "comparative nature" of the international measures. (See also, Lando, O., 1977, p.643).

It has also been claimed that the American Convention of Human Rights has been modelled on the European Convention of Human Rights (Council of Europe Bulletin on Human Rights in the Council of Europe, 1996).

One of the greatest examples of this is the Hague Conference of Private International Law, studies of Bureau of the Conference as the basis of the different treaties.

Comparative observations have been used in determining the impossibility of arriving at an agreement, or the problems of implementation (Butler, W.E., 1977, p.117).

<sup>891</sup> This involves, also, finding common elements and fusing them into the drafted regulation.

It is the political principles which make comparative legal drafting depart, in its argumentative form, from direct modelling. Modelling types of arguments do not tend to be convincing from the point of view of democratic processes.

Modelling is avoided by representing many models at the same time. This pluralistic representation transfers the modelling to the level of generality observation, which tends to be, because of the idea of integrity in international level, more acceptable. On the other hand, there is a possibility of maintaining the comparative observation solely as a contextual exercise.

enactments. This type of use is often seen as a unpolitical and neutral. In the latter case, the comparative information can be used for fundamental reforms of the socio-legal system.<sup>892</sup>

Comparative legal drafting may be also associated with the use of "external" institutions preparing studies on questions relevant to drafting<sup>893</sup>. Furthermore, comparative law may be used in the field of policy formulation or policy restriction<sup>894</sup>. For example, many parliamentarians may use comparative observations in their arguments within the political speeches.

## 1.2. Some historical examples<sup>895</sup>

**Japan.** Although the development of a modern "imitative" legal identity construction was familiar in many countries in Europe 19th century, Japan was definitely the country in which the adoptions were systematically encouraged and made at the educative, scientific, jurisprudential and legislative levels<sup>896</sup>. The legal discourse in Japan was strongly "foreign" and "western" law oriented<sup>897</sup>. While before 1880 the French system was considered important later the German

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<sup>892</sup> For different ways of how comparative law functions in legislation, see Mattila, H.E.S., 1979, p.42 ff.

<sup>893</sup> For example the Max Planck Institute of Foreign and International Law has prepared such studies (see, Riegert, M., 1973).

<sup>894</sup> For diffusion studies, see Karvonen, L., 1981. This does not pertain directly to legal" considerations.

Examples of these policy formulations are not given here.

Andersson, E. (1986, p.13 ff.) has related these influences in the field of private, administrative (procedural) law to the "mother country" nature of Sweden. On the history of the "mother country" idea, see Modeen, T., 1993, p.783 ff.

In the field of taxation, on the other hand - which is quite political or "socio-systematic" field of law - there has taken place a direct modelling (idem.). This modelling was based, moreover, on some internal historical examples (ibid., p.13 ff.). In these original modellings - in 1920's - differences between Sweden and Finland seemed to relate, for example, to the question that in Finland it was a matter of a creation of a tax system of just established national state, and to its economic, cultural, and political peculiarities, and to an attempt to be technically simple. The modellings led to dogmatical and jurisprudential adoptions too (ibid., 18 ff.).

Even if in the field of business income taxation modelling has been nearly a customary practice, there seems to be tendencies to deviation for many reasons (idem.). These deviations may be related, for example, to "Europeanization" in general (ibid., p.27).

<sup>895</sup> The use of comparative law in the British law reform is regulated by law.

Section 3 (1)(f) of the Law Commissions Act 1965: "It shall be the duty of the English and Scottish Law Commission to obtain such information as to the legal systems of other countries as appears to the Commissioners likely to facilitate of performance of any their functions." (Winterton, G., 1978, p.107, Marsh, N.S., 1977, p.666, Graveson, R.H., 1984, p.117). The idea is thus to find new ideas and techniques (Kahn-Freund, O., 1974, p.2).

For comparative legal drafting in Holland, see de Groot, G-R., Schneider, A., 1994, p.64.

In Germany in the field of criminal law, see, Jecheck, H-H., 1974, p.764, and in general, Mössner, J.M., 1974, p.204, and for comparative influences, Jescheck, H-H., 1974, pp.766-769.

<sup>896</sup> Noda, Y., 1975, part I, p.1, 16.

<sup>897</sup> Noda, Y., 1975, p.1, 12-13.

system became influential<sup>898</sup>.

There were also counter-reactions due to the strange outcomes of these adaptations<sup>899</sup>.

Subsequently, the theoretical discussion introduced a distinction between pure imitation and self-inspection<sup>900</sup>.

**United States.** Comparative aspects have had an enormous impact upon the development of law in the United States. They have given both retrospective and prospective perspectives for both to legislation and legal interpretation<sup>901</sup>.

In some states of the United States, comparative legislation has been effected with the help of Law Review Commissions<sup>902</sup>, which have made use of comparative considerations in their reports. They have also utilized certain professional studies of comparative law.<sup>903</sup> Furthermore, national conferences and the preparation of federal "models" and "codes"<sup>904</sup> have employed "foreign law", especially British law, although Civil law systems have also been needed<sup>905</sup>. On the other hand, in certain cases the lack of comparative considerations has been severely criticised<sup>906</sup>.

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<sup>898</sup> Noda, Y., p.5, 19-20. Carbonnier, J., (1991, p. 423 ff.) has claimed, on the basis of some studies (Antonetti, G., Sourieux, J-L., Seizelet, È., Okubo, Y., Hoshino, E.), that the reception from France has been "*more voluntary*" than many other receptions in legal history.

On contemporary Franco-Japanese relations, Kitamura, I., *Cultures différents, enseignement et recherche en droit comparé*. In: *Rev.Int.Dr.Comp.*, 1995

<sup>899</sup> Noda, Y., pp.14-16, 61-63.

<sup>900</sup> Noda, Y., p.66. *Adoptions in the realm of criminal law (from Germany)*, Jecheck, H-H., 1974, p.772.

<sup>901</sup> Zaphiriou, G.A., 1982, p.94, Schlesinger, 1980, p.10 (referring to MacDonald, *The New York Law Revision Commission*, In: *Mod.L.Rev.* 28, 1965).

<sup>902</sup> For example in New York. These Commissions exist also in California (Commission for Revision and Reform of the Law), Michigan, New Jersey (Law Revision and Legislative Services Commission), North Carolina (General Statutes Commission), Oregon (Law Improvement Committee), and Tennessee (Law revision Commission) (Zahiriou, G.A., 1982, p.85).

<sup>903</sup> See, Zaphiriou, G.A., 1982, p.83, and for some examples. Most interesting is the abolition of the legal effects of a seal on written documents. Both analytical and critical arguments by way of comparison were introduced, and the idea of adopting the notarized document was abandoned because of the systematic differences between notaries in New York and in civil law jurisdictions (see, *idem.* and Schlesinger, 1980, p.19 ff.).

<sup>904</sup> For example, in the preparation of the new Federal Criminal code. At the state level of the United States, the Model penal Code has been "comparatively legislated" (Model penal Code (Ten. Craft No. 1-4 1953). This has had an impact upon the interpretation of it also (see, in this regard the chapter on interpretation).

One of the striking examples of an extensive comparative legislative process can be seen in the adoption of the Field's Code of Civil Procedure in United States in 1800 (Zaphiriou, G.A., 1982, pp.77-78., referring to Friedman, L.M., *A history of American law* (N.Y.) 1973 [1985] p.29-41.

For the contemporary situation in the United States, see Winterton, G., 1975, pp.107-108.

<sup>905</sup> Zaphiriou, G.A., 1982, p.79.

<sup>906</sup> Zaphiriou, G.A., 1982, p.84, referring to writings of Schlesinger and Stein, E. (1977).

Some comparative influences of the legal draftsmen have also been recognized.<sup>907</sup>

Early comparative legislation seemed to be strongly determined by the political structures of the time. In the modern era of federal legislation, on the other hand, there seemed to be more thorough searches for information and a variety of comparative considerations. For example, in the preparation of the Criminal code of 1972, the Subcommittee of the Committee on the Judiciary of the United States Senate sent questionnaires to academics. Articles and testimonies, including detailed comparative studies of a variety of countries (Continental European countries with Albania, USSR, and Yugoslavia included) were considered in the hearings.<sup>908</sup>

In general, this practice is fairly well established in the research services of the Congress and in government departments and agencies, based also upon a dialogue with outside consultants, and even with foreign experts.<sup>909</sup>

**Central European countries.** Another interesting example concerning recent developments concerns the Central European countries.

The newly created constitutions in these countries has led in extensive adaptations of law to these countries from Germany, France, United States, Italy, and Spain.<sup>910</sup> For example, in the realm of this "new constitutionalism", it has been attempted to construct constitutions including bills of rights, ideas of social democracy, welfare state, social solidarity, unlimited majority rule, equality, popular sovereignty, legislative supremacy, the separation of powers, and constitutional courts in one form or another<sup>911</sup>. The construction of constitutions was effected in different ways in different countries<sup>912</sup>.

Furthermore, the implementation of market regulation has been "modelled" strongly in line with programs agreed with the European Community. On the other hand, for example

<sup>907</sup> See, Schlesinger, 1980, p.17.

<sup>908</sup> Zaphiriou, G.A., 1982, p.85.

<sup>909</sup> Zaphiriou, G.A., 1982, pp.85-87. These kind of services have been used in the case of revisions of Acts of State doctrines (1981), immigrations laws, in the question of the mandatory use of seat belts, in the Sovereign Immunity question (1976), and in some bi- or multilateral treaty negotiations (eg. double taxation avoidance, extradition). This has been also the case in the field of competition law, although the United States has been definitely the leading country in the field of Antitrust Laws (*idem.*).

<sup>910</sup> See, Tanchev, E., 1995.

For example Hungarian institutions have been referring, both in the drafting and interpretation of its constitutional system, to norms and systems in various nations in numerous cases.

The claim that these countries would have turned somehow "back" to the Romano-Germanic legal family, by turning also to "pre-socialist" sources, has been rejected on the basis that this "family" has neither anymore steady foundations, and that many transplants are a mixture of the European-American "melée" (Ajani, G., 1994, p.1088 ff.). More simple approach and a contrary argumentation, see Merryman, H., 1995.

<sup>911</sup> See, Tanchev, E, 1995, pp.143-145, Schwartz, 1992, p.741.

<sup>912</sup> Elster, 1991, p.447.

taxation and investment laws have been thoroughly influenced by private "lobbying" investors.

It has been claimed that sometimes poor economic conditions have caused problems for the implementation of these "transplants". This has been the case especially concerning the right to work and free health care and to a clean environment. However, dynamic development has taken place in the field of political freedoms, though some problems seem to persist, for example, in the realm of electronic broadcasting.<sup>913</sup>

One of the main problems<sup>914</sup> of transplantation in the recent development seems to be the lack of public sphere discussion<sup>915</sup>. This is related to the speed of the adoptions, to the variety of sources, and to the context of the implementations<sup>916</sup>. Furthermore, it has been claimed that the context there is a atmosphere of "constitutional nihilism and fetishism"<sup>917</sup> characterizes the public adoption of these transplants. This may be associated with the historical tradition of public and political discourse, as well to the eagerness of western companies and European institutions to "implant" certain rules to these countries. This may have led to a kind of an "instrumentalism".<sup>918</sup>

All the same, it is clear that only a more thorough study of the internal discourses in these countries can reveal the success and limitations of these "transplants".

**Finland.** The value of comparative aspects has been fully recognized in legislative drafting and government in Finland<sup>919</sup>. Especially after the Second World war, models for modern Finnish legislation and political argumentation have been openly derived from Sweden and Germany, but also other Nordic and some continental (Switzerland, Austria) and American (USA, Canada) systems have been considered - at least in reasoning of the proposals.<sup>920</sup> This orientation depends

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<sup>913</sup> Tanchev, E., 1995.

<sup>914</sup> On concrete problems, see Tanchev, E., 1995, p.146.

<sup>915</sup> One of the problems of interpretation of the new constitutions on a comparative basis in Central European countries has been the extreme instrumentalism (Tanchev, E., 1995, p.159).

<sup>916</sup> Tanchev, E., 1995, p.160.

<sup>917</sup> Tanchev, E., 1995, p.156. He claims that the scepticism regarding law and constitutionalism, expressed both in the general public and political sphere, characterizes this adoption (nihilism). On the other hand, in certain social groups there is a sincere belief in the almighty of the constitutionalism as a type of "problem-solver" (fetishism).

<sup>918</sup> Tanchev, E., 1995, p.159.

<sup>919</sup> The use in different stages of legislation, see Niemivuo, M., 1996, p.73 ff.

<sup>920</sup> See, Karvonen, L., 1981, Svinhufvud, E., 1994, p.638. On the quantitative extension, Niemivuo, M., 1996, p.78-79). Former times some socialist countries were included (ibid., p.79).

For the latest examples of governmental argumentation on a comparative basis, see the governmental proposals during the 1989-1994 [Hallituksen esitys]: 227/91, 228/91, 50/92, 63/92, 120/92, 165/92, 180/92, 200/92, 203/92, 368/92, 319/92, 4/93, 49/93, 77/93, 311/93, 24/94, 120/94, dealing with a variety of issues: military service for women, tax legislation, private law and company law issues. In 1996: telecommunication, the student grants system, artists' scholarships, the prosecutorial system, pharmacies, closing times of shops, regional government, welfare of criminals, medical doctor education subsidies, juvenile punishments, cattle improvement, waterway transport, investment funds, the waste taxation system, libraries for blind people, working hours, alcohol importing, currency

on the question involved. Furthermore, the study of comparative aspects has been strongly encouraged and is seen to be crucial to the process of legislative drafting.<sup>921</sup>

The contemporary idea of integration in Finland seems to be moving from the comparative approach more and more to the idea of integration into the framework of the European Union<sup>922</sup> and international organizations. Consequently, "comparative" aspects have been seen to be relevant, for example, in terms of comparative "deregulation".<sup>923</sup> It is clear that

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value systems, State guaranteed funds, security of electronic equipment, jurisdiction in criminal matters etc.

These "comparisons" means usually quite superficial explanation of rules in some countries chosen selectively, and sometimes based on expectations of the future changes in these countries.

<sup>921</sup> On the internal discussion on the role of comparative law in Finland, see, Kivivuori, A., 1986, On Law drafting [Lainvalmistelusta], Julkaisusarja B, nro 43, Valtion Koulutuskeskus (p.50,70,71). The instructions from 1992 (Niemi, M., 1996) restrict the scope of comparison to laws or discussed changes in law in Nordic or European (EEC) countries. The audience has been considered too: the argumentation should present the different methods of answering to the question. The analytical extension of the comparative argumentation depends on the extension of the proposed law. If foreign law is not relevant for the proposal, it can be left out. Extensive studies can be annexed to the proposal. The need to make a study in relation to the international treaties is also mentioned.

Personal contacts and Foreign Ministry offices abroad are also used (ibid., p.81).

On the traditional, natural, and necessary nature of the comparison in Finnish legislative drafting, see Svinhufvud, E., 1996, pp.637-638, also Suksi, M., 1993, p.264, and Niemi, M., 1996, p.74, Mattila, H.E.S., 1979. The need for continual consideration of foreign development in institutions (because foreign changes can lead to changes in Finland!), see Niemi, M., 1996, p.79.

Svinhufvud's claim is that the "central" norms of the legal systems of the Germanic, Common law, and Romanistic families should be taken into consideration, and that if this is done it should be reflected explicitly in the text of the proposal (idem.). In private law issues, comparison should cover the norms of the "developed and big industrial countries" because there "the pros and cons of different types of regulation have been already considered". This means that "one could take models from them, of course, by considering own needs as the basic premises of this modelling" (idem.). According to him, the comparison cannot be just a formality. The aim is to find the best possible solution (idem.). Niemi, M. (1996, p.74) maintains: "In principle, this comparison of laws does not deviate from what it is in legal research". The basic problems seem to relate to the resources (ibid., p.75.) (Perhaps the similarities of these spheres of research are related to this lack of resources!)

Although recent governmental proposals are full of comparative considerations, in the latest instructions for the law drafting there was no emphasis on its importance, see, the Instructions for the Legal Drafter [Lainlaatijan opas], Edita, Oikeusministeriö, Helsinki, 1996, The Plan of the State Council for the legal drafting. The Ministry of Justice, 3/1996 [Valtioneuvoston lainvalmistelun kehittämissuunnitelma. Valtioneuvoston periaate päätös. Oikeusministeriö].

Comparisons in Sweden during the 1989-1994 in the governmental proposals [regeringens proposition]: 1989/90:2, 1990/91:73, 1990/91:74, 1990/91:77, 1990/91:124, 1990/91:136, 1991/92:29, 1991/92:80, 1991/92:139, 1992/93:46, 1992/93:75, 1992/93:135, 1992/93:160, 1992/93:161, 1992/93:170, 1992/93:180, 1992/93:171, 1992/93:185, 1992/93:218. Countries referred are England, USA, France, Germany, sometimes New Zealand, Austria, Belgium (see Bogdan, M., 1996, p.3).

<sup>922</sup> For this and the idea that there are some problems in moving to the "European Union" analysis only, Svinhufvud, E., 1996, p.637. Svinhufvud notices correctly that sometimes the reference is even to the "non-existence" of this type of regulation in EU, whereas this "gap" - on the other hand - may be due to the lack of European level competences in this field.

<sup>923</sup> See, Ministry of Justice, The project for the Improvement of the Legal Drafting [Oikeusministeriö, säädösvalmistelun kehittämissuunnitelma], 1995. Concerning the "deregulatory" international pressures in Japan, see, Ito, D., Use and abuse of International pressures for reform of the State Machinery. In: Conference Regulation and deregulation: Japan and Europe in the Global Economy (European University Institute, Robert Schuman Centre) November 1997. Ito stresses how "the exploitation of foreign pressure to divert domestic attention away from popular policies is a strategy employed universally..." (ibid., p.9). .. This observation coincides with one given by an American observer that "Japanese authorities have been prone to exaggerate the level of U.S. pressure when it suits to their purposes to do so. In few cases, they have even resorted to requesting pressure from American authorities" (ibid.,

through deregulation and regional integration, aspects of traditional comparative law are set aside.<sup>924</sup>

In Finland, the "overwhelming interactionism" and the lack of analytical legislative discussion, which we will consider more thoroughly below, is visible in the integration by law into Finnish legislative practice. Furthermore, this integration is reflected in a quite superficial administrative professionalism. The aim of the Finnish legislator seems not to be based upon establishing substantial links between societies by presenting alternative solutions in different contexts and by critically analysing the aspects of the appropriateness and "rationality" of certain legal solutions for society. The intention seems to be to selectively establish the correctness of a particular political solution despite the social, cultural, and systematic contexts. The selection is based on prior selection, and the argumentation is often sketchy, uninformative, and non-analytical.

As mentioned, this problem may be also related partly to the implementation of supranational legislation. Because it seems that international and supranational legislation harmonizes not only "cross border" practices, but, for that matter, also regulation of the internal practices in the Finnish legal-political system (the so-called "equalization effect"), the lack of the discourse on the changes in the law of the system may lead (and has already led) to the problematization of these "indirect governmental transplants".<sup>925</sup>

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p.10). He distinguishes exploitation of foreign pressures to "innovative", "protectionist", non-use of international pressures (ibid., pp.10-11).

See also, Wiegand, W., 1991, p.245.

<sup>924</sup> Also, Svinhufvud, E., 1996, p.637. That at the moment EU countries have been considered more frequently and extensively, see Niemivuo, M., 1996.

<sup>925</sup> There has been an interesting discussion on "foreign" elements entering into the Finnish legal system via the implementation of European Community legislation (In: Oikeus Journal, 1998, Wilhelmsson, T., Joutsamo, K., and the so called "Jack-in-the-box" theory: some "foreign" elements seem to appear in the legal system contingently. They are strong arguments, though they do not emerge in the traditional discourse. This prompts the discussion as to the "spill-over" effect (some discussion on this, see below). Similar types of remarks in the context of civil law by Zimmermann, R. (1995, p.25, 28-29) with, however, some denationalization and natural law emphasis, aiming at "European natural law" on the basis of Roman law (with references to Koschaker, P., *Europa und das römische Recht* (1st. Ed. 1947, p.343 ff.)).

Some informal, but possibly influential, traces of comparative discussion may be found also in France, discussion d'un projet de loi et d'un projet de loi organique. Assemblée Nationale. 2e séance de 4 octobre 1989. *Financement des activités politiques, financement des élections*. 3103, 3016-3018, and discussion d'un projet de loi, après déclaration d'urgence, d'un projet de loi organique. Assemblée Nationale. 1re séance de 29 mai 1989. *Condition de séjour et d'entrées des étrangers en France*. 1312, 1314, 1316, 1319-1320. On the comparative considerations in legislation, see Legeais, R., 1994, p.347, and on influences in general, Agostini, È., 1990, p.462 ff. (claiming that influences are small in quantitative terms and situational, but qualitatively important (structural and institutional reforms like Judicial review and Ombudsman, etc., also in private law, ibid., p.464). Many of the adoptions derive from the European level activity (idem.). (See references in Agostini, È., 1990). That the studies in France are made basically in parliament, Niemivuo, M., 1996, p.80. On the history of Bureau de Législation Entrangère and the definition of its function 1801, Zajtay, I., 1981, p.595.

In Germany, Gesetzentwurf. Deutscher Bundestag, Drucksache 12/105, 19.02.91. *Entwurf eines Gesetzes über spaltung der von der Treuhandanstalt verwalteten Unternehmen* (SpTrUG). On contemporary influences (Code of commerce, France) Heide, H., 1994, p.730.

In Italy, for example, Proposta de Legge costituzionale. Camera dei Deputati. il 5 giugno 1986.

**The International level.** The comparative legal approach plays an important role in the field of private international law. In every international treaty - the postwar examples coming from Bretton Woods and Gatt in the 1950's - comparative aspects have played a significant role. Further permanent functions of comparative law considerations also take shape in the conferences on private international law.

In this connection, however, it is not intended to discuss the role of comparative law in international organizations.

**The European Community.** Comparative law has an established function in European Community legislation. This applies especially to harmonization measures and secondary legislation<sup>926</sup>. This is particularly so at the drafting level, where the relevance of comparative law is considered especially important<sup>927</sup>. This leads to certain characteristics of the system as a whole, as we will see.

Comparative studies in the Community system can be based on independent studies or monographs. Often this includes questionnaires, which a rapporteur collects.<sup>928</sup> It is also possible to use international working groups. The system employ also internal "institutional" expertise<sup>929</sup> - studies organized by secretariats and special commissions. These different spheres of comparative legislation can also be combined.<sup>930</sup> The persons involved in the activity can be academic, but not necessarily.<sup>931</sup>

It has been asserted that studies in the Commission are based on comparing and choosing between competing principles and policies<sup>932</sup>. Many conceptual questions seem to be, however, at the heart of the observations. It has been likewise claimed that comparative

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*Indizione di un referendum consultivo sulla produzione di energia elettrica da impianti nucleari.* 3820, and *Proposta de Legge costituzionale.* Camera dei Deputati, il 4 giugno 1986. *Vaccinazione obbligatoria contro il morbillo.* 3808. etc.

It seems that comparative law is used widely in different legislative systems. However, these observations are based on very sketcy study of the issue in these systems. A more thorough study is needed. However, this would be a matter for a separate work. Here, only Finland and Sweden have been closely considered.

<sup>926</sup> Constantinesco, L.-J., 1975, p.154.

With regard to competition law (Articles 85 and 86 of the EEC Treaty), Trindade, A.A.C., 1977, p.281.

<sup>927</sup> Consequently, the most important comparative research is undertaken in the Commission. See also, Benos, G., 1984, p.251, Lando, O., 1977, p.647. Loussouarn, Y., 1981, p.133.

<sup>928</sup> Lando, O., 1977, p.648.

<sup>929</sup> Lando, O., 1977, p. 649 ff.

<sup>930</sup> Lando, O., 1977, p. 652.

<sup>931</sup> Concerning certain problems, Benos, G., 1984, p.244.

<sup>932</sup> Lando, O., 1977, pp.655-656.

It is not exceptional in the European Commission to take into account the legal solutions of states other than the member states (Kötz?, a., Comparative legal research, Uppsala conference, p.3).

observations provide help in the formulation of a text, which is easier or less problematic to implement. The examination can also include studies of implementation mechanisms. These aspects are important in order to formulate a text, which responds to those various initiatives it intends to give effect to. Subsequently, implementation is thus easier to control and to predict<sup>933</sup>.

**An example from European Community legislation.** We may look shortly in a more detailed way at one of the comparative legislative processes in the European Community, the drafting of the direct tax directives<sup>934</sup>. The drafting of this piece of legislation took nearly 30 years. Problems causing its non-adoption may be found also in the political reluctance of Member States. Indeed, it was only deepening European integration which forced its adoption.

Preliminary comparative investigations cannot be distinguished from the quasi-political debates in COREPER, the *ad hoc* meetings of different committees, or various drafts of the directives. However, in the final stage in 1990, when the final versions were produced, extensive comparative studies were made by the national experts before and during implementation.<sup>935</sup> Without going into the entire structure and content of these comparative studies, some observations can be made.

These studies were produced mainly for the use of experts. They were not public "travaux préparatoires" of Community legislation, and do not seem to function as such in the public discourse either. They functioned as material for the drafters of the legislation, and furthermore, post-implementation, as material for the control of compliance for the Commission. They may have had importance for legal practice.<sup>936</sup>

The studies contained mainly considerations of the problems of the compatibility of the national conceptualization and legal language with the proposed and adopted Community legislation. Some incompatibilities were recognized, but no substantial conclusions or interpretative proposals could really be drawn. However, they served the Commission, when had to give some answers to the informal questions presented by the state officials.

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<sup>933</sup> Benos, G., 1984, p.246.

One form of comparative studies is the studies concerning the implementation of EC norms. However, it has been asked, whether this is really comparative legal study at all (Lando, O., 1977, pp.650-651).

The nature of these studies is definitely comparative, but they cannot really be classified as comparative legal studies, because the interest of these actions is fully determined by the legal interests and the norms of the observing system. As a bi-product, lot of valuable information will emerge.

<sup>934</sup> Directives: Council directive 90/434/EEC, 23 July 1990 (OEJL L 225/2) *on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States*, Council directive 90/435/EEC, 23 July 1990 (OEJL L 225/6) *on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States*.

See, IBFD Publications BV, Original release 1991, especially Thömmes, O., Chapter 5, Commentary on the Merger directive, p.6 ff (Thömmes, O., 1991)

<sup>935</sup> IBFD Publications BV, Original release 1991.

<sup>936</sup> Thömmes, O., 1991, p.9.

This piece of legislation is a good example of the effects of "comparatively drafted legislation". The implementation of the legislation took place in a seemingly neutral but, nevertheless, instrumental way. National conceptualizations are considered more or less to be included in the Community act.<sup>937</sup>

The instrumental idea of the "internal use of comparative material" in legislation can be associated with an idea of "neutrality". The comparison seems rather a justification of institutional functioning and drafting in the Commission, the Council, and the Court. Comparative conceptualizations will not be treated as "travaux préparatoires", and in this way the interpretation of these acts can easily be transferred on the level of the European Court. The heterogenous context of these acts seems to be covered, and this idea functions as the basis for the "delegation of power" to the European Court. This idea is supported by the "purposeful" form of this piece of Community law. On the other hand, if the comparative material would be material for national implementation, this would lead to further confusion within the system, and the texts would no longer seem to be clear "legal" compromises between the legal systems.<sup>938</sup>

Consequently, we may quite easily claim that the drafting - based on comparative research - leads to a relative emptiness of European Community law concepts. At the same time, these texts are easy to instrumentalize in legal argumentation, and this results in the functional method of interpretation<sup>939</sup>.

All the same, it may be claimed that the use of comparative law in the drafting of EC legislation is, to a certain extent, one of the counterparts to the corporatist lobbying and political bargaining processes in the legislative function of the EC. It provides legal arguments to enable the EC Commission to attend to the contingencies of the influences it is facing, and maintains the relative autonomy of the EC legal order. In this sense, comparative law is an extremely important part of EC legislation.<sup>940</sup>

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<sup>937</sup> For a case illustrating the functional, but seemingly literal, interpretation of concepts deriving from comparatively drafted and here discussed Community direct taxation measures, see case 283, 291, 292/94, *Denkavit International BV, VITIC Amsterdam BV and Voormeer BV v. Bundesamt für Finanzen* (1996) ECR I-5063. The Court maintains in its decision: "The expressions of intent on the part of Member States in the Council, such as those on which the Governments rely on their observations, have no legal status if they are not actually expressed in the legislation. Legislation is addressed to those affected by it. They must, in accordance with the principle of legal certainty, be able to rely on what it contains".

<sup>938</sup> See also, 283, 291, 292/94, *Denkavit International BV, VITIC Amsterdam BV and Voormeer BV v. Bundesamt für Finanzen* (see also Opinion of the Advocate General Jacobs, delivered on 2 May 1996) ECR (1996) I-5063.

The government (and interlopers) argued strongly on the generality of "comparative implementation" in different Member States in order to show that a particular national implementation (Germany) is not against the directive. The Advocate General made also a qualitative post-implementation study. The government party claimed as did also the Advocate General, on the basis of a quantitative post-implementation study, that the infringement by the government was not manifest, because the post-implementation comparison shows that this type of implementation is shared by other states. This was seen as an indication of a "good faith" implementation.

<sup>939</sup> For the method of interpretation, see Bredimas, a., 1978a.

<sup>940</sup> In this sense the comparative arguments function, or could function, as a critical perspective upon the ever-increasing corporatism European legislation.

### 1.3. Conclusions

**The effectiveness and limits of comparative legislation.** One can say that comparative legislation in its wide meaning has had enormous establishing and reestablishing functions within the state and the state-paradigm of law at the beginning of the century and, furthermore, after the second world war. Comparative drafting tends to be, in many ways, an effective way of proposing legislation.

At the moment, in those countries (or systems), where comparative observations are made, separate bodies are employed. It looks as if in all systems both internal and external experts are utilised. As we know, expertise is one of the essential features of contemporary legislative processes, especially due to the internationalization of law in general. This is part of the institutionalization of comparative law.

One explanation for the differences between different systems in comparative legislative reasoning can be found in the different methods of publishing legislative drafts. In some systems, comparative observations are published only, when they have had some qualitative importance. Here the description of the considered systems and their impacts are scarcely mentioned. In some systems, no publishing takes place at all, at least with regard to legislative proposals<sup>941</sup>. In some systems there is a tendency to publish almost all comparative observations in a "quasi-analytical" way in relation to legislative proposals, usually, however, in order to stress general tendencies. On the other hand, in systems where the "travaux preparatoires" are extensively reproduced in every legislative proposal, comparative studies are also always included automatically.

It looks like one of the restrictions upon the openness of publication of comparative material is the fear that comparative observations would be misleading<sup>942</sup> or give a wrong overall impression. It looks like in some systems, great attention is paid to the clarity of legislative reasoning, and this is why comparative observations are hardly mentioned. However, it seems to be clear that in some systems comparative observations are taken out of any systematic context in order to establish, in very abstract terms, the motives behind a legislative proposal. Here we recognize two different types of systematic approaches; the first approach stresses the autonomous nature of socio-political systems, and, in the other, a major importance is attached to socio-political pragmatism. In some systems, the intention is to look over systems on a functional basis, i.e. inasmuch as they serve as practical guides for legislative work<sup>943</sup>. Moreover, some systems seem to attach importance to the general international "tradition" as a value as

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<sup>941</sup> See for example the British Law Commission, Marsh, N.S., 1977, p.666 ff.

<sup>942</sup> See also Marsh, N.S., 1977, p.666.

<sup>943</sup> Marsh, N.S., 1977, p.667.

such. On the other hand, some systems seem to emphasize the significance of the reasoning by reference to alternative solutions, i.e. in relation to the departure from the general tradition. There is, of course, some variation depending on the field of legislation in question.

**Why would one need comparative legislation?** Parliamentary discussion cannot be so "complete" with regard the proposed legislative details, especially concerning comparative legal observations. One cannot spend enormous amounts of time in verifying the comparative "correctnesses" of these studies. On the other hand, in the drafting of the legislative proposals, the pressure of time and resources play an important role also by restricting the extent of use of comparative observations. However, this situation effectively diminishes the real political discussion on the issue in question, or transfers it towards professional legislation<sup>944</sup>.

This is why we have to ask why we need comparative studies in legislation at all? Namely, the political discourse appears to be a political discussion concerning "semi-legal" arguments.

It is clear that comparative observations gain additional importance in the "new" type of legislation. On the other hand, the need for comparative studies is attached to the different branches of law also "qualitatively". Furthermore, legislative proposals of administrative law, proposals dealing with purely internal matters (local administration, proposals concerned strictly with the distribution of money, etc.), are, for example, often the branches of law where comparative observations are not used. Moreover, comparative observations have a significance for the legislator, which considers features such as international coherence and integration. They also seem to be kind of international "travaux preparatoires". This is the case especially when no draft documents are available.

This may be related also to the question of "comparative" studies as post-implementation data. Namely, one could claim that the implementation of an international obligation is usually based on the idea of "simultaneous moves"<sup>945</sup>. This means that any implementation is made according to the internal principles of each implementing system, and that comparative information does not provide any information relevant to implementation. However, one could imagine, from the instrumentalist point of view, that "sequential moves" in implementation may provide implementators with material for finding the minimum requirements for the implementation. Even if the final check upon the correct implementation is at the supranational level in general, the "sequential comparative move" may enable the implementator to arrive at a solution which is beneficial for the system in general. Fulfilling the minimum requirements makes it possible to claim some type of generality, and at the same time, to apply

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<sup>944</sup> See also, Marsh, N.S., 1977, p.667, discussing Kahn-Freund, O., 1974, p.1

<sup>945</sup> These concepts derive from ideas presented in the economic sphere, Lorange, B., Roos, J., *Strategic alliances. Formation, implementation, and evolution* (Blackwell) 1992.

it to the system, which is competitive. This may take place especially in systems which consider implementation from the point of view of economic competition. Furthermore, post-implementation comparison may function, within international and regional organizations, as a way of planning future actions, but also, as will see, as a way of considering the "good faith" nature of the internationally controlled implementation.

Nevertheless, there seems to be a use of comparative material in legislation.

**Some analysis of the problems of comparative legislation.** As maintained, comparative method and information used in legislation can quite easily present wrongly the political and social contexts.<sup>946</sup> The use of comparative law in legislative drafting is, consequently, often called "pseudo-comparison".<sup>947</sup> Comparisons may be determined according to the desired end, and may not reveal the alternatives behind reform. Furthermore, one may, in the legislative discourse, be guided by the intent to follow international trends and argue for common international solutions or for one previously selected solution, or one may even argue against culturally "unsatisfactory" solutions.<sup>948</sup> This approach is determined by the political ambitiousness of the proposer or the arguer in the legislative reform.

There are also "internal", informational and communicative, problems recognized in the realm of comparative legislation<sup>949</sup>. Moreover, the comparative approach may, and usually does, lead to further argumentation on the basis of other systems<sup>950</sup>.

As maintained, one of the problems of the "comparative legislator" is that it usually does not seem to recognize thorough and critical scientific research as a basis for legislative reform. Often it is rather oriented to use successful examples in a simplistic and value-based way rather than to evaluate fully the connections between social discourses and the law, "internally" and "externally". It usually undertakes a deep analysis in the sense of quantitative legal analysis, but actually this analysis appears deep only to the extent that it satisfies the expectations of the legally oriented audience, instead of the demands of more general political audience. This is characteristic especially of the legalistic socio-political system, where the authority is traditionally deriving from the legal form rather than from the societal discourse.

This is effective. Because comparative law, in its modern form, is bound to the text rather than to social experience, it seems to remain outside any legal "ideology" and "form of life"

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<sup>946</sup> Hill, J., 1989, p.106. Also Klami, H.T., 1997, p.9. For some analysis of the effects of different basic values in relation to adaptations, see Mattila, H.E.S., 1979, p.302.

<sup>947</sup> On this concept, see de Groot, G., Schneider, H., 1994, pp.63-64.

<sup>948</sup> Stone, F.F., 1978, p.211 ff.

<sup>949</sup> Lando, O., 1977, p.648

<sup>950</sup> Aubin, B., 1970, pp.458-480, Kamba, E.J., 1974, p.499.

An extremely good example is the adaption of constitutionalism within Hungary and other Eastern European countries, see Elster, J., 1991, p.477. On the "expert" assistance, see Bogdan, M., 1996, p.3.

analysis, and it creates a distance, which generates, on the other hand, the impossibility of a critical review. Viewed comparatively, law seems to be based on objective facts.<sup>951</sup> The static and "binaric" thinking about the social conditioning of law causes the rejection of the social context as a discursive process. Modern comparative law seems, necessarily, to understand social and economic conditions, because it is based on non-discursive ethnocultural premises.

Consequently, we may labour the point, in connection to comparative legislation also - that even if the importance of the sociological, economic, political and more general functional, cultural and humanistic aspects are stressed as basic assumptions of legislative drafting, this does not necessarily mean that the approach turns out to be "contextualist". Social and economic conditions seem to be ideally static and instrumentally flexible for many modern legislative comparativists.<sup>952</sup>

Furthermore, one of the striking fallacies of comparative legislation, associated with this question - is that the extensive use of comparative law - as a justification for a legislative proposal, diminishes the value of the travaux préparatoires. In this way it blocks sensible legal interpretations and legal systematization processes based on various contextual materials as a source of legal arguments. This seems to be more striking in systems where the travaux préparatoires are openly acknowledged to be a valid source of law.

Consequently, we may say that the "re-inventing" practice of modern legislative comparativists - in the legal professionalist realm - would not be problematic if it was not connected to the superficial political use of comparative law in a systematic way. The phenomenon may be summarized with the help of the idea of "cognitive control" presented in the comparative law discourse by some authors<sup>953</sup>. Cognitive control is characterized by a formalist ordering and labelling, and the ethnocentric interpretation of comparative information (by limited data). It's claim is "objectivity", and the starting point is strategic.<sup>954</sup> The lack of self-critical and methodological guidance leads to comparative legislation, which does not even look like learning. In this sense, we should speak about foreign law as a political-instrumental argument. Here the use of comparative law in legislation can be seen from the point of view of "legal teaching" rather than "legal learning".

We may ask what kind of law and discourse this type legislative reform conveys?

The main feature is the idea of extremely formal law. However, this positive law is common to all persons and has no contextual or political aspects. This form of law is

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<sup>951</sup> Frankenberg, G., 1985, p.424.

<sup>952</sup> Tanchev, E., 1995, p.160.

<sup>953</sup> Frankenberg, G., 1985, p.427.

<sup>954</sup> Frankenberg, G., 1985, p.427. The "strategic" can be divided into the categories of unconscious concealed acting, which can be claimed to be systematically distorted communication and consciously concealed strategic acting, which can be claimed to be manipulation, see, Habermas, J., 1987, p.332 ff.

homogeneous and universal. Furthermore, it also conveys a sense of from where the "good" formal models are derived (and should be derived).

Consequently, this type of use of comparative law is often based on the "unknown" nature of the environment and, on the other hand, on a "myth" of culture and universality. It is associated with the idea that comparative observations are "deriving" from another society "unknown" to the members of that particular society and political audience and to the discursive sphere for/to/by/among the discourse is effected. And it is exactly this mythic "unknown" nature of this argumentation which makes it persuasive<sup>955</sup>.

In this sense, as we may see, even if the study of comparative legislation is not relevant from the point of view of the question at hands - like from the point of view of a particular legal or political question - it may be relevant from the point of view of the study of the tendencies in that society. Even if the form of the comparative argument is only an indirect indication of the intentions of the legal-political decision-maker, it shows something about the idea of "relevance" in the mind of the arguer. The study of comparative legislation reveals, for example, facts about the openness or the closeness of the societal discourse in general, or, if the analytical approach to comparative law is lacking, it is an indication of the fact that the decision-maker and rule-maker attempts to maintain the homogeneous audience for its decisions (legal audience, political consensus), and to facade the "real" arguments and motivations behind legislative reform. It shows the arguer's intent to establish belief instead of understanding. It hides the political controversies behind political law making. And it is exactly here where one can conclude that "mythic" comparative argumentation seems to be contrary to open social discourse in the sphere of the plurality of substantial standpoints.

**"Political reflexivity"**. As we have already indicated, in those countries (or systems), where comparative observations seem to be one of the main arguments behind statutory reforms, we see reflexive tendencies.<sup>956</sup> In other words, the generally open political culture of legislative drafting is not the only explanation for the use of comparative observations, but reasons for the comparative reasoning can be found, for that matter, in the internal nature of the socio-political system and its principles. Accordingly, the uses of comparative law may be associated directly with the political reflexivity of these systems. Systems which construct their systems comparatively seem to be politically reflexive systems. This is characteristic especially of systems

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<sup>955</sup> The relevancy of comparative arguments is not derived from the factuality or positive explanation surrounding the discourse, known to the participants in the discourse in the public sphere, but the arguments seem to derive from the "black hole" of "self-re-invention" of the comparativist as an administrative "artist" or a "shaman", who bases her claims and argumentation on the "understanding" of legal universality. This claim of universal motives "*forbids the question of the purity of the motives, the objectivity of the motives, or the correctness of her results*" (Frankenberg, G., 1985, p.426). It also forgets the institutional context, status and, functions where the comparison is made.

<sup>956</sup> This may be characteristic to "small countries", as in the case of comparative law education (in education, see, for example, Stoffel, W., L'enseignement du droit comparé en Suisse. In: Rev.Int.Dr.Comp., 1988, p.728).

where there is a systematic use of comparative law. One can maintain that political reflexivity may (has?) result(ed?) in extensive transfers of legislative powers in some countries.

Furthermore, reflexivity does not seem to fade away even during the contemporary internationalization and Europeanization of law. As already indicated, the vertical political reflexivity may be, for example, related to the non-discursive adaptations of European norms<sup>957</sup>.

**Comparative observations in legislation. Are these possible?** The comparative legislator should primarily consider the social environment it is functioning within.<sup>958</sup> It has been maintained that it is the prevailing economic and social circumstances which should determine the choice of the solutions, and, for that matter, the explanation of the comparative alternatives.<sup>959</sup> One could also stress the importance of the political and legal discursive framework and its "traditionalizing" function. It is the social-systematic discourse or the lack of it which determines the internal circumstances of the comparative adaptations. In other words, if social system is to decide on its rules and norms, the question about the use or non-use of comparative observations as such is not so relevant. Comparative observations are just arguments from among other arguments.

Consequently, the main question seems to be about the analytical nature of the discourse. This reveals the discursive openness of the social system. Here we come to the idea of open comparative considerations as a matter of a possibility for the generation of discussion in society.

The comparative perspective seems to be, in the end, a method for arriving at substantial alternatives, if they are taken as substantial alternatives and not as external explanations. There is a reason for the use of comparative considerations. The *a priori* identity thinking, with its premise of similarities and differences within the social needs in different social systems, is replaced by a sensible analysis and an analytical attempt to discover the reality of the social systems and their regulations. The *a priori* identities of different social systems and self-re-inventory practice are replaced by comparative re-search for political identities in a comparative discourse, as a part of the general discourse characterized by the plurality of substantial opinions.

What would this mean for legal research in general?

In the first place, it means that comparative law, as a form of argument in legislation, has to be taken seriously, and that the aim of academic comparative law is to rationalize it. Only in this way does the use of comparative law not remain a function of political

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<sup>957</sup> One example is the European Social Charter. The characterization of the reflexive relationship has been described by the system itself (Council of Europe Bulletin on Human Rights in the Council of Europe, 1996): "*When adopting new laws in areas covered by the Charter, states often use the treaty and the supervisory bodies' case law as guide... In this way the Charter has led to improvements in national legislation and practice in many fields such as family law, protection of children and teenagers, trade union rights and social protection*".

<sup>958</sup> Zweigert, K., Kötz, H., 1987 "*here and now to the national society as it is*" (1, p.22).

<sup>959</sup> Zweigert, K., Kötz, H., 1987, p.12

and governmental legislation and result in governmental "transplanting".

In conclusion, one could say that a system whereby comparative considerations are somehow connected to more thorough academic research is more appreciable. There the alternatives are not based on any institutional restrictions.

## 2. Comparative law in legal interpretation

### 2.1. Introduction

**Preliminary remarks.** The objective in this part of the study is to consider the “practice” of comparative reasoning in law from the point of view of the ideas developed in the previous chapters. This means an examination of the value-based argumentative and justificatory restrictions and the determination of the scope of the use of comparative observations in legal decision-making institutions. In this way one may be able to determine the limits of traditional uses of comparative law in the traditional theory of legal discourse. Only by making some conclusions on the instrumental and value-based adjudicative uses on an empirical basis, one claim to check the validity of the premises developed in the previous chapters, and, on the other hand, to consider the validity of comparative considerations from the point of view of the value-based theory of legal justifications.

On the other hand, the empirical study may raise certain issues for the traditional “classificatory” comparative law to be considered, and - furthermore - offer reasoned possibilities to rethink the “European” paradigm of law.

**The “legal” bases of the use of comparative law in adjudicative reasoning.** The interest of interpreters of law in its comparative aspects has been recognized in legal history, though many explicit references are lacking. Comparative law has been used in public law (international and national), in private law (international and national), in conflicts of law, in international and national arbitration, in regional and various “issue-based” organizations. Its use extends from legal drafting to interpretation and justification - and to legal education to legal cultural studies. On the other hand, there are differences in approaches to comparative legal interpretation, which may depend upon - for example - whether we are speaking about fields of public or private law, and that of national or international law.

We may assert, for example, that premises in international systems are - to a certain extent - contrary to those of national adjudication. In international and regional legal systems, comparability is usually assumed to exist, and the use of comparative studies is considered occasionally virtually necessary.<sup>960</sup> In the realm of comparative interpretation of national law, on the other hand, the basic premise of the adjudicative function seems to be the non-comparability of legal systems. That is to say, in practice, comparative legal arguments - arguments deriving

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<sup>960</sup> As we will see, however, to this “rule” there are both normative and practical exceptions.

from other legal systems - are not relevant or perhaps not even permitted<sup>961</sup>. This may be related to the idea that in an interpretation by comparative observations, as in legal drafting, the question is about the development and improvement of (national) law<sup>962</sup>. This is puzzling for the national adjudication having - as its basic premise - the idea that it is contrary to the concept of a legal system to introduce and emerge *ad hoc* considerations and new rules and interpretations into the system in an unsystematic and unpredictable manner.<sup>963</sup>

On the other hand, in modern legal systems one does not expect judges to know the law of another country.<sup>964</sup> Moreover, comparative interpretation may be seen only as a luxurious form of legal analysis<sup>965</sup>.

As we may notice, however, the reality is more complicated than these assumptions may suggest.<sup>966</sup> We may say that if knowledge exists, there are no principled obstacles to using it - or, at least, to consulting it. On a contrary, in some cases, it may even be the case that the knowledge of another legal system must be considered positively.

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<sup>961</sup> In the case of disallowed sources, a system cannot function as a source of law alone or with some other system. Usually this leads to the maintaining of existing conditions as they are (coherence, comparison by opposites types of argumentation, margin of appreciation). On the other hand, a system, for example, a regional court, gain additional importance because of its institutional actors.

<sup>962</sup> See, Markesinis, P., 1990, p.5 ff.

<sup>963</sup> One may also establish a common denominator to these "legal spheres" of reasoning for the purpose of this study. This common denominator shall be the idea of "legal order", which can be described, in general, as a "sphere" of positive laws and interpretative traditions, which is regulated by the obligation to justify the decisions on the basis of legal sources - in a form or another - in order to maintain the discursive integrity of law.

<sup>964</sup> Markesinis, P., 1990, p.4.

<sup>965</sup> Marsh, N.S., 1977, p.655.

<sup>966</sup> Comparative interpretation plays a practical role in many states, see the remarks on the use of comparative legal analysis in private law in Greece, Turkish, Dutch, Luxemburg, French, Belgium, Swiss, German, Austria, Czech Republic, Marsh, N.S., 1977, p.656. The basic use has been seen in lacunae filling.

Swiss courts refer sometimes to German, Italian, Austrian law, Marsh, N.S., 1977, and references. Remarks on wide use of comparative material in Swiss Courts, see Aubin, B., 1970, p.480.

For uses of English law in United States, see Winterton, G., 1975, p.73.

For uses in Holland, see Koopmans, T., 1996, p.545, 551. For example, Hoogeraad, *Van Greuningen v Bessem*, 21 May 1943, *Nederlandse Jurisprudentie*, N.J. 1943, 455, May, 21, 1943., Advocate General Hartkamp in product liability case, material damage, Hoogeraad 9 October 1992, N.J. 1994, p.535, referring to Supreme Court of California, 607, P.2d, 949 (Cal. 1980), where the Court finally denied the doctrine. Also, Kisch, I., 1981, Supreme Court of Netherlands, Civil division, April 2, 194, Supreme Court of the Netherlands., Civil Division, p.23, 1950, NJ 600, (Austria, France, Germany, Italy, Switzerland used in case on 'promise as a gift').

The application of foreign law in socialist states has also been discussed (Erezinsky, C., 1978). "Modellings" can be identified.

On Austria, for example, see Schwind, F., 1973.

One can make distinctions between the informative function and interpretative function. The informative function does not have a role in the justification as such ("passive comparison"). The interpretative function there is a penetration of the comparative observations to the legal justification ("active comparison"). (Boult, R., 1977).

This idea is problematic in many ways. It assumes that the information as such cannot have any normative role. It also neglects the analysis of the contextual discourses, on which the representation of the passive information is only a sign. This idea considers the passive side of the comparison is only declaratory. Furthermore, this idea seems to forget system maintenance and systems relationship-creative functions. In other words, it does not take into account the discursive nature of the "declarations".

Now, it has been maintained that the legal use of comparative law is connected to the purpose of filling up lacunae in the law.<sup>967</sup> In contemporary adjudication, the practical interpretation of law - on the basis of comparative law - can be also based on common legislation, but for that matter, upon the fact that all countries have undergone similar type of social changes.<sup>968</sup>

The use of comparative law in legal interpretation can also be legally regulated. The legal basis for comparison establishes the *a priori* comparability of certain systems. The legal regulation of comparative law - as a necessary form of consultation in legal interpretation - establishes comparative law as an obligatory source of law in a particular system<sup>969</sup>.

Nevertheless, in adjudication the idea of sources tends to be more liberal than the theory of legal sources often suggests. There can be considerations which do not necessarily appear in the justification and argumentation, and which cannot be - in a systematic way - grasped by the legal sciences. Comparative law seems to be one of these "extra" sources. Courts seem to use comparative law, though no explicit obligations or permissions are formulated in the systematic discourse. Consequently, comparative law is an example of a legal source where there are more controversies and difficulties when it is considered at the theoretical level than when it is used in practice<sup>970</sup>. Reasons for this feature have already been given in the previous chapters.

These aspects give the study two directions: one has to consider the use of

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<sup>967</sup> In European legal history, the prevailing theory of lacunae-filling has been more or less connected to the use of Roman law in the absence of explicit rules. This idea derives from the Bologna School's analysis of medieval practices. (Winterton, G., 1975). For examples in practice, see Coing, H., 1973, p.505.

<sup>968</sup> Marsh, N.S., 1977 pp.664-665.

<sup>969</sup> There are many questions related to these types of legally regulated comparative observations. One may ask, for example, if there an obligation to explicitly analyse these observations in the justification, and secondly, to what extent one has to look into these observations in the internal work of the court?

The Article 1 of the Swiss Zivil Gesetzbuch has been seen a kind of a normative basis (Zweigert, K., Kötz, H., 1977, p.14). It states that

*"Das Gesetz findet auf alle Rechtsfragen Anwendung, für die es nach Wortlaut oder Auslegung eine Bestimmungen enthält.*

*Kann dem Gesetze keine Vorschrift entnommen werden, so soll der Richter nach Gewohnheitsrecht und, wo auch ein solches fehlt, nach der Regel entscheiden, die er als Gesetzgeber aufstellen würde. Er folgt dabei bewährter Lehre und Überlieferung".*

In Israel the case of lacunae in one's own law has been also regulated on legal basis (Friedmann, D., 1975, pp.350-355).

One can find certain legal rules establishing comparative law as a source of law from some international systems (International Court of Justice, Treaty establishing the European Community). In general, see - Bogdan, M., 1990, p.33, Zweigert, K., Kötz, H., 1977, p.7-9., David, R., 1950, pp.100-104, Gutteridge, H.C., 1944, pp.1-10, 1949, pp. 61-71. It has been seen also "common for the worlds civilized nations" and part of the practices of some Regional Courts like the European Court of Justice (Pescatore, P., 1980, pp.337-359, Lando, O., 1986, pp.101-102). See also, for example, Pescatore, P., 1983, pp.337-359, Bogdan, M., 1990, p.93, and p.34, referring to Eustathiades, Droit comparé et méthode comparative en droit international public. In: Xenion. Festschrift Zepos, Vol 2 (Athene) 1973, p.133-139. Also, Schlesinger, R.B., 1968, p.72.

<sup>970</sup> Trindade, A.A.C., 1977.

comparative law both in context and in relation to open justification.<sup>971</sup>

**The material of the study.** The "empirical" material consists of interviews of the judges and administrators, and some cases. Furthermore, some literature is consulted. On the other hand, the idea is also to focus on the roles of different discursive actors in the realm of the use of comparative law<sup>972</sup>. As maintained above, the role of the different organisational actors as comparativists can be evaluated by a study of the interaction between these actors. The role of the administrators, reporters and advocates is essential to allocate the different uses of comparative law. This is necessary in order to understand the role of comparative law in the realm of institutionalized law. Because of this, moreover, some remarks are - at times - made upon the organizational principles.<sup>973</sup>

The results of the interviews, on the other hand, have been merged into different analyses of the practical phenomenon and the explanations. Interviews are not reproduced and explicitly referred to.

**Some special remarks on the interviews.** It must be mentioned also that in relation to some legal institutions, it was easy to obtain access in order to interview judges<sup>974</sup>, and that the entry to some systems was more difficult. In some systems it seemed to be problematic to interview judges, and the interviews had to be made with functionaries.<sup>975</sup> This may be due to many reasons. Analysis of this is, nevertheless, not made here.

The interviews were based on a questionnaire which included certain question

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<sup>971</sup> One should be aware of the problem of the different types of "openesses", which may exist in different legal orders. One should see some legal orders in a "large" sense by including - to the "publicity" of the judgment - also the arguments of the parties and other "players" in the written and even in the oral part of the procedures. Some systems - like English legal system - are discursive and open already in relation to their form of judgment.

This idea would need, however, further development. Nevertheless, what we may say that the written justificatory form is the most decisive from the dogmatic and legal discursive point of view. Furthermore, it is clear that some systems are argumentatively and discursively more open than the others (see, for example, Legeais, R., 1994, 257-258).

<sup>972</sup> The inquiry as to the "informal" uses of comparative law requires consideration of two aspects. Firstly, one has to study the practice of its use in both internal and external argumentation and justification. This requires two different methods; one has to make qualitative studies about the "inspirational" and internal use, and, on the other hand, one must identify comparative practical arguments from the justification of different decisions.

<sup>973</sup> Comparative arguments may appear - in adjudicative processes - in statements of the parties, in the oral hearings, in personal preliminary considerations of judges, in advisory opinions (before hearings), in advisory opinions internal to the institutions, in research internal to the institution, in internal closed discussions, in justificatory judgments, and in dissenting opinions.

<sup>974</sup> Finland, Sweden, Germany, England, European Courts.

<sup>975</sup> Italy, France.

related to the subject<sup>976</sup>. The interviews themselves created further questions. It was not possible to ask all the questions connected to the issue. Some questions, which seem to be essential, remain unasked<sup>977</sup>. All the same, the free flowing nature of the interviews - although structured around the formal questions - revealed some characteristics of the use of comparative law which has been used in this study.

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<sup>976</sup> Questions were:

Introductory questions:

1. Have you been interviewed before on reasoning in this court and internal research within it?

General part:

2. Could you describe shortly the processes of this court?

3. What material is there available?

4. How is internal research made in general? How is it restricted?

5. Do you ask for statements from external experts?

6. Are there external experts used in the course of the proceedings?

7. How long does the procedure last (on average)?

Comparative law:

8. Is comparative law research part of the work of this court?

9. How do you see the role of comparative law in this court in general?

10. How is a comparative study limited, if it is made?

11. What type of information belongs to a comparative survey (sociological, systematic, cases, rules, etc.)?

12. From which countries are there material available?

13. Do the judges have a general interest in comparative law?

14. How much comparative law (cases, rules etc.) is discussed in this institution?

15. Are comparative studies presented by the parties? What is the reaction to these studies?

16. Could you describe the situation where comparative studies are made/reasons for making comparative studies?

The "internal" argumentation in courts:

17. Are comparative arguments used in the internal discourses of the court?

18. What kind of role do they have there?

19. In what form are these arguments used?

20. Are legal systems discussed "technically" or "culturally" ("systematically")?

21. How "distant" are the cases or systems used?

22. How do you see the effect of these comparative observations upon interpretation?

23. Could you give some examples of cases, where comparative law has had a role?

24. What countries are discussed in particular?

Specific questions in international institutions:

25. Do judges compare the laws of their own countries in the internal discussion?

26. How could you explain the fact that comparative observations appear usually in dissenting and advisory opinions?

General questions:

27. Who is the audience of this court?

28. Do you think comparative law is useful, or not, necessary or not and relevant or not?

29. Do you think comparisons are made for integrative purposes or for the purposes of the case only? Is it important "internally" to the legal system, or "externally" to legal systems?

30. Do you see any obstacles for making comparative studies in this court?

31. What could be the obstacle for using comparative reasons in the course of reasoning?

32. Do the lower courts use comparative observations in their justifications?

33. How do you see the development of databases from the point of view of the use of comparative law?

[Some additional questions:

34. What kind of role could comparative law have in contemporary law?

35. What kind of comparative studies would be "useful"?)

Many modifications upon this questioning took place during the interview in order to maintain the "coherence" of the interview.

<sup>977</sup> One of these questions was for example; when are comparative studies made by those, who give dissenting opinions? Are these made before or after the internal decision has been taken?

One of the basic ideas in the methodology of the interviews was to let the subject to define the topic themselves. In other words, the question was defined as a question about the "use of comparative law", but the content of ' comparative law' was let open and unexplicated. Consequently, an interesting phenomena was observed: for example; many of the interviewed connected use of the decisions of some supranational courts to the use of comparative material - or at least their "comparative" nature was recognized - even if, however, all those interviewed stressed, in the end, the "specific" binding nature of the systems and decision deriving from them. This relates to system of "intervening" (by third parties) in European courts.

The interviews played also a role in the selection of cases.

The presentation of the information achieved in the interviews is not explicitly connected to any particular person interviewed. The idea is to speak about legal systems, orders and institutions, and not to give reason for the speculation as to the correctness or wrongness of the answers of those interviewed. The presentation of the remarks is generalized already in the explanation.

It is a fact that the interviews represent quite subjective knowledge. Not all personnel were interviewed, even if the attempt was made to have at least two persons interviewed in one institution. However, one could claim that the conclusions may be generalized to a certain extent.

A phenomenological approach to legal institutions is lacking.

**Some remarks on the analysis of the case law of national adjudication, and the adjudication in the European Systems of Human Rights and the Community.** Even if the tradition of comparative reasoning is strongly connected to the tradition of national systems, the reports and analysis of different cases from national legal systems are not - in any way - "exhaustive". This is due to the fact that the intention of this study is more general. The reason for this is found also in terms of economic and time constraints.

Consequently, the main focus in this analysis is in the functioning of comparative reasoning within the European level institutions. This can be motivated by the fact that in these institutions the role of comparative observations is more explicit and easier to investigate. Furthermore - in these institutions - the basic question of the use of comparative law is connected on a more visible way to the hard cases of law and legal interpretation. On the other hand, it can be claimed that the forms of comparative interpretation of law in national systems are reflected - in a more open form - at the European level. Consequently, the characteristics of comparative interpretation of law can be more easily shown by way of examples.

The analysis of the European Court of Justice and the European Court of Human Rights, in their relation to each other, however, differ considerably because of the "comparative" differences. One has to remember that - as far as the structure of argumentative processes is

concerned - there are remarkable differences between the European Court of Human rights and the European Court of Justice. For example, in the former dissenting opinions are allowed and preliminary (Commission) decisions are given, in the latter this does not occur.

However, the function of the Commission in the European Court of Human Rights (and, in a way, the expressions of the dissenting opinions) can be discursively identified with the role of the Advocate General in the European Court of Justice - even if these remain essentially different types of arrangements. The opinions of the Advocate General and the opinions in the European Commission of Human rights can be situated within the "context" of legal justification.

## 2.2. Some national legal systems

### 2.2.1. General observations

**Legal orders in Europe.** The philosophies of the European legal orders - or the legal "cultures" - differ considerably from the discursive point of view<sup>978</sup>. As we have already noted, in some systems the processes are highly "inquisitorial" (i.e. the continental approach), other systems are more passive (especially the English system as an accusatorial system). In the former type of system, one makes the examination of the law and facts (doctrine, social, comparative conditions etc.) in a functional administration, and in the latter type of system, the arguments put forward derive mainly from the argumentation presented by the parties. We may say that the basic philosophies seem to be remarkably different. One procedural difference is related to the non-inquisitorial nature of common law processes.<sup>979</sup>

This distinction is not as clear as it seems, however. In both types of systems these elements overlap. On more discursive (accusatory) processes, some experts have occasionally been used. On the other hand, in the inquisitorial systems the administration may be - occasionally - separated from the main "court", and - for example - the opinions of the Advocate Generals (or commissaire du gouvernement in France) are not the "official" part of the decision-making as such, but part of the oral procedure.

On the other hand, in some systems the importance of the parties and expertise is recognized, and in some systems there is no "external" research needed. This all, however, depends naturally on the type of cases examined, and also on the different levels of the

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<sup>978</sup> Also, Summer, R.S., Taruffo, M., 1991, pp.508-509. The philosophy may also be related to the philosophy of history in these systems, see Legrand, p., 1996, p.71 ff.

<sup>979</sup> The legal process is discursive in the sense that the task of the judges is not to make any preliminary studies or *ad hoc* studies on the correct material for the law. The material is more or less presented in the legal processes. This seems to differ - to a certain extent - from the idea in continental systems. (Lawson, F., 1977, pp.365-366.) This related to the differences in the significance of systematization (Legrand, P., 1996, p.65 ff.).

"hierarchy" of the courts - though the hierarchical status of the court is not always decisive.

Nevertheless, the basic feature seems to be clear. Some systems' (or courts') administration is philosophically constructed so, that there is great use of *a priori* research before the hearing of the case, and this is to be encouraged organizationally. On the other hand, in some systems (such as the House of Lords, for example) to be the parties are considered the only sources of the arguments, and the role of the administration has - and *should* not have - anything to do with the "substance" and argumentation of the case.

**"Anglo-Saxon common law" and "continental" law.** Here the interest is not to focus on the classification of different legal systems and concentrate on the analysis of their differences and similarities, but to consider the relevance of this distinction from the point of view of the ideas on the sources of law and ideas concerning standards of legal reasoning.<sup>980</sup>

Very generally, continental law can be described as the Roman-Germanic tradition, whereas the common law has originated from the English type of legal system.<sup>981</sup> Nordic systems have been seen as a distinctive "legal group".<sup>982</sup>

Talcott Parson viewed the English legal system as an integrated system of universal norms. Max Weber, on the other hand, saw the common law - one may say - as being less rational than the law in other European systems<sup>983</sup>. Weber saw capitalism establishing itself in England almost despite the legal system.<sup>984</sup>

On the other hand, the traditional idea, which seems to indicate something essential

<sup>980</sup> See, for example, David, R., Brierly, J.E.C., 1978, Zweigert, K., Kötz, H., 1977, Schlesinger, R.B., 1980 and 1995 (pp.480-481 on reasoning and structural differences in general (for example, law and equity)). Gorla, G. (1980, p.308) maintains that what is often forgotten is that the distinction between common law and continental (civil law) was being used already in 16th century English legal literature. Furthermore, the return to this discussion was a phenomenon of the nationalistic English historiography of the modern age. Moreover, this distinction was taken by the continentals as an self-evident distinction from the beginning of 19th century.

See also, Gorla, G., Moccia, L., 1981, p.146, and Moccia, L., 1981, p.158-159 on the pre-modern and modern concept of 'civil law'. Ingredients of differences, see Lobban, M., 1995, p.34 ff.

For some differences between French and common law, see Koopmans, T., 1991, pp.493-494. One of the characteristics of French law is the strict division between private, criminal and administrative law, and the deductive method of reasoning.

<sup>981</sup> For some definitions, see Gorla, G., Moccia, L., 1981, pp.143-144.

<sup>982</sup> Zweigert, K., Kötz, H., 1977, 284 ff.

<sup>983</sup> Weber, M., 1969, pp.294-297, pp.317-318.

<sup>984</sup> Weber, M., 1969, p.318.

Weber's idea on the English system can be criticised. We may say that predictability and flexibility are not necessarily the features of a positive and formal legal system. Namely, if the positive and formal system does not meet the requirements of social development, the informal system will (Friedman, L.M., 1975, pp.207-208).

I believe that the basic problem of Weber's analysis of common law was the problem of not recognizing the "informal formality". This means that he saw the English legal system through the lenses of his own tradition. It can be claimed that formality in the English system is much more formal in the social sense, i.e., the authority of law is seen from the point of view of the "ruler". The Benthamite approach to law explains a lot. On the other hand, the concept of property - extremely central to the Anglo-Saxon legal philosophy - refers more to some kind of a "holistic" approach of property and capital, which can be seen in the trust institutions and their history.

to the differences between these "philosophically" distinctive spheres of law - connected directly to the traditional problems of comparative law - is the function of trusts.<sup>985</sup> One could maintain that the trust is a case in point for more "holistic" thinking about abstract legal institutions in common law countries. It seems as well that the regulation of trusts is related to their social-economic functions.<sup>986</sup> Unlike many "comparable" regulations of the use of capital in continental systems, the law of trusts seem to be an example of "liberal" regulation, which, however, is directly related to many dimensions of social life.

This kind of conceptualization would be quite strange for continental regulation, as many authors have maintained. In continental systems, these aspects are separate from the regulation of family, contract, property and succession law, and the social functions are not seen holistically. This is an example of how different types of regulations take into account the social dimension of the regulated objects in modern liberal law.<sup>987</sup>

Some differences may be found also in relation to meaning of rights in these systems. This may be related to the absence of written constitutional rights in English legal system, for example.<sup>988</sup>

**Interpretative techniques.** Historically one could attempt to search for differences in interpretative techniques - between common and continental law - from the study of historico-political forms of reasoning in different contexts. Here the differences may relate to the emphasis of the natural law in continental and common law countries.<sup>989</sup>

We may assert, on the other hand, that one of the common denominators for these different legal philosophies seems to be the need for a dynamic, yet coherent, developer of the law. In modern continental countries judges were, historically, mistrusted and provided with codified standards, which led to the glorification of the legislature (and sovereign) in this regard. Judge-made law had no place in the hierarchy of sources of law. In the common law, on the other

<sup>985</sup> See, Zweigert, K., Kötz, H., 1977, p.274 ff., referring to Keeton, G.W., *Social Change in the Law of Trusts* (1958), without, however, a thorough historical-contextual study concerning the "public" dimension of the institution.

<sup>986</sup> Zweigert, K., Kötz, 1977, p.278 ff. See also, Drobniç, U., 1972, p.124.

Basically, people applied to the central power, as requested it to take over the church function of the administration of bodies of property which had been established by a testament or a will etc.

It is interesting that this type of explanation is not emphasized by most of the comparative lawyers.

<sup>987</sup> For some discussion, see Rabel, É., 1978, pp.88-90.

<sup>988</sup> See, Legrand, P., 1996, p.70-71. This makes a distinction - at least formally - between English and the United States legal systems.

<sup>989</sup> Pollock, F., Sir, *The expansion of the common law* (South Hackensack, N.J) 1974, p111 ff. Maitland, F.E., *The constitutional history of England : a course of lectures* delivered by F. W. Maitland (Cambridge).

However, the same tendencies can be found in the attempt to "secularize" natural law thinking during the modern era - even if the context and forms of realization of this objective was different (see, Capelletti, M., 1989, pp.127-128). For the United States, see *ibid*, p.130).

hand, the only possibility for creating law, historically, seemed to be through the judiciary.<sup>990</sup> The general differences in interpretative techniques between continental and Anglo-Saxon systems could be explained, accordingly, by the different (public law) assumptions concerning the separation of powers, and by the roles of statutes and precedents as sources of stability.<sup>991</sup> The strictness of the legal norms in the common law has been contrasted with the broader formulations in the civil law systems<sup>992</sup>.

Consequently, one of the basic differences seems to be - or at least has been till now<sup>993</sup> - the idea of a source of law bound to the different emphasis of the case law. In the continental countries, or, more explicitly, in civil law systems, case law has often been considered

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<sup>990</sup> See Herman, S., 1981, p.337.

<sup>991</sup> The most important source of argument is the precedent. This was given in this century, at the House of Lords a horizontal binding force (the so-called "self-limitation" rule, *Case Young v Bristol Aeroplane Co.*, 1944, KB, p.718.). In 1966, however, the self-limitation rule was not considered as an absolute basis for decisions (*Practice Direction*, House of Lords, (1966) 1 WLR p.1234). This has had some practical consequences. It seem that this rule is not obeyed strictly in English courts. The unity of the Common law has been to be preserved by vertical binding qualities. However, there seems to be a tendency, in the contemporary case-law, to challenge vertical binding force (See, *Prott, L.V.*, 1978, p.425. Cases *Broome v Cassell & Co* (1971) 2 QB, p.354, *Schorxch Meier v Hennin* (1974) 3 WLR, p.823, *Miliangos v Georg Frank (Textiles) Ltd* (1975) QB, p.487, and *Harper v National Coal Board* (1974) QB, p.614).

The comity -doctrine, based on the idea of the unity of Common law, has kept this horizontal binding force within Great Britain in general terms ( *Prott, L.V.*, 1978, p.425).

Legrand, P. (1996, p.74 ff.) has spoken about the difference in the idea of the separation of powers (by referring to works of Kahn-Freund, O.). The idea is that in "*England the executive cannot justify any course of action unless it can rely on conferment of a power by the legislature*". On the other hand, continental governance is based on an inherent power to govern.

The relationship between executive and the judiciary is also interesting. One can claim, namely, that the executive is more independent in English system in relation to judiciary than in continental countries. This is based on the observations that the executive branch seems to act quite progressively in English system, being, however, in the full control of judiciary. (This observation is based on the study of the cases against England in European Court of Human rights, and on the cases of *Horseferry* (1993) and *Pinochet* (1998), see below). This could be explained by the fact that where the executive's powers are confirmed by the Parliamentary authority, it may play an effective role under the supervision of the judicial branch. Interesting is also that where the judiciary is confirming the powers of the executive to act, it also relates strongly the justification to the intention of Parliament (*Pinochet*). This type of interaction between politically and legally clearly separate bodies seems to function as described despite of the sphere of law we are speaking about (European law, international law, or purely internal sphere of law).

This type of interaction seems to be really "action" based, whereas in Finland, for example, some recent cases have show (*Campoy case*, child kidnapping, KKO 1998) that the Supreme court of Finland decides the case strictly on statutory basis, but on the same time tries to put pressure on (and generate discussion in press etc.) the Parliament to reconsider the statutory measures (also international agreements (Hague Convention)!) in order to maintain the systematic solution "politically" correct in general. This Finnish example suits to the description of Kahn-Freund on the role of judiciary in continental systems. (This case in Finland is, nevertheless, an extreme example of this type of function.)

<sup>992</sup> Sacco, R., 1991, p.387. In fact, one could say that there are no legal "rules" at all in common law (Legrand, P., 1996, pp.67-68). Judicial decisions may occasionally "appear" as a set of rules (ibid., p.68).

<sup>993</sup> The contemporary British system, for example, seems to be precedent-based Common law, but, more and more, also based on the modern statutory law. Furthermore, there seem to be less dissenting and additional reasonings in justifications. Weber saw this development in a following way: "*As the bureaucratization of formal legislation progresses, the traditional position of English judge is also likely to be transformed permanently and profoundly*" (1969, p.320).

as an "informal" source of law.<sup>994</sup> This may be related in general, as we mentioned to the historical role of the court in these systems<sup>995</sup>, and to differences in the professionalization of law.

The methods of reasoning are remarkably different between the continental and common law courts. The use of few interpretative techniques is not as strongly stressed in the common law as in continental countries. In fact compared to the continental systems in the common law there seems to be a diversity of accepted modes of reasoning<sup>996</sup>, whereas in continental law interpretation usually concentrates on the analysis of a single legal institution, the common law analysis takes into account a bundle of specific problems connected to the plurality of legal institutions<sup>997</sup>.

On the other hand, the stability of the common law seems also to be related to this question. In the common law, stability may be based on the strict distinction between making law and discovering the law (Blackstone). The former seems to be a complicated process, where the establishment of *stare decisis* depends on the explicitness, the width, or narrowness of the reasoning (in substantive sense). We may say that because law-making is more complicated, the cases are more "isolated", and the inductiveness of the law relates to a discursive attitude towards new factuality and the establishment of rules in general.

Now, the biggest difference may lay exactly in the approach to the principles (rules) and the facts: while continental judges approach the instances from principles, the Common law judge goes from the instances to principles. There is therefore a difference in the need for and nature of systematization.<sup>998</sup> Another remarkable difference relates to the numerous separate

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<sup>994</sup> Capelletti, M., 1989, p.144, Markesinis, P., 1990, p.20. See also, Sacco, 1991, p.321, 346. For some historical analysis, see Gorla, G., Moccia, L., 1981, p.147. For judicial precedents in some continental countries in legal history, see *ibid.* p.150.

<sup>995</sup> See for further analysis, Capelletti, M., 1989, pp.144-146.

<sup>996</sup> Prot, L.V., 1978, p.435.

The main methods of reasoning in British systems are: linguistic, philosophical (or logical), historical, traditional and sociological (Cardozo, B., 1947, (ed. Hall, M.E. and Patterson, E.W.), p.117). This appears in the forms of precedent based arguments, the development of procedural substantive law (by examining underlying principles and reason), and judicial logical arguments.

Logical arguments are not formal logical arguments, but consist in a search for basic underlying principles. There is a tendency to use less historical and judicial logical arguments. The doctrinal writings and theory of interpretation are also considered (Prot, L.V., 1978, p.421 and 429). The importance of these writings has increased (Cases *Broome v Cassell*, *Sweet v Parsley* (1970) AC, p.132, and *Miliangos v Georg Frank (Textiles) Ltd* (1975) QB, 487. (Prot, L.V., 1978, p.430)).

The sociological method has its place in the system probably because of the nature of the historical character of Common Law (See case *Herrington v British Railways Board* (1972) AC, p.902), and the influence of academics such as Roscoe Pound (On the latter, see Prot, L.V., 1978, p.430). The application of these sociological arguments mainly supports exceptions to precedents. There is a tendency to use increasingly sociological arguments.

<sup>997</sup> Zweigert, K., Kötz, H., 1987, p.34, Goutal, J.L., 1996, p.117. Legrand, P. (1996, p.65) has suggested that the reasoning on common law is analogical, and in continent institutional (referring to Samuel, G., *The foundations of Legal reasoning*, 1994)..

<sup>998</sup> Cooper, 1950, p.468 ff. Also, Legrand, P.1996, p.65, 68 ff.

One could claim that the relationship between numerous similar cases is horizontally reflexive. This means that the principles are not self-evidently parts of the case, but the interpretation of the principles embedded in

justifications given in a judgment. This seems to indicate also the general discursive characteristics of the English legal system.

In conclusion, it has been claimed that the written judgments of English courts do not aim at exposing the motivation, conscious or unconscious of a judge, but rather to reconcile an audience with the use of power that such a decision authorizes. It attempts to persuade the public to fall in with the court's activity.<sup>999</sup> This may be the reason why judgments of English courts are verbose<sup>1000</sup>; this is a way to avoid giving an impression of arbitrariness to the public<sup>1001</sup>.

**Some conclusions.** It is clear that there are also many differences in methods of interpretation and justification between so called continental countries. In countries where the *travaux préparatoires* have a role, interpretation may be derived from the preliminary material produced by parliament as a legislator in its open publications. In continental countries, the open analysis of this type of material does not seem to be as relevant as in Nordic systems.

**2.2.2. Is comparative interpretation relevant, when the national court takes into account the norms of European Community Law, European Human Rights law, or International Conventions in its decisions?**

**General remarks.** International obligations are in their formal appearance "comparative norms". They have usually been drafted on a comparative basis based on various national law conceptualizations. This is why the relationship between these "comparative norms" and the comparative interpretation and argumentation appears interesting.

Furthermore, we may speak in connection with regional systems such as the European Human Rights system and the European Community system of a practical form of subsidiarity. That is to say that the balance between the systems superiority and autonomy is sought functionally by the institutions in these systems, mainly by the European-level institutions. This means, that the comparative material plays an extremely important role in finding the basis for these types of decisions.

Consequently, it is interesting to ask, what types of interpretative methods one could apply in state systems in the interpretation of, for example, case law related to international

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the previous judgments is interpreted in a new factual context.

<sup>999</sup> Protz, L.V., 1978, p.428.

<sup>1000</sup> Bankowski, Z., MacCormick, N., 1991, p.392.

<sup>1001</sup> The main difference, from the point of view of the subject, can be seen in the method of justification. The free style and the affective reasoning, in the common law courts, differs from continental though (Lawson, F., 1977, p.366, quoting several authors). Naturally, the system of advocate general lessens the effect of this difference (ibid. p.369).

and regional measures, and how this relates to the question of comparative interpretation, which seems to be *a priori* a possible form of interpretation<sup>1002</sup>. In other words, the basic question is whether one can take into account comparative law aspects in applying international and regional norms in national legal systems.

Another remark ought to be made. Comparative interpretation or the interpretation of law on the basis of international obligations may arise in cases which seem to be problematic cases. In other words, the national court may identify, for example, a conflict between its international obligations or European rules in relation to comparative generality.

**The binding nature of the European Community System and the European Human Rights System.** Brief observations concerning the basic doctrines of the "bindingness" of the norms of these systems can be made in this connection, in order to assist us to focus on the relevance of comparative law in realm of these systems.

The European Court has insisted on the supremacy of European Community law in its decisions. This has also been recognized by the courts of many Member States.<sup>1003</sup>

The idea of the use of European Community Law in national courts has its normative basis in the Treaty and the doctrines created by the European Court of Justice. The binding effect of Community law and the case-law of the European Court of Justice is based on Article 5 of the Treaty on European Union. There has also been a "customary " basis for the application of precedents and provisions in different Member States: principles embedded in Acts (England), constitutions (Netherlands), the Constitution and legal practice of the highest courts (France), and other somewhat undefinable situation (eg. In Italy and Germany).<sup>1004</sup>

However, the European Court of Justice, on a comparative basis<sup>1005</sup>, has provided that to attain the objectives of the Treaty, the role of the executive branch cannot vary from one State to another.<sup>1006</sup> Thus, Community measures must override national measures. Even the fundamental rights of a legal system cannot provide an exemption from this.<sup>1007</sup> This has been contested on some occasions by certain Member States, but lately the development in Member States has confirmed the Court's opinion, as mentioned. However, the discussion concerning this is ongoing.<sup>1008</sup>

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<sup>1002</sup> In this respect, the question concerning the differences between the pre-Community and the post-Community periods is also interesting

<sup>1003</sup> See Hartley, T.C., 1994, pp.238-264, Mathijsen, P.S.R.F., 1990, pp.309-310.

<sup>1004</sup> On this, see e.g. Mathijsen, P.S.R.F., 1990, pp.311-312.

<sup>1005</sup> See case 9 and 58/65 *San Michele v High Authority* (1967) ECR I.

<sup>1006</sup> Case 6/64 *Costa v ENEL* (1964) ECR 585.

<sup>1007</sup> Case 4/73 *Nold v Commission* (1974) ECR 491.

<sup>1008</sup> See, Hartley, T.C., 1994, p.264.

There is, furthermore, the doctrine of direct effect. This can be understood in two ways: the obligation to apply and the obligation to abstain from acting in a particular manner and, on the other hand, the rights of these in favour of whom those obligations have been provided.<sup>1009</sup> Directly applicable provisions in the Treaties can be said to be those provisions that do not allow addressees of an obligation a discretionary latitude. If the Article cannot create individual rights, which the national court must protect, there is no direct effect of that Article.<sup>1010</sup> On the other hand, even if no measures are taken, by the Community, to implement such an Article (contrary to the obligation of an Article), it could still be directly applicable.<sup>1011</sup>

The direct effect of secondary legislation of the Community law is based on the Treaty (regulations, Article 189) and certain case law doctrines (directives). Directives can be directly applicable under certain conditions. This creates an obligation to directly apply the applicable directives, and for that matter, to ask advice from the ECJ if there is doubt on the nature of this measure (positive or negative).

The process of determining the direct applicability of a Community provision is covered by Article 177 (the new Article 234) of the Treaty on European Union (referring to the system of preliminary rulings), although courts can also ascertain this through the case-law of the European Court.

Furthermore, the European Court of Justice has created a doctrine according to which national courts are obliged to interpret their laws in accordance with directives.<sup>1012</sup> This is a natural development stemming from the prohibition of acts of national legislative bodies against Community provisions.<sup>1013</sup>

These are the basic doctrines and provisions of the Community legal system which create obligations on the national courts to take into legal account the Community system.

Regarding the European Human Rights System, Article 1 of the Convention for the protection of Human Rights and Fundamental Freedoms<sup>1014</sup> states:

*"The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined Section I of this Convention"*

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<sup>1009</sup> Mathijsen, P.S.R.F., 1990, p.308. According to current law, states may be penalized for not complying with Community obligations (Amsterdam Treaty). On the other hand, States may be obliged to compensate damage resulting from the failure to implement Community provisions (case 6, 9/90 *Francovich v. Italy* (1991) ECR I-5357).

<sup>1010</sup> Case 10/71 *Ministère Public Luxembourgais v Müller* (1971) ECR 723.

<sup>1011</sup> Case 43/75, *Defrenne v Sabena* (1976) ECR 455.

<sup>1012</sup> Case 14/83 *Colson and Kamann v Landnord Rhein Westfalen* ECR (1984) 1891. See also case 79/83 *Harz v Deutsche Tradax* (1984) ECR 1921.

<sup>1013</sup> Case 230/78 *Eridania v Minister of Agriculture and Forestry* (1979) ECR 2749.

<sup>1014</sup> 4 November 1950 (European Convention on Human Rights).

This Article transforms the declaration of rights (in Section I) into a set of obligations for the States which have ratified the Convention.

Concerning the actual texts, some maintain that this comprises an obligation to incorporate the actual text into domestic law, while others disagree. There is, however, an agreement that States have to give full effect to these rights.<sup>1015</sup> This has been enforced by different legal means, depending on the constitutional practices of each Party to the Convention.

The most effective method of incorporation is through national courts.<sup>1016</sup> They have the primary role.<sup>1017</sup> Because states are obliged "*to ensure that their domestic legislation is compatible with the Convention and, if need be, to make any necessary adjustments to this end*", courts also play their part within this procedure.

However, court decisions alone, based on national legislation, can achieve these objectives and thereby fulfill these obligations. The Convention does not, and nor does the Court<sup>1018</sup>, oblige national courts to formally apply the Convention, its provisions, and case-law in their decisions, or to use the provision of the Convention as "comparative" or analogical material in interpretation or argumentation. The use of provisions and their interpretations made by the European Court of Human Rights depends upon the models and practice of interpretation and argumentation in national courts. The provisions are not directly applicable law in the strictly formal sense in national courts even if substantially this seems to be the case.<sup>1019</sup>

The direct formal application of these rights takes place in the form of the enforcement of decisions of the European Court of Human Rights, decided on the basis of a petition or a suit, by the governments and parliaments via alteration to domestic legislation.

Now, our basic interest concerns the question of whether one can use comparative observations in the interpretation and application of Community law and the norms of the European Human Rights System?<sup>1020</sup>

**The "autonomy approach"**. Basically, all disputable interpretations of Community law must be taken to the European Court of Justice on the basis of the Article 177 (the new Article 234) of the Treaty.<sup>1021</sup> The Community system is an autonomous legal order, and only the Court of

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<sup>1015</sup> See, Jacobs, F.G., 1975, p.10.

<sup>1016</sup> Buergenthal, T., 1965, p.215.

<sup>1017</sup> See also, Case *Sadik v. Greece* (1997) 24 EHRR 323.

<sup>1018</sup> For the role of the European Court of Human Rights on this issue, see Martens, S.K. 1998, p.8.

<sup>1019</sup> On the temporal and territorial scope, see Jacobs, F.G., 1975, pp.12-14.

<sup>1020</sup> This idea applies, to a certain extent, also to the relationship between national systems and the European Human Rights System.

<sup>1021</sup> The Article 177 (the new Article 234) states:

*The Court of Justice shall have jurisdiction to give preliminary rulings concerning:*  
(a) *the interpretation of this Treaty;*

Justice is competent to interpret Community law. At first glance, one could maintain that if some comparative aspects become relevant in the interpretation of Community law, they derive only from the institutional interpretations in the realm of Community law.

In the European Human Rights System, national courts do interpret European Human Rights. The Basic Rights of Germany which form the fundamental premisses of the legal system must be in accordance with European Human Rights. Where explicit constitutional rights are not provided within the system, such that is the case in English and Finnish legal systems, for example, the system must evaluate the conformity of its decisions with European human rights principles. National Courts have a relative autonomy in checking this compatibility.

Consequently, national courts are obliged to consider European Human Rights on the basis of the above-cited "conformity rule". In practice this means that in most systems, the Human Rights Court's decisions are taken into account in deciding national cases, and it is national courts which determine the practical application of human rights norms and their content in the first place. The control by the European Court of Human Rights is *a posteriori* in nature and its processes are triggered by applications to the system. Because no pending of national processes takes place automatically<sup>1022</sup>, no autonomy for the Human Rights Court exists. It is a legal order which decides always on the acceptability of material national decisions, not on any autonomous interpretation of European human rights principles.

Naturally, one could treat these interpretations as autonomous interpretations. However, because national courts also have the possibility of interpreting the human rights, there does not seem to exist any autonomy in the sense of the Community legal system. Furthermore, the idea of "functional subsidiarity" is embedded *a priori* in many Articles in the Convention, and the European Court of Human Rights has constantly developed extensive jurisprudence on the "margin of appreciation" doctrine.

Because the application of Community law in national courts, however, demands also an interpretation of national provisions in determining the balance between national rules and Community rules or to identify and resolve possible conflicts between national rules and Community rules, the question arises as to whether one can apply comparative observations in the interpretation of national rules, when, in the same case, the matter concerns the application

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*(b) the validity and interpretation of acts of the institutions of the Community and of the ECB;*

*(c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide where such a question is raised before any court or tribunal of a Member States, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give a judgment, request the Court of Justice to give a preliminary ruling thereon.*

*Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.*

<sup>1022</sup> This is so except in very rare cases like the pending the internal execution processes based on the rule 38 of the Court's procedure.

of Community rules? In a sense, this would make it possible to interpret the generality in national legal systems in order to "fulfil" or to "substantiate" applicable national provisions, and to integrate the national rule into the preexisting interpretation of the European rule.

*A priori* national systems are considered to be in conformity with European rules. The interpretation must be determined by the principle of "Community Law friendly interpretation". In this sense, any comparative material cannot justify any deviation from the Community rule, even if the national rule is be found, on a comparative basis, to be against the prevailing interpretation of the Community rule. If such a conflict existed, the national norm would be invalidated, or where the Community rule is also ambitious, it should be submitted to determination within the processes of the Community Court (Article 177 (the new Article 234)). The comparative generality in European legal systems cannot justify a deviation from the prevailing wording or interpretation at the Community level.

On the other hand, as we will see, comparative generality, because interpreted in "qualitative" ways, are not necessarily an indication of the prevailing Community interpretation. In this sense the role of comparative law is quite problematic in cases where the question also concerns the interpretation of Community norms<sup>1023</sup>. At least, it does not seem to be the "same" at these two levels of legal systems. The qualifying elements are institutionally attached, and due to the superiority of the Community system, Community level comparative interpretation prevails.<sup>1024</sup>

We may say, on the other hand, that in the case of the human rights system, national courts could interpret by comparative means prevailing interpretations of the European Court of Human Rights or the decisions by the Commission. Comparative "deviancies" from these interpretations could be possible because the courts are able to see this as an indication of the current situation within the "*evolution of European standard*", as it is sometimes expressed in the European Court of Human Rights decisions.

Nevertheless, as maintained, the final decision is made, in the case of a petition brought by a competent person, in the European Court of Human Rights. An ongoing conflict between the European human rights principles and national provisions cannot be sustained by national courts, because in the final analysis, identification of this conflict is made only by the Court of Human Rights<sup>1025</sup>. Basically, the application of human rights principles in national Courts is a matter of systematic interpretation based on the "human rights friendly" interpretation. In this sense, there are no obstacles to comparatively interpretation of law in

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<sup>1023</sup> This is quite interesting because it suggests that the "Europeanization" of national legislation actually diminishes the role of comparative law in legal adjudication. This idea seems to be contrary to prevailing opinions. For example, judges seem to consider "Europeanization" as a possibility for the increasing use of comparative perspectives.

<sup>1024</sup> In theoretical terms this seems to indicate that the "analogical key" or the methods of restrictive, expansive or *e contrario* interpretations can be applied only by the Community Court.

<sup>1025</sup> Because of the nature of the "principled" systems, the conflicts are extremely difficult to identify a prior.

national courts, though some European human rights aspects are considered too.

Now, in conclusion, we may note that it is the idea of the "*autonomy and superiority of an order*" which is connected to the possibility of using comparative material in legal interpretation and reasoning in national courts when they are interpreting the norms of European legal systems. In the case of European Community law, there seems to be a total impossibility surrounding the use of comparative material as interpretative material, when the norms of the Community legal system are applied in national courts. In case this material is used, there seems to be a strong assumption of the "imprecision" of the applied norm, in which case the matter would have been a matter of interpretation by the relevant European-level institution. All other sources (the case law of the European Court, general principles etc.) seem to be relevant, but in the case where comparative aspects are taken into account, the national decision-maker seems to go beyond its interpretational competence.

What is interesting is the fact that when the interpretation goes beyond its systematic context, a lack of clarity is assumed. This is based on the fact that the system is assumed to always apply always clear rules, and the comparative aspects raise the question of imprecision. In this case, for example, there are strong arguments for "non-compliance" with European procedural norms, and some doubt concerning the "correctness" surrounding the substantial interpretation by national court.

Another interesting idea relates to the fact that only the European Court seems to be able to apply qualitative comparative law. The difference between the competencies of these courts seems to relate to the possibility of using "complete" comparative legal method. This, on the other hand, transforms this question into a discourse between legal dogmatics and scientific comparative law in relation to the competencies of the European Court.

We could claim, however, that comparative considerations may have quite a peculiar function in the relationship between European Community law and national law. We could imagine that comparative law considerations play a role when national courts are considering the question of the clarity or Community law provisions in relation to the Article 177 (the new Article 234) of Community law. Namely, in considering the need for a preliminary ruling, comparative law studies of disparity or generality in implementation practice may give an indication concerning the lack of clarity of Community law provisions. The disparity may lead to the conclusion that the Community provision is unclear, whereas the generality indicates that the Community provision has been understood in a quite uniform way. In this sense, comparative law may "systematize" the premises of the preliminary ruling procedure.

In conclusion, we may note that comparative law as a "complete" source of law is excluded in cases where there is another "superior" and "autonomous" interpreter of the norms in question. Comparative law as a source of law is a source of law of the "superior" and "autonomous" order, but not for the order which applies these norms in the first instance. Furthermore, if comparative material is used in the application of the norms of the Community

system by national courts, it may be only a matter of "institutional or individual heuristics" by which the decision-maker may convince itself of the "good faith" application of these European norms. In this case, as maintained, their use is instrumental because of the closed decision-making processes because the good faith interpretation cannot be an argument concerning the application of clear and unequivocal norms.

This does not seem to be the case when interpreting European human rights.

**National courts and international law.** The relevance of comparative law in national courts can be seen particularly in the field of public international law, especially in the realm of international criminal law, procedural and extradition questions, and the questions of enforcement and recognition of foreign judgments<sup>1026</sup>.

The use of international law (legal material) as a source of law in national courts has its normative basis in each national system. It is embedded in the traditional doctrines concerning the effects of international obligations and of the sources of law in each national legal system. The implementation of international law is left to the constitutions of individual states<sup>1027</sup>.

As is well-known, in dualistic systems international law (principles, treaties, and custom) must be transformed into national legal systems by "internal" processes. Usually national courts are not able, in dualistic systems, to directly apply international law as such. In monistic, on the other hand, international obligations are directly applicable law, i.e. individuals are also able to claim rights on the basis of international measures<sup>1028</sup>.

All the same, the application of international agreements, and the material directly connected to these measures in national courts differs from the application of international agreements effected via national legislation or a directly applicable international norm. Namely, courts might have to examine the textual and historical meaning and systematic, purposive and teleological dimensions of the international treaty and its application when using it as a legal material. Even if implementing legislation, in a specific dualistic state system, has been enacted, there might still be cases where courts, nevertheless, have to go beyond these formal sources and consider the development of practice at the international level. This may be relevant especially in cases where an international organ has been established to develop law based on an international treaty or procedure.

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<sup>1026</sup> See, Green, L.C., 1967, pp.42-66. International element as a basis of comparative interpretation, see Schlesinger, 1980, p.29.

For examples, see Schreuer, C.H., 1971 (supplementary text for determining lacuna and text, the normative role, pp.258-261, international law in France and the processes of interpretation, *ibid.*, pp.260-265). In the United States, *ibid.*, pp.265 ff. How could be used, *ibid.*, p.272. The use may be substantiative or illustrative (Kisch, I., 1981, p.160).

<sup>1027</sup> Schreuer, Ch., 1993, p.457, Reuter, P., p.17, 21 ff.

<sup>1028</sup> On the theories and nature of different types of systems, see Reuter, P., 1995, p.17

We come to the question of the use of comparative law in national courts when interpreting and applying international norms. As in the case of travaux préparatoires of international treaty rules, the comparative material is also a matter for the internal doctrines concerning the sources of law. However, because no international arrangement comprises an autonomously superior interpretative order (apart from the European Community Law, as noted above) there do not seem to be problems in using comparative material as interpretative material. On the contrary, because international law recognizes state practices as a source of law, and because international bodies use this material, although selectively, comparative law may be source of law for national courts when interpreting international law of even greater relevance. However, many problems remain, as we will see in the case of comparative law in international legal institutions. Comparative studies related to the application of international law are always qualitatively selective, and they serve only to support certain conclusions.

In conclusion, we may say that the nature of the normative relationship between the international and national level in general determines the possibility for the use of comparative material in the interpretation of international law in national courts. However, the basic idea could be that the use of comparative law applies the same "principles" as does to the use of comparative material in international bodies. The "*a posteriori* check" idea regulating the relationship between these levels guarantees the final word for the international legal order.

Nevertheless, we may note that some problems may appear in cases international and national levels use comparative material as a source of law. In case both have used the material in their interpretation, conflicting interpretations of comparative law may appear, which generates the idea that comparative information may be interpreted differently. This may cause problems in the international legal realm, because it introduces arguments by particularity into the international legal order. Here the question can be associated with the normative premises of the qualitative comparative interpretation. This problem may be resolved only by referring to (functional) premises of interpretation of the interpreter himself.

### 2.2.3. Some examples

#### 2.2.3.1. Some courts of United Kingdom and comparative reasoning

**Introduction.** The legal system of the United Kingdom is analysed here more thoroughly than other systems mainly because of the openness and the quality of the argumentative and justificatory practice in relation to comparative law as a source of law. Some examples are

referred to directly in order to give an idea of the normative issues they are related to.<sup>1029</sup>

**International law and comparative reasoning.** In the English system we recognize several explicit references to international law. One of the most famous formulations of the legal obligation to do so is presented by the Lord Denning<sup>1030</sup>:

*"I think we are entitled to look at it, because it is an instrument, which is binding in international law, and we ought always interpret our statutes so as to be in conformity with international law. Our statute does not in terms incorporate the convention nor refer to it, but that does not matter. We can look at it."*

Furthermore<sup>1031</sup>:

*"If the terms of legislation are not clear, however, but are reasonably capable for more than meaning, the treaty itself becomes relevant. There is a prima facie presumption that parliament does not intend to act in breach of international law including specific treaty obligations".*

The leading case regarding the influence of "comparatively interpreted" international law on interpretation within the British system is *Trendtex Trading Corporation Ltd v Central Bank of Nigeria*<sup>1032</sup>. Here the Court of Appeal examined the rules of international law concerning the immunity claim of foreign states in a contractual dispute before the English courts and, furthermore, it studied the nature of international law as interpretative material in the British system.

Lords gave an extensive analysis on the nature of international law and its relationship to British system. According to Lord Denning MR, international law

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<sup>1029</sup> Some examples from the early history are given by Schmitthoff, M., 1941, p. 104 ff. Civil law, for example, was used in some occasions:

*"The Roman law forms no rule, binding itself, upon the subjects of this realms; but in deciding the case upon principle, where no direct authority can be cited from our books, it affords no small evidence of the soundness of the conclusion at which we have arrived, if it proves to be supported by that law, the fruit of the researches of the most learned men, the collected wisdom of ages and the groundwork of the municipal law of the most countries of Europe"* (*Acton v Blundell* (1843) 12 M. & W. 324, 353, Tindal, C.J.)

It was considered as "great assistance", and admissible, if it was "relevant" on decision on "principle", there were "no English authorities", and problem had came up in other jurisdictions as well, or where the use was technical in character (Schmitthoff, M., 1941, pp.104-105). Later there were some emphasis on American and Commonwealth law (*ibid.*, pp.106-107). See also, Gordley, J., 1995, p.558.

<sup>1030</sup> Court of Appeal, *Salomon v Commission custom and exiles* (1966) 2 All ER 340.

<sup>1031</sup> See, (1969) 1 All ER 82.

<sup>1032</sup> *Trendtex Trading Corporation Ltd v Central Bank of Nigeria* (1977) 1 All ER, 881-911.

*"arise out of the consensus of the civilized nations of the world. All nations agree on this. So it is part of the law of nations".*

However,

*"the courts of every country differ in their application of it..."*

and they define rules by

*"seeking guidance from decisions of the courts of other countries, from the jurists who have defined the problem, from treaties and conventions and above all, defining the rule in terms which are consonant with justice rather than adverted to it."*

On the question of the relationship between international law and English Law, Lord Denning answered that

*"...rules of international law, as existing from time to time, do form part of our English Law... but decisions of this court, as to what was the ruling of international law 50 or 60 ago, is not binding on this court today."*

When examining the content of the rule on absolute immunity, he referred to several comparative decisions, and stated that absolute immunity

*"...can no longer be considered a rule of international law. ...Great impetus was given to it [restrictive immunity] in 1952 in the famous Tate letter in the United States. Many countries have now adopted it. We have been given a valuable collection of recent decisions in which the courts of Belgium, Holland, the German Federal Republic, the United States of America and others have abandoned the absolute immunity and granted only restrictive immunity.... To this I would add European Convention of State Immunity 1972.... We can and should state our view as to those rules and apply them as we think best, leaving it to the House to reverse us if we are wrong"*

*"It seems to me that it is the duty of the Member States, and of national courts of those states, to bring the law as to sovereign immunity into harmony through community. The rules applied by each Member State on the subject should be the same as the rules applied by the others. That is by adopting doctrine of restrictive immunity on the lines I have suggested".*

In this judgment, Lord Denning also developed a construction and legitimation of comparative analysis as an interpretative method. The rule of international law should thus be, according to Lord Denning, investigated on a case by case basis and with the help of comparative analysis in the international community. Description of the method of interpretation seemed to comply with the traditional approach to international law. However, strong normative elements

appear in the recommendation. The analysis was extremely value-based.

When applying comparative analysis to the case under discussion, he made a strong example type of comparative statement in favour of his interpretation:

*"But it affords strong support for the view I have expressed, seeing that the German court [Federal Constitutional Court] decided in just the same way for just the same reasons."*

When examining the nature of the defendant as an organ of government, he examined differences in the methods of defining governmental departments in different countries. As a conclusion, supported by this theoretical development of the comparative method for courts interpreting and applying international and English law and the rule founded on comparative argument, he found that the plea of sovereign immunity did not assist the Central Bank of Nigeria and consequently allowed the appeal.

Lord Stephenson, on the other hand, legitimated the analysis of international law through an attempt to avoid a breach of an international rule. He also relied on an extensive comparative (historical-comparative) analysis (factoring in "*courts outside this country*", decisions of the "*United States Supreme Court*", "*Law merchant*" and doctrinal opinions), and made an explicit reference to the decisions of foreign courts. However, he arrived at a normative statement and stressed the fact that

*"the law sought to be applied must, like anything else, be proved by satisfactory evidence which must be shown either that... recognized and acted upon by our own country ... and has been so widely and generally accepted, that it can hardly be supposed that any civilized state would repudiate it. The mere opinions of jurists...are not in themselves sufficient. ..express sanction of international agreement or gradually have grown to be part of the international law by their frequent practical recognition in dealing between various nations... [ref. To Lord Russell of Killowen] international law is...sum of the rules of usages which civilized states have agreed".*

and that

*"But rules of international law, whether they are part of our law or a source of law, must be in some sense proved"*

This proof occurs, according to him, by presenting material from international and national decisions and doctrinal opinions. The reasoning seemed to be basically concentrated upon the method of interpretation of international law.

To the question of whether should the English courts should recognize the change in international rules or await its recognition by the government or by an Act of Parliament, he answered that satisfactory comparative evidence exists and that the court should follow the

example of the German and United States' courts on the question of restrictive immunity. He also referred to Article 3(d) of the Treaty establishing the European Economic Community and to the Basel Convention of 1972 of the Members of the Council of Europe

*"which ought to result in the courts of all the European Economic Community countries coming as close to each other as possible in their decisions the law which they apply and their application of it. If the courts of EEC countries were out of step with other countries... there might be a conflict".*

Lord Sawn LJ. also relied on this comparative material, but examined the recognition of a change from the "internal" point of view. However, he agreed with Lord Denning that international law does not recognize the concept of *stare decisis*. The rule of international law has to be looked at, on a comparative basis, in each case in which the problem arises. He also stated that while the use of comparative argument is the use of a "group" argument, the rule of an individual country is not the same as the result of an extensive comparative study.

In the House of Lords decision in *Fothergill v Monarch Airlines Ltd*<sup>1033</sup> the question arose as to whether the *travaux préparatoires* of an international treaty should be used in the interpretation of an international convention given effect to by English legislation. There was little previous evidence of this practice in English case-law, although some cases were found. The question was examined comparatively (by referring to foreign national practices).

It was maintained that the text in question had been incorporated in the Statute. The material question was the interpretation of an article in the Convention (Article 26 of the Warsaw Convention of 1929). The Convention was introduced into English law by the Carriage by Air Act 1932. In 1955, changes were made to the Convention and they were imported into English law by the Carriage by Air Act, 1961. There was a provision in the new convention (incorporated into English law) maintaining that if any inconsistency should arise between the text in English and the text in French, the French text would prevail.

Thus, there was an obligation to examine the foreign text and its interpretations in that particular language and legal system. This was undertaken by the court. However, the most important comparative study had already been done in the Court of Appeal between the different parties to the Convention, where it had inspected foreign and international doctrines and cases from foreign courts. References were made to a number of cases in various foreign countries, among which only a few were explicitly cited in the decision of the House of Lords.<sup>1034</sup> This was explained in the decision by Lord Wiberforce. The reasons for this were that

*"with the exception of one decision, the decision of the Belgian Cour de*

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<sup>1033</sup> The House of Lords, *Fothergill v Monarch Airlines Ltd* (1980) 2 All ER, p.696 ff.

<sup>1034</sup> Germany, Switzerland, Argentine, France.

*Cassation, they are not decisions of highest courts; secondly, the process of law reporting varies from country to country and they may not be exhaustive. ... Thirdly, in any event, it was not beyond argument when the facts of each case were carefully examined, on which side the preponderance in quantity, or quality, lay. It is safe to say that your Lordships decision in this case will not be out of the line with the balance of decisions given elsewhere".*

However, in the interest of uniformity, Lord Wilberforce considered the general practice in the courts of other Contracting States. He made reference to a comprehensive comparative study made in 1975 for the European Court of Justice.<sup>1035</sup> Furthermore, he supported his conclusions with references to the case law of the Court of Appeal of the United States on the Warsaw Convention<sup>1036</sup> and to the general practice of the courts of the United States. In particular, he made reference to the decision of the French Cour de Cassation and the conclusion of the advocate general.<sup>1037</sup> As a conclusion, on the interpretative technique for using *travaux préparatoires*, he maintained that

*"the travaux préparatoires ought not to be treated as gospel truth. (However) there might be cases where such travaux préparatoires can profitably be used (cautiously)".*

The conditions for this were, according to him, that

*"the material involved is public and accessible and, secondly, that the travaux préparatoires clearly and disputably point to definite legislative intention."*

Lord Diplock did reach a conclusion without this comparative material, but he did not exclude the use of it in interpretation. On the other hand, he considered the use of these *travaux préparatoires* to be a constitutional question. He referred to the Vienna Convention on the Law of Treaties of 1969, to which England is party. According to this, treaties should be interpreted in "good faith" and by reference to "supplementary means of interpretation" which include the preparatory work. According to him, it was a constitutional obligation for an English judge to interpret English law (enacted following an international treaty) in the light of preparatory works. The treaties should also be interpreted using the "writings of academic lawyers ... courts of other European States". The value of these depends on their

*"reputation and status, the extent to which its decisions are binding on courts of*

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<sup>1035</sup> *Official Report of the Judicial and Academic Conference*, European Court of Justice (1975).

<sup>1036</sup> *Day v Transworld Airlines* (1975) 528 F 2d 31.

<sup>1037</sup> Some analyses (and possible personal reasons for Wilberforce's interest in French law), Jolowicz, J.A., 1994, p.751.

*coordinate and inferior jurisdiction in its own country and the coverage of the national law reporting system."*

Lord Fraser of Tullybelton made more cautious use of preparatory works. However, he said that with regard to the expressions and definitions in treaties, preparatory works should be published to the same extent as the incorporating act itself, and in this respect, preparatory works have never been "*reasonably accessible to private citizens or even to lawyers*".

Lord Scarman, on the other hand, stressed the importance of uniformity of interpretation in different states. Support for such interpretation should be accorded as it is in other countries. This led to a comparative study of interpretative techniques of courts of other countries and legal writings. However, he stressed that the use of comparative material (such as travaux préparatoires) depends solely on the individual judge.

Lord Roskill made use of different international conventions (maritime conventions, etc.) to interpret the concepts embodied within the Warsaw Convention. He considered preparatory works to be non-binding material for interpretation. It did not seem

*"legitimate to look at that source [preparatory works of international convention, MK] to solve ambiguities in the legislation which has made those treaty or convention provisions part of the ordinary municipal law of this country".*<sup>1038</sup>

In English law, there has been also a study of the nature ("purpose and structure") of the European Convention on Recognition and Enforcement of Decisions concerning the Custody of Children by comparison with another legal instrument, the Hague Convention on the Civil Aspects of International Child Abduction.<sup>1039</sup> Furthermore, comparative observations have appeared in the interpretation of the Convention relating to the Status of refugees (and 1967 protocol)<sup>1040</sup>. In Maritime cases comparative observations appear constantly.<sup>1041</sup>

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<sup>1038</sup> Further development, House of Lords, *Sidhu v. British Airways (H.L.(E&Sc.))* (1997) 2 W.L.R., 10 Jan. 1997. Here the approach to a 'comparative interpretation' was explained by Lord Hope of Craighead (p.37):

*"Parties were agreed that we might have regard to this material [comparative] for such assistance as it might give. Clearly, much must depend upon the status of each court and of the extent to which the point of issue has been subject to careful analysis. Material of this kind, where it is found to be of appropriate standing and quality, may be of some help in pointing towards an interpretation of the Convention which has received general acceptance in other countries. But the value of the material will be reduced if the decisions conflict with each other or if no clear line of approach appears from them after they have been analysed"*

The court also rejected the application of the European Human rights Convention to the interpretation of this particular Convention. Some linguistic comparisons were also made.

<sup>1039</sup> House of Lords, *In re S. (A Minor) Custody: Habitual residence* (1997) 3 W.L.R., p.597. Lord Slynn of Hadley. See also, Court of Appeal, *Quanes v. Secretary of State for the Home Department* (1998) 1 W.L.R., 30 Jan. 1998.

<sup>1040</sup> Court of Appeal, *Regina v. Immigration Appeal Tribunal, Ex. P. Shah (C.A.)* (1998) 1 W.L.R., 16 Jan. 1998, p.8081 (references to Australian, United States, and Canadian case law).

<sup>1041</sup> See, for example, *Effort Shipping Ltd. v. Linden Management S.a.* (1998) 2 W.L.R. 6 Feb. 1998, p.212.

Finally, we may offer an example of the possible different function of the traditional state comparative law arguments in their relation to new types of “international law comparisons” via an analysis of the *Pinochet* case in the House of Lords<sup>1042</sup>.

In this case the question concerned the immunity of a person on the basis of state immunity doctrine (as codified in the State Immunity Act 1978), (an idea of the Anglo-American common law) doctrine of the act of state, (codified) personal immunity, and residual state immunity. The defendant claimed that his diplomatic immunity cannot be breached on the basis of alleged crimes because he was acting during the period under consideration, as a head of State. Those acts cannot form the basis for an arrest and extradition proceedings.

Two of the judges, upholding the immunity of the person in their dissenting opinions, referred in their reasoning both to different international and national legal orders in addition to the traditional doctrines and provisions of the English legal system.

The first judge found a disparity in the role of the head of state between various systems. By using arguments derived from customary international law authorities, an cases from France and the United States, travaux préparatoires, comparisons of international conventions, and general evaluation of tendencies, the judge neglected the idea that there is in this matter a general practice, consensus, *jus cogens*, or a generally agreed definition of crimes against humanity. He pointed out slowness in this development, the absence of crystallized principles and the persistence of uncertainty. Nevertheless, he made some remarks *de lege ferenda* in relation to the lifting of the sovereign immunity, definitions, and the role of national courts in this respect.

In dealing with the act of state doctrine, he made a thorough study of the case law of United States courts. In conclusion, he applied the idea of “judicial restraint or abstention”.

Another dissenting judge discussed the issue based on United States case-law and opinions of legal authorities beyond domestic sources. Arguments concerning the risks of endangered foreign relations, put forward by the defendant, were also examined. In examining the Parliaments intention, he made the observation that the enactment of the provision relating to “constitutionally responsible rules of public officials” in the implementary legislation of the Genocide Convention indicated the intention to maintain sovereign immunity. Accordingly, even if, in the Torture and Hostages Conventions, this type of provision did not exist, it was “reasonable to suppose that, as with genocide, the equivalent provision would have [also] been omitted”. This was supported by domestic and US case law, and different international texts and opinions of international institutions. Interpretation of the State Immunity Act and case law was also involved.

The question turned, accordingly, upon the issue of the “intention” of Parliament.

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<sup>1042</sup> House of Lords, *Regina v. Bartle and the Commissioner of Police for the Metropolis and others Ex parte Pinochet (on appeal from a Divisional Court of the Queen’s Bench Division), and Regina v. Evans...*, Session 1998-99 Publications on the Internet Judgments, On 25 November 1998.

Two judges, who allowed the legitimacy of the arrest and extradition proceedings, argued strictly on the basis of "international comparisons" and the intention of Parliament, the latter being based on the nature of the implementing legislation (of Torture and Hostage-taking Conventions) and criminal law. The third judge maintained that "*it must follow that Parliament did not intend the act of state doctrine to apply in such cases*". He backed up his argument by observations concerning the events immediately proceeding the signing of the Conventions. According to him, these formed a part of the fight against international terrorism. The final breach of immunity was based on the observation that

*"international law does not require the grant of wider immunity. And it hardly needs saying that torture of his own subjects, or of aliens, would not be regarded by international law as a function of a head of the state..."*

*But international law has made plain that certain types of conduct, including torture and hostage taking, are not acceptable conduct on the part of anyone. This applies as much to heads of state, or even more, as it does to everyone else; the contrary conclusion would make a mockery of international law"*

The "international comparisons" were based on quite strictly literal observations.

The judgments of the Nürnberg trial and unanimous resolutions of United Nations were also considered. On the other hand, the study of customary international law reflected in the State Immunity Act 1978 did, according to him, not recognize torture and Hostage-taking as parts of the function of the Head of the State.

In conclusion, he regarded that England has asserted extra-territorial jurisdiction on these matters.

The fourth judge maintained that immunity does not seem to be absolute. On the other hand, the idea that the acts belonged to the functions of the Head of the State did not find support within international law. Hence, immunity was denied to the arrested person. In finding the inapplicability of the Act of State doctrine, he used arguments of customary international law, and also excerpts from the Third Restatement of the Foreign Relations Law of the United States.

The fifth judge also upheld the legality of the arrest and extradition proceedings.

This case seem to clearly demonstrate certain characteristics of the use of comparative argument. Two dissenting judges relied quite strongly upon comparative observations, which supported their obviously conservative views. On the other hand, "international" comparison (customary international law) and considerations of the implementing legislation in that connection necessitated a careful literal interpretation. This type of interpretation was supported by historical considerations and arguments referring to the intention of Parliament. This phenomenon can be strongly associated with the value-based nature of the decision.

The case was reconsidered in January 1999 because of the fact that one judge

belonged to the Amnesty International and was, consequently, challengeable.<sup>1043</sup>

**Some remarks.** In the English system, there seems to be a liberal attitude towards the use of "extralegal" material in legal interpretation. Although this is mainly so in cases having an international nature, there are also "national" cases, in which the courts have gone beyond internal sources. This has been legitimated basically by the uniformity of interpretation within the international legal community.

In general, it seems clear that the courts in the United Kingdom look to national systems when they are undertaking an interpretation of international law. English courts seem to refer to decisions from many countries including those from non-common law countries<sup>1044</sup>. These sources must be, however, authoritative, and they have to be studied carefully and generally. The material does not seem to be restricted only to "authentic" comparisons, but includes also comparisons made within institutions external to the system. Furthermore, the case law considered is not necessarily restricted to the highest courts but lower court decisions can also be used.

On the basis of the analysed case law on international law, one can make certain remarks. Comparative interpretation seems to be closely connected to the introduction of different ideas on interpretative techniques and methods in a value based but also traditional way. Comparative observations have supported the use of textual sources and travaux préparatoires in relation to different legal (international) measures. Comparative observations have, consequently, led, in this sense, to common sense and literal interpretations and interpretations of the presumed intent of Parliament. These two methods come together in a quite interesting way.

On the other hand, the comparative approach can be used because international law has to be proved. By comparative arguments, one seems to be able to make normative statements concerning the nature of the method of interpretation of incorporated international law. Here the

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<sup>1043</sup> In a case House of Lords, *Regina v Horseferry Road Magistrates Court ex parte Bennet* (1993) WLR 90 (abuse of process) a man a citizen of New Zealand had committed a crime in England, and was forcefully delivered back to England from South Africa, although there was no extradition agreement between these countries. Several judges referred (also indirectly) to foreign cases (i.e. cases from New Zealand, United States, Canadian, Hong Kong, and South African). Citations were presented by parties of the case. The questions dealt with due process, mutually accepted jurisdictions, jurisdictional questions in general, breach of international law, rule of law, etc. Comparative observations were quite "analogical", but arguments derived from these comparative observations were useful. Common law coherence seemed to be one of the basic reasons for adapting these comparative observations.

<sup>1044</sup> Marsh, N.S 1977, p.658.

The Judicial Committee of Privy Council decides all matters of New Zealand law as a final court of Appeal (Winterton, G., 1975, p.73, in Australian private law matters this used to be so, but the Australia has abolished the right to appeal recently). Furthermore, one can say that there is a process of internal modelling between the Commonwealth countries (idem.).

The Privy Council has had a difficult role, because the judges have been obliged in Privy Council to apply for example Hindu and Islamic laws in India (Cinkalese and Tamil law in Ceylon, Chinese law in Hong Kong etc. (ibid., p.91).

“generality” seems to be the main type of argument. In terms of the substance of the decision, on the other hand, example-type reasoning seems to be most commonly used.

The basic idea seems to be the harmony between domestic and international law.

Some comparative observations were made also concerning the reporting techniques in different countries so as to reinforce the comparative analysis produced.

What also seems to be remarkable is that English Courts “compare” additionally international conventions and Treaties in a quite extensive way. The latest cases provide also an interesting idea concerning the relationship between the role of “international law comparisons” and traditional state-law comparisons. We will discuss this idea in the general conclusions of the study.

It is also interesting to note that the institution of “stare decisis” was, to a certain extent, paralleled in comparative analysis.

**European Convention of Human Rights (ECHR).** British courts interpreted the law during the last part of the 20th century so as to ensure that the obligations of protection deriving from the protection of ECHR are met<sup>1045</sup>. The Convention Human Rights was not initially incorporated into the domestic law in England. This was changed by the recent Human Rights Bill. It has been maintained that this is a major constitutional change<sup>1046</sup>, and that it may even give horizontal effect to human rights in British legal thinking.<sup>1047</sup> It may lead to change from the level form to that of substance.<sup>1048</sup>

A typical example of this is the case of *R v Secretary of State for the Home Department, ex parte Doody and others*<sup>1049</sup>, where Staughton LJ used a decision of the European Court of Human Rights to confirm an interpretation concerning the release of a prisoner who was sentenced to life imprisonment.<sup>1050</sup> The “comparative” approach to the case law of the Human

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<sup>1045</sup> Bankowski, Z., MacCormick, N., 1991, p.396.

<sup>1046</sup> Lord Irvine of Lairg, 1998, p.221, for the implications of this change for adjudication and legislation, see *ibid.*, p.225 ff.

<sup>1047</sup> In the new Human Rights Bill in effect from 1998, interpretation of legislation should “be read and given effect to in a way which is compatible with Convention rights” (Clause 3 of the Bill). This seems to be kind of a ‘choice of interpretation’ rule.

See concerning New Bill, Marshall, G, 1998, pp.167-168. See historically, Lord Lester of Herne Hill, Q.C., U.K. Acceptance of the Strasbourg Jurisdiction: What really went on in Whitehall in 1965. In: *Public Law 1998*, p.253.

<sup>1048</sup> Lord Irvine of Lairg, 1998, p.235. On the legal and moral implications of this, see John Laws Sir, *The Limitations of Human Rights*. In: *Public Law*, 1998, p.254 ff.

<sup>1049</sup> *R v Secretary of State for the Home Department, ex parte Doody and other appeals* (1993) 1 All ER 152.

<sup>1050</sup> On the other hand, in the *Derbyshire County Council v Times Newspapers Ltd and others* ((1993) All ER 1011) Lord Keith of Kinkel made reference to a case of the Court of Appeal, where the European Convention of Human Rights (Article 10) and the jurisprudence of the Court was used to confirm the decision that a local authority does not have the right to maintain an action of damages for defamation.

In the case *P v Liverpool Post Plc* ((1991) 2 AC 370) there was an examination of the nature of the

Rights Court was also justified on the following grounds:

*"... the domestic court will give great weight to the judgments, in particular recent judgments, made by the European Court of Human Rights in cases where the facts are similar to the case before the domestic court. That court has unrivalled experience in this field and it would be foolish not to take advantage of that experience. The tensions which the European Court of Human Rights has to resolve are similar to those facing the domestic court and this will often be the case even though a particular case before the European Court of Human Rights sprang from the facts in a country other than England."*<sup>1051</sup>

It seems, however, that the analysis of different national systems is not extensive in connection to the human rights interpretations. Furthermore, at least during 1996-1998, most of the cases dealing with the European Convention of Human rights did not undertake a comparative examination of issues.

However, the method of incorporation of this type of reasoning has led in some cases to comparative interpretation and argumentation in the field of human rights and in the indirect application of the European Convention of Human Rights. As in the case of international law, the practice of the contracting states is examined. For example, in the House of Lords decision of *X Ltd v Morgan-Grampian Ltd*<sup>1052</sup> the Convention's Article 10 and case-law was used to interpret section 10 of the Contempt of Court Act 1981 (disclosure of journalistic sources). Reference was also made to the "*audi alteram partem*" rule as a rule at the "*root of every civilized system of law*".<sup>1053</sup>

One of the most recent examples can be mentioned. Ward, L.J. in the Court of Appeal in a case dealing with the alleged nullity of a marriage (between a woman and a transsexual, who had kept his transsexuality secret), and ancillary financial relief referred to

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mental health tribunal as a court. Lord Donaldson investigated the question with the assistance of a definition of the Court in the European Human Rights system. In the same case, there was a question concerning the restrictions of broadcasting in English law in the light of the Convention's Article 10 ("prescribed by law") and the jurisprudence of the European Court was also analysed. By paralleling the jurisprudence of the European Court with the law of the United Kingdom and by following the changes in legislation in England after those cases - the Court found argumentative material for the interpretation of the Mental Health Act (1983).

<sup>1051</sup> Per Mr Schiemann, L.J., Court of Appeal, *Camelot group Plc. v. Centaur Communications Ltd.* (1998) 2 W.L.R., 20 Feb 1998, 379.

<sup>1052</sup> *X Ltd v Morgan-Grampian Ltd.* (1989 and 1990) 1 AC 1.

<sup>1053</sup> See also, case *Attorney General v Associated Newspapers Ltd and others* (1992) All QBd DC, p.535 ff.

In the Community case *Transocean marine ass. v Commission* (case 17/74 (1974) ECR 1063) the Advocate General Warner maintains, for example, that "*there is a rule embedded in the law of some of our countries that an administrative authority before without the statutory power to the detriment on a particular person must in general hear what the person has to say about that matter, even if that statute does not expressly require it*" (*audi alteram partem, audiat altera pars*).

comparative observations used in the European Convention of Human Rights. In dealing with the issue of transsexuality and matrimonial law, he emphasized the fact that even if the European Court of Human Rights previously granted a wide margin of appreciation to state parties in some comparable cases because of the lack of common ground between the member states, the disparity of practice (related also to the transitional stage of law) the recent case law of the European Court of Human Rights has, nevertheless, re-examined the issue.

The legal counsel for the defendant (the transsexual person) had produced also an extensive study of comparative law (from Sweden, Germany, Italy, the Netherlands, the United States, Australia, New Zealand). This was taken explicitly into account by Ward, L.J.:

*"It is also useful to deal with comparative law aspects and the medical matters to see to what extent they impinge upon matters of public policy and/or mens rea"*

The case law of the Superior Court of New Jersey and New Zealand Family Court cases <sup>1054</sup> were studied quite extensively by this judge. The medical and comparative law arguments intertwined. Finally Ward L.J. maintained that even if

*"...I have been tempted to say, like Potter L.J. and Sir Brian Neill that consideration of them [comparative observations] is strictly unnecessary for the purposes of this judgment. I feel, however, that the decision we have to take on public policy grounds on an issue as sensitive as this is justified by the [comparative] review. Our perception of public policy must at least be tested against perceptions elsewhere even if, in the end result, as Lord Simon of Glaisdale remarked in Vervaeke (formerly Messina) v. Smith [1983] 1 A.C. 145, 164f: 'there appears to be no inherent reason why, giving every weight to the international spirit of the conflict of laws, we should surrender our own policy to that of any foreign society'".*

Extensive examination was also made of other arguments. Potter, L.J. referred also to other jurisdictions in his analysis of the case.

Another case dealing with the marital status of a homosexual deals with comparative observations.<sup>1055</sup> The question concerned the succession rights of a partner. This right was denied, albeit with reluctance. The issue was thought to be appropriate discussion in Parliament (and legislative reform).

Associated developments abroad in relation to international human rights measures

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<sup>1054</sup> *M.T. v. J.T.* 355 A2d. 204 Corbett's case [1971] 83, and *M. V. M.* [1991] N.Z.F.L.R. 337.

<sup>1055</sup> Court of Appeal, *Fitzpatrick v. Sterling Housing Association Ltd.*, (1998) 2 W.L.R., 6 Feb. 1998.

(including the European Convention) were studied by Ward, L.J. in his dissenting opinion. He gave particular focus to the Canadian case law concerning "family status", "spousal rights". Supporting arguments were found. However, the case law of the Human Rights Commission and Court was not supportive (i.e. did not grant protection). Legislation in a number of progressive countries was also studied (Denmark, Norway, Sweden, Greenland, Iceland, Hungary, and the Netherlands) concerning the issue of agreements between homosexual couples on property and inheritance rights, and remarks were made concerning the idea of a "domestic relationship" found in Australian law. Case law developments in Hawaii, United States, and New Zealand were mentioned. Special emphasis was put on a New York Court of Appeals case<sup>1056</sup> for a basic interpretation method concerning interpretation of a statutory document in an analogical case, taking into account both the minority and majority arguments. In the end, the system and case law of the Canadian Constitution (Charter of Rights) was held to support the conclusion. There was also a use of many other types of analysis (linguistic, case-law, etc).

*"there is no essential difference between a homosexual and a heterosexual couple and , accordingly, I would find that the plaintiff had lived with the deceased tenant as his husband and wife."*

As mentioned, the New Human Rights Bill will perhaps change the way in which European human rights are interpreted and used in British courts. However, many problems seem to persist<sup>1057</sup>, and the future will reveal how formal incorporation will, or will not, change British methods of interpretation.

An interesting Commonwealth case can be also mentioned in this context.<sup>1058</sup> In *Matadeen v. Pointu (P.C.)*<sup>1059</sup>, the Privy Council reviewed a case of the Supreme Court of Mauritius, where the Supreme Court had on the basis of a comparative between United States and Indian law applied a general principle of equality, and claimed that this also formed a part of the constitution of Mauritius.

The constitutional issue in question dealt with a regulation issued by a Mauritian governmental institution.

The Privy Council examined the idea of constitutional guarantees in an extremely

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<sup>1056</sup> *Braschi v. Stahl Associates Co.*, 544 N.Y.S.2d 784.

<sup>1057</sup> Marshall, G., 1998, pp.167-170.

<sup>1058</sup> It has to be remembered that decisions of the Privy Council are binding as such.

<sup>1059</sup> Privy Council (1998) 3 W.L.R. 19, June 1998.

broad sense. It used, as arguments, the Mauritian constitution itself, the European Convention of Human Rights, the constitutional systems of United States and India, the International Covenant on Civil and Political Rights, and the statements of the Australian Constitutional Committee (which referred also to the Canadian system).

The Privy Council maintained that because

*“the background of a constitution is an attempt, at a particular moment in history, to lay down an enduring scheme of government in accordance with certain moral and political values... Interpretation must take these purposes into account.”*  
*“...Judges are required to give effect in accordance with their own conscientiously held view of what such principles entail”.*

However, *“in each case the court is concerned with the meaning of [the] language which has been used”*.<sup>1060</sup>

The Supreme Court of Mauritius had not, according to Privy Council, examined, for example, the wording of the “principle of equality” contained in the Constitution, except by stating that it was essential to democracy. The Privy Council examined whether the essence of democracy is that there should be a general justifiable principle of equality. The extension of this idea was to be used in the interpretation of the Article 3 of the Mauritanian Constitution.

The Privy Council argued as follows:

*“... treating like cases alike and unlike cases differently is a general axiom of rational behaviour... ..what accounts a valid reason?. ..who is to decide, whether the reason is valid or not?... Must it always be the courts? The reasons for not treating people uniformly often involve, as they do in this case, questions of social policy on which views may differ. There are questions which the elected representatives of the people have some claim to decide for themselves. The fact that equality of treatment is a general principle of rational behaviour does not entail that it should necessarily be a justifiable principle - that it should always be the judges who have the last word..... sonorous judicial statements of uncontroversial principle often conceal the real problem, which is to mark out the boundary between the powers of the judiciary, the legislature and the executive in deciding how the principle is to be applied.*

*A self-confident democracy may feel that it can give the last word, even in respect of the most fundamental rights, to the popularly elected organs of its constitution. The United Kingdom has traditionally done so;... A generous power of judicial review of legislative action is not therefore of the essence of a democracy. Different societies may have different solutions”.*

The Council proceeded on a comparative basis:

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<sup>1060</sup> This referred to a South African Constitutional Court decision of 1995: *“If the language used by the law giver is ignored in favour of a general resort to ‘values’ the result is not interpretation but divination”.*

*“The United Kingdom theory of sovereignty of Parliament is however, an extreme case. The difficulty about it as experienced in many countries has shown, is that certain fundamental rights need to be protected against overridden by the majority. No one has not yet thought of a better form of protection than by entrenching them in a written constitution, enforced by independent judges. Even the United Kingdom is to adopt a modified form of judicial review of statutes by its incorporation of the European Convention.”*

*... It by no means follows, however, that the rights which are constitutionally protected and subject to judicial review include a general justiciable principle of equality...”*

Here the Council discusses the *Bakke* case in the United States Supreme Court, and concludes that

*“Instead of leaving it to the courts to categorize forms of discrimination on a case by case basis and to concede varying degrees of autonomy to Parliament only as a matter of comity to the legislative branch of government, the constitution may itself identify those forms of discrimination which need to be protected by judicial review against being overridden by majority decision”.*<sup>1061</sup>

After analysing commonwealth experience, the Council concluded that *“these observations, coming as they do from a judge with great experience in the international jurisprudence of human rights, should be borne carefully in mind.”*

The Council makes a classification of different types of systems: (1) systems, which apply a general principle of equality, (2) the systems, which do so on specific grounds, and (3) systems which entrench nothing in this respect.

This classification, made on the basis of comparative observations, serve as a method for in examining the content of the principle of equality in the Constitution of Mauritius.

In the final analysis, the Council noticed an “analogy” between the European Convention formulation and the Constitutional formulation of Mauritius. In both systems, there was no specified grounds of discrimination. Discrimination can be identified even if no substantive right had been violated. Contrary to the Mauritian Constitution, however, the European Convention includes a right to education, for example. This was the matter at issue in this case. At this stage, the Council paralleled the Mauritian system to that of the United States.<sup>1062</sup> However, some differences appear between the United States system (and the Indian

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<sup>1061</sup> An interesting analysis was also undertaken in Queen’s Bench Division, *Regina v. Lord Chancellor* (1998) 2 W.L.R., 29 May 1998, p.854.

<sup>1062</sup> Referring to Powell, J., in *San Antonio Scholl District v Rodriguez* (1973) 411 U.S. 1, 35.

system) in relation to the system of Mauritius. The Constitution of Mauritius does not explicitly speak of “the equal protection of law”, but “the protection of law”. The European Convention seemed to have a more general conceptualization than that prevailing in the Mauritian system.

The Mauritian Constitution (Article 3) seems not to grant substantive equal protection. This is affirmed by the fact that the Article 3 “protection of law” seems to be specified only by the provisions dealing with some procedural rights (such as “*Article 6 of the European Convention*”). This type of interpretation of the constitutional mechanisms of Mauritius was also confirmed by a historical review.

In examining the impact of the International Covenant on Civil and Political Rights, the Council maintained that the Mauritian Constitution cannot be seen to contain the right to education. Furthermore,

*“The Covenant contemplates a diversity of constitutional arrangements, including both legislative and ‘other measures’ by which effect may be given to the rights recognized in the Covenant... it is the legal and political system as a whole and not merely the human rights entrenched in the Constitution which must comply with the Covenant... a state party is not obliged to incorporate the provisions of the Covenant into its domestic law... Same view of incorporation of the European Convention”*

On this basis, no general article setting forth the “protection of law” and “equal protection” were actually needed in order to review the ministerial decision. Ordinary administrative law and the unreasonability principle<sup>1063</sup> would have been sufficient.

In this sense, the Privy Council implicitly confirmed that the Mauritian Constitution belonged to category (3) among the constitutional traditions. It made a comparative classification of systems, and applied it to the specific legal system with some normative consequences.

**European Community Law.** The European Communities Act 1972 introduced the EC system into the English legal system. Sections 2(1), 2(2), 2(4) and 3(1) requires the courts to give legal effect to it, to allow the incorporated Community law without the need for further enactment, and to follow the case-law of European Court of Justice and other institutions concerning the validity, meaning and effect of any Community instrument. In other words, Community Law is part of the

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<sup>1063</sup> *Associated Provincial Picture Houses Ltd. V. Wednesbury Corporation* (1948) 1 K.B. 223.

*corpus of law* and has to be applied as such.<sup>1064</sup> The idea was also expressed by the Lord Denning:

*"...we must no longer speak or think of English law as something on its own. We must speak and think of Community law, of Community rights and obligations, and we must give effect to them... We must get down to it."<sup>1065</sup>*

Consequently, in certain cases English courts have applied Community legislation (Treaty provisions) without questioning whether or not it was directly applicable in Member States.<sup>1066</sup>

The extent to which courts have taken into account Community legislation where there is no legal basis for this consideration is an interesting question.<sup>1067</sup> This question was resolved by the European Court of Justice in relation to directives when it developed the doctrine of "directive-friendly interpretation" (Colson). However, in the case-law before 1983 (before so-called Colson doctrine), the attitudes of the courts were at times quite hostile towards Community Law.<sup>1068</sup> There were also cases in European Court of Justice where the question of the primacy of Community directives over UK law was examined with the result going against the position taken by the UK courts. After the establishment of the Colson doctrine, however, the UK courts subsequently, treated this doctrine as a legal proposition.<sup>1069</sup> In certain fields, such as Value Added Tax, directives have been used as material for the interpretation of Value Added Tax laws.<sup>1070</sup>

It was also suggested in English case law that courts should use the European Court's technique of teleological interpretation. In *James Buckhanan & Co Ltd v Babco Forwarding & shipping (UK) Ltd*<sup>1071</sup> the issue at stake was the interpretation of English law

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<sup>1064</sup> In the field of Value Added Tax, there was a phenomenon called "anticipatory implementation" of the Community law, introduced into the UK system. Here certain directives on the issue were implemented before the obligation to do so came into force (Usher, J.A., 1989, p.100).

A similar type of phenomenon has been called in Finland "*pre-harmonization*" -doctrine. Some aspects of EC-legislation (*European Economic Area* -legislation) were implemented in Finnish legislation before the legal obligation to do so entered into force, see Tähti, A., 1993.

<sup>1065</sup> *Case Bulmer Ltd. v Bollinger S.A.* (1974) 3 WLR 202.

<sup>1066</sup> *Meier v Hennin* (1975) QB 416. See also Bridge, J.W., 1976, pp.13-15.

<sup>1067</sup> On this, see Usher, J.A., 1989, p.99.

<sup>1068</sup> See case *Phonogram v Lane* (1981) 3 All ER 182.

<sup>1069</sup> See, Usher, J.A., 1989, p.100.

<sup>1070</sup> Usher, J.A., 1989, p.99.

<sup>1071</sup> *James Buckhanan & Co Ltd v Babco Forwarding & shipping (UK) Ltd* (1977) 1 All ER, p.521 ff. Some of the latest discussion on the issue, see Irvine of Lairg Lord, 1998, pp.232-233.

(Carriage of Goods by Road Act, 1965), which was identical to the International Convention on Carriage Contracts. Lord Denning not only referred to the international convention, but for that matter called for a uniform interpretation in all countries which are parties to the convention. To achieve this result he proposed that there should be a common method of interpretation, a "European Court method" of interpretation (so as to "go by the design and purpose" when filling legislative gaps, and a "schematic and teleological method of interpretation").<sup>1072</sup>

However, this adaption of teleological interpretation attracted opposition. A comparative examination was made in a subsequent case<sup>1073</sup> to prove that interpretation differed considerably from one Contracting State to another. The adaption of the teleological method was seen to be problematic and the argumentation from literal meaning was instead seen to be preferable. Nevertheless, the doctrine of "European Interpretation" can be claimed to have had a certain effect upon the behaviour of the courts in UK.<sup>1074</sup> Both procedural and legal cultural changes in the UK could be observed followingly.<sup>1075</sup>

There have also been certain remarks made according to which the essential idea in the applicability of European case law is that the legislation reviewed in the case law of the European Court is framed in similar terms to that of the legislation in the United Kingdom.<sup>1076</sup>

In relation to comparative law in terms of the interpretation of the European law references have been made to United States case law in order to predict the possible direction of Community case law.<sup>1077</sup>

Comparative observations were used also in the case of *U. v. W*<sup>1078</sup>. In this case, a couple travelled to Italy to undergo fertility treatment. Because the treatment had not been administered by a licence-holder under English law, the English law conferring paternity could not apply. Even if the law, which did not recognize the procedure carried out by the Italian institute seemed (or was argued) to constitute a restriction to the freedom and derogation to

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<sup>1072</sup> Latter quotations from case *H.P. Bulmer Ltd. v J- Bollinger SA* (1974) 2 All ER 1226 at 1236-37.

<sup>1073</sup> (1977) 3 All ER 1053, referred cases, (France) *Cie L'Helvetia v Cie, Reine et Rhone* (1973) in: Bulletin des transports, and (Netherlands) *British American Tobacco Co (Netherlands) BV v Van Swieten BV* (30 March 1977, Amsterdam).

<sup>1074</sup> Usher, J.A., 1989, pp.108-109. On the contrary, see, Herman, S., 1981, p.327.

<sup>1075</sup> Usher, J.A., 1989, p.109.

<sup>1076</sup> Lord Hoffmann, House of lords, *Customs and exercise Commissioners v. Thorn Materials Supply Ltd.* (1998) W.L.R., 3 July 1998, p.1115.

<sup>1077</sup> House of Lords, *Strathclyde Regional Council v. Wallace* (1998) 1 W.L.R., 6 Feb. 1998, p.266.

<sup>1078</sup> *U. V. W.*, Family Division, *U. V. W. (Attorney-General intervening)* (1997) 3 W.L.R., 17 Oct. 1997, Wilson, J.

provide services under the European Community law, it was justified by the English Court based, for example, on a comparative argument, according to which

*“it would be unrealistic to expect an interest in the exposition of United Kingdom law to be served by arrangements in other member states. Whether it would be realistic to expect the wide-spread and long-term keeping of detailed clinical records seems equally doubtful. The European Commission sponsored a recently published report entitled Ethics, Law and Practice in Human Embryology. The authors found differences across Europe in the regulations covering research on, and the storage and use of, embryos amounting to 'serious incompatibility between member states'. The United Kingdom is the only member state to have set up a statutory body to control procedures. But only one member state has no statutory regulation whatever; as it happens, it is Italy, where the only constraints stem from professional rules.”*

Furthermore, even the declaration, by the male party of the case, to “*undertake to both acknowledge paternity and not to disclaim it in the future*” was invalid, because “*it is not even effective under Italian law.*”

There have been various cases dealing with conflict of laws issues where comparative observations have appeared in various forms.<sup>1079</sup>

It looks as if comparative analysis has not had a great role, in the quantitative sense, in the interpretation of European Community law in British Courts. However, when its role has been recognized, the question has been, as in the case of international law, about the methods of interpreting law in general. Substantially, derogations have been justified on comparative law “disparity” grounds.<sup>1080</sup> Furthermore, it is interesting that comparative arguments have been based on European material directly.

It seems that European Community cases serve also as a good starting point in the construction of arguments in general. This seems to apply also to the use of European human rights law. They do not appear as self-evident institutional standards, but assist in formulating questions, solutions, and in providing extensive and several analytical reasoning.

Strictly speaking, Community law seems to be able at this stage to result in the

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<sup>1079</sup> A good example is provided by case House of Lords, *Kleinwort Benson Ltd. V. Glasgow City Council* (1997) 3 W.L.R., 14 Nov. 1997, p.923. In that case, the reasoning of various judges included reports using comparative observations (ibid., p.935), arguments deriving from state interventions made within a Community case (ibid., p.940), linguistic comparisons (ibid., p.943), and “real” comparative observations (ibid., p.933).

<sup>1080</sup> Interestingly, in the *U. v. W.*, the contrast was seen as being between countries, which have organized a control system, and those, who apply a liberal, “practical”, and professional idea of freedom.

suspension, disapplication, or "unlawful" (nullity) declarations of legislation.<sup>1081</sup> However, the discussion concerning spill-over effect is, nevertheless, still going on.<sup>1082</sup>

**Comparative observations without binding international "connections".** There are some albeit few visible examples of comparative arguments deriving from the analysis of an individual state and the use of this as a source of an persuasive analogy for the interpretation of statutes. Reference in this regard has been made to Commonwealth precedents on statutory interpretation and occasionally to the United States<sup>1083</sup>.

Comparative observations have been used mainly so as to achieve the common interpretation of analogous bodies of statute law.<sup>1084</sup> However, comparison does not always lead to uniform interpretation, as legal-cultural differences can lead to a refusal to follow a rule by another court.<sup>1085</sup>

Some examples can be given of the comparative analysis made by the English courts. A "group" type of argument can be found:

*" Even where in the rules relating to jurisdiction, tests of an exceptionally flexible nature are laid down, no room is left for the exercise of any discretionary latitude. It is true, that continental legal systems recognize the power of a Court to transfer proceedings from one court to another. Even then the Court has no discretion in determining whether or not this power should be exercised. It seems to me that in the light of these considerations it would be impossible for this Court to..."<sup>1086</sup>*

Here continental legal systems were used as examples in the course of the argument to enable the judge arrive at a conclusion. Another case also relates to jurisdictional issues:

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<sup>1081</sup> Lord Irvine of Lairg, 1998, p.229, and the cases mentioned therein (especially the House of Lords, *Factortame Ltd. And other v. Secretary of State for Transport* (1989) 2 All ER, p.692 ff. See also, Hartley, T.C., 1994, p.263.

Further, see *Marshall v. Southampton and South West Area health Authority* (1994) 2 WLR, 292, and *R. V. Secretary of State for Employment ex p. Equal Opportunities Commission* (1995) 1 AC, p.1 ff.

<sup>1082</sup> Lord Irvine of Lairg, 1998, pp.230-231, also, Gordon, A., 1998.

Jolowicz, J.A. (1994, p.750) observed (1994) that comparative law has not been used in connection to European Community law. As we have seen, some references can be found from the contemporary case law..

<sup>1083</sup> For American case law in England, for example see Lord Atkin, *Donoghue V Stevenson* ((1932) A.C. 562) citing *Cardoza in MacPherson v Peak Motor ko*, 217 MY, 382, 111M.E. 1050 (1916), Cohen L.J. discussing *Cantler v Grain, Christmas & Company* (1951) 1 K.P. 164, discussing the opinion of Cardoza CJ in *Ultramares Corp. v. Touche*, 255 N.Y. 170, 1931, 970, 174 N.E. 441.

<sup>1084</sup> Bankowski, Z., MacCormick, N., 1991, p.359 ff.

<sup>1085</sup> Case *Temple v Mitchell* (1956) S.C. 267.

<sup>1086</sup> Queen's bench Division (Commercial Court), *Assurances Generales de France IART v The Chiyoda Fire and Marine Co. (UK) Ltd and Others; UNAT Sa v Rhone Mediterranee Compagnie Francese de Assicurazioni e Riassicurazioni and Others; Same v Same* (1992) 1 Lloyd's Rep. 325, 1 October 1991, No C 59/97,

*"The idea that a national Court has discretion either territorially or as regards to the subject matter of a dispute does not generally exist in continental legal systems. Even where in the rules relating to the jurisdiction, tests of an exceptionally flexible nature are laid down, no room is left for the exercise of any discretionary latitude"*<sup>1087</sup>

In the field of contract law, comparative "group" analysis from doctrinal writings is often undertaken simply to reveal the situation which prevails in other continental countries:

*"Unlike in the majority of continental legal systems, in English law contracts entered into by public bodies are subject to the ordinary procedures and are governed by the private law"*<sup>1088</sup>

In English Courts, the judges have also made comparative references merely to demonstrate that certain rules of English law do not exist in other continental systems and that such rules can be, and ought to be, criticized:

*"...[this sum] paid would not be recoverable apart from the section because it was paid under a mistake of law and, on the law as it stands at present (which is much criticized, especially by comparative lawyers, since no comparable rule is to be found in continental legal systems (see, in particular, Zweigert and Kötz, Introduction to Comparative Law, 1987 vol. 2, pp.260-268), money so paid is generally irrecoverable in English law."*<sup>1089</sup>

Explicit reference has been made to a legal institution contained within the French legal system which does not exist in English Law, but which does, however, exist in other continental legal systems. In this case, the institution was not taken as a basis for the decision, but the analyses of the contents of this institution, together a comparative doctrinal study, enabled a description of the law and the selection of relevant facts for the case:

*"Benjamin's Sale of Goods, 2nd ed, par 664 has this passage: Force Majeure is*

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<sup>1087</sup> Queen's bench Division (Commercial Court) *S & W Berisford plc and another v New Hampshire Insurance Co.* [1990], QB 631, [1990] 2 All ER 321, [1990] 3 WLR 688, [1990] 1 Lloyd's Rep 454, 27 November 1989.

<sup>1088</sup> Queen's Bench Division, *Hazell v Hammersmith and Fulham London Borough Council and Others.* [1990] 2 QB 697, [1990] 2 All ER 33, [1990] 2 WLR 17, [1989], RVR 188, 1 November 1989.

For some contrastive observations with the help of legal historians (Goodhart) in case Chancery Division, *The Incorporated Council of Law Reporting for England and Wales v Attorney-General and another* (18th, 19th, 20th November, 1st December 1970).

<sup>1089</sup> House of Lords, *Tower Hamlets London Borough Council v Chetnik Developments Ltd.* N[1988] 1 AC 858, [1988] 1 All ER 961, [1988] 2 WLR 655, 86 LGR 321, [1988] 26 EG 69, [1988] 2 EGLR 195, [1988] RA 45, 17 March 1988.

*not a term of art in English law, but is very well known in continental legal systems, e.g. that of France, and it has a relatively well defined meaning in French law. French writers are agreeing that a failure of performance will be attributable to force majeure if, without any fault of the party seeking to be excused, ..."*<sup>1090</sup>

In contract and tort law, German and United States systems (analysed on the basis of comparative law authorities) have been used as analogies, by some judges, in discussions covering a possible (and desirable) change in law.<sup>1091</sup> Furthermore, in a case concerning actions in private nuisance based on interference with television signals, the issues were considered in the light of references to New Zealand, German, and North American law, which furnished persuasive analogies as policy and tendency consideration.<sup>1092</sup>

**Conclusions.** We can make some additional conclusive remarks.

Comparative law has been considered a legal source with qualification<sup>1093</sup>. However, it seems that the role of comparative law is not systematic in the interpretation of internal rules by English superior courts, even if some examples can be seen.

One may say that there seems to be an attempt to speak to a more general audience than to the national audience only. However, the use of the comparative observations is highly value-based, illustrative, traditionally unsystematic. The analysis of different systems is strongly determined by the internal premises and ideas of sources of law prevailing in the system. We can also note that the use of comparative law is usually undertaken in relation to controversial and unstable case law.<sup>1094</sup>

A quick look at the case law shows that comparative observations occur more frequently in the commonwealth context than in European context. This indicates that there are

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<sup>1090</sup> Queen's Bench Division (Commercial Court), *Navrom v Callitis Ship Management SA (the "Radauti")* [1987] 2 Lloyd's Rep 276, 10 February 1987.

<sup>1091</sup> See, judge Steyn LJ. Court of Appeal, *White and another v. Jones and others* (1993) 3 All ER, p.481 ff. (501). Also Australian cases used as an example by several judges in their reasoning. Furthermore, House of lords, *Walford and other v Miles and another* (6,7 November 1991, 23 January 1992) (1992) All ER 460.

<sup>1092</sup> House of lords, *Hunter and others v Canary Wharf Ltd Hunter and others v London docklands Development Corp.* (1997) 2 All ER.

Very illustrative Conflict of Law case with extensive comparative argumentation, Court of Appeal, *Boys v Chaplin*, October 10, 11, 12, December 6, 1967.

<sup>1093</sup> Jolowicz, J.A., 1994, p.753 (careful evaluation, pressing need, they should be kept separate, etc.).

<sup>1094</sup> For some discussion on the role of comparative law, see Ward, I., 1995, 24 ff.

attempts to maintain a unity in this realm.<sup>1095</sup> On the other hand, the reason for this orientation toward the common law world may be also a result of the fact that the common law cases are often more analytical than those deriving from continental Europe.<sup>1096</sup> Naturally, the language is a decisive integrating factor too.

On the other hand, those areas of law, which have been created by English statutes seem to more likely to be interpreted by other means than comparative information. However, this does not seem to be the case in relation to the statutes which incorporate international obligations. The common law cases, on the other hand, seems to be more likely to contain comparative arguments.

We may note that the comparative arguments are usually presented by parties. The references to foreign cases can be also indirect, i.e. arguments can derive from earlier case law or even from some cases decided in the lower courts. One can also observe that arguments deriving from the foreign case law are often arguments which are not directly concerning the substance of the "foreign" or the "own" case, but they are arguments which only support the analysis of the arguer. They increase considerably the analytical quality of the reasoning. Consequently, it seems to be possible to take arguments also from "analogical" foreign cases. Nevertheless, many times foreign cases are dealing with similar types of facts and this way they can be used for supporting (authoritatively) the "own" solution directly.

Direct quotations are many times extensive. This seems to assist one's own analysis of the foreign case law, and make it also accessible to the audience. In this type of approach, the "style" and subject matter of the foreign case is more visible.

On the basis of review of the interviews conducted one can make following remarks.

The use of comparative observations is in many ways "inspirational".<sup>1097</sup> In order to explain the nature of this type of use, some comments have to be made on the procedural nature of some English courts.

In the Court of Appeal the 'skeleton' argument is prepared by the parties. If the case is justiciable case, a hearing is set. The procedure can be extremely short (lasting between

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<sup>1095</sup> See also, Legeais, R., 1994, p.358.

<sup>1096</sup> Jolowicz, J.A. (1994, p.753, referring to studies by Markesinis, B.) Suggests that the references to continental systems, in cases where there is an international connection, is more contrasting, whereas the references to common law systems are more practical.

<sup>1097</sup> On the fact that this use relates often to personal connections of an individual judge with his foreign colleagues, Lord Woolf, Foreword. In: Markesinis, B., *Foreign Law and Comparative Methodology* (Oxford) 1997..

1 hour and 10 days). Each judge can produce his own reasoning, though there seems to some departure from tendency nowadays. Furthermore, there is also a tendency towards the presentation a written argument.

In theory, there seems to be a role for comparative law as a source of law, even if, in the practice, it is used infrequently. However, if there is an EC, ECHR, Hague Rules, or other international element involved, the need for comparative material may arise. German, French, and Italian decisions, for example, may be referred to French and German courts' case law (Counceil d'etat and Bundes Verwaltungsgericht) have been discussed recently, for example, in a case dealing with a European Community element, as instances of decisions supporting a particular interpretation. Also United States law has been studied in some cases concerning the right to privacy. Furthermore, Commonwealth and Canadian case law can be considered.

The basic idea in the selection of comparative references seems to be the "importance of the court". On the other hand, the use of comparative observations depends, to a large extent, upon the lawyers having averted to it in the first place. If the barrister, for example, makes an argument that in the Bundesgerichtshof this matter is decided in this manner, then it will be most likely taken into account.

Generally, there is no research undertaken before the case (apart from some small notes by the administration). Furthermore, the consultation of comparative material seems to take place on an inspirational basis ("they stimulate the discussion", "...if there are books on the shelf"). Usually the use which made of it is not extremely "academic". On the other hand, because judges rarely refer to any arguments other than those presented by the parties, the possibilities for undertaking comparative surveys are restricted. This problem is also related to time and resource constraints. The improved quality of the reasoning does not always seem to justify an the extension of time.

The main interest in wing comparative material seems to be when looking at the "philosophical' basis of a solution ("an intellectual problem"). On the other hand, the distinction between the 'internal' interest (interpretation of law) and the 'external' interest (integration) in using comparative observations varies according to the nature of the case. However, where international measures are involved, the external interest may be there even if the main idea is still to interpret the English law.

As in the Court of Appeal, the House of Lords undertakes practically no

preliminary research of its own.<sup>1098</sup> Law Lords do not have research assistance, and preliminary inquiries are made individually with the possible help of a private secretary. Administration is for the technical help. No external experts are used. Exceptionally, medical experts have been consulted.

The decision-makers discuss the main lines of the parties' argument. They rely, to a large extent, upon the information produced by the Counsel of the parties. Individually, they may introduce, based on academic or personal experience, information in a specific case, which is, however, connected to the arguments presented by the parties. It would be considered odd to introduce arguments which had not been introduced by the parties. Parties may make, and have made, comparative observations. The information comes also from the cross-examination of the advocates when dealing with the questions containing European elements.

Even where sufficient resources (library, own collections of academic literature) are available, direct comparative observations seem to be rare. Comparative influences thus seem to be indirect. It looks as if the use of comparative law as a source of argument depends on the individual law lords, and upon how beneficial the undertaking of comparative reasoning is considered to be.

Traditionally, it has been similar jurisdictions and legal systems which have been considered (also in the explicit reasoning) such as the United States and European and common law countries. Comparative aspects and experience may be influential also where law lords sit on the Privy Council as judges<sup>1099</sup>.

In conclusion, we may note that at the moment, general influences thus seem to derive from the legal systems of Germany and North America.

### 2.2.3.2. Sweden

In Swedish legal thought, comparative arguments have been classified as a source of law, which may be taken into account. Comparative observations can be used according to Swedish doctrine if they are not incompatible with Swedish law and *Ordre Public*.<sup>1100</sup>

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<sup>1098</sup> On the procedure, see *Judicial work of the House of Lords, House of Lords, Session 1997-1998*, internet [www.Parliament.the-statione...](http://www.Parliament.the-statione...), p.4-5 of 7.

<sup>1099</sup> Though its role has diminished in recent years.

<sup>1100</sup> Peczenik, A., Bergholz, G., 1991, p.329.

Comparative observations can be used to support the interpretation of a domestic statute.<sup>1101</sup>

Comparative observations can be employed so as to use a distinction made or to ask a question asked in another system. The solution can be substantiated directly by a decisions, or by a doctrine. Both empirical (or also moral) reason have been used.<sup>1102</sup>

The influence may also be based on the perceived authority of a foreign institution. This authority may be the result of the following circumstances:<sup>1103</sup>

- a historical relationship between systems,
- international law (eg. conventions),
- foreign law, which has influenced an international legal instrument,<sup>1104</sup>
- uniform legislation (eg. Nordic Cooperation),
- harmonization process (eg. Nordic Council recommendations, 1974),

The authority of foreign materials (rules and interpretations) may exist even despite the harmonization of statutory rules. Here the authority is based on its ability to provide good justifications, or it is due to the fact that the court in question is highly respected.

Common Scandinavian laws have been interpreted quite similarly.<sup>1105</sup> However, common Scandinavian case-law has not developed, except in the field of maritime law.<sup>1106</sup>

From the interviews one can observe that comparative information is not regularly used in the Swedish Supreme Court, and that these types of studies are situationally made.

The studies in the Supreme Court is prepared by a research group. The court does not use external experts. As in Finland, the common Nordic laws may create a need to consult comparative material deriving from Nordic states. Here the interest is not only in the material law, but also in the grounding of principles. In some commercial cases, United States legislation has been consulted, otherwise these studies are concentrated on major European legal systems.

Parties may sometimes argue on a comparative basis<sup>1107</sup>.

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<sup>1101</sup> Peczenik, A., Bergholz, G., 1991, p.329-330.

<sup>1102</sup> Peczenik, A., Bergholz, G., 1991, p.329-330.

<sup>1103</sup> Peczenik, A., Bergholz, G., 1991, p.330.

<sup>1104</sup> Case NJA, 1983, p.3, study of British system, especially the case *Sandman v Breach* [1927] concerning *International Convention on Oil Pollution* (1969).

<sup>1105</sup> Peczenik, A., Bergholz, G., 1991, pp.330-331, referring to Eckhoff, T., *Rettskildalaere* (2 ed., Oslo) 1987, p.256.

<sup>1106</sup> Peczenik, A., Bergholz, G., 1991, p.330, referring to Sundberg, J.W.F., *Fradda Edda til Ekelöf*, Lund, Studenlitteratur/Akademisk Förlag, 1978, p.188.

<sup>1107</sup> An interesting case, for example, was the Sami case on property rights (HD, 1981:1, NJA I, 1981). Even though the case was decided on the basis of Swedish legislation, reference was made, by the parties, to the Canadian system of treatment of minorities etc.

In the realm of other types of "international" arrangements, there seems to be an interest consulting the material norms of other systems. With regard to the European Community and European human rights system, attention is paid mainly to the law of these institutions. In the field of maritime law comparative material has been used.<sup>1108</sup>

If comparative material is used, the study includes cases and legislation and particularly international measures connected to the issue.

The use of comparative observations may be based on the need to interpret Swedish law rather than to "harmonization" it with the law of other systems.

The obstacles to using comparative law seemed to be based mainly on practical problems (especially time and resource constraints).

### 2.2.3.3. Finland

As mentioned, in Nordic countries, especially in Finland and in Sweden, there are many common statutory laws (eg. family and inheritance law). The legal traditions are similar in many fields of law and legislative cooperation is (or at least was during the beginning of the 19th century) quite active. Swedish precedents and doctrinal opinions are occasionally followed in the legal argumentation and in legal science. Court practice aside from Swedish practice has not often been followed.<sup>1109</sup>

Finland is a dualist country. In other words, international agreements are not legal sources of law for courts as such. They have to be transformed into Finnish law before they constitute applicable law in Finland. International models have been followed by the legislator in many fields of law (particularly with regard to ILO Conventions in the labour law field, the Bern Copyright convention concerning copyright).

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The material was seen to be interesting from the sociological point of view, although the court did not see any need to use comparative elements presented by the parties.

<sup>1108</sup> Also, Grönfors, K., *The Interpretation of International Maritime Conventions by Swedish Law Courts*. In: *Swedish National reports to the XIIIth International congress of Comparative Law (Uppsala) 1990 (199-204)*. Especially English cases have been considered and even the English style of reasoning has been used, thus with some difficulties (*ibid.*, p.202).

<sup>1109</sup> Aarnio, A., 1991, p.139.

Klami has suggested (1980) that the paradigm of comparative law in Finnish legal dogmatics seems to be that foreign law should be taken into consideration, especially Swedish material. However, clear distinctions should be made, and foreign cases and interpretative statements should not be used as primary arguments. On the other hand, when concrete interpretative recommendations are present, foreign legal writers should be used as discussion-sources (Klami, H.T., 1980, p.115).

In Finnish courts, the use of international material in other ways is rare.<sup>1110</sup> However, European human rights decisions, databased in the archives of the Supreme Court, are used in the context of justification constantly, and these observations appear occasionally in the justifications of Finnish Courts.<sup>1111</sup>

One example of explicit comparative reasoning can be mentioned. In this case, the Supreme Court of Finland interpreted the doctrine of diplomatic immunity of a person working in a diplomatic mission in a case concerning contractual question.<sup>1112</sup> The lower courts had justified the immunity based on an interpretation of international law, as set out in legal science. The Supreme Court produced the following justification:<sup>1113</sup>

*"In international law, it has been maintained... In the legal literature and in the contemporary case law of different countries, there is an established opinion that the immunity enjoyed by the state cannot be unrestricted. In the sphere of the European Council, there is an International Covenant.... Finland is not part of this agreement... However, this Treaty - and the basic principles it contains - has to be considered as a source of the prevailing international customary law. Consequently, ..."*

The Court examined the provisions of this treaty. After this inquiry, the Court maintained that

*In the judicial practice of states, which legal culture resembles the legal culture of Finland, there have been cases, in which this question has been ... [the question in the case]... In these cases, states have been able to plea immunity in courts.... On the other hand, there have been cases... In these cases, state immunity has been rejected on the basis that this activity does not comprise an activity which is related to the functions normally associated with sovereignty"*

The Supreme Court upheld the immunity of the person.

It is evident that uses of explicit comparative justifications are rare<sup>1114</sup>.

On the basis of interviews conducted at the Finnish Supreme Court, it can be

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<sup>1110</sup> Aarnio, A., 1991, p.139.

<sup>1111</sup> See, Scheinin, M., Human Rights in Finnish Law [Ihmisoikeudet Suomen oikeudessa] Jyväskylä, 1991.

<sup>1112</sup> As we have seen, the comparative method has been associated, also in English Courts, with the idea of state immunity. On the "comparatively" developed idea of state immunity in Western legal systems (Schreuer, C.H., State Immunity: some recent developments (Cambridge) 1988.

<sup>1113</sup> Translation author's own, Case KKO:1993:120, 30.9.1993.

<sup>1114</sup> In some legal systems, there have been explicit provisions prohibiting the use of comparative law as a source of law. (See below).

observes that in the internal reporting comparative observations can be made. The use is situational. These reports are only for the internal use (contextual use). Experts are not used<sup>1115</sup>. These consultations of comparative material are not necessarily visible in the explicit justifications. However, comparative observations have an impact upon these interpretations.

The consultation can take place at different stages of the internal procedure, and be discussed in the decision-making realm in an informal way.

It appears as if clerks may look to other systems more extensively. It was claimed that the depth of the study depends very much on the knowledge of the clerk working on that particular question. This seems to concern also the judges.

It was claimed that the consultation of comparative legal information seems generally to be rare. However, it looks as if it may be done, if a strong link to another system is suggested, or where the domestic material is somehow lacking relevant data. This seems to be typical in relation to so called "adopted" laws<sup>1116</sup>, or where striking formal similarity exists between the legal rules within two systems<sup>1117</sup>. On the other hand, comparative observations may be made in situations where an international measure constitutes the legal background of a measure. This is especially so in the case of Scandinavian legal cooperation. Rarely are other countries than European countries considered.

Studies of European human rights are made constantly. As mentioned, some scholars have prepared internal databases on this system<sup>1118</sup>.

Furthermore, it seems as if those functionaries who have also a academic interest in the area may follow comparative law development more. On the other hand, there are many "follow up -groups" concerning certain international conventions which result in comparative expertise able to be taken into account<sup>1119</sup>.

The parties rarely produce comparative law material. However, this may occur where interest in the subject is considerable. This material is taken into account by the court.

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<sup>1115</sup>The Finnish Commercial Center has been consulted in a case involving "general trade practices".

<sup>1116</sup> Reference to Sweden (property law, trade law), Germany (especially criminal law), and Anglo-Saxon systems (especially arbitration) was made.

In the case of procedural law, an study of the United states system was mentioned.

In the case of Sea law consultation may be made.

<sup>1117</sup> In France, see the statute dealing with the limited housing companies [Asunto-osakeyhtiölaki].

<sup>1118</sup> The law on the United Nations Convention on Civil and Political Rights Convention do not seem to be directly relevant.

<sup>1119</sup> Council of Europe, Lugano Convention, Haag International Private Law, etc.

Usually this type of reasoning by the parties is based upon the consultation of experts external to the institutional system.

As maintained, the idea has been customarily to research developments in Scandinavian countries. Studies of this nature are usually not claimed to be exhaustive. However, studies of, for example, Swedish jurisprudence are not rare (cases, scholarly opinions) and, in some cases, such consultation is even expected. This may be the result of the linguistic and historical connections between the two countries.<sup>1120</sup> However, the conclusion of this comparative observation may be also that the legislation or the jurisprudence differs too greatly.

The interest to make comparative observations may arise also in order to find arguments for a concrete case.

There seems to be no principled objections to reasoning and justification on a comparative basis. The main obstacles for comparative consultation were resources. On the other hand, in Court, there is a lot of material (laws, commentaries) presented from other countries, and because of the databases, the available material is ever-increasing.

One could form the view that more extensive comparative studies are needed. On the other hand, the "internationalization" of law was seen a factor, which may, and which already has (Council of Europe), resulted in some comparative legal considerations.

The Court seems to address its arguments mainly to the parties, but also to the general public, and to a certain extent to the Court itself for future cases. It was emphasised that the Court is mainly searching to establish a precedent.

There has been considerable developments in terms of increasing the quality and range of justifications in Finnish legal system.<sup>1121</sup>

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<sup>1120</sup> See, the chapter on the Finnish comparative legislation above.

<sup>1121</sup> See also, *Interpreting Statutes*, 1991.

An historically interesting development took place in the 1945 proposal for Procedural Law [Hallituksen esitys Eduskunnalle laeiksi oikeudenkäymiskaaren... 24 luvun...muuttamisesta, 1945 vp. N:o 137].

Before that, based on the law of 1734 (Sweden-Finland), judges were prohibited from referring to the "law of a foreign country" [*men utlänsk lag, må ej therwid utberopas*] or from using foreign languages [*eller främmande språk brukas*] in a judgment (Rättegångsbalk 1734). This provision was even reenacted in the 1921 law (19th January 1921 [Hallituksen esitys 1921, N:o 31]). In the new 1945 proposal, and the Law on 1948, this was changed "*because the use of foreign law becomes necessary in so called international private law cases, and, on the other hand, already the constitutional law [hallitusmuoto] paragraph 14 maintains that judgments cannot be given in a foreign language*" [Hallituksen esitys, N:o 137].

On English development on issue, Schmitthoff, M., 1941, p.104.

#### 2.2.3.4. Germany

In the German legal system, "*general principles of international law form a part of constitutional law*", referring to the general principles of international law recognized by civilized nations<sup>1122</sup>. The interpretations of the German Constitutional Court are much indebted to the ideas prevailing in the United States Supreme Court<sup>1123</sup>.

However, comparative law as a source of law has evidently a limited role. This has been also recognized by the German Supreme Court. However, comparative arguments, nevertheless, do occur sometimes.<sup>1124</sup> The use of comparative law occurs, where there is an

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<sup>1122</sup> Article 25 of the Constitution. See also, Doethring, 1987, p.55. For some cases, see 1 BVerfGE 332 (1952), June 13, 1952. This case dealt with the question whether one may enforce criminal law judgment, made in the Soviet occupied territories, in the Federal Republic of Germany. The Court found no obstacles to this in this particular case. The Court recognizes the constitutional provisions, according to which this type of enforcement is not possible, if the judgment is against the basic principles or constitutional provisions of the federal legal system ("*wesentliche rechtstatliche Grunsätze... Grundrechte*"). However, in this case there were no constitutional obstacles. The Court maintained that the principle of equality is not touched upon by the judgment. Furthermore, the fact that the judgment was made in the absence of the accused did not violate basic principles. This latter observation was backed up by observation (presented by the party, Bundesjustizministerium) that sentencing in absentia is allowed, in certain cases, also in other "*Kulturländer*". A special reference was made to Austria (347). This reference was clearly made due to of the absence of existing domestic case law.

On the use in relation to general principles of international law, Drobnig, U., 1986, p.613 ff.

<sup>1123</sup> Stern, K., *Der Staatsrecht der Bundesrepublik Deutschland*, vol 2, 1980, p.331.

In general, and for some cases on the concretization of the constitutional principles, see Mössner, J.M., 1974, p.228 ff. (for example, cases BverfG, 1, 154, BverfG, 5, 85 (135) KPD Urteil on Article 21 of the Constitution. Also Drobnig, 1986, p.630. Aubin suggests that comparisons mainly complete, confirm and control the traditional solutions (1970, p.479). Sometimes references are only to the "contextual" use of comparative law, without any trace of analysis (BverfG, 3, 225 (244) equality question).

See also BverfG, 18, 112 (117) concerning "*Kulturstaaen*" and "*demokratin der westlischen welt*", BverfG, 20, 162 (220-221) and for comparative law considerations of the status of the press, and other issues, BverfG 1 97 (106), Bverf 1 97 (101), BverfG 7, 198 (208). BverfG 7, 377 (415), BverfG 7, 29 (40, Austria and France considered).

See also, Aubin, B., 1970, p.458. Zweigert, K., *Rechtsvergleichung als universale interpretazione*. In: *RebelsZ* 15, 1949/50, p.5-21.

Markesinis, B (1993, pp.632-533) has suggested that the English style of judgments and handling of cases may be expected to have influence to German legal system in the future.

<sup>1124</sup> BGHZ, 86, 240; Foreign judgments due solely to the fact that they are based on different laws are only of limited relevance for German law (Markesinis, B., 1990, p.4). On the rareness, see Drobnig, U., 1986, p.629. The court has given explicitly the preference of domestic arguments over comparative ones ("negative application"), and it has rejected foreign solutions (Aubin, B., 1970, p.471 ff. (480)). Comparative method is proposed as applicable (ibid., p.480).

BGHZ 101, 215 (223), 30 June 1987 the Bundesgerichtshof has used some arguments from the United States and United Kingdom (eg. rescue doctrine) in justifying a non-liability role in the medical technology (see also, Markesinis, B., 1990, p.5). In the beginning of 19th century, references were mainly to Austria (corporation law). In 30's, references were made to France, England and Switzerland. During the Nazi regime, no references can be found. After the war the US system has played an essential role (Aubin, B., 1970).

For 30 cases of jurisprudence of major trading countries and international arbitral tribunals, examined by Langen being based upon comparative law (Langen, *Transnational commercial law (Leyden)* 1973 p.214-215, see Mádl, F., 1978, p.9).

The Bundesgerichtshof has also maintained that courts are not entitled to use the techniques employed

international connection. This connection is related to the existence of an international convention or to adoption in general or to the prevailing crossborder situation (conflict of laws, extradition, maritime law).<sup>1125</sup>

From the interviews one can observe that the use of comparative law is basically derived from the experience of judges in both the Supreme Court and the Constitutional Court in Germany. On the other hand, in the German Supreme Court, the opinions of the professors of some faculties or institutions of law may appear in the reasoning of some parties.

In the Constitutional Court, the preliminary research differs from case to case. There are sometimes comparative studies made. Research can be undertaken in the Court by the parties, especially by the federal government (mainly in cases pertaining to the private law sphere), which may use it also in reasoning. The Court can also ask academics or an institute to produce a study by an external expert<sup>1126</sup>.

Comparative studies are included in the memorandum of the reporting judge. Usually comparative studies deal with the systems of European states. Considerations based upon the United States system may sometimes appear as well.

Often aspects of human rights documents (European and United Nations) are presented by the parties.

Comparative studies consist only of statutory law and case law. Sociological information derives usually only from the domestic sphere. However, it seems to be useful for the court to follow developments in other European countries. This seems to concern especially French and English law and social discourses.

There are private collections of political, legal, sociological material which may be used individually, and foreign newspapers may be looked at as well. Furthermore, active links exist with foreign courts and visits to courts in other countries may take place.

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in the interpretation of German law in interpreting international agreements (BGHst 12, (36)).

See also, Alexy, R, 1991, p.73. He refers to a following type of argumentation by the German Constitutional court:

*"A look at foreign regulations shows that in the same or nearly the same version of the text of the statute the wide interpretation of the concept of dwelling predominates (compare for example for Switzerland BGE 81 I,119ff.; for Austria the constitutional Court's decisions of November 22nd, 1932, Nr.1486, March 14th, 1949, Nr. 1747, July 2nd 1955, Nr.2867, and December 16th, 1965, Nr 5182, as well as Ermacora, Handbuch der Grundfreiheiten und der Menschenrechten, 1963, 241; for Italy: Encyclopedica del diritto XIII (1964), 859 ff.; and Faso, La Libertá di domicilio, 1968, 34 ff., for the USA the Dissenting Opinion of the Justice Frankfurter in the case of Davis v United States, June 10th, 1946 - 328 US 582, 596 f - and see v City of Seattle, June 5th, 1967 - 387 US 541).*

<sup>1125</sup> Drobnič, U., 1986, p.629.

<sup>1126</sup> Studies has been produced for example in some family law cases. See also, Heide, H., 1994, p.732.

The comparative material seems to be relevant when circumstances change, and the factual events in question are unprecedented. In these cases it seems to be important to know what people may think<sup>1127</sup>. Comparative reasoning appears when there is a need for an "adaptation to a new situation", a need to show that "in other states such an idea does not exist", to demonstrate that "other systems have hesitated in adopting such a solution", or merely to show that other solutions exist. Comparative interpretation seems to be aimed mainly at domestic interpretation rather than "harmonization".

The main obstacles for the consultation of comparative material seem to be procedural economic (i.e. time and resource constraints). However, unfamiliarity with comparative sources may also cause some hesitation.

The European human rights system is considered in many cases due to its similarity to the German system of basic rights.

The systems within the various "Länder" can also be compared<sup>1128</sup>.

One gets the impression that the Constitutional Court seems to address its arguments to the general public and politicians. This results in an attempt to be transparent and comprehensible.

#### 2.2.3.5. Italy

The rules of "other legal orders" are applied in Italian courts when this is necessary according to the principles of international law. The European Declaration of Human rights is also occasionally referred to when interpreting Italian statutes.

Interviews seemed to indicate that the use of comparative law in the Supreme Court is not extensive. In fact, the interviews seemed to show that systematic use of these observations do not occur at all. Explicit references to comparative observations are also not made. The possibility of making comparative observations was recognized, however, especially where the facts are new, or when an legal institution is adopted from another legal system.

The main obstacles may be due to language problems and impediments may also

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<sup>1127</sup> In this context the reference was made to the question of homosexual marriage, where the Danish situation was examined, for example.

<sup>1128</sup> Reference has been made, for instance, to a case dealing with compulsory fire protection for men.

arise due to historical factors and legal cultural considerations. If comparative influences do occur this is seen as a matter of comparative law education.

In the Constitutional Court, by contrast, the use of comparative information seems to be a matter of systematic study. In 1987, there has been the Autonomous Section for comparative Constitutional Law (Sezione Autonoma di Diritto costituzionale comparato) established, consisting of foreign lawyers (two groups of eight persons). They studied constitutional systems for two years.<sup>1129</sup> This generated 1989 the establishment of a relatively permanent department for the making of comparative studies for the Court. Even if this department appear to be extremely small, it, nevertheless, publishes comparative information for the internal use of the Court.

In the beginning of its existence this section made studies concerning questions related directly to cases before the Court, and since 1989 it began to study jurisprudence and doctrine of foreign and comparative constitutional law. It also arranged some visits to foreign institutions.

The department making comparative studies has been producing material, for example, concerning difficult cases in fields as diverse as human rights, criminal law, and family law. The studies seem to be directly related to a particular case before the court. These inquiries often contain an examination of the political context of the law in each the system (for example, a newspaper review). The material from which the information is derived is sometimes included within the internal report. No sociological or cultural aspects are examined.

The information is used differently according to the preferences of each member of the court, and the attitude towards this comparative information seems to differ considerably between different members.

These studies do not necessarily have a direct impact upon the explicit justifications of the court. They usually belong to the context of justification and in this way may influence the functioning of the Court.<sup>1130</sup>

In the argumentation of some cases before the establishment of the department (1980-1987) one has used expressions such as "*other states of the European Community...*", "the

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<sup>1129</sup> The source also the document Servizio Studi. Sezione Autonoma di diritto costituzionale comparato. Elenco dei quaderni e di lavoro della Sezione Autonomade diritoo costituzionale comparato del Servizio Studi, dalla sua istituzione - giugno 1987 - al dicembre 1992 (CORTE COSTITUZIONALE, Segreteria generale, gennaio 1993. Prof. Sandulli, S., Consigliere preposto alla Sezione Autonoma di diritto costituzionale comparato del Servizio Studi).

<sup>1130</sup> Pegoraro, L., 1987, p.607.

*experience of other countries*"..., "...the solution in European states does not differ substantially from the solution in Italy...", "... the Supreme Court of the United States maintained...", "In most countries...", "... in various foreign legislations..." etc.<sup>1131</sup> It seems that the most interest is in the systems of France, Germany, United Kingdom, and the United States.<sup>1132</sup> In some cases, many diverse countries have been mentioned.<sup>1133</sup>

There are also informal channels of communication administrations of different courts in Europe, which are used for informal consultation.<sup>1134</sup>

### 2.2.3.6. France

In the Supreme Court of France (Cour de Cassation), the administration makes an independent study of the legal question submitted to the court. One may claim, however, that there is no considerable and systematic use of comparative law in the Supreme Court of France (Cour de Cassation).<sup>1135</sup> These observations do not appear neither frequently in the opinions of the Advocate Generals of the Supreme Court (Cour de Cassation).<sup>1136</sup> However, in some administrative cases (Conseil d'Etat) the *commissaire du gouvernement* has given comparative consideration to certain aspects.

There seems to be some enthusiasm in the Conseil Constitutionnel to consider other constitutional regimes in Europe.<sup>1137</sup>

In a particular case, the administration often examines the law of the European human rights systems. This is noticeable also in the conclusions of the *commissaire du gouvernement*.

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<sup>1131</sup> For a list of cases and some analysis, see Pegoraro, L., 1987, pp.601-612. Apart from finding elasticity, the Court seems to search for rational and more permanent tendencies (ibid., pp.612-613). For some analysis, see de Vergotti, G., 1993, pp.12-15.

<sup>1132</sup> Pegoraro, L., 1987, pp.609-610.

<sup>1133</sup> Pegoraro, L., 1987, pp.603-605.

<sup>1134</sup> No interviews were made with judges.

These observations are supported also in the light of the doctrinal discussion which exists concerning the use of comparative law in Italy, see Pizzorusso, A., 1983, pp.109-113.

<sup>1135</sup> Also, Legeais, R., 1994, p.348, 354 ff.. This does not mean that comparative law should not be used (idem.).

<sup>1136</sup> One may see some comparative argumentation in some opinions (such as M. Dontenville; L'article 1384 alinéa 1 du Code Civil: source résurgente (Germany, Quebec, Algeria, Egypt, Japan) (Rapport de la Cour de Cassation, 1991 pp.82-84),

<sup>1137</sup> Legeais, R., 1994, pp.356-357.

Legal sources are mainly the texts, doctrine, precedents and fundamental decisions, and some reasoning by analogical.<sup>1138</sup> Comparative law just does not seem to have a direct role as a legal source. Influences may arrive via conferences and other types of discussions, or via some kind of internal use, which is inspirational and may be observed only indirectly.<sup>1139</sup> This is so even if in the *travaux préparatoires* there are references to the legislation of other countries.

In private international law and some other types of cases, having an "international" connection, the consultation of foreign law may be, however, obligatory. This type of use is not very developed.<sup>1140</sup> External experts are not usually used.<sup>1141</sup>

The lack of comparative observations seems not to be the result of procedural economic obstacles, but, in general, there does not seem to be any great interest in this type of material, not even in internal discussions.<sup>1142</sup>

Nevertheless, attitudes seem to be changing.<sup>1143</sup>

### 2.2.3.7. The Netherlands

There has been some use of comparative observations in the Supreme Court of the Netherlands:<sup>1144</sup>

*"In accordance with what has been accepted in that country and with what was then accepted in neighbouring countries (France, Belgium, Germany and England) under statutory judicial law", the damages for nonmaterial damage must be reasonable and just".*

There was also a case in which the Court applied comparative information and based its decision (using also other interpretative methods) on uniform rule of civil law. In this

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<sup>1138</sup> Troper, M., Grzegorzczak, C., Gardies, J-L., 1991, p.171 ff.

<sup>1139</sup> Legeais, R., 1994, pp.355-357.

<sup>1140</sup> Comparative observations may be made, to a certain extent, in cases of private international, maritime, administrative, and criminal law, having an international connection. There are however, some difficulties to observe this (also, Legeais, R., 1994, pp.353-354 ff.).

<sup>1141</sup> On the development of the legal informatics in France, see Linant de Bellefonds, X., *L'utilisation d'un "système expert" en droit comparé*. In: *Rev.Int.Dr.Comp.*, 1994, p. 703 ff.

<sup>1142</sup> See also, Bézard, O., 1994, p.776-777. Reasons seem to be procedure economic and cultural. Documentation exists. European integration is conceived strictly institutionally (*ibid.*, p.778-779).

<sup>1143</sup> Legeais, R., 1994.

<sup>1144</sup> See, Kisch, I., 1981 and his analysis.

case, there was extensive citation from the decisions of some other European countries (Austria, France, Germany and Switzerland)<sup>1145</sup>.

The argumentative constructions were not based on historical connections between different legal systems (i.e. combination of historical and comparative method), but, rather, they viewed foreign solutions as a model.<sup>1146</sup>

### 2.2.3.8. United States

Before the revolution, English statutory principles were not applied in American courts obligatorily. There was a relative freedom in terms of their treatment. The statutes were considered, if they were considered suitable to the prevailing conditions<sup>1147</sup>. There were also "reenactments" of certain statutes by the provinces.<sup>1148</sup>

After the revolution, they gained, in general, an interpretative value<sup>1149</sup>. In the 18th century, English law lost its normative value, and its use was even prohibited in certain states.<sup>1150</sup> However, the trend revived in the 1950's.<sup>1151</sup>

Comparative interpretation seems to be a "legally" accepted method of interpretation in the United States.<sup>1152</sup>

In the states of the United States the drafting of the Model Penal Code has resulted

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<sup>1145</sup> For a similar case in the Supreme Court of New Jersey, see *Greensban v Slate*, 12 NJ 426, 97A.2T 390 (1953).

<sup>1146</sup> For an example of how comparative law is used in the Netherlands (see Koopmans, T., 1996, p.545, 551). For analytical and example type of reasoning, see Advocate General Hartkamp, Hooge raad, 9 oct 1992, N.J., 1994, p.2474 ff. (ibid., p.535) referring to the Supreme Court of California, 607 P.2d 949 (Cal.1980) in the matter concerning the market shared product liability. The court rejected this reasoning. The Code Civil was used as the basis. On case law, see also Koopmans, T., 1996, p.555. See also Hoge Raad 7, Mei 1993, nr. 8152., p.1175 ff. (N.J. 1995).

See, furthermore, Kisch, I., 1981, and another example, Hooge Raad, *Van Kreuningen v Bessem*, 21 May 1943, *Nederlandse Jurisprudentie N.J.*, 1943, 455.

<sup>1147</sup> Gray, J.C., 1972, p.197. For some history, see Gordley, J., 1995, p. 558 ff.

<sup>1148</sup> South Carolina, year 1712 (Gray, J.C., 1972 p.197).

<sup>1149</sup> Gray, J.C., 1972, pp.244-245. Especially French and Dutch influences.

<sup>1150</sup> Gray, J.C., 1972, p.243. On developments in general, Hug, P., 1932, p.1068.

<sup>1151</sup> Schlesinger, R.B., 1980, p.9.

<sup>1152</sup> See, Schlesinger, R.B., 1980, p.6 ff., mentioning cases, for example, concerning the working hours of women, etc.

Schlesinger identifies some evolution and diverse elements of the doctrines of comparative law from the applied comparative law in common law (ibid., p.45 ff.):

- foreign law as a fact (based on Lord Mansfield's idea from the 18th century);
- comparative law treated as a modification of a statute or a source of innovation;
- the techniques of proving and studying foreign law.

numerous references and considerations to comparative law aspects, particularly regarding its application. In this context, comparative interpretation has been claimed to be either indirect or direct. By the indirect comparison is meant comparative references to foreign textbooks or law review articles which, in turn, themselves use comparative material.<sup>1153</sup>

The direct use of comparative interpretation has been seen, for example, in cases dealing with certain contractual questions<sup>1154</sup>. In certain negligence cases, a combination of interstate and indirect international comparison has been employed.<sup>1155</sup> The need for comparative analysis in these cases was based on the fact that the legislation was an example of the common law.<sup>1156</sup> The court seemed to deal basically with question concerning change in the doctrine, and whether this could established by the court before the legislator. Furthermore, the question was also about the evaluation of a new and the old doctrine and their definitions<sup>1157</sup>. The solution adopted was that judge made law can be changed by the courts. The code was considered only to be a declaration of the common law. Apart from comparative reasoning, the "new" doctrine was adopted on the bases of fairness and equity. The court also maintained in its reasoning that similar legislative practices existed in 25 states of the US. The content of the doctrine was based on an interstate comparison with a critical review of the alternative practice in one particular state<sup>1158</sup>.

In the United States, comparative references have taken place constantly in the field of maritime law. In some cases, comparison has been undertaken because, on certain points, there was no regulation on that point by the national legislature. These references have concerned Roman law as codified in Spain (*Consolato del mare*), the Amalfitan Code of Naples, the Laws

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<sup>1153</sup> Zaphiriou, G.A., 1982, p.87. This practice concerning the use of law review references has turned the system closer to continental practice than to the English common law practice (ibid. p.88).

An extensive study of the use of comparative law has been presented by Schlesinger (1980).

<sup>1154</sup> The supreme Court of New Jersey used, in its argumentation, the French, German, Italian and Swiss Civil Codes (*Greenspan v. Slate*, 12 N.J. 426, 97 A.2d 390 (1953)).

<sup>1155</sup> For example, *Li v. Yellow cab Co. of California*, 13 cal. 3d 804, 532 P.2d v1226, 119 Cal. Rptr. 858 (1975) (see, Zaphiriou, G.A., 1982, pp.88-89). The interstate and international comparisons can be claimed to be methodologically quite similar (Zaphiriou, G.A., 1982, p.95).

<sup>1156</sup> *Li v. Yellow cab Co. of California*, pp.814-815 and pp.855-856. The reference was made to the Louisiana Civil code, Code Napoleon, to New York and English cases referred already in the drafting, and the relationship between the Field Civil code and the history of French conceptualization (Zaphiriou, G.A., 1982, pp.89-90).

<sup>1157</sup> Zaphiriou, G.A., 1982, pp.89-90.

<sup>1158</sup> *Li v. Yellow cab Co. California*, p.875.

of Oleron from France, and the Hanse Towns Laws, of Germanic origin.<sup>1159</sup> The application of these laws was considered acceptable because of the "*wisdom and experience, evidence in the particular maritime institutions of other commercial countries...*". Furthermore, these laws were "*guides*", and in similar cases had a "*high and exemplary importance*". This was due to the fact that it was "*safer to follow them than to trust entirely to the varying and crooked line of discretion*".<sup>1160</sup> This application was based also on adaption of the common law to America.<sup>1161</sup>

This type of comparative interpretation has had a considerable impact upon the maritime law of the United States.<sup>1162</sup> These references have been based on the fact that a great number of countries (indeed, most countries) have ratified or acceded to the rules. Fairness and flexibility seem to be main ideas behind the interpretation of maritime law.<sup>1163</sup>

The development of commercial law, the law of contracts, and the law of bailment in United States has been also interpreted in the light of the civil law influences.<sup>1164</sup>

Interstate (American) comparative interpretation is also commonly practised. The restatement of law, for example, serves as a basis for this interstate comparison.<sup>1165</sup>

One interesting concept appearing in the discussion concerning comparative interpretation in United states is the concept of "*rational selection*". The opinion of the Supreme Court of Texas explains the nature of this idea:

*"The rules of the Common law have never been considered obligatory, as matter of absolute principle, on questions of practice; but our court have either adhered to their former practice, or have adopted such rules of their own as seemed dictated by considerations of policy and convenience, rather than pursue the common law practice, where the rule which is afforded was found to be unsuited to our system, or inconvenient of application."*<sup>1166</sup>

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<sup>1159</sup> Zaphiriou, G.A., 1982, p.77 ff., referring to *Thompson v. Catherina*, 23 F. Cas. 1028 (D. Pa. 1795) (No. 13, 929).

<sup>1160</sup> Case Thompson, p.1030.

<sup>1161</sup> Zaphiriou, G.A., 1982, p.79.

<sup>1162</sup> Cases, US Supreme Court, *Moragne v. States Lines Inc.*, 398 U.S. 375 (1970), and *United states v. Reliable Transfer*, 421 U.S. 397 (1975) (Maritime Torts, referring to the Brussels Collision Liability Convention of 1910).

<sup>1163</sup> See also Zaphiriou, G.A., 1972, p.79.

<sup>1164</sup> Zaphiriou, G.A., 1982, p.81. Schlesinger, R.B., 1980, p.6 ff.

<sup>1165</sup> Zaphiriou, G.A., 1982, p.82.

This restatement of law was prepared, by commencing with the establishment of the American law Institute, 1923 and with the association with many legal institutions in the United States, to be the restatement in the field of private law, judgments, the conflicts of law, and the law of international relations as a orderly statement of the common law of the United States (*ibid.*, p.82).

<sup>1166</sup> *Grassmeyer v. Beeson*, 13 Tex., 524, 531 (1855) (referred by Zaphiriou, G.A., 1982).

By means of this 'rational selection' doctrine the Texas system was influenced by both common law and civil law traditions<sup>1167</sup>.

Another interesting directive for comparative interpretation can be found in a case of the Californian Supreme court which decided to interpret the applicable law (Civil Code) in the light of foreign common law influences

*"except in those instances, where its language clearly and unequivocally discloses an intention to depart from, alter, or abrogate the common law concerning a particular subject matter"*<sup>1168</sup>.

It has been claimed that this led, to a certain extent, eclecticism in the adoption of law. The same phenomenon is visible in many states of the United States.<sup>1169</sup> It has been suggested that states tend to form groups in following one technique.<sup>1170</sup>

The American experience seems to indicate that it is in the nature of the subject which determines the "rationale" of the comparison. Furthermore, it seems to be clear that the common language and the reliability of the information encourage a comparative approach and comparative interpretations.<sup>1171</sup>

Comparative interpretation, interstate and international, in United States courts seems to consist of the examination of the antecedents of a legal principle or rule, its functioning, its economic and social justifications, its suitability for the general and procedural framework of the adaptive system, and the "philosophy of the system". This philosophy relates to the conservative or progressive character of the system.<sup>1172</sup>

The decline of the use of comparative law in United States courts may be associated with the rise of the Anglo-American science of law, the increasing dominance of the historical jurist, analytical jurisprudence, and the growing emphasis upon local sovereignty and nationalism.<sup>1173</sup>

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<sup>1167</sup> Zaphiriou, G.A., 1982, p.76.

<sup>1168</sup> Case *Estate of Elizalde*, 182 cal. 427, 433, 188 P. 560, 562, (1920) (referred by Zaphiriou, G.A., 1982).

<sup>1169</sup> Zaphiriou, G.A., 1982, p.77.

<sup>1170</sup> Zaphiriou, G.A., 1982, p.93.

<sup>1171</sup> Zaphiriou, G.A., 1982, p.91.

<sup>1172</sup> Zaphiriou, G.A., 1982, p.91.

<sup>1173</sup> This was related to the "judicial doctrine" orientation in the study and the teaching of law in the United States (see Capelletti, M., 1990b).

The development of comparative law was connected to the establishment of the nation state (Koopmans, T., 1996, p.548, Coing, H., 1978, p.31).

It might be that the practice of comparative interpretation, for example, is due to the rise of nationalism

#### 2.2.4. The internal conflict of laws

It is quite evident that comparative law does not have the same meaning in the practice of all countries. Furthermore, in relation to some systems, some functions could be easily considered as "comparisons", whereas in relation to other systems they do not necessarily appear to be comparisons or comparative law at all. For example, a "comparison" of English, Canadian, New Zealand, Australian experience has not been unambitiously seen as a "legal comparison" and to belong to the realm of comparative law <sup>1174</sup>. However, these types of references would be most likely be classified by a continental lawyer as comparative law. This fact is related to different conceptions of law.

This also concerns the phenomenon referred to as internal conflict of laws.

The idea of the internal conflict of laws refers to the possibility of looking into conflicts between normative (legal) systems from within one legal system.<sup>1175</sup> These divergences can be territorially, culturally, or personality based<sup>1176</sup>. This type of decision-making is strongly public policy oriented, and the comparative method is used in a study of local legal systems in their own context (eg. ideologies, stages of technical development, etc.)<sup>1177</sup>. Problems, on the other hand, occur in examining questions such as, what really is "proper law" what are the connecting factors between identified systems (of norms), and what really is the "tertium comparationis".

An idea has been proposed that comparison, in this context, should proceed by examining what is compared, identifying differences and similarities, explaining differences and similarities<sup>1178</sup>. In this sense, the whole process of comparison is an extensive comparative discourse on all problems of comparative law, and, for that matter, on the systems themselves as

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and the criteria presented by Pound. However, another perspective must also be taken into account. We are also speaking about open and closed comparative influences.

For an extensive study on the comparative law in the Courts of United States, see Schlesinger, R.B., 1980.

<sup>1174</sup> Hazard, J.N., 1973. In Australia, see Bates, F., 1981, p.259 ff.

<sup>1175</sup> Sanders, A.J.G.M., 1990, p.57.

<sup>1176</sup> See, Benet T.V., 1985, p.65. The criteria for application are related to expectations, life styles, secondary agreements, nature of transactions, forms used, situation of action and property etc.

<sup>1177</sup> Sanders, A.J.G.M., 1990, p.6.

<sup>1178</sup> Sanders, A.J.G.M., 1990, p.62.

such (a "formative" process). This idea does not, however, explain the particular distinctiveness of this phenomenon or provide an approach to it.

The possibility of moving from ethnocentrism in this type of internal conflict of laws may be possible, if one applies a discourse principle, and lets the parties, to a certain extent, "speak for themselves" and for their legal system<sup>1179</sup>. Here we come, however, quite close to questions of political integrity.

### 2.2.5. Comparative law in mixed courts

Comparative law has been of great use in so-called mixed courts<sup>1180</sup>. In 19th century Egypt, for example, there was a mixed court interpreting Egyptian private international law and some other legal questions. The court consisted of judges from different countries and they discussed legal questions with the help of comparative observations, often based on their own experiences.<sup>1181</sup> The mixed court had an enormous role in establishing and defining the law of that system.

### 2.3. The case of private international law

**General observations.** Contemporary private international law is based on the primary rule which claims that national systems have their own private international law rules and rules concerning the conflict of laws<sup>1182</sup>. The legal basis rests, in other words, upon the private international rules of each system, though many "general" principles can also be applied. Here the idea is not to go into details regarding this question. The main focus is in the role of comparative law in the choice of law situations<sup>1183</sup>.

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<sup>1179</sup> Sanders, A.J.G.M., 1990, p.64. This could be called some kind of "functional legal multiculturalism and pluralism".

<sup>1180</sup> Baxter, L.G., 1983.

By mixed legal systems one can understand systems derived from two or more systems generally recognized as independent of others (Mcknight, J., 1977, p.77).

<sup>1181</sup> Hill, E., 1978, p.299. They were abolished 1949.

<sup>1182</sup> This seems to be so, even if one can say that private international law is a branch of law, or a legal discipline, within a system of municipal law (Kahn-Freund, O., 1976).

<sup>1183</sup> The terms private international law and conflict of laws seem to be used interchangeably, the former in continental European, and the latter in the English speaking countries (Kahn-Freund, O., 1976, p.2).

In private international law there are three central problems: the choice of law, choice of forum, and the choices of the extent to which the substantive rules of the "foreign" law will be considered and applied (*ibid.*, p. 3).

In terms of choice of law, there are basically two approaches. One is the strict selection approach, and the other is the functional-instrumental approach<sup>1184</sup>. The first seems to be based on the idea that divergences between rules are relatively few, or that it is quite difficult to establish an intelligible study of another system.<sup>1185</sup> By contrast, the functional-instrumental approach appears to be concerned with relevant policies and general expectations.<sup>1186</sup>

Now, it is evident that comparative law has a role in matters of private international law. This is due to several characteristics. Basically, because in private international law we are dealing with many laws, some kind of comparison is clearly needed<sup>1187</sup>. Furthermore, the idea behind the application of conflict rules is clearly to evaluate whether there are material differences between systems.<sup>1188</sup> The conflict rules do not result in clear rules which enable a solution to be found. One requires comparative processes. If comparisons are not made, the justification is a - "façade" justification of the solution<sup>1189</sup>.

On the other hand, according to some conflict of law rules, the foreign law can even be an obligatory source of law (with the exceptions of public policy).<sup>1190</sup> In this case, foreign law has to be applied to the case. To be able to determine the applicability and content of those rules, one has to study, comparatively, foreign law in relation to the law of one's "own" system.<sup>1191</sup>

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Some writers have envisaged a quite extensive role for comparative law in conflict situations ("*Agreement must be reached so that one and the same international relation will everywhere be subject to the same rule in all national systems*", David, R., Brierly, J.E.C., 1978, p.10).

<sup>1184</sup> Von Mehren, A.M., 1975, p.751 ff.

<sup>1185</sup> Von Mehren, A.M., 1975, p.752.

<sup>1186</sup> Von Mehren, A.M., 1975, pp.755-756.

<sup>1187</sup> De Boer, Th.M., 1994, p.16. See, Valladão, H., 1961, p.108.

<sup>1188</sup> De Boer, Th.M., 1994, pp.18-19. Comparative law is used in these processes for finding genuine conflicts or similarities between systems.

<sup>1189</sup> Von Mehren, A.T., 1975, p.752.

The solution to the interpretation of the international private law may be determined by the quality of the decision, not only by the institutional authority (Mádl, F., 1978, p.9, referring to Langen, 1973). The judge can be called a mediator between systems).

The choice of law needs comparative method in terms of substantiation of the choice of law question and justification. The choice - based on national rules - does not lead to any conclusions concerning the relationship between these systems, and in that sense the comparative analysis may be seen - to a certain extent - to be unimportant.

The comparative argumentation is institutional, unless there is a rich comparative law tradition in the national discourse. Even foreign authors can be of importance.

<sup>1190</sup> For example, Swiss Federal International Private Law Code, Article 16.

<sup>1191</sup> Some analysis, Ereciński, C., 1978, p.208. On the relativization, Schlesinger, R.B., 1962/63, p.71.

Comparative law gains importance in the situations of ordre public, where the basic principles of the *lex fori* seem to conflict with the law of the foreign system.

The basic difference between comparative law as such and comparative law in private international law can be seen in their obligatoriness. Choice of law rules generate obligatory and allowed uses of comparative law,

The most favourable solution may exist in terms of the choice of law, if the comparative analysis reveals unclear, non-acceptable or otherwise problematic solutions. Within choice of law, preference is given to the national system, and this is justified in terms of national public policy. However, often the use of public policy is based on non-consideration of divergences<sup>1192</sup>. It has been maintained that the choice of law approach, which neglects comparative law, can become unpredictable and neglect the idea of decisional harmony. This may increase the use of the public policy exception.

A approach known as non-choice, i.e. that no choice has to be made because no differences exist, is also connected to comparative observations.<sup>1193</sup> In these cases, comparative law is a method for arriving at a solution. This leads usually to the law of the *lex fori*, but also to the so called "cumulative application of systems".<sup>1194</sup>

The role of foreign law in private international law can be also contrasting. Although comparative law is used, the justification can be "translated" into the terms of the system.<sup>1195</sup>

The comparative method can be used also in shaping the conflict rules<sup>1196</sup>, and in their study and dissemination<sup>1197</sup>. One can attempt to find common solutions<sup>1198</sup>.

**Some remarks on the nature of comparative law in private international law.** In private international law, there seems to be two possibilities with regard to the possible approaches to

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whereas comparative practice as such can practically never be obligatory, unless some internal rules of an organization so determine.

<sup>1192</sup> Von Mehren, A.T., 1975, pp.752-753.

However, the difference between comparative law (as such) and comparative law, related to the choice of law rules, is that no prior idea of better or most favourable law exists in the realm of the choice of law. In the choice of law the national law is the premise, and even if foreign rules are applied, this takes place in the realm of national private international law rules.

There are some national rules - for example, in Swiss international private law rules, as we have seen - where preference is given to the solution, which refers to the "most favourable result" (Swiss Statute on Private International, EC Contracts Convention, Article 52, 61).

An example of the restrictions upon the considerations of the foreign law (20th century, BGB Article 30): "*Die Anwendung des ausländischen Gesetzes ist ausgeschlossen, wenn die Anwendung gegen die guten Sitten oder gegen der Zweck eines deutsches Gesetzes verstossen würde*".

<sup>1193</sup> De Boer, Th.M., 1994, p.19, D'Oliveira, H.U.J., 1981, p.51 ff.

<sup>1194</sup> D'Oliveira, H.U.J., 1981.

<sup>1195</sup> De Boer, Th.M., 1994, p.18.

<sup>1196</sup> Loussouarn, Y., 1981, p.131.

<sup>1197</sup> Kahn-Freund, O., 1976, p.2.

<sup>1198</sup> Loussouarn, Y., 1981, p.133.

foreign law: it can be considered as a question of fact or of law.<sup>1199</sup> If it is considered as a question of fact, it does not have a "legal" status. In this case, the rules of evidence, and not only the legal analytical tools, seem to apply to the phenomena. If, on the other hand, the foreign law is seen as a "legal" feature, the legal analytical approach applies<sup>1200</sup>. However, the distinction between pure fact and law is not so clear cut<sup>1201</sup>.

The phenomenon of the burden of proof is related to the application of the rules of evidence. Here the idea prevails that the content of law has to be shown. This recalls the comparative law principle that, should foreign law be taken into account rationally, the decision-maker has to establish a certain degree of legal analysis.<sup>1202</sup>

Comparison within decision-making can be made explicitly. However, foreign law is often not analysed. This may be related to the idea that when the decision not to apply foreign law is based on explicit analysis, there exists a possibility of consisting the solution on the basis that an improper analysis of the foreign law took place and that an inadequate understanding of it existed. Consequently, the use of comparative law analysis is clearly connected to the question of persuasiveness. This may also be the reason why foreign law may be treated as a fact. As the question concerns the rejection of foreign law as applicable law, this can be more easily accomplished when one can refer to the analysis, and not to the substance of the foreign law as such.

On the other hand, it has been maintained that comparison in private international law must be extremely nominalistic. This may be associated with its strict nature based on substantive principles of civilized nations, good faith, equality and good conscience, *pacta sunt*

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<sup>1199</sup> For example, in principle, Germany as law, England as fact (Hartley, T.C., 1996, p.273, Fentiman, R., 1992, p.142, on the history since Lord Mansfield (1700) in England and United States, Schlesinger, R.B., 1962, p.56 ff.). Comparison with different approaches to proof, see *ibid.*, p.274 ff. The question is related to *ex officio* application and to the status of the court (Hartley, T.C., 1996, p.273, Fentiman, R., 1992, p.149) or the use of statements made by (or requested from) authoritative institutes (Fentiman, R., 1992, p.145). However, in English courts, the foreign law is not, as such, treated "in equal footing" (Fentiman, R., 1992, p.143). For the process of proof (experts and judges considerations, etc), see Jolowicz, J.A., 1994, pp.748-750. For the history, practicality, and current "threats" by idea of "voluntary pleading" by Rome Convention, and on the role of already examined foreign law questions expressed in the Civil Evidence Act, see *ibid.*, p.143 ff., and pp.155-156). The testimony of foreign law is, however, qualified by "*demeneour, clarity and persuasiveness... [and] practical experience*", and, in the end, by judges' considerations of analogy or ignorance (*ibid.*, pp.146-148). For practical problems (solution itself, mistakes, unpredictability, costs) and policy issues (some degree of predictability, general effectiveness and time-saving, flexibility - discouraging, however, access to courts and resulting unpredictability in general) (see *ibid.*, p. 150 ff.).

<sup>1200</sup> Ereciński, C., 1978, p.206-207.

<sup>1201</sup> For some analysis of this and problem, see Kahn-Freund, O., 1976, pp.279-281. "A question of fact of a peculiar kind" (see Fentiman, R., 1992, p.145 ff. And the English cases referred).

<sup>1202</sup> In general on the proof of foreign law, see Hartley, T.C., 1996, p.271 ff.

servanda, etc.<sup>1203</sup>

It seems to be clear that in choice of law situations foreign law is treated as law more than merely as fact, even if certain ideas concerning the burden of proof may be applied. It also seems that because foreign law is treated in an "integrative manner" (eg. by considering its basic principles to be applicable) and because, consequently, the conflict really seems to be a conflict of legal principles rather than conflict of legal rules, there is also a general legal integrity principle applied (adjudicative integrity). Furthermore, it looks like the *tertium comparationis*, in this case, is the legal system itself<sup>1204</sup>.

**The differences and similarities between comparative law and choice of law interpretations.** We may claim that "comparative law" in private international law questions is not really comparative law in discursive sense. Namely, choices are usually justified on the basis of national rules concerning conflict of laws, although, sometimes, general principles are used. However, there is no attempt to justify any general principles for the international discourse, but the solution is determined not on the basis of generality or disparity in any scientific sense but on the basis of public policy disparity and institutional premises. Using the terms of the discourse analysis, national and institutional legal opinions are decisive. The audience is not any comparative law opinion or opinion of any external institution or the general legal audience.

This difference can be explained also from another point of view. In comparative law, as such, one does not have to make any choice of legal norms or rules except before the comparison is undertaken, and not always even then. Comparative considerations, in choice of law interpretation, on the other hand, aims to identify the choices of the one best interpretation. However, it is basically the internal rules of the system which are interpreted<sup>1205</sup>. The limits come from the "*ordre public*" of each of the legal systems. In comparative law, on the other hand, there are only a few methodological instructions governing the choice of "suitable" material for the comparative survey, if any at all.

In this sense, we may say that even if the method of comparison is used, one cannot speak of a genuine comparative interpretation. Nevertheless, there are also some similarities in

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<sup>1203</sup> For some analysis, Kahn-Freund, O., 1976, p.279.

<sup>1204</sup> For example, if the acceptability of foreign rules, as applicable law, is contested, the metarule of "public policy" can apply. This concept makes it possible to maintain that the law of another country is law at the same time as it is rejected as applicable law.

<sup>1205</sup> The comparative process is restricted to the legally regulated extent of comparison.

approach. The comparative interpreter, using comparative law as a source of law, restricts, in general, the possible considerations by reference to some subjective criteria which do not necessarily differ greatly from the "ordre public" considerations. However, both choice of law and the comparative interpretation have their specific practical purpose, which thoroughly conditions the process. In the choice of law, there is no need, for example, to increase knowledge and understanding of legal phenomena as such.<sup>1206</sup>

**International commercial arbitration.** The role of comparative law, in the international commercial arbitration, is extremely practical and elementary<sup>1207</sup>. In fact, it is the primary source of practice in this sphere. This applies to the drafting of the rules, to the arbitration itself, and to the choice of the place and law of the arbitration.<sup>1208</sup> Comparative law determines the possibilities for all these elements of the arbitration, and, by determining those "strategic" choices, it has an impact to the outcome itself<sup>1209</sup>.

In international commercial arbitration one usually departs from the rules of one system, takes into account general principles, and makes a comparative evaluation of certain aspects of the laws<sup>1210</sup>.

The comparative legal aspect is connected to the international nature of the disputes, and, moreover, to the fact that the parties are often of different nationalities. On the other hand, the applicable law may not be referred to at all in the contract. In such cases, the comparative aspects are usually considered at the end of the decision-making, where the applicable law is determined.<sup>1211</sup>

In cases of "*Lex Mercatoria*" comparative law seems to be the only source<sup>1212</sup>. The

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<sup>1206</sup> Schmitthoff, M. (1941, p.107 ff.) Has maintains that "*applied comparative law begins just where the Conflict of laws end, namely in examining the contents of the different legal systems and submitting the transaction to that system which is the most appropriate to it*".

<sup>1207</sup> Valladão, H., 1961, p.112. It has even been claimed that the interest in comparative law in commercial law is a result of the "universal" nature of the latter *ibid.*, referring to Jaeger, P.G., *Comparazione e diritto commerciale*. In: *L'apporto della comparazione alla scienza giuridica* (Milano), 1980, p.303.

<sup>1208</sup> Gaillard, E., 1988, pp.283-284, 288.

<sup>1209</sup> Gaillard, E., 1988, pp.285-286.

<sup>1210</sup> See, for example *SPP Middle East Limited and Southern Pacific Proprieties Limited v Arabic Republic of Egypt and the Egyptian General Company...*, ICC Arbitration Nr YD/AS nr 3493, International Commercial Code of Arbitration, 11 march 1983 (International Law reports Vol 86, 1991, Cambridge, p.435-458). Studying the governing law, para. 49-51. See Jolowicz, J.A., 1994, p.754 ff.

<sup>1211</sup> Gaillard, E., 1988, p.287.

<sup>1212</sup> Gaillard, E., 1988, p.288.

interesting feature is that one can include all comparative aspects, comparison of the rules of international conventions, national laws, practices of different level institutions etc., within the idea of "Lex Mercatoria" comparison.

However, the role of comparative law in international arbitration does not differ considerably from the premises found in relation to private international law.<sup>1213</sup>

#### 2.4. Public international law in international organizations

**General remarks.** It has been claimed that the process of interpretation in the International Court of Justice is not a process bound by rules. On the other hand, it is agreed by many authors that in the interpretation of multilateral treaties, especially treaties establishing international organizations, the historical will of the parties is not decisive but rather the most important element is the objective content of the rule.<sup>1214</sup>

The doctrines of sources of law are fairly underdeveloped in international "systems". These systems' sources of law are in international treaties, in their interpretations, and in doctrinal discussions.

In historical terms, "comparative law" in public international law was determined by quite practical forms of cooperation and conflict resolution<sup>1215</sup>. However, international custom

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<sup>1213</sup> A case illustrating the choice of law can be mentioned. In the case *SPP (Middle East) Limited and Southern Pacific Properties Limited v. Arab Republic of Egypt and Egyptian general Company for Tourism and Hotels* (ICC Arbitration no yd/as no 3493, International Chamber of Commerce, Court of Arbitration, 11 March 1983, pp.435-459) describes the applicable law as follows:

*"The Agreements do not provide specially for the law, which is to govern the contract... the relevant domestic law... is that of Egypt... The claimants, however, contend that no rules and/or principles drawn from the body of domestic Egyptian law should be allowed to override the principles of international law applicable to international investment projects of this kind... The defendants refute the claimants argument in favour of the so-called 'de-nationalization' of the applicable law..."*

By referring to the literature (doctrinal contributions, resolution by international organization, judicial and arbitration precedents), the decision-making body makes a distinction between the "de-nationalization" doctrine, and the doctrine that domestic laws can be referred to within the realm of the principles of international law, which "ensure the protection to the contractual rights of the private party vis-à-vis the sovereign state". The law governing is, consequently, the "law of Egypt only in as much as they do not contravene the said principles" (of international law).

<sup>1214</sup> Bleckmann, A., *Die Aufgaben einer Methodenlehre den Völkerrechts. Probleme der Rechtsquellenlehre im Völkerrechts* (Heidelberg) 1978, p.75.

<sup>1215</sup> For example, in early international relations and in the international system, as Watson explains with regard to early Roman public law, the comparative perspectives were determined by the similarity of religion. Public law was identified, to a certain extent, with the public religious institutions. They were two sides of the same coin. The highest lawyers were priests, and there was a difference between the legal relationships between the "Latin" people and the others having another religion (Watson, A., 1993).

For many reasons, mainly because of the increasing interaction, this type of thinking (system) broke down, and public relations were determined by more "secular" and permanent actors (diplomatic missions etc). Public

has been the oldest source of international law, dating from the period of non-positive international law<sup>1216</sup>.

In contemporary public international law, comparative law is a necessary yet neglected element in interpreting law by international organizations<sup>1217</sup>. We may say that nowadays the internal laws of the members of the international community are relevant material for international justice and for law-creating functions. On the other hand, comparative observations have been seen as a source of analogy for the development of international law<sup>1218</sup>. However, at the moment, one can consider that it is a direct source for both the interpretation of custom and treaties.<sup>1219</sup>

It has been claimed that the aim of the use of the comparative method in interpretation is not to replace the judicial function, but only to clarify and inform it.<sup>1220</sup> Comparative law can be seen as a supplementary source of law differing from pure legal transplantation<sup>1221</sup>. It seems that the idea of the legal basis is not to directly aid in interpretation, but to make it possible to use certain legal materials in the interpretation. The aim is to avoid *lacunae*

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relations were created in the form of treaties rather than in a one-sided processes. Public law became "horizontal". This was the basis of modern European public law.

<sup>1216</sup> Menon, P.K., 1986, p.186 ff.

<sup>1217</sup> In international law we can identify many types of decision-makers. There are the law of the Sea Tribunal, Trade organization tribunals, Iran-US tribunal. There have been also the Ad Hoc Criminal Law Tribunals etc. The international "order" has been defined as a "disordered medley" of law (Jennings, R.Y., 1996, p.5).

In the Nürnberg decisions based on the Agreement for the prosecution and Punishment of the major War Criminals of the European axis (Nürnberg War Crimes Trial 1946, London, 8 August 1945) it was stated that the "*law of war is to be found not only in the Treaties, but in the customs and practices of the states which gradually obtained universal recognition, and from the general principles of justice applied by jurists and practised by military courts*". Many "treaty comparisons" were made too ("*The prohibition of aggressive war demanded by the conscience of the world, finds its expression in the series of Pacts and Treaties to which the Tribunal has just referred*").

<sup>1218</sup> See, Haraszti, G., 1978, p. 318.

On the general binding force and "law creative" inabilities of the decisions, see Article 59 of the Statute.

<sup>1219</sup> Lauterpacht, H., 1987, pp.65-95.

In international custom we can make a distinction between old custom, and the new custom (McWhinney, E., 1979). It is found in the practice of states.

Certain criteria is required to establish a international custom. It has to be ancient, invariable, continuous and uniform, reasonable, not immoral, certain and definite, compulsory, and consistent (ibid., p.186).

There seems to be some confusion about the idea of "comparison" in international law, and in relation to interpretation of international treaties. Some writers refer, when speaking about "comparison", to comparison of "factual situations" and comparison of "treaties" (Bos, M. Theory and Practice of Treaty Interpretation. In: Netherlands International Law Review, 1980, p.140). This is different from the traditional comparative law comparisons.

<sup>1220</sup> Cruz, P. de, 1993, p.21.

<sup>1221</sup> The idea that the "comparative" interpretation of a treaty is not *a priori* in conflict with any other international treaties has been expressed for example in the Council of Europe (European) Charter for Regional or Minority Languages, Article 4 (with international agreements, charters etc).

in the system and to guarantee a reasonable administration of justice<sup>1222</sup>.

**Some legal bases and their analysis.** Some legal bases for the general approach to interpretation on the basis of different legal systems can be found also in the 1969 Vienna Convention on the Law of Treaties<sup>1223</sup>. Article 27 may be considered with regard to the use of comparative observations. According to this article, for example, municipal law cannot provide a justification for the failure to perform an international obligation<sup>1224</sup>.

The International Court of Justice applies "*general principles of law recognized by civilized nations*"<sup>1225</sup> and, furthermore, the judgments of the courts of different nations<sup>1226</sup>. In determining the applicable principles, one can also use more restricted international and regional agreements as a source of rules<sup>1227</sup>. It has been claimed that these generalities are identified by means of a comparative study<sup>1228</sup>. The idea in these both approaches is to compare existing legal

<sup>1222</sup> The lacunae are results of the ambiguousness of the system in the beginning, Davis, F., 1969, p.626.

<sup>1223</sup> The Treaty sets out, inter alia, the ideas of "good faith", "ordinary meaning", "context", "object", "purpose", "non-retroactivity", the historical relations between treaties, "supplementary means of interpretation", relationship between versions, third states, and role of later development, etc.

<sup>1224</sup> UN A/conf. 39/II ad. 2 (1971).

<sup>1225</sup> Article 38 of the Statute of International Court of Justice (Annexed to the Charter of the United Nations, June 26, 1945, i.c. similar to the Statute of the Permanent Court of International Justice):

*1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:*

- a. International conventions, whether general or particular, establishing rules expressly recognized by the contesting states;*
- b. International custom, as evidence of a general practice accepted as law;*
- c. The general principles of law recognized by civilized nations;*
- d. Subject to the provisions of Article 59 ("The decision of the Court has no binding force except between the parties and in respect of that particular case"), judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law*

*2. This provision shall not prejudice the power of the Court to decide a case ex aequo et bono, if the parties agree thereto."*

(See, *Asylum*, ICJ Reports (1950) 149.)

On the development of the "civilized" criteria, see Menon, P.K., 1986, p.192, Watson, A., 1993. See also, Gutteridge, H.C., 1944, p.2 ff, and pp.9-10.

The criteria refer to the "rationality of the system", "peace loving", "able and willing".

After the collapse of the Eastern European regime the criticism of this source has ceased, Menon, P.K., 1986, p.195.

<sup>1226</sup> See also, Graveson, R.H., 1958, p.657.

<sup>1227</sup> *Case Asylum*, ICJ reports (1950) 94. See in general, Fitzmaurice, G., 1986., p.16-19. Legal systems as a source of international law, (analysing the case ICJ Reports (1954) 54). Schlesinger maintains that "*the general principles find their expression in municipal laws of each nation*" (1980, p.37).

<sup>1228</sup> Menon, P.K., 1986, p.192, Friedmann, W., 1963, pp.282-283. In the context of law of nations, some scepticism by Gutteridge, H.C., 1944, p.8-9. Gutteridge sees some, but little, function of comparative law mainly in constructing the "principles" (methods?) of interpretation (intention idea, generalia specialibus non derogant, etc.) (idem.).

systems.<sup>1229</sup>

Consequently, it can be asked whether rules of municipal law really are sources of public international law? We may say that this is the case. International custom, which is in many ways reflected in domestic law, is constituted by "*evidence of the general practice accepted as law*".<sup>1230</sup>

However, as already maintained, it is a subsidiary means for the determination of rules of law<sup>1231</sup>. On the other hand, comparative analogical argument or the generalities have to be supplemented by other subsidiary means, which are judicial practice and the teachings of highly qualified publicists<sup>1232</sup>. The mere practice of states does not automatically become part of international law. One has to prove that a custom was established. Comparative observations as special arguments thus require supporting arguments.

This means that a certain legal quality has to be attached to the custom. This quality requires proof that the alleged custom has become binding on the other party<sup>1233</sup>. Basically, no "*uncertainty, contradiction, fluctuation, discrepancy, or inconsistency, from constant uniform usage*" may exist<sup>1234</sup>.

This suggests also that one may concentrate upon the "main systems" of law in order to determine the existence of a customary rule. It has been suggested also that the application of this rule application cannot be, however, in absolute contradiction with any of the other systems or against its fundamental concepts<sup>1235</sup>. According to some moderate writers, the practice of some systems can constitute evidence of a "preexisting customary rule" or can even

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<sup>1229</sup> See for example, Zweigert, K., Kötz, H., 1977, pp.7-9. David, R., 1950, pp.100-104, Gutteridge, H.C., 1944, pp.1-10, 1949, pp.61-71.

<sup>1230</sup> Article 38(1).

<sup>1231</sup> Example, case *Nicaragua* (1986) ICJ reports 98. Case *North Sea Continental shelf* (1969) ICJ Reports.

<sup>1232</sup> Article 38(1)(b). Menon, P.K., 1986, p.196, 198-199, on the critical value, p.198. Some analysis on this type of consideration, Gutteridge, H.C., 1944, p.9.

It must be general practice, but for that matter accepted as law (McWinney, E., 1979, p.197).

The latter aspect is related to the *opinio juris*. This is not specified in any other way. It must refer to the Article 38 definitions. However, the idea is based on the observation that the states were acting as fulfilling legal obligations, Menon, P.K., 1986, pp.190-191 (cases *Lotus*, *Asylum*, *North Sea Continental shelf*).

<sup>1233</sup> Case *Asylum* (1950) ICJ Reports.

<sup>1234</sup> Case *Asylum* (1950) ICJ Reports.

<sup>1235</sup> Gutteridge, H.C., 1949, p.65, *ibid*, 1944, p.4 ff. Menon, P.K., 1986, pp.196-197. The idea in Article 38 of the Statute of the International Court of Justice does not mean that the "*recognition by the civilized nations*" would mean all civilized nations (For example, Man, Reflections on commercial law of nations. In: British Yearbook of International Law, 1957, p.38-39).

The fact that the analysis of the state systems is qualitative is related also to the neglect of any "state will" theory in international law. The analysis is made in relatively autonomous basis.

have an influence upon the creation of subsequent international custom.<sup>1236</sup> No reference to any state, however, can be identified in the work of the International Court of Justice<sup>1237</sup>.

The generality can be achieved also by showing that it would be absolutely absurd to not have such a principle within the system.<sup>1238</sup>

In this sense, customary international law deviates from a mere comparative law analogy, even if the comparative observations do play an important role in the examination of these international norms. The legal quality of such norm, one may say, is established by the institutional authority of International Courts or authorities.

To conclude, one could say that, in public international law, comparative argument is basically a qualitatively analogical argument. On the other hand, the International Court of Justice has not been extremely enthusiastic in applying the Article 38(1) and comparative law method<sup>1239</sup>.

The latest development of the WTO also seem to be interesting from the point of view of this topic. The structure of the sources of the WTO systems are related to the WTO agreement itself.<sup>1240</sup> It mentions, on the other hand, (annexed) additional agreements. The main method of interpretation is "textual interpretation" (Article 17 of the Dispute settlement agreement). It has been maintained that the sources consist on GATT dispute settlement panel decision, WTO practice, particular reports of the dispute settlement panel and the WTO Appellate Body, custom, the teachings of highly qualified publicists, general principles of law, and, finally, other international instruments (similar to Article 38(1) of the Statute of the International Court of Justice).<sup>1241</sup>

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<sup>1236</sup> Lauterpacht, H., 1929, p.78, and p.80 ff.. See also Menon, P.K., 1986, p.197. For a good examination of the concept of customary international law, see Encyclopaedia of International law.

The Vienna Convention restricts the possibility of taking into account implementation material as a comparative source.

See, however, Permanent Court of Justice, 12 PCJ series B nos 2-3, p.40, 12 August 1982 (competencies of International labour organization, advisory opinion) Court may take into account measures taken on the basis of the Treaty, comparative studies within an extremely wide sphere.

<sup>1237</sup> See, Jennings, R.Y., 1996. Gutteridge sees the function of comparative law as correcting from the tendencies of "single system" application (referring to Lauterpacht).

In general, in international systems one could recognize an idea of the "respect for national legal systems", which functions as a basic legal tenet of comparative legal observations.

<sup>1238</sup> O'Connell, D.P., 1970, p.11.

<sup>1239</sup> Bredimas, A., 1978a, p.124, referring to various authors.

<sup>1240</sup> Final Act, 15 April 1994.

<sup>1241</sup> Article 3.2. of the new agreement refers to the "customary rules of interpretation in public international law". See also Article 7.

For a general analysis, Palmetier, D., Mavroidis, P.C., 1998, p.400.

Article XVI:1 of the WTO agreement maintains that the "*WTO shall be guided by the decisions, procedures and customary practices followed by the contracting states to GATT 1947*". This seems to indicate that comparative law is a relevant source. However, this is so only to the extent that the observed countries were part of the GATT 1947. Furthermore, it seems to include only practice which is related to the application of the GATT agreement.<sup>1242</sup>

The interpretation of general principles of law and other international instruments, however, could bring some comparative observations into the work of the system.

### 3. Comparative law in the European level case law

#### 3.1. European Community

##### 3.1.1. General remarks

**The European Community legal order as a subject of research from the point of view of comparative interpretation and reasoning.** One can say that the European Court of Justice is a good object of study from the point of view of the subject of comparative law. This is so because no basic doctrine of sources really has been established. There are no strict rules of reasoning such as those occasionally presented in connection to the national traditions, especially within continental thinking. This feature may be related to its "self-formative" stage or nature in general.

The Community system consists of many types of legal traditions. This is one of the reasons why one can note forms of expressions and interactions of arguments which do not appear in national legal systems.

We may say that European level law is justificatory in nature, whereas state systems have, as noted, created formal and mechanical approaches to legal argumentation. Because it is open according to its sources, one can recognize also normative or value-based limitations upon its argumentative style.

This feature is related also to a different conception of law at the European level.

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<sup>1242</sup> For some problems in the interpretation of this provisions, see Palmetier, D., Mavroidis, P.C., 1998, p.407.

It is more "principle" oriented, and linguistic interpretation seems to be more of a problem.<sup>1243</sup>

Comparative law influences (and adoptions) in the reasoning on European law have been studied mainly from the "constructivist" point of view. This is the basic approach of many scholars and judges. However, certain problems exist in this analysis.<sup>1244</sup>

Comparative reasoning has been observed to be a kind of a "natural" basis for certain principles. In many of these studies the basic idea seems to be that comparative arguments do function as basic elements for these principles. This is part of the "methodological" tradition of comparative law. Real "rhetorical" functions are not revealed<sup>1245</sup>. The constructivist approach does not consider the principles and different conceptualizations together. These studies have not focussed on the relationship interaction of these arguments with other arguments. The "substantivization" in the empirical sense also remains concealed.

A different approach would suggest, consequently, a deliberation, not over questions such as "what principles are constructed", but what kind of connection these principles have to substantive questions and to other arguments, i.e. in what situation are they used?

The problem of the constructivist approach is, furthermore, that it considers Community law somehow, in empirical sense, to be subordinate to state systems. It is quite problematic, in terms of the methodological and traditional approach to comparative law, to admit that European institutions use their own powers and are autonomous as legal orders. Consequently, one should perhaps see general principles of Community law as being relatively separate from general principles in the realm of comparative studies. These principles cannot be seen only as a reproduction of the common tradition of Member States, but their application context in European law should be studied more carefully.

One of the problems of the previous studies has also been that they have not regarded the evolutive idea behind the function of the use of comparisons as such. In other words, they have not explained why comparative studies are repeated, even within the same types

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<sup>1243</sup> On interpretation, see Hartley, T.C., 1994, pp.85-86.

<sup>1244</sup> See the studies of, for example, Koopmans, Pescatore etc. (judges of the European Court).

<sup>1245</sup> In general, for the relationship between rules and principles, Bredimas, A., 1978a, p.125, principles and comparative studies (ibid., p.128). Sources (national systems, public international law and laws of non-Member States) from which principles are "drawn" (ibid., p.125 ff.). The constant integrative force (ibid., 132-133), and the idea that in the ultimate form the result is *jus commune*.

The idea is somehow "evolutionist" in the sense that comparative arguments establish something. One could claim that they interpret something rather than establish something. The principles can be also seen as "methods".

of situations.<sup>1246</sup>

Consequently, this type of discursive point of view, the analysis does not exist. Furthermore, more recent cases have not been considered.

One of the interesting features concerning previous studies is, however, that many of the writers are judges themselves. This seems to be due to the fact that the use of comparative law is so deeply rooted in the institutional framework that only judges feel able to write about these issues. This is related also to the fact that no real dogmatic analysis is made. The ideas repeated in those "institutional" analyses are quite similar, and the derived scholarly analysis, on the other hand, often is only a reproduction of that analysis<sup>1247</sup>.

We may emphasise the fact that the European level functions as an example of typical comparativist legal interpretation. In this sense, one could apply the results of the forms of use of comparative law to the study of national legal systems.

**General remarks on interpretation in Community law.** The European Court of Justice has

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<sup>1246</sup> The explanation for this may be as follows: states demand an examination of hard cases from different points of views. The Court protects its own case law in relation to these claims.

The constructivist approach provides very powerful explanation for the use of comparative law (See, for example, Bredimas, A., 1978a, also Pescatore, P., 1980, p.339, Jacobs, F.G., 1990, p.107). One can easily see, that the studies tend to stress the listing of the principles "constructed" by comparative law without any analysis of the phenomena.

However, one could claim that it is not necessarily so that comparative law would be "constructing" any of the principles applied. One could claim that the whole process of consideration is "principle-led" in the sense that it is the principle, which is decisive for the use of comparative law.

For a more "institutionally" oriented approach, see Demas, G., 1984. See also, Bengoetxea, J., 1993, pp.5-6. Use of comparative law as "concretization", see Mössner, J.N., 1974, p.218.

The constructivist fallacy can be associated with an "illusion" resulting in the similar "order" of arguments, and the idea of an analogy between the heuristic and the justificatory forms. If comparisons are represented before the principled arguments, it certainly looks as if the comparative arguments are somehow "constructing" the principles. The constructivist approach stresses the positive results of the uses of comparative law, but neglects the "deviations" or "non-applications" of the results of the comparative considerations as part of the systematic discourse (negative and positive "konretisierung" (Mössner, J.N., 1974, p.228), stressing of the special features of one's own system (ibid., p.240).

A more fundamental analysis can be made, if one takes into account the relationship between these arguments in a more legal-material sense, and treats them as separate methods for the question. Their uses and non-uses in comparison with other arguments might tell more about the function of comparative law in the system. The study of the constructions of argumentation is a matter of argumentative style. The idea in this study is not to explain the uses of comparative law on a constructivist basis, but its uses on the basis of the discourse theory and, in particular, by the interaction between the arguments on the functionalist basis. This way one is more able to consider also comparative arguments like "comparison by opposites" and subtle forms of uses of comparisons.

<sup>1247</sup> The comparative legal studies in the realm of the European Community can be described, also in this sense, as institutionally autopoietic. This means that they are "institutionally" self-referential studies, which do not really explain legal phenomenon. They seem to form part of the self-justification of the institution.

used different methods of interpretation in its case law<sup>1248</sup>. One could therefore claim that it has not bound itself to only one method. In its case-law, it has stressed the sovereignty of Member States, aspects of competition, general aspects of social security, and free movement etc. It has also spoken of the legal security of individuals.<sup>1249</sup> From the point of view of historical interpretation, the Court has underscored future prospects rather than past and original intentions of the drafters of the Treaty.<sup>1250</sup> In its textual interpretation, the Court has applied the principle of uniformity of Community law rather than strictly accepted the literal meaning of the words and concepts as such<sup>1251</sup>. In these cases, one may say, it has done so in order to use an analogical interpretative method. This has been defined as "functional textual interpretation".<sup>1252</sup>

It has been claimed that the only leading principle or method in the interpretation of the Court is the pro-integrative method of interpretation. This has led to a functional approach by the Court, and the result has been that the Court can be seen as a political lawmaker in the European system.<sup>1253</sup> It has even been claimed that the Court can never be relied upon to stay within the limits set by the commonly-acknowledged methods of interpretation<sup>1254</sup>.

However, if some analytical distinctions can be made in the realm of this pro-integrative approach, one may claim that the interpretative methods of the European Court of Justice are those of "institutional systematic" or contextual interpretation method, and teleological interpretation in conjunction with the idea of the "rule of effectiveness" ("*La notion d'effet utile*" "*the concept of useful effect*"<sup>1255</sup>). These ideas stem from the incomplete structure and the goal-oriented nature of the Treaties establishing the Community system<sup>1256</sup>, and from the constructive role played by the judges of the Court<sup>1257</sup>. We have also spoken of the "emptiness"

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<sup>1248</sup> See, Schermers, G., Waelbroeck, D., 1987, p.11 ff., and Millett, T., 1988, p.163 ff., who is making a distinction between literal, schematic, teleological, [comparative] linguistic, autonomous-conceptual, general-principled, non-retroactive, restrictedly deviating, travaux préparatoires, effectiveness ("effet utile").

<sup>1249</sup> Bredimas, A., 1978a, p.177.

<sup>1250</sup> Bredimas, A., 1978a, p.178, and Gulmann, C., 1980, pp.198-199. Hartley, T.C., 1994, p.86.

<sup>1251</sup> See, for example, starting from case 75/63 *Hoekstra (née Unger)* (1964) ECR 177 (see also, Bredimas, A., 1978a).

<sup>1252</sup> On this see Bredimas, A., 1978a, p.177.

<sup>1253</sup> See on this, Rasmussen, H., 1986, and Blok, P., 1974, p.355.

<sup>1254</sup> Blok, P., 1974, pp.355-356.

<sup>1255</sup> Lecourt, R., 1976, p.236.

<sup>1256</sup> Pescatore, P., 1975, p.176.

<sup>1257</sup> Pescatore, P., 1974, p.86, Lecourt, R., 1976, p.235.

One could say that the nature of this type of method is increasing.

of the conceptual framework of the European legal discourse.

It has to be stressed that the teleological construction is different in the European system as it is within national systems: the aims in the interpretation of an EC rule can often be found in the objectives of the EC legislation itself and forms part of the textual and historical interpretation whereas in national legal systems the results of the decisions are seen at a much more pragmatic, individual level. The EC's pro-integrative approach is the decisive element in its method of the teleological interpretation, whereas national systems do not have to consider this feature. This does not necessarily mean that the European Court of Justice would not consider individuals.

It is the idea of levels of interpretations, nevertheless, which seems to produce this difference between the national and European systems: the ECJ does not interpret concrete cases, only EC law; national systems do interpret concrete cases, not European law. In this sense, the system can be defined as rather a unique type of legal order, as the Court has itself claimed.<sup>1258</sup> Thus, the problems it addresses are also different from those faced by national courts.<sup>1259</sup>

The Court is composed of judges coming from different legal orders with different conceptual, cultural and educational backgrounds. Thus, there are necessarily no common models, national or international, for conceptualizations. Judges personal backgrounds may have a strong impact upon their opinions.<sup>1260</sup>

Legal texts are drafted in the languages of each Member State. This generates one problem; the problem of the comparability of national and EC conceptualizations. Because of this, the Community rules tend to be quite weak. We may say, furthermore, that the EC conceptualization is reflected within the political consensus. The consensus is achieved sometimes by including all national systems in a Community rule.<sup>1261</sup> This creates dynamism for the Community system.<sup>1262</sup> It likewise makes it possible for the Court to use different methods of interpretation which have not traditionally familiar to the national legal systems and to consider broad political, economic and social developments within society. Furthermore, the interpreting institutions have to, as they fairly frequently do, refer to the "filling of gaps" in the system, for example by using a comparative approach and by accepting guidance from the national systems

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<sup>1258</sup> Case 26/62 *Van Gend and Loos v Neederlandse Administratie der Belastingen* (1963) ECR 1.

<sup>1259</sup> Gulmann, C., 1980, p.191 and 193.

<sup>1260</sup> See Usher, J.A., 1976, p.369 and case 37/72 *Marcato v Commission* (1973) ECR 361.

<sup>1261</sup> In the field of tax law, see for example, Legall, J-P., Dibout, P., 1991, p.1061.

<sup>1262</sup> Gulmann, C., 1980, p.192.

and their solutions, usually in a contextual form. This approach finds its normative basis also in the EC Treaties and in the case-law of the Court.<sup>1263</sup>

**The legal basis for the use of comparative law.** The Treaty of Rome contains Articles, which demand for a statement of reasons underlying the decisions reached<sup>1264</sup>. On the other hand, one may also "comparatively" establish this kind of obligation in the context of European law. However, the extent of these justifications is not clearly established<sup>1265</sup>.

The use of comparisons is not only regulated by legal rules giving them legal status, but case law has also restricted their use. On the other hand, the publishing of comparative studies is restricted by internal institutional rules such as the "principle of confidentiality".

The use of comparative observations are based, in the European Union system, on Article F.2. and Art. 215, for example. Article F sets forth the "constitutional traditions" and European human rights as a basis of the European order<sup>1266</sup>.

Another Article must be mentioned. The legal basis of the application of international law in the European Community system is Article 173. International treaties can be applied in the interpretation of Community law as though they are not "directly" applicable rules within the Community system<sup>1267</sup>. All the same, because of their binding nature in the Member States, they do appear binding also upon the European institutions as long as the institutions do not challenge their validity for some reason.<sup>1268</sup>

<sup>1263</sup> For some remarks on the centrality of the teleological and comparative method, rather than the textual one, see Wilmers de, J.M., 1991, p.37.

<sup>1264</sup> Article 190 of the Rome Treaty does not explicitly mention the Court of Justice. On the other hand, Article 33 of the Protocol on the statute of the Court of Justice of the European Community and Article 34 of the Protocol on the Statute of the Court of Justice of the European Atomic Energy Community states that "*Judgments shall state the reasons on which they are based*".

A case on this issue, see 222/86 *Heylens* (1978) ECR 4097.

<sup>1265</sup> Naturally the European Community Court studies analytically the system which is a party to the dispute (See, Pescatore, P., 1980, p.342).

<sup>1266</sup> Title I, Common Provisions.

The common tradition idea has been interpreted also as a legal source of inspiration (See, Pescatore, 1980, p.340. In general, Marsh, N.S., 1977 p.657). The national legal systems are "*philosophical, political and legal substratum*" to Community law (Bredimas, A., 1978a, referring to a statement by the Advocate General Delamonte). See also, Pescatore, P., 1980, Wilmars de, J.M., 1991, p.39 ff.

<sup>1267</sup> See, Schermers, H.G., 1979, pp.171-172, see case 21-24/72, *International Fruit Company* (1972) ECR 1226.

<sup>1268</sup> There are references to general principles, and to the public international law, in a number of Articles of the Treaty, see also Article 234 EC. The principles at public international law have been used in filling gaps (Bredimas, A., 1978a, p.134).

However, some scepticism has been expressed concerning the possibility of deriving principles from public international law because of the unique nature of the Community law. This has been also the approach of the

Different institutional actors such as Court and the Advocates General have had different ideas concerning the extent of the argumentation. There are many "institutional" structural reasons behind this, as we will see. Sometimes the proposals presented by the Advocate Generals do not necessarily coincide with the position taken by the Court<sup>1269</sup>.

**General remarks on the use of comparative law in the European Community legal order.**

The use of comparative law in European Community law has not been seen as a scientific project and exact role of comparative law in general is not particularly clear for its users either<sup>1270</sup>. However, it has been seen as a method for "lacunae filling" as a means of revealing all possible solutions and as an extremely important part of the Community law<sup>1271</sup>. In the practice of the European Community system, the first level of comparison is seen as useful and even necessary.<sup>1272</sup> It has its justificatory function, even if it appears often in a highly synthetic form.<sup>1273</sup> European law is inter-state ("inter-etatic") law<sup>1274</sup> not only politically, but also legally.

The use of comparative arguments and their effects are more striking in the Community order than in other international systems. This is due to the nature of Community law as a more comprehensive legal order.

One can note as in the case of general international law applied in international institutions, that "European custom" does not mean only the customary law of the Member States in comparative terms, but, for that matter, also custom in international systems. These norms may

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European Court. The use is exceptional (*ibid.*, pp.134-135, referring to Pescatore, P.). In the realm of the human rights openness is more visible (Bredimas, A., 1978a, p.135).

Some analysis of the bindingness, see Hartley, T.C., 1994, p.184.

<sup>1269</sup> The same phenomenon can be recognized in the European Court of Human Rights. Comparative analysis seem to be connected to these dissenting opinions and conflicting points of views, see below.

<sup>1270</sup> Pescatore, P., 1980, pp.352-353. Jacobs says that it is "comparative law", which is used (Jacobs, F.G., 1990, p.99). Similarly, see Pescatore, P., 1980, p.337, Friedmann, W., 1973, p.227. Concerning the selectivity of the method, see Wilmar de, J.M., 1991, p.39.

The emerging experiences of lawyers in the "comparative" sense explains the strengths of the European system, but also many of its weaknesses (Hunnings, H., 1996, p.52).

Some analysis, Galmot, Y., 1990, p.255 ff.

<sup>1271</sup> Concerning lacunae in the "Community system", see Wilmar de, J.M., 1991, p.38 ff.

There have been claims that the idea that comparative law would be somehow only a European Community issue has been rejected (Koopmans, T., 1996, p.545, 549). See also Benos, G., 1984, p.247.

See also *Note d'information sur la division recherche et documentation*, Janvier 1995.

<sup>1272</sup> Dehousse, R., 1994, p.13. Trindade, A.A.C., 1977, p.281. Ress, G., 1976.

<sup>1273</sup> Pescatore, P., 1980, p.338, 352-355.

<sup>1274</sup> On the concept, see Herczegh, G., 1978, p.73-76.

Case *Lotus* (1927) PICJ Reports, p.19.

function as an indirect "source". Furthermore, traditional comparative legal arguments in the Community system must also be supported by additional arguments.

One could say that the system of intervening by the Member States in the processes of the Court may bring a comparative element to legal cases. However, this type of "comparative influence" cannot be considered as a "use of comparative law". This idea does not really belong to the realm of the use of comparative law (comparative reasoning) in the context of this study<sup>1275</sup>. Even if the process in this respect is extremely interesting, it would require a separate study. We may say that this process looks more like a process of political comparison. It is not based on any "systematic" approach, and is in many ways related solely to the interests of the parties. However, as we will see, some systematic arguments, provided by parties as well as by these "additional actors" in the traditional process, can have an influence upon the court's argumentation<sup>1276</sup>.

**Some general remarks on comparative influences in Community law.** It has been maintained that there are several national influences embedded in the Community system<sup>1277</sup>. Some concepts and principles can be claimed to have been adopted by the Court directly from national sources:<sup>1278</sup>

- Community preferences (the external trade)<sup>1279</sup>, equality of treatment of nationals

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<sup>1275</sup> How parties intervene in the procedure and its nature as a comparative process, see Koopmans, T., 1996, p.548. A good example, Case 155/79, *A.M. et S.* (1982) ECR 1575.

<sup>1276</sup> One part of the professionalization of legal interpretation related to the autopoietic features and to the practical nature of the Community law, is the use of different state interventionistic methods in the Community system. This "political" comparative process guarantees, that political integrity can be, to a certain extent, maintained. On the other hand, the functionalism embedded in this idea restricts the importance of the legal discursive nature of the interpretation.

<sup>1277</sup> See, Koopmans, T., 1996, p.501 (from France comes, for example, the misuse of power doctrine, the non-expression of the dissenting opinions, the role of Advocate General). See also, Schwarze, J., 1991, p.4.

It is self-evident that European legal systems have adopted legal styles of different systems (this applies, to a certain extent to the national systems too). The adoptions have been visible especially in the realm of the European Community system, where the accession of different states has had its impact to the style of the supra-national system (For example, de Gruz, P., 1994, p.135, Koopmans, T., 1991, p.493).

It has been maintained that the European legal institutions change their styles in result of the new legal cultures entering into it. This "cultural" comparative law seems not to be comparative legal argument, but a kind of an adaptation of the system to a new situation. It is quite unpredictable, and cannot included within the idea of modern law. It is rather a change in the institutional culture.

<sup>1278</sup> See also Usher, J.A., 1976, pp. 362-368. For the types of concepts have been taken, see Koopmans, T., 1996, p.547. What is its role, Markesinis, B., 1993, p.634.

<sup>1279</sup> Case 5/67 *Beus v Hauptzollamt Munich* (1968) ECR 83.

- of other Member States<sup>1280</sup>, prohibition against elimination of competition<sup>1281</sup> and the duty of "solidarity" between Member States<sup>1282</sup>,
- proportionality<sup>1283</sup>,
- legitimate expectations<sup>1284</sup>,
- legal certainty<sup>1285</sup>,
- good faith<sup>1286</sup>,
- the right to be heard<sup>1287</sup>,
- force majeure<sup>1288</sup>,
- estoppel,<sup>1289</sup>
- unjust enrichment<sup>1290</sup>,
- legitimate self-protection<sup>1291</sup>, and
- the idea of *non bis in idem*<sup>1292</sup>.

On the other hand, the text of the treaty is strongly influenced by French administrative law (for example, grounds for annulment ("*excès de pouvoir*")<sup>1293</sup>, forms of judgments, organization of the judiciary, and judicial behaviour in general). German ideas on the relationship between the federal and state levels also had their influence upon the thinking of the Court. Methods of reasoning, discussion of procedural questions, and the role of oral hearings

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<sup>1280</sup> Case 152/73 *Sotgi v Deutsche Bundespost* (1974) ECR 153.

<sup>1281</sup> E.g. case 6/72 *Continental Can v Commission* (1973) ECR 215.

<sup>1282</sup> Case 39/72 *Commission v Italy* (1973) ECR 101.

<sup>1283</sup> "*Verhältnismäßigkeitsgrundsatz*". See also cases 8/55 *Fédération Charbonnière de Belgique v High Authority*, Rec. 1955, p.199. See later case-law, 11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* (1970) ECR, 1125, 5/73 *Balkan-Import-Export v Hauptzollamt Berlin-Packhof* (1973) ECR 1091, and 63-69/72 *Werhahn Hansamühle and others v Council and Commission* (1973) ECR 1229.

<sup>1284</sup> "*Protection de la confiance légitime*" - "*Vertrauensschutz*". See opinion of Advocate-General Warner in case 2/75 *Einfuhr- und Vorratstelle Getreide v Mackprang* (1975) ECR 607. The same rule can be found in French and Belgium case law (Advocate-General Roemer (1973) ECR 723).

<sup>1285</sup> Cases 78/74 *Deuka v Einfuhr- und Vorratstelle Getreide* (1975) ECR 421, and 5/75 (same) (1975) ECR 759. In other form, see Usher, J.A., 1976, p.367, and cases 48/72 *Brasserie de Haecht v Wilkin-Janssen* (1973) ECR 77 and 127/73 *B.R.T v SABAM* (1974) ECR 51.

The idea of non-retroactivity of acts of legislation has been also recognized, see Pescatore, P., 1980, p.340.

<sup>1286</sup> Case 44/59 *Fiddelaar v Commission*, Rec. 1960 p.1077.

<sup>1287</sup> Case 17/74 *Transocean Marine Paint Association v Commission* (1974) ECR 1063, and the opinion of the Advocate General Warner. Modifications to this, see case 136/79 *National Panasonic* (1980) ECR 2033. Some analysis, Schwarze, J., 1991, p.9 ff.

<sup>1288</sup> Case 158/73 *Kampffmayer v Einfuhr- und Vorratstelle Getreide* (1974) ECR 110.

<sup>1289</sup> Cases 17 and 20/61 *Klöckner v High authority* (1962) ECR 325.

<sup>1290</sup> Case 36/72 *Meganck v Commission* (1973) ECR 527.

<sup>1291</sup> Case 16/61 *Modena v High authority* (1962) ECR 289.

<sup>1292</sup> Cases 18 and 35/65 *Gutmann v Commission* (1966) ECR 103.

<sup>1293</sup> On the influences to administrative law, its development, and the problems of comparative basis of it, see Schwarze, J., 1991, p.5 ff.

and case law have changed gradually based on influences from common law countries.<sup>1294</sup> One may even claim that the discourse between the “bar and bench” has become emphasized<sup>1295</sup>.

All these influences derive from the fact that Community law did not emerge in a historical vacuum. Legal institutions of this kind, on the other hand, can be seen as the “hard core” of the Community legal system but also as the “hard cores” of each individual legal system.

Next we will look at the traditional forms of comparative observations appearing in the work of Community Court.

### 3.1.2. Comparative reasoning in the realm of international law in the European Court of Justice

**General remarks.** International law can be seen, from the point of view of the European Community legal system, as an additional source of law. It refers to law which “every court would apply”<sup>1296</sup>. This is the traditional comparative perspective regarding the application of international norms in the European Community system.

Some examples on the use of international law in the European Court may be mentioned.

When deciding the *Stoeckel* case<sup>1297</sup>, the European Court of Justice examined only the relationship between national law and European Community Law but did not refer to the fact that France, the defendant, was a party to the ILO Convention concerning on the same matter. This reflects the typical attitude of the European Court of Justice towards the international legal system.<sup>1298</sup>

On the other hand, there has been a long debate on the direct applicability of the GATT (General Agreement of Tariffs and Trade) in the European legal system. The direct applicability of that agreement could have been asserted due to the fact that the European Court of Justice has clearly stated that it has fulfilled its obligations towards the GATT agreement.<sup>1299</sup>

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<sup>1294</sup> See, Koopmans, T., 1991, p.500.

<sup>1295</sup> Koopmans, T., 1991, p.505.

<sup>1296</sup> Schermers, H.G., 1979, p.169, analysis of the case 41/74 *van Duyn* (definition of state competencies, discrimination based on nationality) ECR (1974) 1351.

<sup>1297</sup> Case 345/89, *Criminal Proceedings against Stoeckel* (1991) ECR I-4047.

<sup>1298</sup> The Advocate General did, however, examine the nature of the Convention.

<sup>1299</sup> Case 21-24/72, *International Fruit Company* (1972) ECR 1219, 1227.

Later, in examining the role of GATT within the Community system, the Advocate General referred also to the practices of the Member States and to the general role of GATT in the legal systems of the member states<sup>1300</sup>. In the systems of the Member States it was seen as exceptional that the GATT was "*directly invoked before the judicial institutions*".<sup>1301</sup>

However, despite the fact that the European Court of Justice has not explicitly mentioned the direct applicability of the GATT agreement, it has used it as source of arguments in several cases, and has recognized it as a possible source of interpretation<sup>1302</sup>. One example is a case regarding tariff quotas from 1993<sup>1303</sup>:

*"As the fifth recital in the preamble to the basic regulation indicates, the aim of reallocation in the course of the year is to enable the annual quota to be fully utilized which is in the interests both of the Community operators affected and the Community partners in the GATT."*

Where the case does not derive any the rule directly from the GATT system, the Court can use the GATT as supporting material in arguing in support of its conclusion. In this case, reference was made to the interests of GATT Parties as a type of additional "comparative" observation.

Another example of this "supporting" use of the GATT agreement can be found in an interpretation dealing with anti-dumping measures:<sup>1304</sup>

*"In that regard the Court points out that Article 2(5) of GATT anti-dumping code provides that... and Article 2(6) provides that...  
As the Commission correctly points out, the only difference between anti-dumping code and the Community regulation with respect to the construction of the export price is that, whereas the code merely lays down the principle that allowances should be made for costs incurred between importation and resale "including*

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<sup>1300</sup> Opinion of Advocate General Gulmann delivered on 8 June 1994, case 280/93, *Federal Republic of Germany v Council of the European Union* (bananas - common organization of the market - import regime) ECR 4973.

<sup>1301</sup> Case 280/93, *Federal Republic of Germany v Council of the European Union* (bananas - common organization of the market - import regime) ECR 4973.

For comparative argumentation by the Commission and counter-argumentation by the Advocate General in the field of external relations, see also Opinion of Mr Advocate General Tesauro delivered on 16 December 1993, case 327/91, *French Republic v Commission of the European Communities* (agreement between the Commission and the United States regarding the application of their competition laws - competence - statement of reasons) (1994) ECR I-3641.

<sup>1302</sup> See case 178/87 *Minolta v Commission/Council*, 21 January 1991 (1992) ECR I-1577.

<sup>1303</sup> Case 106/90, 317/90, 129/91, *Emerald Meats Ltd v Commission*, 23 January 1990 (1993) ECR I-209.

<sup>1304</sup> See, case 188/88 *NMB GmbH and Commission*, 10 March 1992 (1992) ECR I-1689.

*duties and taxes", the EC regulation specifies certain duties and other costs, including anti-dumping duties for which allowances must be made."*

In this way the Court did not find any inconsistency between GATT provisions and EC legislation, which, on the other hand, confirmed the EC systems authority over the question.<sup>1305</sup> The Court looked, in other words, into the content of the GATT agreement, although it did not grant it any superiority over EC legislation; thus, it used the GATT to support the superiority of EC legislation.<sup>1306</sup>

This type of idea seems to apply also to the United Nations Charter<sup>1307</sup>, certain other international treaties, and humanitarian law in relation to the European Community system.<sup>1308</sup> However, in the case of the Yaounde Convention of 1963 the Court has held that Article 2(1) of that Treaty was directly applicable<sup>1309</sup>. Treaties and international agreements entered into by the Community are binding on both the Community and the Member States (Article 228(2) of the Treaty on European Union). The Member States are obliged to enforce international agreements as Contracting parties, but also the European Community has to do so. It is therefore the task of the Community to ensure the uniform application of the treaty in different Member States.

Furthermore, the ECJ has also used ICES (*International Council for the Exploration of the Sea*) documents and international law to gain support for its argumentation in certain cases<sup>1310</sup>:

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<sup>1305</sup> GATT assisting in the interpretation of Community norms; and on the rejection of applicants argument, see Opinion of Mr Advocate General Darmon, delivered on 7 February 1991, case 49/88, *Al-Jubail Fertilizer v Council* (1991) ECR I-3187.

<sup>1306</sup> It is possible that the Courts attitude towards other international Treaties is based on the idea presented in Article 30 of the Vienna Convention on the Law of Treaties, which maintains, regarding on the application of successive treaties relating to the same subject matter, that

*"When all the parties to the earlier treaty are parties also to the treaty but the earlier treaty is not terminated or suspended in operation..., the earlier treaty applies only to the extent that its provisions are compatible with those of the latter treaty".*

<sup>1307</sup> Council Regulation 2340/90 of August 1990 (*Prevention of Community Trade with Iraq and Kuwait*, OJ 1990 L 213/1).

<sup>1308</sup> Schreuer, Ch., 1993, p.459.

<sup>1309</sup> Case 87/75 *Bresciani* (1976) ECR 129.

However, the direct applicability of this treaty was based on the idea of non-reciprocity nature of the Treaty, and the Community in this treaty gave benefits directly upon the other party. It is hardly possible, that reciprocal treaties can be directly applicable. See, on this, Advocate General Trabucchi in this case (ECR 129 ff.), and Hartley, T.C., 1983.

<sup>1310</sup> Case 280/89 *Ireland v Commission*, 2 December, 1992 (1992) ECR I-6185. See also, Case 279/87 *Tipp-Ex GmbH & Co. V. Commission* (1990) ECR I-261.

*"...that the contested regulations are justified in so far as public international law authorizes it to decline to recognize the nationality of vessels which do not have a genuine link with the state whose flag they are flying...*

*...that under international law a vessel has the nationality of the State in which it is registered and that it is for that state to determine the exercise of its sovereign powers the conditions for the grant of such nationality...*

*...and the Irish regulations cannot therefore be justified on the basis of public international law"*

In this case the examination of international law had a direct impact on the substantive decision of the Court. However, the public international law argument was not accompanied supported by any comparative observations.

In general, in these types of interpretations, no traditional comparative observations seem to be used.

The Court has also been forced to give a statement concerning the argumentative value of practices of Member States' trading partners.<sup>1311</sup>

*"In the view of the fact that NHB's European subsidiaries have not shown that the system adopted by the Community is unlawful, the fact that the Communities' trading partners adopt other methods does not render that system is unlawful"*

**The European Court of Justice and human rights.** In the field of human rights, the situation is somewhat. There are normative bases which justify the use of extralegal material as a source of EC law.

Fundamental rights have been traditionally considered as an *"integral part of the general principles of law ... protected by the European Court of Justice"*, and the Court has stated that *"these fundamental rights derive from the constitutional traditions of Member States"*.<sup>1312</sup> However, the interpretation of fundamental rights has to be evaluated in the light Community law itself.<sup>1313</sup>

During the period before the Treaty on European Union, the Court referred

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<sup>1311</sup> Case 188/88 *NMB GmbH v. Commission* (1992) ECR I-1689.

<sup>1312</sup> In many cases, the court has examined the compatibility of Community freedoms with these fundamental rights. See on this, cases 11/70 *Internationale Handelsgesellschaft v Einfuhr- und Vorratstelle Getreide* (1970) ECR 1125, 25/70 *Einfuhr- und Vorratstelle v Köster* (1970) ECR 1161, 44/79 *Hauer v Land Rheinland Pfalz* (1979) ECR 3727, and 46/87 *Hoech v Commission* (1987) ECR 1549. For some analysis, see Wilmers de, J.M., 1991, p.37 ff.

The idea of fundamental rights has been seen as a program of comparative constitutional law (Pescatore, P., 1980, p.341).

<sup>1313</sup> Case 11/70 *Internationale Handelsgesellschaft* (1970) ECR 1125 (17 December 1970). For some analysis, see Wilmer de, J.M., 1991, p.38 ff.

constantly to the European human rights system<sup>1314</sup> and the rights provided in the national constitutions of its Member States.<sup>1315</sup> The comparative observations have supported the interpretation of many European human rights arguments.

In one case<sup>1316</sup> the Court asserted that

*"Fundamental rights are an integral part of the general principles of law, the observance of which the court ensures. In safeguarding these rights the court is bound to draw inspiration from the constitutional traditions common to the Member States, and cannot uphold measures which are incompatible with the fundamental rights established and guaranteed by the constitutions of these states. Similarly, international treaties for the protection of human rights, on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of the community law"*

In terms of the facts of the case, the court explained the general approach to the interpretation of these rights:

*"If rights of ownership are protected by the constitutional laws of all the Member States and if similar guarantees are given in respect of their right freely to choose and practice their trade or profession, the rights thereby granted, far from constituting unfettered prerogatives, must be viewed in the light of the social function of the property and activities protected thereunder. For this reason, rights of this nature are protected by law subject always to restrictions laid down in accordance with the public interest. Within the Community legal order it likewise seems legitimate that these rights should, if necessary, be subject to certain limits justified by the overall objectives pursued by the Community, on condition that the substance of these rights is left untouched.*

*The above guarantees can in no respect be extended to protect mere commercial interests or opportunities, the uncertainties of which are part of the very essence of economic activity."<sup>1317</sup>*

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<sup>1314</sup> Council of Europe, Rome, November 4, 1950, into force 2 September 2, 1953.

However, this reference took place only after the last Member State became a Contracting Party to this Convention (see, Schreuer, Ch., 1993, p.459).

<sup>1315</sup> See cases 4/73 *Nold v Commission* (1974) ECR 491, 507, 36/75, *Rutili v Minister of the Interior* (1975) ECR 1219, 1232, 44/79, *Hauer v Rheinland-Pfalz* (1979) ECR 3727, 3745. For some analysis, see Pescatore, P., 1980, p.341.

Also Commission has adopted a memorandum on the Accession of the European Community to the European human rights system (*Bulletin of the European Communities*, 4/1979, 16).

<sup>1316</sup> Case 4/73 *Nold, Kohlen- und Bausstoffgrosshandlung v Commission* (1974) ECR 491 (14 May 1974).

<sup>1317</sup> The judgment continued as follows (on the "substance"):

*"If rights of ownership are protected by the constitutional laws of all the Member States and if similar guarantees are given in respect of their right freely to choose and practice their trade or profession, the rights thereby guaranteed, far from constituting unfettered prerogatives, must be viewed in the light of the social function of the property and activities protected thereunder. For this reason, rights of this nature are protected by law subject always to limitations laid down in accordance with the public interest. Within the Community legal order it likewise seems legitimate that these rights should, if necessary, be subject to certain limits justified by the overall objectives*

This reasoning was based on the observations of the Advocate General<sup>1318</sup>. There was also consideration of Joint Declarations by the European Parliament, the Council, and the Commission on fundamental rights.<sup>1319</sup> This type of interpretation lays down the basic ideas about the value of the comparative approach in the Community system (substantive generality, derogations based on Communities' objectives).

The Treaty of European Union codified the development of the case-law and sources of law doctrine created by the European Community legal system in Article F.2.:

*"2. The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community Law."*

It could be claimed that this provision established some kind of normative basis and an obligation for the European Court of Justice to use comparative analysis when examining certain legal questions. We may say that this is not only a statement of the static existence of general principles common to the Member States, but that, for that matter, it imposes an obligation to follow the development of the case-law of the European Court of Human Rights and argumentation in these cases and to oversee the development of the national constitutions in this respect. In some ways, it confirms the position of comparative analysis as a dynamic part of the legal sources of the European Community legal system.

On the other hand, some changes were introduced by the Amsterdam Treaty 1997

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*pursued by the Community, on condition that the substance of these rights is left untouched. As regards the guarantees accorded to a particular undertaking, they can in no respect be extended to protect mere commercial interests or opportunities, the uncertainties of which are part of the very essence of economic activity.*

*The disadvantages claimed by the applicant are in fact the result of economic change and not of the contested decision. It was for the applicant, confronted by the economic changes brought about by the recession in coal production, to acknowledge the situation and itself carry out the necessary adaptations."*

<sup>1318</sup> Mr. Trabucchi. Opinion delivered on 28 March 1974 is of particular importance. This well argued opinion goes through the nature of the fundamental principles, their uses, their purposes, making comparative references to systems of the Member States - in general, and to a certain extent, in particular. On these bases he dismisses the applicants claims.

<sup>1319</sup> OJ 1977 C-103, and *Bulletin of the European Communities*, 3-1977. See also European Council Declaration of April 8, 1978 on Democracy, *Bulletin of the European Communities*, 3-1978.

in realm of the Article F<sup>1320</sup>. It remains to be seen what kind of change the inclusion of fundamental rights in the Amsterdam treaty will bring into the system. One may predict that comparative analysis may lose its importance due to the fact that the basic rights argument may become an independent basis of Community law claims. The Community system will define its jurisdictional relationship towards both the European human rights system and also towards the general constitutional traditions of the Member States, because for the first time, it will be able to apply the general basic rights in the context of Community law. On the other hand, there is a possibility that comparative law argumentation may become an integral part of the interpretation of the relationship between the European Community and Member State levels.

However, the basic doctrine of comparative interpretation seems to be already well-established in the case law.

### **3.1.3. The use of state legal systems in the absence of international obligations**

#### **3.1.3.1. Doctrine concerning the use of comparative observations**

**The types of uses and users of comparative law.** As we have seen, Community judges are guided by the principles derived from national legal systems<sup>1321</sup>. On the other hand, the sphere of use of such generality arguments is not restricted to any particular field of principles. It is the nature of the case in question, and the arguments made by the parties, which determines the nature of the consideration given to these general principles.

What does comparative law study mean to the European Court of Justice? This is perhaps best understood via some of its case law.

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<sup>1320</sup> "1. *The Union is founded on the principles of liberty, democracy, respect of human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States*  
 2. *The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.*  
 3. *The Union shall respect the national identities of its Member States.*  
 4. *The Union shall provide itself with the means necessary to attain its objectives and carry through its policies."*  
 (Compare the Rome Treaty and Maastricht Treaty; in them national identity is mentioned in the first paragraph.)

<sup>1321</sup> One of the first cases, Case 1/57, 14/57, *Société des Usines à Tubes de la Sarre v High Authority* (1957) ECR 105. Referred, for example, in case 137/92 *Commission of the European Communities v Basf AG* (1994) ECR I-2555 (Judgment of the Court of 15 June 1994).

The Advocates General have stressed the fact that in the Community system there is no attempt to study concepts common to several legal systems and in this way to arrive at generalizations<sup>1322</sup>. Furthermore, the Community legal order "*does not aim in principle to define its concepts on the basis of one or more national legal systems without express provision to that effect*"<sup>1323</sup> The Advocate General have maintained, for example, that

*"These minimum requirements are based on the provisions of the common customs tariff read in conjunction with regulation no 1259/72 that is to say, on provisions of Community law which do not refer to legal system of the Member States in determining their meaning and scope; the Community legal order does not in fact aim in principle to define its concepts on the basis of one or more national legal systems without express provision to that effect. In this case all national variations from such common requirements as to quality tend to distort the uniform effect of regulation no 1259/72 as amended and to use it for purposes other than that for which it was intended, which is the disposal of butter stock sale at a reduced price to certain processing undertakings by permitting reduction in the monetary and compensatory amounts pertaining to the market of products whose destination is not necessarily that for which a favourable rate is provided by that regulation."*

In the context of the concept of the "employee", the Court maintained the possibility of interpreting the term with reference to the term "*common to the legal systems of the Member States*", but at the same time confirmed, with reference to the Courts interpretation of the term "worker" in another case, that there is, however, only a "Community" meaning:

*"It is common ground that directive no 77/187 does not contain an express definition of the term 'employee'. In order to establish its meaning it is necessary to apply generally recognized principles of interpretation by referring in the first place to the ordinary meaning be attributed to that term in its context and by obtaining such guidance as may be derived from Community texts and from concepts common to the legal systems of the Member States.*

*24. It may be recalled that the court, inter alia in its judgment of 2 March 1982 (case 53/81, Levin, (1982) ECR 1035), held that the term 'worker' as used in the Treaty, may not be defined by reference to the national laws of the Member States but has a Community meaning. If this were not the case, the community rules on freedom of movement for workers would be frustrated, since the meaning of the term could be decided and modified unilaterally, without a control by the community institutions, by the Member States, which would thus be able to exclude*

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<sup>1322</sup> Opinion of Mr Advocate General Lenz delivered on 14 June 1988. Case *Weissgerber v. Finanzamt Neustadt* (reference for a preliminary ruling from the Finanzgericht Rheinland-Pfalz, effect of directives - exemption from vat - passing on of tax) (1988) ECR 4433.

<sup>1323</sup> Case 64/81 *De Franceschi Nicolaus Corman et Fils SA v. Hauptzollamt Gronau* (1992) ECR 13 (judgment of the Court, 27 January 1982). Also Case 191/90 *Generics UK, Harris Phar. LTD v So Klein and French Laborat. Ltd.* (1992) ECR I-5335 (27 October 1992).

... certain categories of persons from the benefit of the Treaty."<sup>1324</sup>

This type of interpretative idea suggests an interaction between the ordinary (textual) meaning and the comparative method of interpretation.

Similar ideas have been expressed also in following way, based on a criticized practice:

*"Moreover, the concept could not truly purport to derive from a principle common to the laws of the Member States but would be carrying too far the frequently criticized doctrine of "act of the government" whose scope is tending to be considerably narrowed in some legal systems where it was formerly most rigorously applied."*<sup>1325</sup>

This has been recognized also in the field of social security:

*"...elements of particular benefit, purposes and the conditions on which it is granted, and not on whether a benefit is classified as a social security benefit by national legislation."*<sup>1326</sup>

In some cases, the Court has maintained that it is unnecessary to refer to comparative law:

*"Accordingly, and without it being necessary to examine the different legal systems of Member States, the applicants are not justified in claiming that the Commission has failed to observe the above mentioned principles laid down by the Court of Justice in its judgment in the papiers peints case."*<sup>1327</sup>

The basic "doctrine" for the rejection of comparison is based on the impossibility of comparing the State's own legal system with the Community system. This may be related to the idea of the "autonomy of the Community legal order"<sup>1328</sup>. This idea has been formulated, for

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<sup>1324</sup> Case 105/84, *Foreningen af Arbejdsledere i Danmark v. a/s Danmols Inventar A/S* (reference for a preliminary ruling from the Vestre Landsret - safeguarding of employees' rights in the event of transfers of undertakings) (1985) ECR 2639-2654 (Judgment of the court, fifth chamber, of 11 July 1985).

<sup>1325</sup> Opinion of Mr Advocate General Darmon delivered on 1 June 1989 in case 241/87 *Maclaine Watson & Co. Ltd v. Council of the European Communities and Commission of the European Communities* (1990) ECR I-1797.

<sup>1326</sup> See also, case 98/94 *Christel Schmidt v Rijksdienst voor pensioenen* (reference for a preliminary ruling: Arbeidsrechtbank Antwerpen - Belgium. Regulation (EEC) no 1408/71 - social security - national rules against) (1995) ECR I-2559 (Judgment of the court (first chamber) of 11 August 1995).

<sup>1327</sup> Case 34/92 *Fiatagri UK Ltd and New Holland Ford Ltd v. Commission of the European Communities* (1994) ECR II-905 (Judgment of the court of first instance (second chamber) of 27 October 1994).

<sup>1328</sup> Case 6/64 *Costa v. ENEL* (1964) ECR 585.

example, in the following way:

*"Secondly, it is not open to Member States to rely on the special features of their legal systems by way of defence where they have failed to carry out their community obligations. It is well established that Member State may not rely upon provisions, practices or circumstances existing in its internal legal system in order to justify a failure to fulfil obligations arising under Community law : see, for example, case 254/83 Commission v Italy [1984] ECR 3395. In particular, a Member States may not plead administrative difficulties existing in that state in order to justify such a failure : see case 58/83 Commission v Greece [1984] 202 . Moreover, to allow such a defence as that invoked by the German government here would obviously prejudice the uniform application of Community law: the application of Community law would be at the mercy of the procedural peculiarities of each national legal system".*<sup>1329</sup>

Furthermore, the "disharmony" between national and Community concepts of "legal person" (in Article 173 of the Treaty) has also been recognized by the Court<sup>1330</sup>.

The same idea has been, on some occasions, explained in a more indirect way with reference to the functioning of the Community order:

*" ... finally, it should be pointed out that the Court declared in the Ferwerda judgment that no consideration whatever which under one of the legal systems of the Member States is or may be based on a principle of legal certainty can in all cases constitute a defence against a claim for the recovery of Community financial benefits wrongly granted. It must in each case be considered whether such application does not jeopardize the very basics of the rule providing for such recovery and whether it does not result in practice in frustrating such recovery".*<sup>1331</sup>

The basic rejection of comparative law is usually based on a more extensive comparative study, which results, in consequence, in some remarks on the disparity of the different systems:

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<sup>1329</sup> Opinion of Mr Advocate General Jacobs delivered on 15 May 1990 in case 217/88 *Commission of the European Communities v Federal Republic of Germany* (Agriculture - common organization of the market in wine - national coercive measures) (1990) ECR I-2879. The same idea is expressed in the case 140/78 *Commission of the European Communities v Italian Republic* (Agricultural structure policy - submission of statements of account) (1980) ECR 3687 - 3701 (Judgment of the court of 10 December 1980), case 140/78 *Commission of the European Communities v Italian Republic* (Failure to adopt within the prescribed period the measures needed to comply with a directive - annual accounts of certain types of companies) (1986) ECR 1199-1205 (Judgment of the court of 20 March 1986).

<sup>1330</sup> Case 135/81 *Groupement des Agences de Voyages, Asbl v Commission of the European Communities* (Application for a declaration of the nullity of a decision) (1982) ECR 3799-3811 (Judgment of the court (first chamber), 28 October 1982).

<sup>1331</sup> Opinion of Mr Advocate General Darmon delivered on 29 November 1988. In case 94/87 *Commission of the European Communities v Federal Republic of Germany* (State aids - undertaking producing primary aluminium - recovery)(1989) ECR 175.

*"Those examples clearly emphasize that at the Community level the expression "public undertaking", which must necessarily have a uniform meaning, cannot be defined by reference to the different legal concepts of the national legal systems. For the purposes of defining the concept "undertaking" within the meaning of Community competition law and the expression public undertaking" within the meaning of directive 80/72, the greater importance must therefore be attached to function..."*<sup>1332</sup>

The same idea was seen in the case concerning the equal treatment of men and women. The Advocate General rejected the references to the treatment of the principle of equality in different systems, because that would weaken the application of the "Community principle of equal treatment" as well as the "uniform application of the Community rules".<sup>1333</sup> Surprisingly, the reference was made only to Irish, French, Italian, and Greek systems. Furthermore, in the same context, the principle of equal treatment has been seen, in general, as a "cornerstone of contemporary legal systems".<sup>1334</sup> We will discuss the comparative reasoning in this context below in the analysis of the Kalanke case.

It must be mentioned that comparative observations frequently appear in the submissions to the Court presented by the parties. These types of references have been recognized and analysed, to a certain extent, by the Court.

The Commission has pointed out, in several submissions, the "comparative" diversity of the legal systems. In a case supporting national systems' competence, the Court recognized how

*"[a]s the Commission points out in its written observations, the Community legislation is largely silent on the respective interests of landlord and tenant, leaving it to the Member States to strike the necessary balance. That this should be left to national authorities is logical, given the diversity of national legal systems and implementing legislation and the different circumstances of individual producers."*<sup>1335</sup>

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<sup>1332</sup> Opinion of Mr Advocate General Mischo delivered on 4 November 1986 in case 118/85 *Commission of the European Communities v Republic of Italy* (Transparency of financial relations between Member States and public undertakings) (1987) ECR 2599.

<sup>1333</sup> Joined opinion of Mr Advocate General Darmon delivered on 14 November 1989 in case 177/88 *Elisabeth Johanna Pacifica Dekker v Stichting Vormingscentrum voor jong volwassenen plus* (1990) ECR I-3941.

<sup>1334</sup> Opinion of Mr Advocate General Tesauo delivered on 23 January 1991 in case 63/89 *Assurances du credit SA and Compagnie belge d'assurance credit SA v Council of the European Communities and Commission of the European Communities* (1991) ECR I-1799.

This issue is dealt more thoroughly in relation to the *Kalanke* case, see below.

<sup>1335</sup> Opinion of Mr Advocate General Jacobs delivered on 27 April 1989 in case 5/88 *Hubert Wachauf v Federal Republic of Germany* (Reference for a preliminary ruling : Verwaltungsgericht Frankfurt am Main - Germany) (1989) ECR 2609.

Also "generality" arguments have been used by the Commission to support its Community law interpretation:

*"the Commission likewise contends that the termination of a contract of employment, whether by way of dismissal or automatically, is included to the concept 'conditions of employment' and does not fall within the exceptions to the principle of equality of treatment referred to in Article 2 of the directive no 76/207 or within the scope of directive... In that connection it states that in the national systems termination of a contract of employment also falls within the sphere of labour law rather than of social security law."<sup>1336</sup>*

However, the Advocate General was not convinced of the interpretation on these bases.

Commission reports have been also used by the Court in several cases, and they may even be referred to by the Court in its justification:

*"The information provided by the Commission shows that national systems of assistance for orphans vary considerably. In the view of this variation and in order to avoid arbitrary differences according to the national systems, the term in Article 78(1) of regulation No 1408/71 must be interpreted as referring to all benefits intended under the applicable national law".<sup>1337</sup>*

In this case, the comparative study and its result (the showing of clear disparities between national legislation) had a direct impact on the result of the case.

States frequently attempt to argue on the basis of their legislation, when there is a question of interpretation of EC legislation.<sup>1338</sup> Moreover, the parties use comparative arguments to support their views:

*"In support of that submission, the applicants claim that in the legal systems of all the Member States the debtor is not entitled to profit from a delay in the payment of sums which are due. The creditor may not be deprived of interest produced by the sums which he could have used to meet his needs from the date on which they*

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<sup>1336</sup> Case 262/84 *Vera Mia Beets-Proper v F. Van Lanschot Bankiers NV* (Reference for a preliminary ruling from the Hoge Raad der Nederlanden. Equality of treatment for men and women - conditions governing dismissal) (1986) ECR 773-793 (Judgment of the Court of 26 February 1986).

<sup>1337</sup> Case 188/90 *Mario Donguzzi-Zordanin v Landesversicherungsanstalt Schwaben* (1992) ECR I-2039 (19 March 1992).

<sup>1338</sup> See case 78/91 *Hughes v Chief Adjudication Officer, Belfast* (1992) ECR I-4839 (16 July 1992).

were due."<sup>1339</sup>

There are several examples of the analysis of the rules of the directives and regulations (other than in the field of the Brussels Convention and the competition law) where, both in the institutional context of justification and in the justification itself there is the use of comparative observations. One example can be taken up here:

*"The difference in question is based on the distinction between residents' and nonresident', which is to be found in all legal systems and is internationally accepted. It is an essential distinction in the law. It is thus also applicable in the context of Article 52 of the Treaty."*<sup>1340</sup>

**Indirect comparison.** Comparisons, in the Community system, can take the form of direct references, but some indirect comparisons are also made. These "indirect comparisons" can be, as we have seen, derived from the material produced by the Commission or from the "comparative legal sciences":

*"notwithstanding the preparatory work carried out at the Commission behest (Eugen Ulmer : the law on unfair competition in the Member States of the EEC, part I: comparative survey; study undertaken at the request of the Commission of the European Communities by the Max-Planck-Institut fuer auslaendisches und internationale patent, urheber - und wettbewerbsrecht, Muenchen, in particular no 432), no harmonization has been achieved with regard to designations of origin indications of provenance and so on (see written question no 250/86, 290, 17.11.1986, p. 36). Designations of origin exist in the legal system of some Member States, and to a lesser extent or not at all in that of others (see in that regard: Jean Pierre Cochet: La notion d'appell d'origine en droit communautaire, 1985, and Klaus-Juergen Kraatz: der Schutz geographischer Weinbezeichnungen im Recht der europaeischen Gemeinschaften, 1980)."*<sup>1341</sup>

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<sup>1339</sup> Case T-16/89 *Hans Herkenrath and others v Commission of the European Communities* (Officials - remuneration - default interest and compensatory interest) (1992) ECR II-275 (Judgment of the Court of First Instance (second chamber) of 26 February 1992).

<sup>1340</sup> Case 270/83 *Commission of the European Communities v French Republic* (Freedom of establishment in regard to insurance - corporation tax and shareholders' tax credits) (1986) ECR 273-308 (Judgment of the court of 28 January 1986).

See also, case 124/83 *Direktoratet for markedsordningerne v s. A. Nicolas Corman et fils* (Reference for a preliminary ruling from the Östre Landsret. Common organisation of the agricultural markets) (1985) ECR 3777-3794 (Judgment of the court of 5 December 1985), case T-275/94 *Groupement des Cartes Bancaires "CB" v Commission of the European Communities* (1995) II-2169 (Judgment of the court of first instance (fourth chamber, extended composition) of 14 July 1995), and case 49/84 *Leon Debaecker and Berthe Plouvier v Cornelis Gerrit Bouwman* (Reference for a preliminary ruling from the hoge raad der nederlanden. Brussels convention - Article 27.2 - service in sufficient time) (1985) 1779-1803 (Judgment of the Court (fourth chamber) of 11 June 1985).

<sup>1341</sup> Opinion of Mr Advocate General Van Gerven delivered on 22 February 1989 in case 263/87 *Kingdom of Denmark v Commission of the European Communities* (Clearance of egg accounts - export refunds - Grana Padano cheese) (1989) ECR 1081.

See also, Opinion of Mr Advocate General Van Gerven delivered on 28 January 1992 in case 104/89

**The comparison of language versions.** The comparison of language versions is one of the "comparative" methods used by the Court. Comparisons of language versions have generated the idea of a "wide and nontechnical interpretation of concepts":

*"Comparison of the versions in the different languages of the Community of the text of Article 2 of regulation no 1788/69 shows that these terms must not be interpreted in the strict technical sense which the terms agent' or' concessionaire' may have in the law of one or other of the Member States but may be interpreted widely and in a nontechnical manner. The terms' sole agent' and' sole concessionaire' must not be understood as referring to two quite distinct and mutually exclusive legal constructions but as intended to include the different constructions in the legal systems of the Member States refer under the one or the other of these designations to contractual relationships belonging to the category thus indicated."*<sup>1342</sup>

**Conclusions.** The relationship between a supranational system and the national systems it "contains" is never static. The direct influence and applicability of national laws in the European Court of Justice has occasionally been discussed.

Basically, the rule is that the Court of Justice does not have the competence to apply national laws.<sup>1343</sup> Furthermore, the Court of Justice cannot decide on the violation of a national law or interpret national provisions.<sup>1344</sup> As we have seen, the ECJ is very reluctant to look into the national legislation in the different Member States. However, claims based on the disparity between legislation in the different Member States and the absence of common rules as justifying discriminatory practices in Member States has been rejected by the ECJ.<sup>1345</sup>

Nevertheless, the ECJ has to deal with and interpret national systems, at least when the Treaty makes explicit reference to the national systems (and its concepts), as in the case of human rights.<sup>1346</sup> This also takes place in cases where there are problems with the interpretation

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*J.M. Mulder and others and Otto Heinemann v Council of the European Communities and Commission of the European Communities (Additional levy on milk - non-contractual liability) (1992) ECR I-3061.*

<sup>1342</sup> Case 82/76 *Farbwerke Hoechst v. Hauptzollamt Frankfurt-am-Main* (Preliminary ruling requested by the Hessisches Finanzgericht. Value for customs purposes of trade-marks) (1977) 335-350 (Judgment of the court of 17 February 1977). See also, opinion of the Advocate General Warner (also comparative observations in general).

<sup>1343</sup> Case 1/58 *Stork v High Authority* (1958) ECR 17, and 36-40/59 *Geitling v High Authority* (1960) ECR 423.

<sup>1344</sup> See, 78/70 *Deutsche Grammophon v Metro* (1971) ECR 487.

<sup>1345</sup> Case 191/90 *Generics UK, Harris Phar. LTD v S. Kline and French Laborat. Ltd.* (1992) ECR I-5335 (27 October 1992).

<sup>1346</sup> Case 50/71 *Wünsche v Einfuhr- und Vorratstelle Getreide* (1972) ECR 53. See for example Article 58.

of concepts in the European system.<sup>1347</sup>

From the practice of the European Court of Justice it can be seen that the German, French and English legal conceptualizations have had an indirect influence on the practice of the Court.<sup>1348</sup> However, this can be verified only indirectly, because the Court has explicitly rejected this "one-sided adaption". The use of conceptualizations foreign to the Community system derives from the fact that even if a rule is not mentioned in written law this is not proof that it does not exist.<sup>1349</sup> On the other hand, the fact that conceptualization is used does not mean that all ingredients of particular national systems will necessarily be accepted. In fact, the use of national concepts can be extremely "analogical", and the Advocate Generals in particular have developed an extremely broad comparative approach.<sup>1350</sup>

Because the specific rules in Member States are not directly applicable norms for the ECJ, they rather seem to be kind of "facts" of the case. In other words, they are non-normative material of the system. However, they can be used to support certain conclusions in cases, and can be used as material for the argument. The use of the results of these comparative studies is not based on the features of any one specific legal system, but rather on a set of "group" features of these systems (disparity or uniformity in an (institutionally) qualitative sense)<sup>1351</sup>.

It seems that comparative interpretation has to do with quite strict textual and literal interpretations.

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<sup>1347</sup> This was mentioned in particular in the statement of Advocate General Roemer in the case *5/54 Netherlands v High Authority* (1954) Rec. 201. See also cases 17,20/61 *Klöckner-Werke AG and Hoesch AG v High Authority* (1962) ECR 325 ja 159/78 *Republic of Italy v. Commission* (1979) ECR 3247.

<sup>1348</sup> Cruz, de R., 1993, Chapter 5. There have been cases, where the Court has explicitly referred to the law of other Member States as applicable law, see 7/56 and 3-7/57 *Algera and others v Assembly*, Rec. 1957, p.81,114-116. Some analysis, Schwarze, J., 1991, p.5.

However, these decisions were made before the Community system had specific provisions dealing with those questions.

<sup>1349</sup> Case 108/63 *Merlini v High Authority* (1965) ECR 1, 10.

<sup>1350</sup> See case 14/61 *Hoogovens v High Authority* (1962) ECR 253, 280-283 and 13/61 *De Geus v Bosch* (1962) ECR 45, 58-61.

<sup>1351</sup> One could claim that if national conceptualizations were accepted as such within the EC system, one could even claim discriminatory treatment among Member States. The idea of referring normatively only to certain systems in the EC legal system would be against the formal legal equality of the national systems. This is why the Court is unable to explicitly use direct conceptualizations of one Member State. The ECJ refers to all systems. Referring is "recognition" type of argumentation, and not argumentation by direct normative and legal-instrumental arguments.

It could be claimed, that the EC system attempts, via the adaptation of certain methods of comparative argumentation (towards national and other international systems), to achieve coherence and harmony with the other systems.

### 3.1.3.2. Some examples of comparative reasoning and its consequences

**General remarks.** The Court and the Advocates General have used "qualitative" comparative analysis and argumentation in several occasions in arguing for the positive content of certain concepts, rules, and principles. The list of examples presented here is not exhaustive. Furthermore, the "legal" function of these comparisons is not analysed thoroughly in this chapter. The idea here is to present a variety of examples from different fields of law. The presentation is divided into the comparative interpretation of concepts, rules, principles, procedural rules, staff cases, and finally, some "constitutional" ideas.

**Some conceptual questions.** In certain cases, the Advocates General, with reference to case law, have considered national conceptualizations as a source of interpretation, particularly when the matter is about the interpretation of different language versions<sup>1352</sup>:

*"First, the different language versions are all equally authentic and an interpretation of a provision of Community law thus involves a comparison of the various language versions (judgment of 6 October 1982 in case 283/81 Cilfit v Ministry of Health [1982] ECR at 3430, paragraph 18). Secondly, Greece joined the Community only at the adoption of that regulation. Thus, in so far as the Greek language version differs from the text as published in 1971 and since then maintained in the other languages, it can only be a translation error first question."*

and that

*"Nothing permits the conclusion to be drawn that expressions have different meaning in Community law than the one it has in the national legal systems..."<sup>1353</sup>*

The concept of "*minimum benefit*" occurring in a regulation<sup>1354</sup> was, according to the Advocate General, to be interpreted with "*reference to the minimum benefits fixed by the laws of the various Member States*". The study was based on the examination of the concept in

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<sup>1352</sup> The question at issue was about the expression 'at the purchasers own risk' in Article 15 (a) of Regulation no 2960/77.

<sup>1353</sup> Opinion of Mr Advocate General Mischo delivered on 11 February 1988 in case 71/87 *Greek state v Inter-Kom AE* (Reference for a preliminary ruling from the Efeteio (court of appeal)) (1988) 1979.

<sup>1354</sup> Article 50 of regulation no 1408/71

those systems "where the existence of it is not contested".<sup>1355</sup> This study was made under the auspices of the Commission.

Moreover, the distinction between "rights in personam" and "rights in rem" was adopted by the Advocate General on the basis of the "indirect" comparative argument referred to in the so-called Schlosser report.<sup>1356</sup>

The interpretation of the concept of a "legal person" has been supported by observations based upon observed "tendencies in the national jurisprudence":

*"The fact that under the second paragraph of Article 173 only legal (and natural) persons are entitled to bring actions and that only such persons are deemed to have general capacity - as distinct from the capacity to bring an action (see paragraph 8, above) - does not seem to constitute a real obstacle. There is, after all, in many legal systems, evidence of a general tendency to interpret the concept of "legal person" in a pragmatic way, allowing the courts to decide on the basis of the way in which positive law structures the legal sphere of particular organ or institution that within a specific legal relationship that organ or institution has (to a greater or lesser degree) legal personality. There is also clear evidence of that tendency in the case-law of this court."*<sup>1357</sup>

In the realm of the Brussels Convention, which is within the jurisdiction of the Court, there is an explicit reference to the need for comparative analysis in the interpretation of certain concepts. Consequently, there have been several interpretations made on a comparative basis. Indeed, the Court has developed a doctrine of "comparative interpretation" in this field of law<sup>1358</sup>.

Comparative interpretation was expressed by the Court in cases dealing with the concept of 'civil and commercial matters' and 'ordinary' and 'extraordinary' appeals (Articles 30 and 38 of the Brussels Convention). There the Court had explained that when one is interpreting the Brussels Convention clauses ("especially title III thereof") the reference is to be made "to the law of one of the states concerned but, first, to the objectives and the scheme of the Convention

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<sup>1355</sup> Case 22/81 *Regina v Social Security Commissioner, ex parte Norman Ivor Browning* (reference for a preliminary ruling from the High court of justice, Queen's bench division, divisional court, London) (1981) 3357-3372 (Judgment of the court (second chamber), 17 December 1981).

<sup>1356</sup> Opinion of Mr Advocate General Darmon delivered on 8 February 1994 in case 294/92 *George Lawrence Webb v Lawrence Desmond Webb* (Reference for a preliminary ruling: Court of appeal (England) - United Kingdom) (1994) I-1717.

<sup>1357</sup> Opinion of Mr Advocate General Van Gerven delivered on 30 November 1989 in case 70/88 *European Parliament v Council of the European Communities* (Capacity of the European Parliament to bring an action for annulment) (1990) ECR I-2041.

<sup>1358</sup> Brussels convention, 27 September 1968, renewed, 9 Oct 1978, OJ, 1979 LK 04, p.44. See also on the Brussels Convention cases, Pescatore, P, 1980, pp.343-344.

and, secondly, to the general principles which stem from the corpus of the national legal systems."<sup>1359</sup>

There the Advocate General had identified a lacunae in the law. The parties had been arguing on the basis of international practices. The Advocate General spoke of the different possible approaches, and referred to governmental opinions in the context of the case in addition to Commission reports and the purpose and the history of the drafting.<sup>1360</sup> The Commission had been advocating the idea of an "ideal solution" ("*independent conceptualization*"). The Advocate General, however, viewed the idea of an independent "comparative" construction as difficult and tending toward uncertainty. Consequently, he referred to the "*experience of the national courts*", and came to the conclusion that the matter should be related to the definition provided by the court (and the state), where an enforced judgment had been given.

Another good example is the case concerning the "*clause conferring jurisdiction*" in a company's statutes<sup>1361</sup>. It shows also how the comparative law method has been developed in a "first case" dealing with the issue, and how interpretation may become somewhat dogmatic.

In case, the Advocate General made an extensive study of the idea of the "*clause conferring the jurisdiction*" in different legal systems. The Court, based on the report of the Advocate General, investigated the question as to whether the jurisdiction-conferring clause contained in the statute of the company (expressing the jurisdiction) was an agreement within the meaning of the Article 17 of the Brussels Convention.

The Court argued that there was a disparity between the legal systems concerning the relationship between a shareholder and a company limited by shares. In some systems "*the relationship is characterized as contractual, in others it is regarded as institutional, normative or sui generis.*" The Court maintained that the interpretation of this concept must be independent. This idea was explained so as to derive the "*objectives and the general scheme of the Conven-*

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<sup>1359</sup> Case 29/76 *Lufttransportunternehmen GmbH and co. Kg v Eurocontrol* (Preliminary ruling requested by the Oberlandesgericht Düsseldorf) (1976) ECR 1541-1552 (Judgment of the court of 14 October 1976).

<sup>1360</sup> Advocates General have been referring to the absence of comparative information in the preparatory documents of the Convention, and the comparative studies produced in the so-called Generate report on the issue (OJ 1979 C 59) - including also bilateral treaties (see, for example, Opinion of the Advocate General Gulmann, 20th February 1992 in case 261/90 *Mario Reichert, Hans-Heinz Reichert and Ingeborg Klocker v Dresden Bank Ag* (reference to the preliminary ruling, Cour d'appel d'Aix-en-provence - France) (1992) ECR I-2149). In this case the Court went through also the different language versions of the provision in question, and made other comparative law observations.

<sup>1361</sup> The Article 17 of the Brussels Convention. Case 214/89 *Powell Duffryn plc v Wolfgang Petereit* (Reference for the preliminary ruling: Oberlandesgericht Koblenz - Germany. Brussels convention - Jurisdiction Agreement - Clause contained in the statutes of the company limited by shares) (1992) ECR I-1745 (Judgment of the Court of 10 March 1992).

This was based on the Opinion of Mr Advocate General Tesauo delivered on 20 November 1991.

tion", and in order to

*"ensure the equality and uniformity of the rights and obligations arising out of the Convention. For the contracting states and the persons concerned, therefore it is important that the concept of "agreement conferring jurisdiction" should not be interpreted simply as referring to the national law of one or other of the states concerned."*

The Court refused to interpret the concept by reference to a set of example or model, and instead used the fact that disparity existed between national laws to arrive at an independent idea concerning the concept.<sup>1362</sup>

However, in answering to the question whether that particular clause in the statute, as it was expressed, satisfied *"the formal requirements of the Article 17"*, the Court again made a reference to national legal systems. It found that there was a comparative "generality" among legal systems (*"in the legal systems of all the contracting states"*) regarding the fact that the statutes of a company are in written form, and that they are the basic instruments governing the relationship between the shareholder and the company. Furthermore, the way that shares are acquired does not have an effect on the fact that every shareholder ought to be informed of the binding nature of the statute.<sup>1363</sup>

The Court's ruling has been thereafter confirmed by several cases dealing with various concepts in the Brussels Convention.<sup>1364</sup> In certain opinions<sup>1365</sup>, detailed comparative

<sup>1362</sup> In the Case 3/82 *Peters v Znav* (1983) ECR 987, the Court interpreted the concept of the *'matters relating to a contract'*.

<sup>1363</sup> This was used also in Opinion of Mr Advocate General Lenz delivered on 8 March 1994 in case 288/92 *Custom made commercial Ltd v Stawa Metallbau GmbH* (Reference for a preliminary ruling: bundesgerichtshof - Germany. Brussels convention - place of performance of an obligation - uniform law) (1994) I-2913.

<sup>1364</sup> This was used as a starting point also in case 9/77 *Bavaria Fluggesellschaft Schwabe and co kg and Germanair Bedarfsluftfahrt GmbH and co kg v Eurocontrol* (Preliminary rulings requested by the Bundesgerichtshof) (1977) ECR 1517-1527 (Judgment of the court of 14 July 1977), 133/78 *Henri Gourdain v Franz Nadler* (Preliminary ruling requested by the Bundesgerichtshof. Brussels convention. Bankruptcy and proceedings relating to the winding-up) (1979) 733-746 (Judgment of the court of 22 February 1979).

Furthermore, Case 150/77 *Berdhand v OTT* (1978) ECR 1432, 814/79 *Netherlands state v Reinhold Rueffer* (Preliminary ruling requested by the Hoge Raad der Nederlanden. Brussels convention of 1968) (1980) ECR 3807-3822 (Judgment of the court of 16 December 1980), 288/82 *Ferdinand M.J.J. Duijnstee in his capacity as liquidator of b.v. Schroefboutenfabriek (in liquidation) v Lodewijk Goderbauer* (Reference for a preliminary ruling from the Hoge Raad der Nederlanden) (1983) ECR 3663-3679 (Judgment of the court (fourth chamber) of 15 November 1983), *Criminal proceedings against Siegfried Ewald Rinkau* (preliminary ruling requested by the Hoge Raad of The Netherlands. Article II of the protocol annexed to the Convention on jurisdiction of 27 (for example, the distinction between "intentionally and non-intentionally committed crimes"), and the concept 'rights in property arising out of a matrimonial relationship') (1981) ECR 1391-1404 (Judgment of the court of 26 May 1981), 143-78 *Jacques de Cavel v Luise de Cavel* (Preliminary ruling requested by the Bundesgerichtshof) (1979) ECR 1055-1068 (Judgment of the court of 27 March 1979), *Martin Peters Bauunternehmung GmbH v Zuid Nederlandse Aannemers Vereniging* (Reference for a preliminary ruling from the Hoge Raad der Nederlanden) (1983) 987-1004 (Judgment of the court, 22 March 1983), Opinion of Mr Advocate General Darmon delivered on 23 November 1989 in case 220/88 *Dumez France and Tracoba v Hessische*

references to the legal systems of the Member States were not even considered to be necessary, particularly where the case is "clear".<sup>1366</sup>

Disparities were found in the idea of *lis pendens* (Article 21 of the Convention, 'first seized court')<sup>1367</sup>. This resulted in a *a fortiori* type of reasoning and a ruling, according to which the

*"the court 'first seized' is the one in which the requirements for proceedings to become definitely pending were first fulfilled, such requirements to be determined in accordance with the national law of each of the courts concerned"*.<sup>1368</sup>

**The comparative interpretation of some rules.** Comparative interpretation undertaken by the Advocates General and the Court can be found in several interpretations of different rules with regard to different types of legal measures.

The different language versions and corresponding national "contexts" have been considered by the Court in relation to the 'transfer of an undertaking' in the realm of Article 1(1) of the Council Directive 77/187<sup>1369</sup>. The Court noted<sup>1370</sup>, that there were discrepancies between different language versions regarding the term 'legal transfer' and its applicability:

*"A comparison of the various language versions of the provision in question shows*

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*Landesbank and others* (Reference for a preliminary ruling : Cour de Cassation - France. Brussels convention - matters relating to tort, delict or quasi-delict (the concept of "ricochet"), interpretation of Article 5(3), indirect victim, injury to a parent company due to the financial losses sustained by its subsidiary) (1990) ECR I-49). In it there is really extensive and analytical analysis of the legal discourse and practice on the subject.

<sup>1365</sup> Opinion of Mr Advocate General Sir Gordon Slynn delivered on 17 December 1987 in case 9/87 *S. P. R. L. Arcado v s. A. Haviland* (reference for a preliminary ruling from the Court of appeal, Brussels, referring to the detailed study in Peters case) (1988) ECR 1539.

<sup>1366</sup> Reference to the case 14/77 *de Bloos v Bouer* (1976) ECR 1497.

<sup>1367</sup> Case 129/83 *Siegfried Zelger v Sebastiano Salinitri* (Reference for a preliminary ruling from the Oberlandesgericht München. Brussels Convention - Article 21, court first seised) (1984) ECR 2397 (Judgment of the court (fourth chamber) of 7 June 1984).

<sup>1368</sup> See also, Advocate General Mancini (Opinion delivered on 11 June 1987) in case 144/86 *Gubisch Maschinenfabrik v Giulio Palumbo* (Reference for a preliminary ruling from the Corte Suprema di Cassazione. Brussels Convention - meaning of *lis pendens*) (1987) ECR 4861 (Judgment of the court (sixth chamber) of 8 December 1987), and Opinion of Mr Advocate General Tesaro delivered on 13 July 1994 in case 406/92 *The owners of the cargo lately laden on board the ship Tatry v the owners of the ship Maciej Rataj* (Reference for a preliminary ruling: court of appeal (England)) (1994) ECR I-5439.

For further analysis, see Pescatore, P., 1980, pp.343-344 (case 12/76 *Tessili* (1976) ECR 1473 (6 October 1976).

<sup>1369</sup> February 1977.

<sup>1370</sup> Case 135/83 *HBM Abels v Bedrijfsvereniging voor de Metaalindustrie en de Elektrotechnische Industrie* [1985] ECR 469.

See also, Opinion of Mr Advocate General Van Gerven delivered on 30 May 1991 in case 362/89 *Giuseppe d' Urso and Adriana Ventadori and others v Ercole Marelli Elettromeccanica Generale spa and others* (reference for a preliminary ruling: Pretura di Milano - Italy) (1991) ECR I-4105.

*that there are terminological divergencies between what regards the transfer of undertakings. Whilst the German ('vertragliche übertragung'), French ('cession conventionnelle'), Greek ('snmssatikh ekxvrhsh'), Italian ('cessione contrattuale') and Dutch ('overdrach krachtens overeenkomst') versions clearly refer only to transfers resulting from a contract, from which it may be concluded that other of transfers such as those resulting from an administrative measure or judicial decision are excluded, the English ('legal transfer') and Danish ('overdragelse') versions appear to indicate that the scope is wider and that, moreover, it should be noted that the concept of contractual transfer is different in the insolvency laws of the various Member States, as become apparent in these proceedings. Whilst certain Member States consider that in certain circumstances a sale effected in the context of liquidation proceedings is a normal contractual sale, even if judicial intervention is a preliminary requirement for conclusion of such a contract, under other legal systems the sale is in certain circumstances regarded as taking place by virtue of a measure adopted by a public authority. In view of those divergencies, the scope of the provision at issue cannot be appraised solely on the basis of a textual interpretation."*

The analysis of these differences impelled the Court to conclude that not only textual interpretation was possible, but that one could use also the interpretative techniques such as "in the scheme of the directive", "its place in the Community system", and "its purpose".

Accordingly, there were differences noted also in the contexts of the interpretation of the insolvency laws in different Member States, which seemed to be essential for the interpretation of the Article of the Directive.<sup>1371</sup> The disparity found and the specificity of the rules on liquidation and analogous rules led the Court to conclude that the idea of 'transfer of undertakings' does not apply in the context of current proceedings.

The provisions of the same directive have been interpreted comparatively also by the Advocate General. He referred to the "comparative travaux préparatoires" of the Community system in his opinion:

*"It is well known that in the legal systems many Member States transfer of contract is regarded as a multilateral contract and therefore requires the agreement of the third party. It should however be noted that, in drawing up the provisions of directive 77/187/EEC, the Community legislature took this fact into account."<sup>1372</sup>*

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<sup>1371</sup> And as a general conclusion the Court stated that

*"if the directive had been intended to apply also to transfers of undertakings in the context of such proceedings, an express provision would have been included for that purpose".*

<sup>1372</sup> Opinion of Mr Advocate General Mancini delivered on 9 February 1988 in case 144/87 *Harry Berg and j. T. M. Busschers v Ivo Martin Besselsen* (Reference for a preliminary ruling from the Hoge Raad der Nederlanden. Safeguarding of employees' rights in the event of transfers of undertakings) (1988) ECR 2559.

In furthering this analysis, the Advocate General found the diversity of solutions concerning the legal status of a contract in the transfer of the undertakings in different Member States. He referred to the French, Belgian, Dutch, and Italian law.

In the same case, the parties attempted to argue on a comparative basis on behalf of the interpretation that a debt may only be transferred with the creditor's consent. This argument was based on the idea that this constituted a principle "*generally recognized in the legal systems of the Member States*" and was a general principle of obligations. The Court doubted the generality of the rule, and, consequently, rejected the argument, without, however, any references to comparative law.<sup>1373</sup>

In a case dealing, once again, with the Company Law Directive, the Advocate General made a slightly more extensive comparative study concerning the question of acquisition of legal personality in the Member States. Reference was made to Dutch and Portuguese law, the laws of the parties and those prevailing in the system of the Advocate General. They served as examples for further studies concerning an acceptable model.<sup>1374</sup>

The rule that an error in application of the Community law caused by an interpretation in good faith by the national authorities does not result in ability to recover sums paid due to that error was established by the Advocate General by a justification with reference, again, to comparative observations of the legal systems of the Member States ("*most of the Member States*"). In different systems, it would have been impossible to commence administrative or judicial procedures cases such as these.<sup>1375</sup>

In a case concerning the interpretation of the recognition of diplomas<sup>1376</sup>, there was a dispute between the Advocate General, the Government, and the defendant, as to whether the duty of recognition also existed in connection with the freedom of establishment. The "sociological" disparity presented by the parties was rejected by the Advocate General on the basis of "comparative" considerations:

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<sup>1373</sup> Case 144/87 *Harry Berg and j. T. M. Busschers v Ivo Martin Besselsen* (Reference for a preliminary ruling from the Hoge Raad der Nederlanden. Safeguarding of employees' rights in the event of transfers of undertakings) (1988) ECR 2559.

<sup>1374</sup> Opinion of Mr Advocate General Vilaca delivered on 8 March 1988 in case 136/87 *Ubrink Isolatie bv v Dak-en Wandtechniek bv* (reference for a preliminary ruling from the Hoge Raad der Nederlanden. Company law - first harmonizing directive of the Council) (1988) ECR 4665.

<sup>1375</sup> 18/76 *Government of the Federal Republic of Germany v Commission of the European Communities* (1979) ECR 343-396 (Judgment of the court of 7 February 1979), and 11/76 *Government of the Kingdom of The Netherlands v Commission of the European Communities* (1979) ECR 245-285 (Judgment of the court of 7 February 1979).

<sup>1376</sup> Established by Council Directive 89/48/EEC

*"They take the view that a lawyer who wishes to establish himself in another Member State must acquaint himself with a wholly different legal system: the qualifications and experience acquired by him in his Member State of origin or in the host Member State are not relevant in that connection. I am not persuaded by that argument because it assumes that no significant aspects of similarity can exist between the national legal systems in the Community and the manner of legal practice in the various Member States, a supposition which I find difficult to accept in the light of the historical relationship between a number of national legal systems of the Member States (25) and the way in which justice is administered. Furthermore, and above all, it takes no account of the efforts made by a lawyer from another Member State to acquaint himself with the legal system and the legal practice of the Member State in which he also wishes to practice. That does not mean that the existing differences between the Member States would not justify an admission procedure for lawyers from other Member States; however, in my view, freedom of establishment and the exercise of a profession throughout the Community would be hindered in an unjustified manner if, upon application for admission by a lawyer from another Member State, no account at all were taken of qualifications already obtained and their correspondence with the qualifications required by the law of the host Member State."<sup>1377</sup>*

The Court also formulated an interesting "directive" for comparative interpretation with regard to the authorities of the Member States. Namely, it maintained that there is the possibility ("may") for local authorities to make a comparative study when applying the principles of freedom of establishment and rules in the field of the recognition of diplomas:

*"In the course of that examination, a Member State may, however, take into consideration objective differences relating to both the legal framework of the profession in question in the Member State of origin and to its field of activity. In the case of the profession of lawyer, a Member State may therefore carry out a comparative examination of diplomas, taking account of the differences identified between the national legal systems concerned."<sup>1378</sup>*

One of the general principles explicitly rejected on the basis of a comparative analysis was the principle of "*force majeure*" (in a particular context). This interpretation was based on the fact that "*its application presupposes the non-performance of an obligation upon*

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<sup>1377</sup> Opinion of Mr Advocate General Van Gerven delivered on 28 November 1990 in case 340/98 *Irene Vlassopoulou v Ministerium für Justiz, Bundes- und Europaangelegenheiten baden-Württemberg* (Reference for a preliminary ruling: Bundesgerichtshof - Germany) (1991) ECR I-2357.

Similar types of comparative aspects played an important role also in another cases on the same subject.

<sup>1378</sup> Case 340/98 *Irene Vlassopoulou v Ministerium für Justiz, Bundes- und Europaangelegenheiten baden-Württemberg* (Reference for a preliminary ruling: Bundesgerichtshof - Germany) (1991) ECR I-2357.

See also Opinion of Mr Advocate General Jacobs delivered on 26 February 1992 in case 104/91 *Colegio Oficial de Agentes de la Propiedad Inmobiliaria v j. L. AguirreBorrell and others* (Reference for a preliminary ruling: Juzgado de Instrucción n. 20 de Madrid) (1992) ECR I-3003, and the judgment.

*the individual with respect to the administration". No general principle was discovered "in the national legal systems where there is no such obligation".*

The Advocate General argued that

*"Reference to the national legal systems reveals that the force majeure has certain effects in criminal law, others in public law and other again in the private law.; they are for the most part governed by specific rules... the fact that there is no uniform view regarding the force majeure... ".<sup>1379</sup>*

The Court agreed with this interpretation.<sup>1380</sup>

Moreover, in the field of copyright law (concerning the right to restrain the hiring out of the video cassette) the Advocate General used a comparative "generality" argument in order to support the rejection of the argument put by a party that the public performance should be assimilated to the hiring out of the cassette:

*"In order to understand this it is useful to in keep in mind that, under many national legal systems, the pursuit of the activity of hiring-out becomes unrestricted as soon as the cassette is offered for sale or, as in Germany, entails at most an obligation to give to the author fair compensation. The determining factor, however, is that even in those states the author, following sale of the recording, retains the right to control every other form of exploitation of the hiring-out of the cassette... remains a purely commercial transaction, the risk which it carries - namely that the persons hiring the cassette may see the film several times .... the owner of the right to perform it but by the person who has hired the cassette."<sup>1381</sup>*

Furthermore, in defining the nature of copyright, the Advocate General used some comparative observations:

*"In the legal systems of the Member States copyright is a typical right of exploitation in the form of the right of reproduction on the one hand and the right of public performance on the other (applying to situations where it takes place by way of a sound recording). The peculiarity of French law lies in the fact that an assignment of the reproduction may be restricted to a specific use (private use); if public use is made of the reproduction, the supplementary mechanical*

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<sup>1379</sup> The diversity of the rule in different fields of law has been recognized by the Court in case 4/68 *Schwarzwaldmilch v Einfuhr- und Vorratstelle Fette* [1968] ECR 377.

<sup>1380</sup> See, the Opinion of Advocate General Caporti delivered on 18 January 1978 in case 68/77 *Ifg-Intercontinentale Fleischhandelsgesellschaft Mbh and co. Kg v Commission of the European Communities (Force majeure)* (1978) ECR 353-0371 (Judgment of the Court of 14 February 1978).

<sup>1381</sup> Opinion of Mr Advocate General Mancini delivered on 26 January 1988 in case 158/86 *Warner brothers inc. And Metronome video Aps v Erik Viuff Christiansen* (Reference for a preliminary ruling from the Östre Landsret. Copyright - action to restrain the hiring-out of video-cassettes) (1988) ECR 2605 .

*reproduction fee becomes payable.*<sup>1382</sup>

Furthermore, comparative observations have also been related to the so-called "generality of the hallmarking of valuable objects". In Belgium, contrary to all other Member States, silver-plated articles were also required to be hallmarked. The Court accepted the Belgian system and ruled that the obligation to stamp silver-plated articles can be regarded as necessary for the effective "protection of consumers and promoting fair trading".<sup>1383</sup>

In the context of the directive covering technical regulations<sup>1384</sup>, the Advocate General addressed to the question of whether it is accepted in Community law (in relation to the free movement of goods) that a public entity involved in the selling of equipment can also grant "selling-permissions" for imported equipments.<sup>1385</sup> The Advocate General maintained that it would not be against Community law if there was a possibility for a review procedure for such decision. He noted that this would not "lead to disruption of the legal systems of the Member States" because

*"While in most of them the situation regarding the approval of telephones is similar to that in Belgium [the country to which the preliminary ruling pertained] in so far as the entity holding the power of approval is not truly distinct the body holding the monopoly for operating the telecommunications network, most of them also allow for a review of the legality of refusal of approval which includes a check on reasons related to the noncompliance with technical specifications which may include the commissioning of experts' reports. New measures will have to be introduced only in Member States where review of legality does not extend to the merits of reasons relating to technical assessments, that is to say, apparently, Italy, Ireland and Luxembourg. It may be assumed that recourse to experts .. enable the national courts concerned to extend their review to technical reasons for refusal of approval which, on the face of it, should not give rise to major problems."*

In the case dealing with lotteries and the applicability of rules concerning the

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<sup>1382</sup> Opinion of Mr Advocate General Lenz delivered on 24 February 1987 in case 402/85 *G. Basset v Societe des auteurs, compositeurs et editeurs de musique (sacem)* (Reference for a preliminary ruling from the cour d' appel, Versailles) (1987) 1747 .

<sup>1383</sup> Case 220/81 *Robertson and others* (1982) ECR 2701.

See also, Opinion of Advocate General Gulmann delivered on 9 June 1994 in case 293/93 *Criminal proceedings against Ludomira Neeltje Barbara Houtwipper* (Reference for a preliminary ruling: Arrondissementsrechtbank Zutphen Netherlands) (1994) ECR I-4249.

<sup>1384</sup> No. 83/189.

<sup>1385</sup> Opinion of Mr Advocate General Darmon delivered on 15 March 1989 in case 18/88 *Regie des telegraphes et des telephones v Gb-Inno-bm Sa* (Reference for a preliminary ruling: tribunal de commerce de bruxelles - Belgium) (1991) ECR I-5941.

internal market to them, the Advocate General based his analytical argument on the regulation of the lotteries in different Member States. This report had been made by the Commission. It dealt with the functioning of lotteries, and its relationship to public control. All Member States except Italy submitted their observations on the issue.<sup>1386</sup>

The Court has also relied on comparative socio-cultural arguments in order to preserve the competence of Member States:<sup>1387</sup>

*"National rules restricting the opening of shops on Sundays reflected certain choices relating to particular national or regional socio-cultural characteristics. It was for the Member States to make these choices."*

In the context of competition rules, the Court has developed, on the basis of comparative considerations, the idea that the principle of the equality of the treatment of consumers is applicable in relation to economic rules. This was related to the interpretation of Article 3(b) of the Treaty on the Economic and Steel Community. The Court claimed, on comparative basis, that

*"Pursuant to a principle generally accepted in the legal systems of the Member States, equality of treatment in the matter of economic rules did not prevent different prices being fixed in accordance with the parties situation of consumers or of categories of consumers provided that the differences in treatment correspond to the difference in the situations of such persons. If there is no objectively established basis, distinct treatment are arbitrary, discriminatory and illegal. It cannot be at all that economic rules are unfair, on the pretext that they involve different consequences or disparate disadvantages for the persons concerned when this is clearly the result of their operating conditions."<sup>1388</sup>*

Moreover, in the context of Article 93(3) (state aid), the Advocate General maintained that the so-called "standstill obligation" of the Treaty should have a direct effect, and that any interested person should be able to challenge state aid in national proceedings. He made

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<sup>1386</sup> Opinion of Mr Advocate General Gulmann delivered on 16 December 1993 in case 275/92 *Her Majesty's customs and excise v Gerhart Schindler and Joerg Schindler* (Reference for a preliminary ruling: High Court of Justice, Queen's bench division - United Kingdom) (1994) ECR I-1039.

<sup>1387</sup> Case 169/91 *Council of the City Norwich, Stoke-on-Trent/B&Q plc* (1992) ECR I-6635 (20 April 1991).

<sup>1388</sup> Case 11-57 *Societe d' electro-chimie, d' electro-metallurgie et des acieries electriques d' uginé v High Authority of the ECSC* (1958) 357 (Judgment of the Court of 26 June 1958).

See also case 13/57 *Wirtschaftsvereinigung eisen- und stahlindustrie, gussstahlwerk Carl Boennhoff, Gussstahlwerk Witten, Ruhrstahl and Eisenwerk Annahütte Alfred Zeller v High Authority of the ECSC* (1958) ECR 265 (Judgment of the court of 21 June 1958), 10/57 *Societe des anciens etablissements Aubert et Duval v High Authority of the ECSC* (1958) 401 (Judgment of the Court of 26 June 1958), 12/57 *Syndicat de la siderurgie du centre-midi v High Authority of the ECSC* (1958) 473 (Judgment of the Court of 26 June 1958).

a reference to the situation in national legal systems and observed that there are

*"differences between the various legal systems concerning the conditions and extent of judicial protection granted (for example, limitations on applications for interim measures brought before the administrative courts)"<sup>1389</sup>.*

However, an example was found from the Italian Constitutional Court of decision that declared that *"regional laws granting aid which were approved by the regional assembly before the Community verification procedure had been completed were unconstitutional"*. Furthermore, the Advocate General took as an example a decision of the United Kingdom Court of Appeal<sup>1390</sup>, where it had been maintained that the authorities had to restrain from implementing state aid before, and on the conditions that, the Commission had approved it. The Advocate General also maintained that there is a general *"trend"* for developing procedures of such kind.

The Court has also interpreted the principles regarding the severity of the sanctions to be imposed against a company which had breached several rules of the EAEC<sup>1391</sup>. The company had argued that the fact that the infringements notionally overlap should be a diminishing factor. The Court refused, however, to grant lesser sanctions. The Court argued that

*"On the contrary, it is well established, as is apparent from the approach adopted in certain national legal systems, that in such cases it is appropriate to impose the severest sanction possible"<sup>1392</sup>.*

In dealing with the effect of the Directive's provisions in the realm of the principle of the equal treatment of men and women at work and its effect upon the third parties, the Advocate General made an extensive study of the similar provisions (and their effects) in the International Convention on Civil and Political rights, the Convention on Economic, Social and Cultural Rights<sup>1393</sup>, and especially the European Convention of Human Rights, and referred to the academic writings in different Member States concerning these Conventions. He also referred to

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<sup>1389</sup> Opinion of Mr Advocate General Tesouro delivered on 19 September 1989 in case 142/87 *Kingdom of Belgium v Commission of the European Communities* (State aid - state aid for a steel tube undertaking - withdrawal by way of recovery) (1990) I-959.

<sup>1390</sup> 24 February 1986 *R v Attorney General ex parte Imperial Chemical Industries*.

<sup>1391</sup> Atomic Energy Treaty.

<sup>1392</sup> Case 308/90 *Advanced nNuclear Fuels GmbH v Commission of the European Communities* (Action for annulment - Commission Decision relating to a procedure in application of article 83 of the Euratom treaty) (1993) ECR I-309 (Judgment of the court (sixth chamber) of 21 January 1993).

<sup>1393</sup> Both 19 December 1966.

the "*constitutional traditions of the Member States*".<sup>1394</sup>

Furthermore, in the complex of cases dealing with the equality of treatment of men and women and the legislative prohibition of night-work<sup>1395</sup>, the Advocate General<sup>1396</sup> described the comparative historical and current practices at both the national and international levels with a special reference to the practices of certain states<sup>1397</sup>. Any derogation from the principle was seen to be applied restrictively. Furthermore, the application of this principle in the context of transsexuality was also studied in the light of comparative observations of states and of a detailed study of the practice in the European system of human rights.<sup>1398</sup>

There has also been some discussion concerning the "*protection of family life*" with the aid of comparative observations. Here one can note the way in which the interpretation of the applicable principle in Community law has been "found" within the Community system of the past, and how it has become a fundamental principle of Community law and furthermore how its interpretation still continues to be based on comparative observations.

One of the first cases, in which this principle was discussed was the Bergemann case<sup>1399</sup>. The Advocate General observed, in the context of the interpretation of the concept of "*residence*", that this concept has to be interpreted in the context of the protection of family life. He observed, how

*"marriage and the family enjoy considerable protection both at international level and within the legal systems of the Member States European convention for the*

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<sup>1394</sup> Opinion of Mr Advocate General van Geven delivered on 30 January 1990 in case 262/88 *Douglas Harvey Barber v Guardian Royal Exchange Assurance Group* (Reference for a preliminary ruling; Court of Appeal - United Kingdom - Social Policy - equal pay for men and women - compulsory redundancy - early payment of a retirement pension) (1990) ECR I-1889.

In the case dealing with the dismissal of a pregnant women, the applicant also referred strongly to the same international and national measures, see case T-45/90 *Alicia Speybrouck v European Parliament* (temporary staff - dismissal - protection of pregnant employees - reasons) (1992) ECR II-33 (Judgment of the court of first instance (fifth chamber) of 28 January 1992).

<sup>1395</sup> Directive No. 76/207.

<sup>1396</sup> Opinion of the Advocate General Tesauo delivered on 24 January 1991 in case 345/89 *Criminal proceedings against Alfred Stoeckel* (Reference for a preliminary ruling: tribunal de police d'Illkirch - France) (1991) ECR I-4047.

<sup>1397</sup> Italian Constitutional Court, Judgment No 210 of 9 July 1986, *Gazzetta Ufficiale della Repubblica Italiana*, no 38 1 August 1986.

See, similarly the case 158/91 *Ministre public and direction du travail et de l'emploi v Jean-Claude Levy* ((1993) ECR I-4287) which also took now into account a recent decision of the German Constitutional Court (28 January 1992).

<sup>1398</sup> Opinion of Mr Advocate General Tesauo delivered on 14 December 1995 in case 13/94 *P v s and Cornwall County Council* (Reference to the preliminary ruling: industrial tribunal, Truro - United Kingdom) (1996) ECR I-2143.

<sup>1399</sup> Opinion of Mr Advocate General Lenz delivered on 15 June 1988 in case 236/87 *Anna Bergemann v Bundesanstalt für Arbeit* (Reference for a preliminary ruling from the Landessozialgericht für das Land Nordrhein-Westfalen) (1988) ECR 5125.

*protection of human rights and fundamental freedoms, which all the Member States of the Community have ratified".*

He then undertook an analysis of the European human rights system and observed how even the project for establishing the family can be included within the realm of the principle. However, this did not mean that all negative consequences necessarily intervene it.

Furthermore, he analysed the provisions in the European Social charter, which have been ratified by all Member States except Belgium, Luxembourg and Portugal. It contained a provision on the social, economic, and legal protection of family life. This Charter defined also the scope of the positive measures forming part of the social security (family allowances, social benefits, tax legislation and aid to young couples, these being not, however, positive rights for the individual). However, the "*common political will*" and common values could still be recognized. Consequently, they could be used, according to the Advocate General, in the interpretation of the directly applicable laws.

Similarly, the International Covenant on Civil and Political rights, ratified by all but Greece and Ireland, explicitly prohibited measures which penalized or jeopardise the right to family life. Measures obliging spouses to live apart was listed as an example of a measure which would contravene this prohibition. The family's special need for protection was recognized in this Covenant even if the actual application may differ to a certain extent between the parties due to the differences in social, economical, cultural, and political circumstances and traditions.

Furthermore, the International Convention on Economic, Social and Cultural rights, being ratified all Member States but Ireland, recognized also the "*widest possible protection*" to the family.

The Advocate General also made a traditional, albeit rather eclectic, comparative study of the laws in the Member States in this area:

*"Similarly, the legal systems of the Member States make provision special protection for marriage and the family, even if the level of protection and the manner in which it is applied in practice varies. Special status accorded to the family and marriage is reflected in constitutional law in the Federal Republic of Germany, Spain, Ireland Italy and Portugal. In the Netherlands the provisions of the European Convention on Human Rights constitute directly applicable law. Under French constitutional system, the conditions necessary for the development of the individual and the family are guaranteed by the preamble to the 1946 constitution, to which the present constitution refers. In the British legal order, marriage and the family are recognized as fundamental values both by ordinary legislation and in the decisions of the court. In Belgium there is in fact no constitutional provision protecting marriage and the family. Under labour law,*

*however, a statutory provision declares void any term in a contract of employment (19) providing for termination of the contract in the event of marriage or pregnancy. In Denmark, no express protection of the family is laid down in the constitution. On the other hand, such protection is afforded under labour law and social law. The fact that a spouse leaves his or her employment in order to follow the other spouse to the latter's place of employment does not prevent him or her from claiming unemployment benefit."*

Moreover, he examined analytically the relationship between principles concerning the protection of the family and the unemployment benefits (consistency). In the end, he made the following conclusion concerning the existence of a general principle:

*" A comparative examination of these provisions does not then disclose the existence of a general principle of law according to which the spouse is always entitled to unemployment benefit, where his or her unemployment is the result of a change of residence linked to family circumstances. It is to be observed, however, that the principle that an employee who giving up his employment in order to live together with his spouse or to be to continue living together should not be refused unemployment benefit is widely accepted.*

*The unity of the family is also a value directly recognized under legal order of the Community, as is shown by the right to families of workers (20) and self-employed workers 21) in Community legislation.*

*In the light of the foregoing legal assessment, the setting-up of family home in a Member State other than the previous state of residence also amounts to "residing" within the meaning of article 71 of regulation no 1408/71. The decisive factor in this respect is whether the person concerned has actually taken up residence, so that even a relatively short period may satisfy this requirement."*

The Court agreed with this argument, and decided that for unemployment benefit purposes, the relocated person should be considered as a resident in the state to which he has moved.<sup>1400</sup>

This principle did, following this case, play a quite decisive role in the interpretation of the Court. In the case of *Reibolt*<sup>1401</sup>, the Court referred to the *Bergemann* case and to the consideration of the "circumstances" in interpreting his residence status. The same idea was

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<sup>1400</sup> Case 236/87 *Anna Bergemann v Bundesanstalt für Arbeit* (Reference for a preliminary ruling from the Landessozialgericht für das Land Nordrhein-Westfalen) (1988) ECR 5125.

<sup>1401</sup> Case 216/89 *Beate Reibolt v Bundesanstalt für Arbeit* (Reference for a preliminary ruling Bundes socialgericht - Germany. Social Security for emigrant workers - regulation no 1408/71 (1)(b)(ii)) (1990) ECR I-4163 (Judgment of the Court (third chamber) of 13 November 1990).

repeated in the argument in the *Toosey* case<sup>1402</sup>. In the case of *Joop van Gestel*<sup>1403</sup> the Court explicitly justified the decision by referring to the rule in the *Bergmann* case, which expressed the idea of the possibility of receiving unemployment benefits under the most "*favourable conditions*" for those seeking new employment. This idea applied especially to persons who "*retain close ties*" in particular of a personal and vocational nature, with the country where they have settled and habitually reside:

*"It is reasonable that workers that have such links with the state in which they reside should be accorded the best conditions in that state for finding a new employment"*.

**Article 215.** Article 215 of the Treaty on European Economic Community provides that the Court shall use "*general principles common to the Member States*" to decide issues of non-contractual liability and damage caused by its institutions or by its servants in the performance of their duties.<sup>1404</sup> Furthermore, the Court shall resolve this problem, where no Treaty provisions exist, on the basis of "*reference to the rules acknowledged by the legislation, learned writings and the case law of the member countries*".<sup>1405</sup>

It can be mentioned that, for example, the general admissibility of claims for the payment of interest have been established according to comparative argument.<sup>1406</sup> Some recent

<sup>1402</sup> Opinion of Mr Advocate General Lenz delivered on 18 November 1993 in case 287/92 *Alison Maitland Toosey v Chief Adjudication Officer* (Reference for the preliminary ruling - Social Security Commissioner - United Kingdom) (1994) I-279.

<sup>1403</sup> Case 454/93 *Rijksdienst voor Arbeidsvoorziening v Joop van Gestel* (Reference for a preliminary ruling: Arbeidshof Brussel - Belgium. Social security for migrant workers - designation of the competent state) (1995) I-1707 (Judgment of the Court (sixth chamber) of 29 June 1995).

<sup>1404</sup> See case 106 and 120/87 *Asteris v Greece* (1988) ECR 5515.

Some analysis of comparative law and Article 215, see Galmot, Y., 1990, p.256 ff.

<sup>1405</sup> See case, 7/56 and 3-7/57 *Algera et al. v Common Assembly* (1957-1958) ECR 39.

*"In the case of contractual liability the Community shall in accordance with the common principles common to the Member States make good any damage caused by its institutions or by its civil servants in the performance of their duties"* (55/71 *Zukkerfabrik Shoppenstead v Council*, (1971) ECR 975).

For a discussion on the drafting of the liability articles in the ECSC treaty, see opinion of (acting) Advocate General Biancarelli, delivered on 30 January 1991 in case T-120/89 *Stahlwerke Peine-Salzgitter v Commission of the European Communities* (ECSC - non-contractual liability of the Community) (1991) II-279. The Advocate General discussed the comparative "constructing" of liability Articles 34 and 40 of the ECSC treaty on the basis of the *travaux préparatoires* (memorandum of 28 September 1950) (p.310 ff.). At the basis of this provision were the "*general principles of law common to all developed legal systems*". Furthermore, he discussed the interpretation of the Article on the basis of the notion of direct and special harm "*well known in all the legal systems of the Member States*" (p.336). Furthermore, comparative observations established fact, "*as is the case in all developed legal systems*", that compensation can be granted not only for *lucrum cessans* [lost profit], but also for *damnum emergens* [future damage]), "*provided that, as in the present case, direct causality is sufficiently established*" (p.359).

<sup>1406</sup> Joined cases 64 and 113/76, 167 and 239/78, 27, 28 and 45/79 *P. Dumortier freres sa and others v Council of the European Communities* (Maize gritz - liability) (1979) 3091-3119 (Judgment of the court of 4 October 1979).

cases on the conditions of liability have included comparative observations from within the systems of the Member States<sup>1407</sup>.

There are also cases in the practice of the European Court related to the question of whether Community institutions can be liable for damage caused by their legal actions. Article 215 deals with the question of this type of non-contractual liability. It has been used in examining whether the legal acts of the institution resulting in damage to an individual can be the basis of liability.

The following analysis attempts to show the role of comparative law in "new cases", and the subsequent development of the case law on the basis of comparative observations.

In one of the first cases, in *Zuckerfabrik Schoppenstedt*, the question was discussed on the basis of the admissibility of applications for damages arising from legislative measures. Reference was made also to analogous articles of the ECSC Treaty (Article 34).

The legal argumentation of the Advocate General began by scrutinizing the arguments made in several cases of the European Court. In the context of the admissibility of the claim of liability, the Advocate General discussed firstly the question of whether a legislative act can be the basis for non-contractual liability. In this respect, he referred to comparative law. Explicit (indirect) references were made also to the conference on state liability based on wrongful conduct by its institutions held at the Max-Planck Institute in 1964, and to the publication following it.

The comparative examination showed that solutions adopted in different legal systems varied considerably. For example in Belgium and France, liability for the breach of an was possible. In principle, this was ruled out in Italy and the Federal Republic of Germany. However, the differences between the various legal systems were considered to be technical in nature.

The Advocate General maintained that the expression in Article 215 "*should not be taken too literally* [ "the general principles common to the Member States" ]":

*"For Community law the criteria is not only the rules which exist in all Member States, nor is the lowest common denominator determinative, nor does the 'rule of lowest limit' apply<sup>1408</sup>."*

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<sup>1407</sup> Opinion of Mr Advocate General Lenz delivered on 16 June 1994 in case 23/93 Tv10 sa v commissariaat voor de media (Reference for a preliminary ruling: Raad van state - Netherlands. Freedom to provide services - national legislation (1994) I-4795.

<sup>1408</sup> Reference to Heldricht, *Europerecht*, p.349.

According to him, one has to likewise refer to the objectives of the Treaty and the peculiarities of the Community structure, "*and in which perhaps it is appropriate that the guideline be in the best elaborated national rules*".<sup>1409</sup> He made also reference to the ECSC system (Article 34) and to the fact that the individual affected can challenge regulations (Articles 177 (the new Article 234) and 184 of the EEC Treaty). Furthermore, according to him, the case law recognized a rule of non-restrictive interpretation in cases, where the protection of rights are involved<sup>1410</sup>. The latter fact can be relevant to the control of the legality of the regulation.

These arguments prompted the outcome, according to which even if the measure, as such, is not found in all legal systems, one can, on 'incomplete' comparative basis, recognize it as a principle of liability forming part of Community law. The fact that it was widely recognized and, in some cases, even included in positive formal laws, supported this conclusion.

Secondly, the Advocate General asked whether it was possible to make the (compensation) claim before the European Court based on a measure declared valid, or does the measure have to be already declared invalid. Apart from references to the ECSC system and analogous discussion in the Courts case law<sup>1411</sup>, the comparative observations supported the latter possibility. French, Belgian and German law recognized the possibility of claiming compensation based also on valid administrative measure. In other countries this was not so because of the impossibility of the court to review the validity of administrative acts.

After having reflected upon the comparison between the different models of state systems and Community system and with the fact that the Community court had accepted a possibility to review the validity of administrative measure, he chose the alternative, according to which the question of invalidity was not relevant.

The next question was whether an act, which has not been annulled can constitute a wrongful measure. This question had been discussed on the basis of scholarly opinion delivered in at the 46th conference of German lawyers.<sup>1412</sup> These opinions had confirmed that there was no rule, in the Member States systems or in the EEC Treaty, which imposed the obligation to find a prior invalidity. On the contrary, the ECSC Treaty had claimed opposite.

Other claims of inadmissibility were rejected on other bases.

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<sup>1409</sup> Referring to Zweigert, K., *Rebels Zeitschrift*, Vol. 28, p.611.

<sup>1410</sup> Case 6/60 *J.-E. Humblet v Belgium State* (1969) Rec. p.1189.

<sup>1411</sup> Case 25/62 *Plaumann & Co. V Commission* (1963) ECR 96.

<sup>1412</sup> Ule, Borner, Fusz, Bülow, Ganshof van der Meersch, and Goffin.

In examining the substance of the case, he did not examine the nature of the breach.<sup>1413</sup> He discussed briefly, from the point of view of the general principles of the Member States, the idea of an "*additional qualifying factor*" which would have established the responsibility of the Community institutions. He maintained that there was no possibilities of finding

*"sufficiently substantial evidence of the additional qualifying factor of misconduct necessary under Community law ... and which may probably also be regarded as a general principle under the legal systems of the Member States."*

The Court, on the other hand, upheld the rule according to which there had to be a "*sufficiently flagrant violation*".

In this case, the Advocate General established a comparative approach as a basis for the evaluation of the nature of the Community rule in question.

In the case law on the subject which followed<sup>1414</sup>, the Advocate General<sup>1415</sup> referred to the Court rule of "*sufficiently clear violation of a superior rule of law for the protection of the individual*". Furthermore, the Advocate General accepted the previous opinion of the Advocate General in the *Zuckerfabrik Schoppenstedt* case that the Community system imposes no obligation to submit an administrative complaint to the Community authorities prior to the lodging of an application to the Court for damages. He upheld the admissibility of the complaints.

In the following opinion concerning the substance of this case, the Advocate General repeated the *Zuckerfabrik* rule on the "*sufficiently clear violation*".

In the following cases, the Court also repeated the "*sufficiently flagrant violation rule*" test<sup>1416</sup>.

Subsequently, the question was dealt with, for example, in the case *Bayerische*

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<sup>1413</sup> Opinion of Mr. Advocate General Roemer delivered on 13 October 1971.

<sup>1414</sup> Cases 9 and 11/71 *Compagnie d'Approvisionnement de Transport et de Credit SA and Grands Moulins de Paris SA v Commission of the European Communities* (1972) ECR 391 (Judgment of the Court 13 June 1972).

<sup>1415</sup> Opinion of the Mr Advocate General Dutheillet de Lamothe delivered on 14 July 1971 ((1972) ECR 409) on admissibility, and opinion of the Mr Advocate General Mayras delivered on 24 May 1972 ((1972) ECR 415) on the substance of the violation.

<sup>1416</sup> Case 23/72 *Mercur Aussenhandels GmbH v Commission of the European Communities* (1973) ECR 1055 (Judgment of the Court 24 October 1973)/ Opinion of Mr Advocate General Mayras delivered on 27 June 1972 (1973) ECR 1076, 153/73 *Holtz & Willemsen GmbH v Council and Commission of the European Communities* (1974) ECR 675 (Judgment of the Court of 2 July 1974)/ Opinion of Mr Advocate General Reischl delivered on 8 May 1974, (1974) ECR 697, 74/74 *Comptoir National Technique Agricole (CNTA) SA v Commission of the European Communities* (1975) ECR 533 (Judgment of the Court of 14 May 1975)/ opinion of Mr Advocate General Trabucchi, delivered on 23 April 1975 (1975) ECR 543, cases 54 and 60/76 *Compagnie Industrielle et Agricole Comte de Loheac and Others v Council and Commission of the European Communities* (1977) ECR 645 (Judgment of the Court of 31 March 1977)/ opinion of the Mr Advocate General Reischl delivered on 10 March 1977 (1977) ECR 655.

*HNL*<sup>1417</sup>, where the applicants claimed compensation for damage which they had suffered through the effects of a Council Regulation<sup>1418</sup>. That regulation had been declared null and void by the Court in its decision<sup>1419</sup>.

The Advocate General reaffirmed at the outset <sup>1420</sup> the rule that the legislative nature of the regulation does not *a priori* prevent the examination of the Communities' liability. Furthermore, a specific examination was needed because the declaration of nullity was not an automatic basis for compensation.

In connection to the first question, the Advocate General undertook a brief comparative analysis of the different solutions existing in the Member States. Special attention was paid to the differences between the systems making no clear distinction between constitutional rules and legislative rules (England) and, on the other hand, the systems which clearly establish such difference (Italy and Germany). In the context of comparative observations, he remarked that in general the liability of the state for damage caused by unlawful regulations or orders is accepted "*even if the conditions vary from one system to another*".

Non-contractual liability, based on Article 215, was to be decided on the basis of the general principles found in the laws of the Member States. However, first it was to be decided what kind of measure the regulation was in relation to the measures existing in the national systems. Only that way could one identify, from the national systems, the general principles applicable.

Even if it was clear that structural and political differences existed, and that the analogy was not perfect, regulation was seen more as a legislative act, as a statute, than an administrative act. In this connection, the Advocate General referred to a comparative study

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<sup>1417</sup> Case 83/76 *Bayerische hnl Vermehrungsbetriebe GmbH and co. Kg and others v Council and Commission of the European Communities* (Skimmed-milk powder - liability) (1978) 1209-1226 (Judgment of the court of 25 May 1978).

<sup>1418</sup> No 563/76 of 15 March 1976. On compulsory purchase of skimmedmilk powder held by intervention agencies for use in feeding stuffs.

<sup>1419</sup> In case 114/76 *Bela-Mühle v Grows-Farm* (1977) ECR 1211 (Judgment of the Court of 5 July 1977), 116/76 *Granaria Hoofdprodukschap voor Akkerbouwproducten* (1977) ECR 1247 (Judgment of the Court 5 July 1977), 119 and 120/76 *Öhmühle Hamburg and Hauptzollamt Hamburg and Hauptzollamt Bremen-Nord* (1977) ECR 1269 (Judgment of the Court of 5 July 1977).

<sup>1420</sup> Opinion of Mr Advocate General Capotorti delivered on 1 March 1978 in case 83/76 *Bayerische hnl Vermehrungsbetriebe GmbH and co. Kg and others v Council and Commission of the European Communities* (1978) ECR 1226.

produced by the Advocates General in previous case law.<sup>1421</sup> He claimed, however, that

*“In my opinion, in view of the extreme difficulty of making the hierarchy of the Community legislative measures coincide with that of the national legislative measures, it is logical that more rigorous solution concerning the liability of the public authorities should be adopted with regard to the Council of the European Communities, which has the twofold capacity of legislature and administration without having the democratic mandate and the power to express the sovereignty of the people which may justify exempting the legislature from the general rules on liability.”*

On the other hand, in discussing the idea of “sufficiently serious breach”, the Advocate General maintained that

*“... It seems that since there is no possibility of eliciting any other guidance from the general principles common to the laws of the Member States, Community law accepts, for the purposes of the non-contractual liability of the Community, that the undoubtedly voluntary nature of the acts adopted by the institutions is sufficient and that nature gives rise to a presumption of blame when an unlawful measure is enacted. This moreover is the solution accepted with regard to unlawful administrative measures in the legal systems of certain Member States, including Italy, the Netherlands, Belgium, and Luxembourg (see in this connection the article entitled “Zur Reform des Staatshaftungsrechts” by the Max-Planck-Institut für Öffentliches recht und Völkerrecht, 1975, p.8)”.*

On this basis he came to the conclusions that the “unjustifiable” nature of the Community conduct had been already established.

Related to the seriousness of the breach, the Advocate General referred also to the decisions of the Conseil d'État contained in a Max-Planck-Institute study. However, he proposed some elements for interpretation, but maintained at the same time that his interpretation was, nevertheless, autonomous of tendencies in national systems which seemed to assert, on the contrary, that the compensation is not dependent upon the extent of damage. Furthermore, in discussing the categories of persons to be compensated, he referred also to German legal theory, but wished to avoid these types of analogies. In the end, some distinctions made by the Bundesgerichtshof were discussed with a view of extending these principles also to Community law. According to this rationale, a wide category of persons should be considered to be able to claim compensation.

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<sup>1421</sup> Opinion of the Advocate General Roemer on 13 July 1971 in case 5/71 *Zuckerfabrik Schoppenstedt* (1971) ECR 975 (Judgment of the Court 2 December 1971) (opinion (1971) ECR 986).

In order to see the role of the comparative examination, one has to observe the evolution of this case law.

Finally, the Advocate General came to the conclusion that

*“Council regulation..., which has been already declared null and void ... was in serious breach both of the superior rules on non-discrimination and proportionality conferring rights on individuals and of the second subparagraph of Article 40(3) and Article 39 of the Treaty.”*

The Court restated, on the other hand, the idea of “sufficiently serious breach” prevailing in case law. It regarded the principles applicable in different Member States and maintained that liability is a relatively exceptional phenomenon and is incurred only in special circumstances. It followed from this that

*“Individuals may be required, in the sectors coming within the economic policy of the Community, to accept within a reasonable limits certain harmful effects on their economic interests as a result of a legislative measure without being able to obtain compensation from public funds, even if that measure has been declared null and void”.*

and that

*“In legislative field such as the one in question... the Community does not therefor incur liability unless the institution concerned has manifestly and gravely disregarded the limits on the exercise of its powers”*

Furthermore,

*In these circumstances the fact that the regulation is null and void is insufficient for the Community to incur liable...”*

In conclusion, we may question why the principle of “serious breach” was discussed more thoroughly, on comparative basis, in the *Bayerische HNL*, a subsequent case to quite similar cases. We can say that this was related to the fact that only in this case the claim of compensation was based on a Council regulation which had already been declared null and void. In the earlier case law, the issues had been concerned compensation claims on the basis of regulations, which had not been previously declared invalid, or which were issued by other Community Institutions. On the basis of comparative observations, the Advocate General tried to apply the previous case law in a new situation. Furthermore, it seems clear that the Advocate General tried to reach a solution regarding the opinions of two different Advocates Generals concerning the issue of “seriousness of the breach”, basing his reasoning on comparative observations.

However, we may observe that for the Court, which opposed the Advocate General’s conclusion, the idea of a ‘*sufficiently serious breach*’ no longer neither provided a clear basis of justification. The question was more pressing and concrete than in the previous cases,

for, in this case, one could quite convincingly claim that a "*serious breach*" had occurred. The declaration of nullity was a strong basis for that argument. Accordingly, the Court seemed to establish a new rule concerning the obligation of an individual to "*accept in reasonable limits certain harmful effects on their economic interests*", and that liability is "*exceptional and incurs only in special circumstances*". It reached this conclusion on the basis of comparative observations.<sup>1422</sup>

**Comparative law in some other questions.** There are several interpretations of the procedural traditions of the European Community order which have been accomplished by means of comparative analysis.

The Advocates General have recognized national discussions concerning distinction between issues of fact and questions of law, concerning ideas on errors of fact and of law.<sup>1423</sup> Furthermore, the characterization of certain official documents as proof has also taken place by reference to national traditions.<sup>1424</sup> Procedural rules concerning the "*right to fair hearing*" and the "*confidentiality of certain information*" have been discussed with a help of comparative references by the Advocate General:<sup>1425</sup>

*"Most commentators on European and American anti-dumping law..."*

The idea was to "harmonize" rules via some comparative remarks:

*"...However, the Commission and Court should be invited to consider the feasibility of such rules, and hence of introducing in the Community measures similar to those that exists in the United States".*

Some remarks were made also on European Human Rights.<sup>1426</sup>

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<sup>1422</sup> For some analysis of Article 215 and comparative law, see Pescatore, P., 1980, p.342. He maintains that comparative law defines, not the basis of Community principles, but rather the limits of the Community legislature's responsibility.

<sup>1423</sup> Opinion of Mr Advocate General Jacobs delivered on 10 November 1993 in case 53/92 *Hilti v Commission of the European Communities* (Appeal - competition - abuse of a dominant position - concept of relevant market) (1994) I-667.

<sup>1424</sup> Opinion of Mr Advocate General Darmon delivered on 7 February 1991 in case 49/88 *Al-Jubail fertilizer company (Samad) and Saudi Arabian fertilizer company (Safco) v Council of the European Communities* (Application for a declaration that Council Regulation (EEC) no. 3339/87) (1991) I-3187.

<sup>1425</sup> Opinion of Mr Advocate General Darmon delivered on 7 February 1991 in case 49/88 *Al-Jubail*. The interpretation related also to the interpretation of the GATT rules.

<sup>1426</sup> The remarks is interesting, if one wants to understand, for example, the recent proposed changes to the European Human Rights system (Commission merged to the Court) in relation to the introduction of Basic Rights to the jurisdiction of the Community Court:

*"Furthermore, the situation is not really satisfactory in the terms of fundamental rights. If the*

However, the main argument was justified with reference to comparative law *de lege ferenda* by means of an extensive reference to scholarly writings and cases, particularly to the American law:

*"I am of course aware of the difficulties inherent in having to reconcile the observance of the right to a fair hearing with the protection of the confidentiality of certain information. However, I will point out that, in other legal systems, solutions to those difficulties have apparently been found.*

*Under American law, since the trade agreements act 1979..."*

Further analysis was taken along the following lines:

*"... The last point has been the subject of much discussion in academic legal texts and American case-law. Until 1983 the Court of International Trade had refused disclosure to "in-house counsels" or "corporate counsels" on the ground that it did not wish to place them "under the unnatural and unremitting strain of having to exercise constant self-censorship in normal working relations (86). That line of decisions was terminated judgment of the Court of Appeals of the Federal Circuit, establishing that granting disclosure was a matter to be examined... The Court of Appeals proceeded largely on the basis that "in-house counsels" and "retained counsels" are officers of the court and are bound by the same Code of Professional Responsibility, and are subject to the same sanctions. In-house counsels provide the same services and are subject to the same types of pressures as retained counsels..."*

The question of "modelling" was raised and the answer given affirmed its role:

*"Can such a system be transposed to Community law? As noted above academic legal texts seem broadly favourable, and the European Parliament hopes that this avenue will be explored. The American experience has been declared satisfactory. Canada also uses a similar system. As the president, Mr Due, stated: "there may be justification in aligning even the procedural rules on those of the other partners" of GATT...."*

*Are the legal difficulties insuperable? Advocates, solicitors and barristers are required to observe the rules of professional ethics in all the Member States, no matter whether those rules are imposed by the legislature or by the profession by itself. A breach of confidentiality is, in principle, punished under the domestic legal order in every Member State.... It is difficult to see what arguments could support the view that, even given the same guarantees, European lawyers are not in a position to perform the same function as officers of the court as their*

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*European Commission of Human Rights declares inadmissible applications directed against national decisions enacted pursuant to Community Act [reference: Application No 13258/87 M. & Co. V Federal republic of Germany: Decision of 9 February 1990] the main reason is that, through its successive judgments, the Court has established the principle that it reviews the Community institutions' observance of fundamental rights. It is therefore far from important to avoid conspicuous discrepancies between the construction of this Court puts on the rights to a fair trial and the requirements already laid down by the European Court of Human Rights".*

*American counterparts."*

The Court maintained the conclusion arrived at by the Advocate General that the regulation is void in so far as it affects the applicant.<sup>1427</sup> It maintained that the role of confidentiality is more important in Community law because of the lack of such procedural guarantees that exist in certain national systems. No other comparative law references were expressed.

**Staff cases.** The Court has also made an extensive study of the legislation and case-law of different Member States in order to resolve problems in certain staff cases.

According to "*generally accepted principle in the national legal systems*" the applicant's claim was well founded "*if he had suffered loss corresponding to the alleged enrichment of the other party*".<sup>1428</sup> Furthermore, the exclusion of suicide from compensation refers only to voluntary suicide "*in accordance with a general tendency in the legal systems of the Member States both regard to accident insurance and social security*".<sup>1429</sup> The disciplinary procedure and the principles of "*audi alteram partem*" were to be interpreted "*in the light of the rule in the most legal systems of the Member States*".<sup>1430</sup>

The rules for calculating time limits for bringing actions were considered to be in

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<sup>1427</sup> Case 49/88 *Al-Jubail fertilizer company (Samad) and Saudi Arabian fertilizer company (Safco) v Council of the European Communities* (Application for a declaration that Council Regulation (EEC) no. 3339/87) (1991) ECR I-3187.

<sup>1428</sup> Case 26/67 *Henri Danvin v Commission of the European Communities* (1968) ECR 315 (Judgment of the Court (second chamber) of 11 July 1968).

<sup>1429</sup> Case 18/70 *X v Council of the European Communities* (1972) ECR 1205 (Judgment of the court (first chamber) of 6 December 1972).

<sup>1430</sup> Case 141/85 *Henri de Compte v European Parliament* (Official - disciplinary measures) (1985) ECR 1951-1968 (Judgment of the court (third chamber) of 20 June 1985).

Concerning the statement of reasons (referring to the situation in Member States), see Opinion of Mr Advocate General Mancini delivered on 19 January 1988 in case 319/85 *Misset v Council of the European Communities* (officials - disciplinary measures) (1988) ECR 1861. On time limits for bringing actions, see also the opinion of Mancini in case 152/85 *Misset* (1987) ECR 223. He maintains, for example, that "*even two exceptions to which I have referred prove to be more apparent than real; that is to say in substance they are in conformity with the rationale of the calculation prevailing in the Community...*" (the reasoning based on analysing and justification on Latin terms).

On comparative basis, limiting the responsibility to give reasons, see case T-160/89 *Gregoris Evangelos Kalavros v Court of Justice of the European Communities* (1990) ECR II-871 (Judgment of the court of first instance (fifth chamber) of 13 December 1990).

accordance with this "survey of comparative law...except in France and Ireland".<sup>1431</sup> Furthermore, the Advocate General did not agree with the claim that there is no possibility to challenge a decision rejecting a complaint, where the decision merely confirms the contested act. This was supported by reference to the Italian and French system.<sup>1432</sup>

The Court has also explicitly noted certain concepts embodied the Staff Regulations as being derived directly from the legal systems of the Member States<sup>1433</sup>,

*"which, under their laws, impose a mutual obligation to provide maintenance on relatives by blood and/or marriage of a greater or lesser degree of proximity. That concept must therefore be understood as referring exclusively to an obligation of maintenance imposed on an official by a source of law independent of the will of the parties' end as excluding maintenance obligations of a contractual, moral or compensatory nature. Since neither Community law nor the staff regulations provide the Community Court with any guide as to how it should define, by way of independent interpretation, the meaning and scope of the concept of a legal responsibility to maintain entitling an official to receive a dependent child allowance under Article 2(4) of annex vii to the Staff Regulations, it is necessary to determine whether the national legal system to which the official in question is subject imposes such a responsibility on the official."*

In this case, the Court formulated a new doctrine of comparative interpretation, by which it tried to maintain the autonomous character of Community concepts<sup>1434</sup>:

*"The terms of a provision of Community law which makes no express reference to the laws of the Member States for the purpose of determining its meaning and scope must normally be given an independent interpretation which must take into account the context of the provision and the purpose of the relevant rules.... in the absence of an express reference to the laws of the Member States, the application of Community law may sometimes necessitate reference to the laws of the Member States where the Community court cannot identify in Community law or in the general principles of Community law criteria enabling it to define the meaning*

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<sup>1431</sup> For this in detail, see Opinion of Mr Advocate General Mancini delivered on 18 November 1986 in case 152/85 *Rudolf Misset v Council of the European Communities* (Official - admissibility - period for commencing proceedings) (1987) ECR 223.

<sup>1432</sup> Opinion of Mr Advocate General Tesouro delivered on 30 November 1988 in case 224/87 *Jean Koutchoumoff v Commission of the European Communities* (Official - assistance pursuant to article 24 of the staff regulations - damages) (1989) ECR 99.

<sup>1433</sup> For a concept of "legal responsibility", see Article 67; annex vii, art. 2(4).

<sup>1434</sup> Often comparative arguments are related to the justification of the autonomy of the European interpretation. The idea that no generality can be found in legal systems justifies the possibility of the European Court of Justice to coming to an autonomous interpretation, see also, Pescatore, P., 1980, p.344.

See also, Wilmers de, J.M., 1991, p.38. The autonomous interpretation does not mean, however, that the interpretation would be absolutely contrary to some interpretation in member States.

*and scope of such a provision by way of independent interpretation.*"<sup>1435</sup>

Likewise, rules governing pre-recruitment medical examinations have been approved with reference both to the European system of human rights and to the legal systems of the Member States.<sup>1436</sup> The confidentiality of medical findings was also confirmed by a comparative study, which asked by the Court from the Commission. This study had a direct impact upon the outcome of the case<sup>1437</sup>.

Various parties have also presented comparative rationales in these type of cases. Retrospective appointment, for instance, was alleged to be unlawful as "*generally regarded in legal systems*" unless there were urgent and compelling reasons for it.<sup>1438</sup> The Advocate General accepted this reasoning as decisive.

Furthermore, one applicant referred to the "*German and Luxemburgian law*" in order to support the idea of a "*tax abatement for taxable persons with a child doing military service*". The Parliament, as a defendant, sought to reject the argument on the basis of the nature of the Community tax system as "autonomous". The Court ultimately upheld the European Parliaments argument on the basis of its own case law<sup>1439</sup>.

The court has also used "*general principles of labour law*" to examine the right of staff to engage in trade union activities.<sup>1440</sup>

**"Comparative reasoning within constitutional arguments".** One can also speak of comparative reasonings in relation to the fundamental "constitutional" aspects of the European

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<sup>1435</sup> Case 85/91 *Lilian r. Khouri v Commission of the European Communities* (Official - dependent child allowance - person treated as a dependent child) (1992) ECR II-2637 (Judgment of the court of first instance (fourth chamber) of 18 December 1992). Reference made to the Case 327/82 *Ekro v produktschap voor Vee en Vlees* (1984) ECR 107.

<sup>1436</sup> Case T-10/93 *A. V. Commission of the European Communities* (Official - recruitment - person who is HIV positive - refusal to appoint - physical unfitness - legality of article 33 of the staff regulations) (1994) II-179 (Judgment of the court of first instance (third chamber) of 14 April 1994).

<sup>1437</sup> Case 155/78 *Mlle M. v Commission of the European Communities* (1980) ECR 1797 (Judgment of the Court of 10 June 1980).

<sup>1438</sup> Opinion of Mr Advocate General Jacobs delivered on 24 January 1989 in case 341/85 *Erik van der Stijl and Geoffrey Cullington v Commission of the European Communities* (Officials - implementation of a judgment annulling an appointment) (1989) ECR 511.

<sup>1439</sup> Case T-41/89 *Georg Schwedler v European Parliament* (Officials - tax abatement - dependent child) (1990) II-79 (Judgment of the court of first instance (fifth chamber) of 8 March 1990).

See also, for example, Case 90/74 *Deboeck v Commission* (1975) ECR 1123.

<sup>1440</sup> Case 175/73 *Union Syndicale v Council* (1974) ECR 917 and 18/74 *Syndicat Général v Commission* (1974) ECR 933.

For some analysis of staff cases, see Pescatore, P., 1980, pp.344-345.

order. The Court has used comparative legal observations, for instance, in justifying decisions concerning the external and internal relationships of its institutions.

The idea of the separation of powers has been discussed by the Advocates General.<sup>1441</sup> This notion was connected to the discussion of the Article 178 powers of the Court. According to the "*principle common to all legal systems requiring clear separation of judicial function and lawmaking*", the courts only decide cases, but do not interfere within the legislative choices of the competent institutions.<sup>1442</sup>

The relationship between different institutions has been also discussed<sup>1443</sup> by the Advocate General on a comparative basis. One question was related to the Council's argument, in a case against the Commission, that the matter is not really a "dispute". The comparison took place between the countries "*having the constitutional court*" (Federal Republic of Germany, Spain, France, and Italy). In this way the Advocate General came to the conclusion that conflicts between the institutions are legal disputes concerning the rights and duties of the institutions. Such disputes are not merely political, but are also legal.

Of particular interest was the comparative observations made in the case adopting the idea of the "*continuity of a legal system*". The Court observed that "*in accordance with the principle common to the legal systems of the Member States, the origins of which may be traced back to Roman law, legislation is amended, unless the legislature expresses a contrary intention*". This will be developed further below.<sup>1444</sup>

In a case concerning the idea of public access to documentation, on the other hand, the Advocate General extensively discussed the context of the legislative acts enacted by the

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<sup>1441</sup> Opinion of Mr Advocate General Tesauo delivered on 23 January 1991 in case 63/89 *Assurances du Credit sa and Compagnie Belge d'Assurance Credit sa v Council of the European Communities and Commission of the European Communities* (1991) ECR I-1799.

<sup>1442</sup> The Court, on the other hand, in its judgment on that case, did not consider the question put forward by the Council, see case 45/86 *Commission of the European Communities v Council of the European Communities* (generalized tariff preferences, application for the annulment of an act, legal basis, obligation to give reasons for Community acts) (1987) ECR 1493 (Judgment of the Court of 26 March 1987).

<sup>1443</sup> Opinion of Mr Advocate General Lenz delivered on 29 January 1987 in case 45/86 *Commission of the European Communities v Council of the European Communities* (Generalised tariff preferences - application for the annulment of an act) (1987) ECR 1493.

<sup>1444</sup> Case 23/68 *Johannes Gerhardus Klomp v Inspektie der Belastingen* (Preliminary ruling requested by the Gerechtshof, the Hague) (1969) ECR 43 (Judgment of the court of 25 February 1969).

A similar type of case with comparative observations, see Opinion of Mr Advocate General Gulmann delivered on 24 June 1992 in case 187/91 *Belgian state v Societe Cooperative Belovo* (Reference for a preliminary ruling: tribunal de premiere instance de Neufchateau - Belgium) (1992) I-4937.

Council. The principle discussed was seen as fundamental for "any democratic system".<sup>1445</sup> This included a recognition that citizens have a "broad rights to be informed", which "all national systems" maintain. Certain variation between member states were, nevertheless, observed. The Advocate General analysed different types of documents, and undertook a short historical survey.<sup>1446</sup> Furthermore, he referred to the measures adopted by the Council of Europe.<sup>1447</sup> Consequently, certain "tendencies" were identified. On this basis, the Advocate General concluded that certain legislative acts at the Community level were "desirable". However, "self-regulation" by the institutions was seen to be the rule, and the Council act on "the code of conduct" was not considered to be a legislative act. Consequently, it was not able to form the subject of a process of annulment.<sup>1448</sup>

The principle of the right to effective protection by a court<sup>1449</sup> and interim protection<sup>1450</sup>, as well as the generalities and disparities concerning the application of the principle of protection of written communications between lawyer and client have also been examined on comparative basis.<sup>1451</sup>

With regard to the laws governing the budget of the European Community, the concept of "commitment" has been based on comparative observations, which have enabled the

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<sup>1445</sup> Opinion of Mr Advocate General Tesauro delivered on 28 November 1995 in case 58/94 *Kingdom of The Netherlands v Council of the European Union* (Action for annulment - rules on public access to Council documents) (1996) ECR I-2169.

<sup>1446</sup> The Advocate General explicitly mentioned that the comparative survey was produced by the court's own documentation service.

<sup>1447</sup> Recommendation no 854 (1979) of the Assembly of 1 February 1979, and Recommendation no r (81) 19 of the Committee of Ministers of 25 November 1981.

<sup>1448</sup> Council decision 93/731/EC of 20 December 1993, and 93/662/EC of 6 December 1993, and the "code of conduct", 93/730/EC, restricting in certain cases the access to documentation.

<sup>1449</sup> Opinion of Mr Advocate General Darmon delivered on 27 October 1993 in case 228/92 *Roquette freres sa v Hauptzollamt Geldern* (Reference for a preliminary ruling: Finanzgericht Düsseldorf, Germany. Monetary compensatory amounts on derived products of maize, declaration of invalidity, temporal effect) (1994) ECR 1445.

<sup>1450</sup> Opinion of Mr Advocate General Tesauro delivered on 17 May 1990 in case 213/89 *The Queen v Secretary of state for transport, ex parte Factortame Ltd and others* (Reference for a preliminary ruling: House of lords - United Kingdom) (1990) ECR I-2433.

The Advocate General discussed the idea of interim protection (suspending of the application) as a general phenomenon in the legal systems of Member States (except the Danish system). He undertook relatively analytical study of the French, German and the Italian system, and the doctrinal writings.

On the Courts case, see Judgment of the Court of 19 June 1990.

<sup>1451</sup> Case 155/79 *Am and S Europe limited v Commission of the European Communities* (Legal privilege) (1982) ECR 1575-1616 (Judgment of the court, 18 May 1982). Some analysis, Galmot, Y., 1982p.256 ff, and Schwarze, J., 1991, p.10 ff.

prevailing interpretation to emerge. In this case the Advocate General<sup>1452</sup> asked whether Community concepts in this matter are different from those prevailing in national legal systems. After providing a negative answer to this question, the concept was given a comparative interpretation mainly by referring to French budgetary law. Some references to other national systems were also made (particularly with regard to Belgium, Italian, Greek, and Spanish systems). Overall, it was claimed that under most of the legal systems of the Member States, "commitment" goes beyond a strictly financial or accounting operation. It encompassed substantive decisions as well. Accordingly, he maintained that the Court should refer to the comparative generality of the conceptualizations of the legal systems of the Member States when interpreting the Community concept.<sup>1453</sup>

Many other cases could be mentioned. However, analysis of them is not presented here.<sup>1454</sup>

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<sup>1452</sup> Opinion of Mr Advocate General Darmon delivered on 30 June 1989 in case 16/88 *Commission of the European Communities v Council of the European Communities* (Authorisation conferred on the Commission under article 145) (1989) ECR 3457.

<sup>1453</sup> On the control of "legality" relating to the balance of interest, proportionality, respect of confidence etc., see Wilmer de, J.M., 1991, p.37. He speaks also about reverse development, where Belgian procedural law seemed to have been modelled, in the course of federalisation, upon European Community law (Article 177 (the new Article 234) system). However, one should note that a similar system has existed also in Italian constitutional law.

<sup>1454</sup> Case 222/86 *Heylens* (1987) ECR 4097.

Case 81/87 (*The Queen v H.M. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General trust plc.* (1988) ECR 5483) deals with freedom of establishment.

The Advocate General recognizes disparity "at the point where the company law meets the tax law" has resulted interpretation of Community law "as it stands" (Opinion of Advocate General Darmon on 7 June 1988 in case 81/87 *The Queen v H.M. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General trust plc.* (1988) ECR 5483). However, he uses comparative generality in order to establish the Community interpretation ("Generally, in most Member States..."). The interpretation left quite extensive powers for the Member States to determine the tax treatment of companies transferring the central management and control of a company to another Member State.

The Court referred to the Comparative observations presented by the Commission, and it maintains that the Treaty recognizes this difference a priori (Article 220 to be used as a basis for further acts). Further measures were to be taken to include such a cases into the realm of freedom of establishment (Judgment of the Court 27 September 1988, ECR 1988, 5483).

Some cases also: fundamental rights, see Bredimas, A., 1978b, pp.330-331. First cases, 5,11,13, 15/62 *Fer.Ro., Erba, ALMA, & co.* (1962) ECR pp.449 ff. See 16/61 *Ferriere di Modena* (1962) ECR 289 (Articles 85,86 EEC 60 ECSC modelled, Anti trust law in USA, 71, Sherman Act, Robinson Act, US case law) (pp.313-315). Also Opinion of Advocate General Mayras in case 48/69 *ICI Ltd v Commission* (1972) ECR 619. Opinion of Advocate General Lagrange in case 14/61 *Koninklijke Ned. Hoogovens* (1962) ECR 277. He takes into account the aims of the treaty, and interprets the comparative material based on these assumptions. One can also check the economic and political climate in accordance with the objectives (see, Bredimas, A., 1978a). Opinion of Advocate General La Grange in case 3/55 *Assider* (1954/1956) ECR 72 (misuse of power, Article 33, ECSC, judicial review of administrative action). That comparative examination is necessary, *ibid.* and case 28/67 *Molgeret-Zentrale* (1968) ECR 143 (different tax systems).

Also Opinion of Advocate General Lenz 21 September 1995 in case 415/90 *Union Royal Belgie de Sociétés de Foibal asociasion ASVLM others v J-M- Bosman and others* (1995) ECR I-4921 (Judgment of the Court 15 December 1995) compares different rules of different social subsystems (UEFA, FIFA rules, Member States,

### 3.1.4. Conclusions

Case law.... Some conclusions can be drawn on the basis of the case law.

Comparative argumentation has had different results. Comparative studies have supported a relatively wide interpretation of EC-legislation. If comparative observations are rejected, it appears as if no wide interpretation is applied, but the Court examines the question textual-functionally. The disparity between systems has supported independent argument solely on the basis of EC legislation and general principles (equality).

The use of the conceptualizations and definitions of one legal system have been rejected in defining the content of EC legislation, and the Court has preferred an independent "EC" interpretation for concepts. However, it is clear that in some cases certain national

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mainly produced by the UEFA, points, UEFA published: can be national emphasis etc.).

With regard to abortion case 159/90 *The Society for the Protection of Unborn Children Ireland Ltd v Steven Grogan et others* (1991) ECR 4685 (Judgment of the Court of 4 October 1995) Court maintained:

*"Termination of pregnancy lawfully practised in several Member States is a medical activity, which is normally provided for remuneration and may be carried out as part of professional activity"*

and it concluded that

*"it is not for the Court to substitute its assessment for that of the legislator in those Member States where the activities in question are practised legally"*

Jurisdictional questions and Convention of Human Rights Article 10(1), opinion of Advocate General Van Gerven delivered on 11 June 1991 in case 159/90 *The Society for the protection of unborn children Ireland Ltd v Steven Grogan et others* (1991) ECR 4685 (Judgment of the Court of 4 October 1995) (1991) ECR I-4685:

*"Indeed, in those Member States where the abortion is permitted under certain conditions there are frequently requirements laid down regard to advice and counselling, which are designated to prevent abortion become routine and commercialized, or to ensure that the information is provided only by authorized persons, and that the decision to carry out an abortion is taken with knowledge of the facts that is to say, with the necessary advice and counselling".*

He goes through German, France, Belgium laws. The norm (restriction on the distribution of information valid) follows directly from this analysis. Interpretation of Community law is in accordance with Article 10 of the European Convention of Human Rights etc. Analysis is assisted by a "moral" argument; the objective is justified under Community law, if it relates to the policy choice of a moral and philosophical nature, the assessment of which is a matter for the Member States and in respect of which they are entitled to be involved on ground of public policy, (Article 56, 66, 36 of the EC Treaty, "grounds, which can justify discriminatory measures", "A genuine and sufficiently serious threat to the requirements of public policy effecting one of the fundamental interests of the society").

For the review of how the internal principles determine the extension and nature of the comparative adoption, in staff regulations, Opinion of Advocate General Warner delivered in March 1973 in case 81/72 *Commission v Council* (1973) ECR 588:

*"The Council, which is responsible for the organization of staff, may, as part of the means implementing Article 65, incorporate procedures of collective bargaining similar to those practised in Member States according to their various methods, and divide up the decision making process in the successive phases in accordance with the practice usually in the Community".*

For various "comparative" cases, see Bredimas, A., 1978a, pp.128-134, Jacobs, F.G., 1990, p.109 ff., Pescatore, P., 1980.

conceptualizations have had a direct impact upon the Courts interpretation<sup>1455</sup>. In fact, there seems to be a tendency toward a non-autonomy of comparative interpretation.

An extensive study of different systems has resulted in the adoption of certain models which have been found to be common to most of the Member States<sup>1456</sup>. There have been some "generality" based interpretations even based on the analysis of "tendencies". Furthermore, US influences are quite strong.<sup>1457</sup> The US systems are studied usually extremely thoroughly, and clear "modelling" has even taken place. The "extra-Community" comparison appears especially in cases where there is a general international agreement involved. In general, there is a strong interaction between the international rules and national rules in comparative studies. These two spheres are often linked together in justification.

Socio-legal and cultural arguments and the "coherence" demands of one national legal system<sup>1458</sup> (which obviously requires study and an understanding of that particular legal system) have supported the independency of a Member State to decide on the issue. This could be described as some kind of functional subsidiarity. On the other hand, the demand for this special treatment has usually been made by many, if not all, Member States in one particular case, which means, on the other hand, that the case has been strongly influenced by the demands or objections of Member States, and the cultural and coherence arguments are function as legitimating constructions.

The Court also uses comparative private law analogies in establishing principles having a clearly public nature.<sup>1459</sup> Legal fields are not necessarily kept separate in constructing analogies. More traditional comparisons are clearly effected in the field of the Brussels Convention.

Some systems are sometimes studied more thoroughly, while others remaining in the referential context. This is connected to the value-based nature of comparative reasoning and interpretations. Sometimes this type of reasoning appears quite incomprehensible from the legal

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<sup>1455</sup> See also, Schermers, G., Waelbroeck, D., 1987, p.13.

<sup>1456</sup> See Unger, J.A., 1976, pp.370-373, a case-study of the extensive comparative analysis by Advocate General Warner and a rule introduction by the Court in the case 17/74 *Transocean Marine Paint Association v Commission* (1974) ECR 1963. "The right to be heard" was found to be part of the Article 164 of the Rome Treaty.

<sup>1457</sup> Interest in US law can be also result of the fact that German and English law have been strongly influenced by it, Bredimas, A., 1978a, pp.132-133.

<sup>1458</sup> See cases 204/90 and 300/90 *Hans Martin Backmann v Etat Belge, Commission v Etat Belge* (1992) ECR I-249 (28 January 1992). Coherence arguments were put forward by most of the Member States.

<sup>1459</sup> On this type of exercise, see Gutteridge, H.C., 1944, p.5-7.

point of view. The choices of the compared are made in accordance with the "main" or "most important" systems. We may speak about strongly "institutional" qualitative comparative law studies. On the other hand, systems which have constitutional courts are frequently examined more thoroughly.

Often the peculiarities of the system of the party to the dispute are examined in the light of other systems.

Roman law serves often as a *tertium comparationis* but also some systems, such as the French system, functions like this. Much depends upon the Advocate General in question and his background.<sup>1460</sup>

Interestingly, sometimes the Court has given a directive to national systems to interpret certain provisions based on comparative interpretations. Furthermore, a reference to the comparative nature of Community rules is also found.

In general, we may say that the nature of the comparison differs depending on the legal basis which makes it possible. However, no really systematic structure of analytical reasoning can be identified. Furthermore, the institutional actors' influences in relation to each other are not very self-evident. However, there is a strong idea of cooperation between different Community institutions. On the other hand, comparative studies are many times seen as "frustrating" the main interpretation.

In conclusion, it seems that the comparative generality arguments seem to interact with common sense textual interpretation. This seems to apply also to the rejection of comparative observations. However, in the latter case we speak about the common sense textual meaning of the Community provisions. On the other hand, any disparity identified seems to interact with "practical" interpretation attached to ideas of purpose, intention, scheme and a more systematic interpretation of Community system.

It also seems that whenever there is a new situation, the comparative situation has to be studied again.

**... and interviews.** The interviews which were undertaken can be used in defining the scope of comparative reasoning in Community law and to explain the context of the justificatory uses.

One can make distinctions between three levels of informal use of comparative law in Community adjudication. Namely, comparative law can be instrumentalized in connection with

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<sup>1460</sup> For some indications of this type of approach, Pescatore, P., 1980, p.350.

the special knowledge of the staff, special knowledge of the judge himself, or by the special knowledge of other judges represented in the internal discourses in the court. The special knowledge of each national lawyer functions as a basis of the comparative information.<sup>1461</sup>

In 1995, there were at least 20 extensive comparative surveys made in the preliminary preparation of a case.<sup>1462</sup> The studies seem to have had a tremendous use and impact. The studies are not necessarily reflected in the explicit judgments, and they were for internal use.<sup>1463</sup> Comparative studies, were, however, not routine.

The Court initiates these studies. However, there is also a coordinator of the study, who designs the framework for the study.<sup>1464</sup> The research made during the proceedings is usually only comparative in nature. The reporting judge can ask the research division to make a comparative study on a specific legal question. Advocate Generals and judges have their own staff, which may be asked to make a study, especially when there are problems in finding a consensus.

All states are alleged to be considered. In competition cases, consideration has been given also to the Japanese legal system, and some remarks have been made on legal systems of other European countries than the Member States<sup>1465</sup>. In some cases the jurisprudence of the Supreme Court of the United States has been looked over (5-6 studies).<sup>1466</sup>

The papers produced are usually 50-60 pages in length. The studies produced are usually given to the Court in a shortened version, 10-15 pages<sup>1467</sup>. They contain a description of the situation in each Member State. On the other hand, there are usually remarks made on the

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<sup>1461</sup> See also, Pescatore, P., 1980, p.349.

<sup>1462</sup> However, Pescatore, P., 1980, p.358, speaks about "daily use".

On preparation, see European Courts, Hunnings, H., 1996.

<sup>1463</sup> Also *Note d'information sur la division recherche et documentation* (Janvier 1995), and Pescatore, P., 1980, p.338. These explicit references were made until 1980 in 15-20 judgments (25 years of functioning), see Pescatore, P., 1980, p.338.

<sup>1464</sup> *Note...*, 1995, p.2.

<sup>1465</sup> This was so especially in relation to EFTA states. Most of them were not yet Member States of the European Community. There may have been also studies of the Israelian system.

In most recent cases (316/95 *Generics v. Smith, Kline & French Laboratories Ltd.* ((1997) ECR I-3929) dealing with medical patents. In his opinion Advocate General Jacobs studied also the system of New Zealand, because its "*case-law is of persuasive value in the United Kingdom and in Ireland*" (in addition to German, Italian, United States, and the United Kingdom case law).

<sup>1466</sup> For some judges the selection of countries seems to be Latin centred. Pescatore claims that the original Community was based on some kind of a "bipolarity" between Latin and Germanic systems, Germanic systems were seen as containing "Roman heritage". The extension took place after accession of new countries. This "continentalist" nature is, however, still stressed. (Pescatore, P., 1980, pp.350-351)

<sup>1467</sup> A case mentioned, publicity of documents.

extent to which the systems differ from each other. One of the main interests arises also from the need to know, what results the decision will have in different Member States.

Studies are usually only "legal". Databases are available in the Court. This means a description of the law in force, and an evaluation of legislation and precedents, cases from supreme and the constitutional courts. However (for example in competition cases) there can also be an economic analysis of the consequences. Sometimes the comparative studies include a description of a system which is common to all Member States (eg. The European Human Rights System). There may also be sociological and political remarks in the conclusions.

Historical descriptions are rare. This was explained to be due to the fact that "the Court is already near to the solution". However, some historical "evolution" may be taken into account. However, the Court usually takes into account only the minimum common denominator<sup>1468</sup>. Advocates General can take into account more features deriving from these studies.

It is not rare that the parties produce comparative studies. The basic argument seems to be that some states have a system such as the system in question. Moreover, the exceptions are sometimes described. All the same, it is rare that states make extensive studies. The studies produced by the parties are taken into account. Mainly the states' studies are considered, less so other parties' studies. The basis is, however, the internal studies of the institution. It was claimed that the Commissions' studies are not used as such<sup>1469</sup>. It seems as if the Court's own investigations are independent, at least from the legislative preparatory work of the Commission. On the other hand, the Commission's reports are considered valuable, and they are often used also in decision-making<sup>1470</sup>. The Commission is clearly considered sometimes as a specialist on comparative law by the Court.<sup>1471</sup>

Advocates General make more extensive studies. Their role is to discuss different possibilities, and to make a synthesis. The Court's reasoning is more formal. From the interviews one gets the impression that usually no special studies are presented to the Advocates General, but the same studies prepared by the research division may be used by both instances.

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<sup>1468</sup> For some analysis, de Wilmars, J.M., 1991, p.39.

<sup>1469</sup> The role of the Commissions studies in the work of the Court is quite unclear. The Court refers in many cases to the Commission's studies.

<sup>1470</sup> Pescatore, P., 1980, p.348, also Lando, O., 1977, p.656

<sup>1471</sup> Pescatore, P., 1980, p.348. Pescatore sees this to be due to its connections with permanent representations and also because of the material it has due to its law-proposing function.

In oral proceedings, comparative studies are not usually discussed. However, as mentioned before, in the preliminary ruling procedures, Member States have possibility to make oral or written statements (*amicus curiae*). Basically, the function of this seems to be to inform the Court about the importance of the case in relation to a particular system. It is not "comparative" in nature, though it is acknowledged by the Court. Each Member State may present some conclusions concerning the features of their legal systems.

In general, comparative studies seem to have a clear and even a decisive role. The substantive impact of the study depends on its content. If the systems differ greatly, there is a different impact than when the systems are relatively similar. Then the solutions have to be "created". The comparative studies play a role in cases, where there is no case law on that legal question, no clear text is available, or where the Court wants to decide as a matter of principle, or if the case is, for example, economically important<sup>1472</sup>. The role of comparative law is seen as "filling the lacunae". Comparative studies can have an effect upon the final decision in many ways. However, it can be also of minor importance for the substance of the decision.

The main obstacles to making extensive studies and examinations, and to using them, were seen in the work load etc. No principled obstacles were seen to prevent the disclosure of comparative material in justification. The fact that studies are made in a strict relation to a concrete case must have an effect on their analytical quality.

Some documents, such as comparative law studies produced by an institution, are not available for external observers such as researchers due to the principle of confidentiality. This may be related to the unofficial and draft nature of these studies. However, the studies are produced in a quite complete report form within the internal circulation of the institution, even if there seemed to be also more unsystematic material produced.

It was claimed that the Court directs its arguments to the parties and the institutions of the Member States, but, for that matter, also to the wider institutions in some difficult cases, where their social or economic impact seems to be enormous.

The inclusion of new states within the European Community and European Union has led to a greater "comparative" input into the internal functioning of the Court.<sup>1473</sup>

In conclusion, it appear as if the use of comparative law in the European Court of Justice is extremely instrumental from the point of view of the legal discourse.

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<sup>1472</sup> Reference was made to VAT calculation

<sup>1473</sup> See also, Pescatore, P., 1980, p.350.

### 3.2. The European System of Human Rights

#### 3.2.1. General remarks

In this chapter we shall provide a few examples and an analysis of comparative reasoning in the European human rights system in different fields of law<sup>1474</sup>. The list is not exhaustive. The case law studied is restricted mainly to the freedom of expression principle. However, some interesting examples in the realm of other principles are analysed too.

The interpretation methods of the human rights systems vary. The report of the Commission of the European system of human rights in the *Golder case*<sup>1475</sup> examined the normative principles of interpretation of the European Convention of Human rights. The Vienna Convention of the Law of Treaties can be applied to the interpretation of this Convention. In this sense, the interpretation methods can be seen method embodying the principles of "good faith", "ordinary meaning in context", "in the light of its object and purpose", and the "intention of the Contracting Parties"<sup>1476</sup>. This has also been expressed by the Court in certain cases.<sup>1477</sup>

These features lead to certain dynamics within interpretation. For example, social and political attitudes have to be taken into consideration.<sup>1478</sup> Thus, preparatory material is used very cautiously<sup>1479</sup>. This also means that the "comparative context" has to be ascertained all over again.

In the earlier case law, the Commission has also used material from other

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<sup>1474</sup> For some other cases: *Wemhoff* ECHR (1968) A/7 and some other cases 1968-1978, see analysis by van der Meersch W.J.G., 1980, p.323-324. On the use of the decisions of the supreme courts of some Member States of the Council of Europe, and the diplomatic protection of companies by International Court of Justice, European Court of Human Rights, *Agrotexim and others v Greece*, A/330 (1995) EHRR 250 (25 Oct 1995), *Bryan v United Kingdom*, A/335 (1995) EHRR 290 (22 Nov. 1995) concerning systems of judicial control of administrative decisions, In international law, the legitimacy of collective bargaining, *Gustafsson* (1996) EHRR, Freedom of association, negative right not to enter into collective agreements with trade unions, use of different international instruments (European Social Charter, International Covenant of Economic, Social and Cultural Rights, Conventions of International Labour Organizations). *Sunday times* (1979-1980) EHRR 2:245, how contempt of court seems to be only a British speciality.

For some "hard cases" dealing with the concept of family, see the analysis by van der Meersch W.J.G., 1980, pp.332-333.

On international treaties, see Jennings, R.Y., 1996, p.5

It looks as if some parts of the legal provisions of the system, such as the idea of "*necessary in the democratic society*" (ECHR) do demand comparative observations in deciding the extension of these definitions (Doering, K., 1987, p.54).

<sup>1475</sup> Case *Golder* (1975) EHRR 1:524.

<sup>1476</sup> Article 31(1) of the Vienna Convention. Compare also Article 30 of the Vienna Convention and Article 60 of the Human Rights Convention.

<sup>1477</sup> Case *Wemhoff* (1968) EHRR.

<sup>1478</sup> Jacobs, F.G., 1975, p.18.

<sup>1479</sup> *Golder* (1975) EHRR 1:524, Commission, para. 46., and *Lawless* (1979-80) EHRR 1:1, para. 14.

international Conventions (eg. From the International Labour Organization) to avoid inconsistent outcomes of similar instruments in the international field.<sup>1480</sup>

Comparative observations appear throughout the systemic interpretation and argumentation, and comparative interpretation has been a basic feature in the history of the European system of human rights, even if they have been seen even "dangerous" field from the point of view of the system<sup>1481</sup>. The European Convention is based on the common traditions of constitutional law and on the common legal tradition of the Member States of the Council of Europe.<sup>1482</sup> Consequently, comparative analysis has had an effect upon the interpretation of the Convention in the Commission, in the Court, and in dissenting opinions.<sup>1483</sup> In this way, and with the help of the comparative method of interpretation, the Court has been able to find a strike between the international and national traditions.

### 3.2.2. Some examples of comparative reasoning

**Trial within a reasonable time or release pending trial: "English system and those derived from it"**. In *Kemmance v France*<sup>1484</sup> the question at issue concerned the duration of pre-trial detention (Article 5(1)(c), Right to liberty and security of person). The criminal proceedings in question had lasted more than eight and half years. This detention had been prolonged on four occasions. The Commission argued comparatively that

*"With regard to the pre-trial detention provided for in Article 5(1)(c) it is true that in certain legal systems, particularly the English system and those derived from it, the opening of a criminal investigation is very closely associated with arrest. The Court's case law takes account of this in accepting that the persistence of reasonable suspicion "after a certain lapse of time ... no longer suffices" to justify detention [referring to the case LETELLIER v FRANCE (A/207), 1992) 14 E.H.R.R. 83, para 35.].*

*In the present case the "certain lapse of time" had no doubt been exceeded by several years. In order to justify further detention, therefore, the Government should prove its necessity for recognised reasons, such as the risk of absconding, collusion or repetition of an offence.*

*The Commission has shown that in this case the applicant's detention was not necessary on any of these grounds."*

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<sup>1480</sup> Jacobs, F.G., 1975, p.19.

<sup>1481</sup> Van der Meersch, W.J.G., 1980, p.317.

<sup>1482</sup> Concerning this and the legal basis in general, see van der Meersch, W.J.G., 1980, pp.319-320.

<sup>1483</sup> Scheuner, Ch, 1968, p.214.

<sup>1484</sup> A/218 (1995) EHRR 349.

**Corporal punishment in private schools: “Western European States”, “developments throughout Europe”.** In *Costello-Roberts v United Kingdom*<sup>1485</sup> the question concerned corporal punishment in schools in relation to Article 3 (“*No one shall be subjected to torture or to inhuman or degrading treatment or punishment*”) and Article 8 of the ECHR..

The Commission justified the alleged infringement of Article 8 (right to private life) with reference to the purposes mentioned in Article 8(2). In his dissenting opinion, a member<sup>1486</sup> of the Commission rejected this idea on the following comparative basis:

*“I find it difficult to accept that corporal punishment could ever be necessary in a democratic society for any of the purposes enumerated in Article 8(2), as no other Western European State practices it, most schools in Britain now reject it and the House of Lords supported its total abandonment since this case corporal punishment has been abolished in State schools. Now that State schools are no longer permitted to use corporal punishment any proposition that corporal punishment might be necessary in a private school will be even more difficult to defend.”*

The Court’s argument made reference to Article 28 of the United Nations Convention on the Rights of the Child<sup>1487</sup>, which explicitly refers to the maintenance of school discipline related to the child’s human dignity. It found, with the help of this reasoning, that corporal punishment falls within jurisdiction of the European Convention. In the end, however, the conduct was found not to breach the Articles in question.

In their partly dissenting opinions, four of the judges<sup>1488</sup> found that a breach of Article 3 had occurred on the basis of comparative considerations:

*“At the relevant time the law relating to corporal punishment applied to all pupils in both State and independent schools in the United Kingdom. However, reflecting developments throughout Europe, such punishment was made unlawful for pupils in State and certain, independent schools. Given that such punishment was being progressively outlawed elsewhere, it must have appeared all the more degrading to those remaining pupils in independent schools whose disciplinary regimes persisted in punishing their pupils in this way.”*

**Non-enforcement of access and custody rights: “situations in Member States”.** In the case of *Hokkanen*<sup>1489</sup> the question concerned claims of infringement of Articles 6, 8, and 13 of the Convention, and Article 5 of Protocol 7. The reasons given were that when the applicant had given the child to the custody of her grandparents, they refused to give her back, and also the

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<sup>1485</sup> 25 March 1993, A/247-C (1995) EHRR 112.

<sup>1486</sup> Mr. Schermers.

<sup>1487</sup> 20 November 1989.

<sup>1488</sup> Mr. Ryssdal, Vilhjalmsson, Matscher, and Wildhaber.

<sup>1489</sup> (23 September 1994) A/299-A (1995) EHRR 139.

police chief officer refused to execute the custody order. Furthermore, the Appeal Court had permanently transferred custody to the grandparents, and declined to enforce access against the child's wishes.

The Government had referred to Article 3 of the 1989 United Nations Convention on the Rights of the Child, Article 19(1)(b) of the 1980 European Convention on the Enforcement of Decisions Concerning Custody of Children and on Restoration of Custody of Children, and Articles 1 and 12(3) of the 1980 Convention on the Civil Aspects of International Child Abduction.

In arguing about the infringement of Article 8 (respect for family life), the Commission interpreted the concept of 'respect' according to the Convention:

*"The Commission recalls in this connection that the notion of "respect" enshrined in Article 8 is not clear-cut. This is the case especially where the positive obligations implicit in that concept are concerned. Its requirements will vary considerably from case to case according to the practices followed and situations obtaining in the Contracting States. When determining whether or not such an obligation exists regard must be had to fair balance that has to be struck between the general interest and the interest of the individual as well as to the margin of the appreciation afforded to the contracting States."*

The Court noted the Commission's observations, but maintained that even if the boundaries between the State's positive and negative obligations do not lend themselves to precise definition, the "*applicable principles are similar*". However, it came to the conclusion that the non-enforcement of the applicants right to access had violated the Article 8 of the Convention.

**Non-recognition of paternity: no clear European notion of respect, differing court practices in European countries, reform tendencies and their results, a historical comparison.** In *Kroon and others against The Netherlands*<sup>1490</sup>, the biological father had claimed the right to paternity in a court, but his application was rejected, because, according to Dutch law, child's father is the married husband of the mother, and because the legal husband refused to deny the paternity. The claim brought was the breach of Article 8 (right to family life) in conjunction with Article 14 (discrimination).

The Commission justified its opinion by referring to the comparative observations made by the Court in the *Rasmussen* case<sup>1491</sup>. There the Court had remarked that "*in the Contracting States' legislation regarding paternity proceedings there is no common ground, and that in most of these States the position of the mother and that of her husband is regulated in*

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<sup>1490</sup> 27 October 1994, A/297-C (1995) EHRR 263.

<sup>1491</sup> *Rasmussen v Denmark*, A /87 (1985) EHRR 371, para 40.

*different ways*". On this basis, the Court found that the difference in time-limits, applicable to the institution of paternity proceedings in different states, was not an argument justifying a discriminatory treatment.

The Court in this case, on the other hand, found a violation of Article 8.

In his dissenting opinion, where no violation of Article 8 was found - on the basis that the rejection by the court was justified interference - one of the judges<sup>1492</sup> analysed the Court's case from the standpoint of the ideas of "evolutive interpretation" and "living instrument" ideas. The Court had previously proposed such a method of interpretation on several occasions.

This judge remarked that the dilemma of the creative interpretation is more serious in the cases on *"marriage, divorce, filiation or adoption, because they bring the existing religious, ideological or traditional conceptions of the family in each community"*. He referred to the Court's comparative argumentation in the case of *Johnson and Others v Ireland*<sup>1493</sup> dealing with the question:

*"[E]specially as far as those positive obligations are concerned, the European notion of 'respect' is not clear-cut: having regard to the diversity of the Court of practices followed and the situations obtaining in the Contracting States, the notion's requirements will vary considerably from case to case. Accordingly, this is an area in which the Contracting Parties enjoy a wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention with due regard to the needs and resources of the community and of individuals ..."*

On the same occasion, the judge referred to other instruments produced by the Council of Europe to harmonize family laws:

*"This has led to reforms in family law in many countries of Europe, from the 1970's onwards. These reforms have achieved a certain approximation of national laws but not their uniformity, particularly in regard to the regulation of procedures for denying legal paternity, which still take many different forms. On the other hand, there is a tendency in the regulation of the use of new techniques of human reproduction towards prohibiting challenges to legal paternity by anonymous sperm donors.*

*Account should also be taken of the importance of the family in many Contracting States, of the persistence in these countries of a social rejection of adultery and of the common belief that a united family facilitates the healthy development of the child."*

Furthermore, another judge<sup>1494</sup> presented his dissenting opinion on comparative and

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<sup>1492</sup> Mr. Morenilla.

<sup>1493</sup> A/112 (1987) EHRR 203, para 55.

<sup>1494</sup> Mr. Bonnici.

historical (Roman law) basis, finding no violation:

"2. Netherlands law, like the legislation of some other Contracting States, in given circumstances "presumes" the paternity of a child, in conformity with the maxim of Roman Law *pater is est quem nuptiae demonstrant* [L.5 De in jus voc.] thereby establishing and ensuring inter alia the rights of the child. In matters of this type, I believe that it is a principle of good law to hold that the interests of the child are paramount."

"4. In conclusion therefore, I cannot agree with the majority of my colleagues because, (a) in the legislation of a substantial number of Contracting States rules similar to those of the impugned Netherlands law are principally concerned with the protection of the rights and interests of the child (even against the "opportunistic" wishes of the parents) and this vital and important factor has not been given sufficient consideration in a matter which may have a substantial impact as to where exactly the margin of appreciation lies which each one of the Contracting States enjoys in this matter; and (b) there is no "family life" in the instant case, even if there are biological reasons for holding that there are "family ties". Moreover, in paragraph 40 of the judgment, reference is made to "social reality" as one of the factors which should prevail over the legal presumption of paternity. In my opinion, ever mindful of the frequent appeals avocations made to "social reality" in justification of certain notorious laws enacted in Soviet Russia [1920-1989] and in Nazi Germany [1933-1945], it is dangerous and unsafe to bring such criteria into the field of family rights. The approach to those rights should be made from steadier and more stable platforms.

5. It follows from the above that I am against granting any financial relief to the applicants under Article 50."

**Transsexuality: "Changing attitudes", but differences between "Member States of the Council of Europe", developments of legislation and case law, "no consensus between Council of Europe Member States".** In the case *B v France*, dealing with the refusal of the government to recognize a changed sexual identity and the change of civil status based on this change, the Court supported its argumentation with a relatively extensive examination of the legislation in Member States of the Convention.<sup>1495</sup> When examining the notion of "respect" the Court noted, as before, that "*its requirements vary considerably from case to case according to the practices followed and situations obtained in the Contracting States*".

When dealing with the former case law on the same subject against another Contracting State (England)<sup>1496</sup>, the Court examined the differences in the legislation of these two countries (France and England) and the consequences of these differences from the point of view of the Convention.

When examining scientific, legal and social developments in this area, the Court

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<sup>1495</sup> 25 March 1992, A/232-C (1993) EHRR 1.

<sup>1496</sup> Case *Rees v United Kingdom* (1987) EHRR 56, para. 35, and *Cossey v United Kingdom* (1991) EHRR 622, para.36.

considered (also on the basis of an examination of former cases) that

*"attitudes have changed but there are still differences in the attitudes between the Member States of the Council of Europe"*

This was, however,

*"counterbalanced to an increasing extent by developments in the legislation and the case law of many of those States".*

The Court also considered the applicants' references to the resolutions and recommendations of the European Parliament.<sup>1497</sup> However, the Court foresaw problems in uniformity related to many issues: in definitions, in the conditions under which a change of sexual identity could be authorized, in international aspects, in the legal consequences of such a change, in opportunities for choosing a different forename, in the confidentiality of documents, in information mentioning that change, and finally, in the effects on the family-dimensions of this change (legal consequences). The Court found that

*"there is no sufficiently broad consensus between the Member States of the Council of Europe to convince the court to reach opposite conclusion to those in the former cases."*

The extensive comparative argumentation was not, therefore, a decisive element in the argumentation as a whole. The final conclusions of the Court related mainly to the factual differences between the previous cases and to the daily situations of the applicant and the balance between general and individual interests. It found a violation of Article 8 of the Convention (right to respect for his private and family life... and the exercise of this right).

**Pre-trial detention: average length of pretrial detention, comparative scholarly opinion, legislation and case law in other countries, comparative law as a source of law.** In the case of *W v Switzerland* concerning pre-trial detention and its length, the dissenting opinion of a judge<sup>1498</sup> devoted extensive attention to the comparative analysis, supported by the opinions of scholars in various States. When referring to comparative criminal law, he found that the

*"average length of pre-trial detention is less than two or three months and that with respect to economic offences and bankruptcies the average length is less than one year".*

Furthermore, he took as a

*"typical example of the official statistic of the French Ministry of Justice, which*

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<sup>1497</sup> These were mainly the arguments put forward by the applicant based on the dissenting opinion of judge Martens in *Cossey v United Kingdom* (1991) EHRR 660-661.

<sup>1498</sup> 26 January 1993, A/254 (1994) EHRR 60. The dissenting opinion of Mr. Pettiti.

*could be transposed with similar results of other European States with similar population, the list of serious and less serious crimes by category for 1989...shows: for bankruptcies, an average length of two months (seven cases of three months, one only in excess of 18 months); for fraud; extortion and blackmail, an average length of four to eight months. Yet in France parliament has often deplored the excessive length of pre-trial detention and has attempted to remedy this by reforming the Code of Criminal Procedure"*

Furthermore, he referred to legal writings on criminal law and criminal policy in different countries and found that

*"no academic specialist or practitioner in Europe justifies pre-trial detention lasting four years for economic offences, even multiple ones"...*

and that *"authors regret the excessive length of pre-trial detention"*. Reference was made to writers and law in Belgium, England, France and Italy.

A historical comparative analysis supported the observation, that a

*"number of States have enacted legislation laying down a maximum length of pre-trial detention (six months or one year, for example in Czechoslovakia)*

and that

*"the case law of the other States" [than Switzerland] limits the length of pre-trial detention to about six months to two years". Furthermore, the "comparative law shows that no country (other than Switzerland) practices detention for four years in the field of bankruptcy and fraud, even for criminal cases which are more serious than economic offences".*

Finally, he noted that

*"in the Member States of the Council of Europe which have investigative proceedings, practitioners have noted that certain judges have a propensity to anticipate the sentence sometimes by pre-trial detention, or to press the accused to make admissions by postponing appearances for months while dismissing requests for release"*

With reference to philosophical, teleological, and case law-arguments, he came to the conclusion that the length and the manner in which pre-trial detention was executed violated Article 5 of the Convention (the "preassumption of innocence").

**Conclusions.** Conclusions relating to these observations are made after the following examination of the principle of freedom of expression.

**5.2.3. Comparative reasoning related to Articles 10(1) and (2) ("freedom of expression" and the "necessity in a democratic society") in the European system of human rights**

**"The common denominator" conception, "traditions of the Contracting States" (case Engel).** The case of *Engel and Others v The Netherlands*<sup>1499</sup> dealt with the relationship between the publication and distribution of certain prohibited writings by some soldiers in the Netherlands armed forces and the Article 19 (freedom of expression) and Article 5 (right to liberty)<sup>1500</sup>. The applicants had been sentenced and arrested on the basis of the writings' publication and distribution, which was covered by the laws of military discipline.

Although the Court found that the Article applied to servicemen as well as to ordinary persons, it was not breached by the penalties which had been imposed because the interference was legitimate and justified by the desire to protect the military discipline.

The Court argued comparatively to show that the action taken by the state belonged to the sphere of the Convention's Article 6. It also undertook a comparative examination of whether the action by the state belonged to the realm of criminal law or that of disciplinary law, or to both. The Court defined it as an inquiry "*in the light of the common denominator of the respective legislation of the various Contracting States*".

The Court maintained that

*"The seriousness of what is at stake, the traditions of the Contracting States, and the importance attached by the Convention to respect for the physical liberty of the person all require that this should be so [powers of the supervision by the Court of Human Rights].*

*It is on the basis of these criteria that the court will ascertain whether some or all of the applicants were a subject of a "criminal charge" within the meaning of the Article 6."*

However, the Court refused to undertake an extensive interpretation of the provision.

**Practice at the international level, interpretation methods, practice in the majority of the Member States of the Council of Europe, analogical legislation in other Contracting States (case Handyside).** The *Handyside* case<sup>1501</sup> dealt with a situation where a publisher had been charged and convicted under the law by having in his possession obscene books. Books were seized, forfeited and destroyed. The book was circulated also everywhere else in Europe, and in

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<sup>1499</sup> 8 June 1976, A/22 (1978).

<sup>1500</sup> Article 11 on the freedom of association was also involved.

<sup>1501</sup> 7 December 1976, A/24. See for some analysis also, van der Meersch, W.J.G., 1980, p.328-331.

some other parts of the country of the parties to the dispute. Both the Court and the Commission did not find any breach of Article 10, or rather, the Court declared it justified under the Article 10(2) of the Convention.

The *Handyside* case has been one of the most influential cases in the European system of human rights. In this case the Court established the basis for the idea of the "absence of the general concept of European morals".<sup>1502</sup> Furthermore, the Court also developed its idea on the "marginal appreciation" doctrine, and the idea of "European level supervision" combined with this national supervision.

The Court defined the nature of the European system of human rights in its relation to the national systems<sup>1503</sup>. The Court also made explicit its method of interpretation, which is related to the idea of "comparative interpretation":

*"It follows from this that it is in no way the Court's task to take the place of the competent national courts but rather to review under Article 10 the decisions they delivered in the exercise of their power of appreciation. However, the Court's supervision would generally prove illusory if it did no more than examine these decision in isolation; it must view them in the light of the case as a whole, including the publication in question and the arguments and evidence adduced by the applicant, in the domestic legal system and then at the international level. The Court must decide, on the different data available to it whether the reasons given by the national authorities to justify the actual measures of interference they take are relevant and sufficient under Article 10(2)."*

The Court had to take a comparative standpoint mainly because the book had been circulated also in other states parties to the Convention:

*"The applicant and the minority of the Commission laid stress on the further point that, in addition to the original Danish edition, translations of the Little Book appeared and circulated freely in the majority of the Member States of the Council of Europe. Here again, the national margin of appreciation and the optional nature of the 'restrictions' and 'penalties' referred to in Article 10 (2) prevent the Court from accepting the argument. The Contracting States have each fashioned their approach in the light of the situation obtaining in their respective territories; they have had regard, inter alia, to the different views prevailing there about the demands of the protection of morals in a democratic society. The fact that most of them decided to allow the work to be distributed does not mean that the contrary decision of the Inner London Quarter Sessions was a breach of Article 10. Besides, some of the editions published outside the United Kingdom do not include the passages, or at least not all the passages, cited in the judgment of 29 October 1971 as striking examples of a tendency to 'deprave and corrupt'."*

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<sup>1502</sup> This idea will be observed closely in connection to some other cases.

<sup>1503</sup> Referring to the cases (for Art. 5(3)) *Wemhoff* (1968) EHRR 55, 76, para. 12; *Neumeister v Austria* (NO. 1) (1968), 1 E.H.R.R. 91, 126, para. 5; *Stög-Müller v Austria* (1969), 1 E.H.R.R. 155, 190, para 3 *Matznetze v Austria* (1969), 1 E.H.R.R. 198, 224, para 3.; and *Ringeisen v Austria* (1971), 1 E.H.R.R. 493, para 104.

Here the Court explicitly rejected the decisiveness of these types of comparative observations, which, nevertheless, seemed to indicate a generality of practices.

However, the applicants claim that the seizure was not 'necessary' in a democratic society was dismissed on the basis of comparative observations:

*"53.... If the applicant is right, their object should have been at the most one or few copies of the book to be used as exhibits in the criminal proceedings. The Court does not share this view since the police had good reasons for trying to lay their hands on all the stock as a temporary means of protecting the young against the danger to morals on whose existence it was for the trial court to decide. The legislation of many Contracting States provides for a seizure analogous to that envisaged by section 3 of the English 1959/1964 Acts."*

**The United States Supreme Courts doctrine, "Unusual in a democratic country of our time" (case Arrowsmith).** In the case *Arrowsmith v United Kingdom*<sup>1504</sup>, the applicant had been delivering pacifist leaflets in front of an army camp directed to soldiers persuading them to seduce from their duty or allegiance in relation to service in Northern Ireland. She was convicted to imprisonment. The question in the Commission was about the "*necessity of the interference*" in relation to the right guaranteed in the Article 10, where the act aimed at protecting national security and the prevention of disorder within the army.

**Context of justification.** In another case before the Commission, the applicant wanted the case to be examined comparatively:

*"It remains to be examined whether the applicant's prosecution and conviction, and the sentence imposed [seven months' imprisonment] were necessary in order to secure this aim [protection of national security and the prevention of disorder within the army].*

*The applicant has suggested that the 'clear and present danger doctrine', as developed by the United States Supreme Court, be applied.*

*The notion 'necessary' implies a 'pressing social need' which may include the clear and present danger test and must be assessed in the light of the circumstances of a given case."*

The Commission decided that the justification for restrictions, penalties etc. upon the freedom of expression (and the concept of necessity in Article 10(2)) "*implies a pressing social need which may include the 'clear and present danger' test, and must be assessed in the light of the particular circumstances of the case*".

One of the members of the Commission, in his dissenting opinion, made a general comparative observations to support his argument that long imprisonment was out of proportion

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<sup>1504</sup> 12 October 1978, Application 7050/75(1981) EHRR 218.

to the legitimate aim pursued<sup>1505</sup>:

*"Finally, I consider that the interference by a way of a long imprisonment, even as it was reduced upon appeal, was out of proportion to the legitimate aim pursued as required by the European Court of Human Rights in the HANDYSIDE case. It is to my knowledge, quite unusual in a democratic country in our time to punish anyone in this way for non-violent political offences such as those committed by applicant, and I cannot reconcile it with the requirement of necessary in the present case it leaves me with the unfortunate impression that in this case, because of the serious and violent conflict in Northern Ireland, the authorities have over-reacted.*

*That tolerance for the views of dissidents which we expect of other countries should not be abandoned in Western Europe even in times of crisis. Although the applicant's action remotely threatened public policy, this is not in my opinion a sufficient justification for interference under the system of the European Convention whose claim to credibility it is very important to preserve in the world-wide debate on human rights."*

**Other international measures (case Glimmerveen).** The case of *Glimmerveen v Hagenbeek v Netherlands*<sup>1506</sup> dealt with the question, whether the possession of leaflets inciting racial hatred was to be protected by Article 10 of the Convention.

In this case, the Commission, concluding that Article 10 of the Convention was inapplicable, made reference to the other international systems presented (as an argument by the Government Party)

*"Indeed, the Government have drawn the attention of the Commission in particular in the light of Article 60 of the Convention, to the Netherlands' international obligations under the International Convention on the Elimination of all Forms of Racial Discrimination of 1965, to which the Netherlands acceded in 1971.*

*[20] The Netherlands' authorities, in allowing the applicants to proclaim freely and without penalty their ideas would certainly encourage the discrimination prohibited by the provisions of the European Convention on Human Rights referred to above and the above Convention of New York of 1965.*

*[21] The Commission holds the view that the expression of the political ideas of the applicants clearly constitutes an activity within the meaning of Article 17 of the Convention.*

*[22] The applicants are essentially seeking to use Article 10 to provide a basis under the Convention for a right to engage in these activities which are, as shown above, contrary to the text and spirit of the Convention and which right, if granted, would contribute to the destruction- of the rights and freedoms referred to above.*

*Consequently, the Commission finds that the applicants cannot by reason of the*

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<sup>1505</sup> Mr. Opsahl.

<sup>1506</sup> 11 October 1979, appl. 8348/78 and 8406/78 (1982) EHRR 260.

*provisions of Article 17 of the Convention, rely on Article 10 of the Convention."*

**Similar Legislation in most European countries (case X v Germany).** In the case of *X v Federal Republic of Germany*<sup>1507</sup> dealing with freedom of speech and its "necessary restrictions in the democratic society", the Commission stated that

*"Moreover, the Commission has had regard the fact that most European countries that have ratified the Convention have legislation which restricts the free flow of commercial "ideas" in the interest of protecting consumers from misleading or deceptive practices"....*

*Taking both these observations into account<sup>1508</sup> the Commission considers that the test of "necessity" in the second paragraph of the Article 10 should therefore be a less strict one when one applied to restraints imposed on commercial ideas."*

On this basis the Commission came to the conclusion that the injunction granted by the Market court of the Federal Republic of Germany was necessary in a democratic society for the protection of the rights of other (i.e. consumers).

**Similarities between the systems in some countries, examples of legal decisions (Liberal Party).** In the case of *Liberal Party v United Kingdom*<sup>1509</sup> the Commission found that Article 10 does not guarantee the right to vote as such, nor does it guarantee the right to stand for election or any other right already provided by Article 3 of the First Protocol. In this manner the Commission found that Article 10 alone was inapplicable also when it was read in conjunction with Article 14. In its reasoning, the Commission made an extensive reasoning on comparative basis:

*"Article 3 requires that elections are being held under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature. The applicants seem to suggest that the disadvantage existing for the Liberal Party, as for any smaller party, does not really assure the free expression of the opinion the people. Although the Commission agrees that this disadvantage exists and may be of considerable political impact it cannot find a violation of Article 3 of the First Protocol alone or in conjunction with Article 14 of the Convention on that basis. The simple majority system is one of the two basic electoral systems It is or has been used in many democratic countries. It has always been accepted as allowing for the free expression of the opinion of the people even if it operates to the detriment of small parties.*

*10. This reasoning is supported by the fact that even countries which know of a fundamental right to equality of voting still admit the simple majority system as*

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<sup>1507</sup> Appl. 8410/78, 13 December 1979. The case dealt with the advertising activities of religious communities and its misleading character.

<sup>1508</sup> The other observation concerned the jurisprudence of the Court (*Handyside*, A/24, 7. December 1977).

<sup>1509</sup> Appl. No. 8765/79 (1982) EHRR 106, 18 December.

*complying with the requirement. The Federal Constitutional Court of the Federal Republic of Germany [Bundesverfassungsgericht, Decision, Vol. 34, 81, 100 with references] has held that both electoral systems, proportionate representation and simple majority vote, are constitutional and in line with the requirement of equality of voting. The United States Supreme Court controls election laws on the basis of the equal protection clause of the 14th Amendment to the US Constitution [WHITCOMB v. CHAVIS 403, U.S. 124, 156 (1971)- WHITE V. REGESTER, 412 U.S. 755, 766 (1973)]. It accepts the prevailing system with simple majority electoral districts, including, under specific circumstances, multimember districts although these may be very much to the disadvantage of smaller groups."*

**No comparable provisions in other states and in international instruments, similarities between the legislation of the state parties, no general practice, evolution in Europe and in North America, Supreme Court of United States (case Barthold).** In the case of *Barthold v Germany*<sup>1510</sup> the question concerned the alleged breaking of professional rules by a veterinary surgeon, who had advertised and published in a manner which contravened the law.

He had also been critical in a newspaper article of the lack of emergency services available at night. Interim and final injunctions required him to refrain from repeating statements on the basis of the "non-objective nature" of the statements. The Court found there to have been a violation of Article 10.

**Context of justification.** In the course of its argument the Government attempted to justify its conduct on the basis of comparative similarity of competition rules in different national and international instruments:

*"(52.)... Finally; in the submission of the Government, in the field of the "policing" of unfair competition the Contracting States enjoyed a wide margin of appreciation and the legal traditions of the Contracting States had to be respected by the Convention institutions. In this connection, provisions comparable to those of the relevant German legislation were to be found in other States of the Council of Europe, in international instruments and in the law of the European Communities."*

**Justification.** The Court refused to accept this argumentation because of the subsidiarity nature of the powers<sup>1511</sup>, and maintained that the margin of appreciation "enjoyed by the Contracting States has to go hand in hand with the European supervision, which is more or less extensive

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<sup>1510</sup> A/90 (1985) EHRR 383, 25 March 1985.

<sup>1511</sup> Some analysis of the idea of "subsidiarity" in the European Human Rights system is provided by van der Meersch, W.J.G., 1980, p.328 (Belgian linguistic and Handyside cases).

depending on circumstances"<sup>1512</sup>.

However, two members of the Court<sup>1513</sup>, who also found that violation of Article 10 had not taken place responded directly to the comparative argument put forward by the Government:

*"Although restrictions on advertising and publicity by members of the liberal professions are well known in the States Parties to the Convention, the combined application of rules from these two categories ["professional conduct and unfair competition"] are not general practice."*

Another member of the Court<sup>1514</sup> put forward an interesting "comparative legal development" argument in his dissenting opinion. He came also to the conclusion that there had been a violation of Article 10, but he stressed the importance of a wider scope for the argumentation:

*"As of now, however, one cannot ignore the considerable evolution that has occurred, in Europe as well as in North America, within the professional bodies representing the liberal professions in opening themselves up to certain forms of collective advertising about their activities and even to certain forms of individual advertising, in particular so as to indicate practitioners' specialities. Standards of professional conduct are thereby undergoing development and, for members of the liberal professions, it is not possible to divorce assessment of professional conduct from the degree of liberty afforded in relation to advertising, which is what happened in Dr. Barthold's case. Freedom of expression in its true dimension is the right to receive and to impart information and ideas. Commercial speech is directly connected with that freedom."*

He motivated the inclusion of "commercial speech" within the realm of freedom of expression with a direct reference to the case law of the United States Supreme Court:

*"Such was the import of a decision by the Commission; such is the case law of the Supreme Court of the United States under the First Amendment [VIRGINIA STATE BOARD OF PHARMACY V. VIRGINIA CONSUMER COUNCIL 425 U.S. 748 (1976); BATES V BAR OF ARIZONA 433 U S 350 (1977); CENTRAL HUDSON GAS & ELECTRIC CORP V PUBLIC SERVICE COMMISSION 447 U.S. 557 (1980)] albeit that the commercial communications are afforded a different degree of protection to that granted in respect of the press."*

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<sup>1512</sup> This refers to an idea of coherence of a national system and to a teleological derogation.

However, to maintain the integrity of the general human rights system, the future observation is explained ("together with the European surveillance .... "at this stage...".)

<sup>1513</sup> Mr. Vilhjalmsson and Mr. Bindschedler-Robert.

<sup>1514</sup> Mr Pettiti.

**Sources of law doctrines compared; other international measures (The Declaration of Human Rights and International Covenant on Civil and Political Rights), geographical position compared (case *Glaserapp*).** In the *Glaserapp* case<sup>1515</sup> the question concerned the revocation of an appointment of a school teacher on the basis of her unsuitability. It was claimed, by the German responsible authority, that she was not prepared to approve or uphold the principles of a free and democratic society. Legal proceedings in Germany had upheld this conclusion.

**Context of justification.** In its opinion, the European Commission of Human Rights argued by the comparative generality of doctrines of sources of law. That established the basis for an interpretation of the "lawfulness of the restriction" in the following way:

*"Since judicial precedent is relied upon by the Government as an additional source of law which added the required precision to the statutory texts, it is relevant to refer also to the further dictum in the SUNDAY TIMES judgment according to which the word law in the expression 'prescribed by law' covers not only statute but also unwritten law. The Commission regards this consideration as valid not only in respect of the common law but also in respect of other legal systems where the legislation deliberately leaves room for judicial precedent. Accordingly the judicial principles established by precedent must be regarded as "law" within the meaning of Article 10(2), provided that they are adhered to by the courts in a consistent manner."*

On this basis the Commission found that the application of judicial principles comprise valid basis as "law" in this case.

**Justification.** In studying the nature of the European human rights system, the nature of the rights included within it, and the aims of the Convention, the Court agreed with the government's argumentation:<sup>1516</sup>

*"48. The Universal Declaration of Human Rights of 10 December 1948 and the International Covenant on Civil and Political Rights of 16 December 1966 provide, respectively, that everyone has the right of equal access to public service in his country and that every citizen shall have the right and the opportunity to have access, on general terms of equality, to public service in his country. In contrast, neither the European Convention nor any of its Protocols sets forth any such right. Moreover as the Government rightly pointed out the signatory states deliberately did not include such a right; drafting history of the Protocols 4 and 7 shows this unequivocally. In particular, the initial versions of Protocol 7 contained a provision similar to Article 21(2) of the Universal Declaration and*

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<sup>1515</sup> A/104, (1987) EHRR 25, 28 August 1986.

<sup>1516</sup> Similar type of case, see *Kosiek v. Germany* (A/105 (1987) EHRR 328, 28 August 1986) where also the concurring opinion of judge Bindschedler-Robert, Pinheiro, Farinha, Pettiti, Walsch, Russo, Bernardt stressed the importance of "national tradition and the system governing the Civil Service".

*Article 25 of the International Covenant; this clause was subsequently deleted. This is not therefore a chance omission from the European instruments; as the Preamble to the Convention states, they are designed to ensure the collective enforcement of 'certain' of the rights stated in the Universal Declaration."*

The Court discovered, in other words, that the Convention was in conflict with other international instrument. It seemed to find it impossible to interpret the Convention in the light of these other instruments, but related the travaux préparatoires and the intention of the parties with this contrastive use of other international instruments.

Consequently, the Court did not find a breach of Article 10 by the national authorities.

Comparative reasoning was used likewise by the dissenting judges in finding the inapplicability of Article 10 to the case.

In his dissenting opinion, in finding a violation of Article 10, another judge pointed out comparatively (in general terms) that,

*"While the contracting states did not wish to commit themselves to recognizing a right of access to the Civil Service in the convention or its protocols, the High contracting Parties nonetheless undertook in Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms guaranteed in the in the Convention. It follows that access to the Civil Service must not be impeded on grounds protected by the Convention (for example, freedom of opinion, freedom of expression).*

*21. Taken to its extreme, the reasoning of the majority of the Court could authorise a State to refuse to admit to the Civil Service candidates who, while fulfilling all the requirements of nationality, age, health and professional qualifications, did not satisfy certain criteria of race, colour or religion. Obviously such a situation is unthinkable for all the Member States of the Council of Europe."*

The government's comparative argument was rejected by this judge in following manner:

*"36. A second argument expounded by the Agent of the Government to justify current legislation in the Federal Republic of Germany was the following (translation from the German): ... Germany is a divided nation whose position bordering on the Communist States of the Warsaw Pact exposes it to special dangers. This requires us to take additional precautions to safeguard our free democracy and makes us different from other Council of Europe States."*

In other words, the government had presented a comparative argument based on that country's peculiar national, geographic, and political circumstances to legitimate an exception from European human rights. The judge refused to uphold this type of comparative

argument:<sup>1517</sup>

*"Without wishing to enter into a debate on that argument, I consider nonetheless that the Federal Republic of Germany is not the only country in such a geographical position. Yet it is the only country to have the legislation complained of."*

**Common principle of law in Contracting States (case Müller).** In *Müller and others v Switzerland*<sup>1518</sup>, the question concerned confiscation of a painting on the grounds the protection of morals. Legally it dealt with the necessary restrictions of freedom of speech (artistic freedom) in a democratic society and the "margin of appreciation" doctrine. The Court argued comparatively concerning the rule of confiscation<sup>1519</sup>:

*"A principle of law which is common to the Contracting States allows confiscation of items whose use has been lawfully adjudged illicit and dangerous to the general interest. In the instant case, the purpose was to protect the public from any repetition of the offence."*

This comparative observation was one of the main arguments by which the Court came to its conclusion, that the Article 10 had not been infringed by the Swiss Court.

**The practice in other Member States of the Council of Europe, hypothetical "non-reaction" (case Markt Intern).** In *Markt Intern and Beermann v Germany*<sup>1520</sup>, the question concerned right to publish claims of a dissatisfied client of a company in a newspaper. In the specific context, this was found, by the German court, to involve "acts contrary to honest practices". The European Court accepted this finding of the German Court. The restriction was found to be legitimate on the basis of its aims.

**Context of justification.** In his dissenting opinion, however, one of the members of the European Court of Human Rights<sup>1521</sup> analysed comparatively the general discourse in European States:

*"The problem is all the more serious because often the States which seek to restrict the freedom use the pretext of economic infringements or breaches of*

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<sup>1517</sup> Exactly same argument in *Kosiek* case.

<sup>1518</sup> A/133 (1991) EHRR 212, 24 May 1988.

<sup>1519</sup> Reference to the *Handyside* case.

<sup>1520</sup> A/164 (1990) EHRR 161, 20 November 1989, The case must be distinguished from the case *Markt Intern and Beerman v. Germany*, 18 December 1987.

<sup>1521</sup> Mr. Pettiti.

*economic legislation such as anti-competitive or antitrust provisions to institute proceedings for political motives or to protect 'mixed' interests (State-industrial) in order to erect a barrier to the freedom of expression.*

*The economic pressure which groups or laboratories can exert should not be underestimated. In certain cases this pressure has been such that it has delayed the establishment of the truth and therefore put back the prohibition of a medicine or substance dangerous for the public health.*

*The economic press of numerous Member States publishes each day articles, millions of copies of which are circulated, containing criticism of products in terms a hundred times stronger than those in question in the Markt Intern case. It is this freedom accorded to that press which ensures the protection of the public at large.*

Another member of the Court expressed his dissenting opinion based on the generality of "non-existing" law in Europe (the party's laws constituting an exception to this)<sup>1522</sup>:

*"...It should therefore be asked whether it can be necessary in a democratic society to restrict the rights and fundamental freedoms of an organ of the press in this way solely because that organ has espoused the cause of specific economic interests, namely those of a particular sector of a specialised trade. I am in no doubt that this question must be answered in the negative. This is clear from the fact that, as far as I know, such a rule extending the scope of the law on unfair competition to the detriment of freedom of the press is unknown in the other Member States of the Council of Europe, and rightly so because, in certain respects, all newspapers may be regarded as partisan, having espoused the cause of certain specific interests."*

On this basis he came to the conclusion that such acts by the state were not necessary in a democratic society, and consequently, that there had been a violation of Article 10 of the Convention.

Rejection of the analogy derived from another international measures, the European Community as example, tendencies towards democracy in Eastern Europe, scholarly opinions in Europe and the United States, the United States constitution and its interpretation, the factual situation in European countries, other international conventions (case Groppera). In *Groppera radio Advocate General v Switzerland*<sup>1523</sup>, a company was obliged to terminate its transmissions by cable. The Swiss authorities imposing this obligation referred to a new law prohibiting transmissions by those stations, which did not comply with international treaties and agreements.

**Context of justification.** Two members of the Court stated in their dissenting opinion that

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<sup>1522</sup> Mr. Martens.

<sup>1523</sup> A/173 (1990) EHRR 321, 28 March 1990, Mr Matscher, Mr Bindschedler-Robert.

*"I cannot accept paragraph 61 of the judgment [of this Court]. In my opinion, it is unacceptable to reason on the basis of drafting history of a later instrument drawn up in a different community (the United Nations), not within the Council of Europe..."*

*"...the fact that the sentence was not included in the International Covenant of Civil and Political rights is of no importance when interpreting paragraph (1) of the Article 10 of the European Convention of Human Rights, in which it does occur."*

The members rejected also the "implicit" adaption of the European Community doctrine on "*precision and clarity*" of the publication in the reasoning of the Court.<sup>1524</sup> They claimed that

*"There was no publication in the Swiss official gazette. I honestly doubt whether what may be acceptable in respect of European Community legislation included in Community's Official Journal, which is regarded as an official gazette in the Member States too, can be acceptable in respect of other international instruments."*

However, the members came to the same conclusion as did the Court.

The same case also inspired other judges<sup>1525</sup> to present detailed example type of comparisons of case law in their strong dissenting opinion:

*"Recent European cases concerning jurisdiction, copyright (author's rights), and tort damages have examined and classified the rules and systems which are applicable and are brought out the distinctions to be made by reference to different situations:*

*(a) the transmission itself, or the reception, is contrary to national law [Paris Court in case Potasses, "referring to the European Court of Justice"] ..."*

In stressing the importance of the freedom of expression (including the freedom to receive information) especially in connection to telecommunications they maintained in rather value-based form:

*"The countries of Eastern Europe have been encouraged towards democracy thanks to the transborder broadcasts and wish to join the European Convention on Transborder Communication Satellites. Case law and academic lawyers in this field, both American and European, agree that this freedom should be extended to the field of telecommunications.*

*The European Court should uphold this safeguard and promotion of the freedom of expression in the same spirit as that of the first amendment to the Constitution of the United States and the work of United nations (16th session). It should be remembered what Helvetius said, "it is necessary to think and to be able to say everything"- and the Declaration of Virginia (1776), "freedom of press is one of*

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<sup>1524</sup> Argumentation in para 68 of the judgment (*Groppera* case).

<sup>1525</sup> Mr. Pettiti.

*the most powerful bastions of liberty".*

**Justification.** In justifying the decision, the Court examined the general tendencies in Europe<sup>1526</sup>:

*"Since then [signing of the Convention], changed views and technical progress, particularly the appearance of cable transmissions, have resulted in the abolition of State monopolies in many European countries and the establishment of private radio stations, often local ones, in addition to the public services. Furthermore, the national licencing systems are required not only for the orderly regulation of broadcasting enterprises at the national level but also in large part to give effect to international rules, including in particular number 2020 of the Radio Regulations"*

Furthermore, the Court, in dealing with the interpretation of the broadcasting licencing system in Switzerland, also compared Article 19 of the 1966 International Covenant on Civil and Political Rights, and maintained<sup>1527</sup> that

*"[it] does not include a provision corresponding to the third sentence of Article 10(1) of the Convention [of Human rights]. The negotiating history of the Article 19 shows that the inclusion of such a provision in an Article had been proposed with a view to the licencing not of the information imparted but rather of the technical means of broadcasting in order to prevent chaos in the use of frequencies. However in inclusion was opposed on the ground that it might be utilized to hamper free expression, and it was decided that such a provision was not necessary because licencing in a sense intended was deemed to be covered by the reference to 'public order' in paragraph (3) of the Article.*

*This supports the conclusion that the purpose of the third sentence of the Article 19(1) of the Convention [on the Human Rights] is to make it clear that states are permitted to control by a licencing system the way in which broad casting is organized in their territories, particularly in its technical aspects. It does not , however, provide that licencing measures shall not otherwise be subject to the requirements of paragraph (2) [of the Convention], for that would lead to a result contrary to the object and purpose of Article taken as a whole."*

The Court used, in other words, another international agreement as a comparative reference. It analysed the legislative history of this convention, and on this basis interpreted the content of the European Convention by analogy.

On this basis, it came to the conclusion that the third sentence of Article 10(1) was applicable to this case ("*This Article does not prevent states from requiring the licencing of broadcasting, television or cinema enterprises*").

However, the scope of its applicability needed also to be interpreted. Accordingly, the Court came to the conclusion that the interference by the Swiss authorities was in accordance

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<sup>1526</sup> With regard to tendencies approach, see Schreuer, C.H., 1971, pp.275-277 (*Otto Preminger Institute*).

<sup>1527</sup> Reference to UN doc. A/500, 16th session of the United Nations General Assembly, 5 December 1961, para 23.

with the Article. The question thus concerned only whether the interference was "prescribed by law", and had legitimate aims, and "was necessary in a democratic society". In the end, the interference was found to be in accordance with Convention's Article 10.

**The practice of states, some states particularly, Council of Europe as *tertium comparationis*, international developments, international measures and their interpretation; implementation by parties, questionnaires answered by authorities: no general practice, international measures and their objectives (case *Autronic*). In the case of *Autronic v Switzerland*<sup>1528</sup> concerning the applicability of the Article on freedom of expression to the receiving of uncoded television programs (an application by a party to get a permission from the state to do so), the Court referred to the Commissions report, which included comparative observations:<sup>1529</sup>**

*"The practice of several Council of Europe member States, including France and United Kingdom, suggested that the International Telecommunication Convention and the Radio Regulations did not preclude direct reception of signals retransmitted by telecommunication satellite where they were intended for the general public."<sup>1530</sup>*

Furthermore, in looking into the necessity of restrictions in a democratic society, the Court observed, that

*"In the legal field, developments have included, at international level, the signature within the Council of Europe on 5 May 1989 of the European Convention on Transfrontier television and, at national level, the fact that several Member States allow reception of uncoded television broadcasts from telecommunication satellites without requiring the consent of the authorities of the country in which the station transmitting to the satellite is situated.*

*The latter circumstance is not without relevance, since the other states signatories to the International telecommunication Convention and the international authorities do not appear to have protested at the interpretation of Article 22 of this Convention and the provisions of the Radio Regulations that it implies. The contrary interpretation of these provisions, which was relied by the Swiss Government by the support of the interference, is consequently not convincing. This is also apparent from paragraphs 19 and 20 of the International telecommunication Union's reply to the Governments questions."*

On this basis, the Court did find that the Article 10 can be applied to the case. Consequently, after examining the facts of the case, the Court concluded that the Swiss

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<sup>1528</sup> A/178 (1990) EHRR 485, 22 May 1990.

<sup>1529</sup> Commission report, 8th March 1989

<sup>1530</sup> The applicant company had suggested in its argumentation, comparatively, that other Contracting States had more liberal rules.

authorities, in refusing an application to receive the programs, violated Article 10 of the Convention.

In their dissenting opinions two members of the Court<sup>1531</sup> referred to an interesting comparative study made by the Swiss authorities as a basis for some kind of a *bona fide* justification, and argued on the basis of diversity existing between states:

*"According to the interpretation prevailing at the time (ad also quite recently), Switzerland accepted that this undertaking obliged it to make authorisation for reception subject to the consent of the transmitting State, in the instant case the Soviet Union, as is clear from the replies by several foreign administrations to which Switzerland had sent a request for information (The Soviet Union of 7 February 1981, the Netherlands of July 1985, Finland of 8 July 1985, Germany of 29 August 1989). It was also in accordance with the recommendation adopted in 1982 by the European Conference of Postal and Telecommunication Administrations. Therefore Switzerland legitimately believed that it was not only authorised but obliged to make the authorisation sought by Autronic Advocate General subject to the consent of the competent Soviet authority, in order to meet its international obligations by fulfilling them as they were understood by the appropriate international organisations and the other States, particularly the State interested in the present case, the Soviet Union. In other words, as the consent of the Soviet authorities was not obtained, the refusal of authorisation which is the subject of the complaint by Autronic Advocate General could be regarded at that time as a measure necessary to prevent disorder in international telecommunications.*

*Even though in recent years some national administrations seem to have waived the condition of obtaining the prior consent of the transmitting State, it appears from the replies received in 1989 that this is not yet the general practice. This is proved by the international agreements signed for the creation of Entersat and Intelsat, which permit transmissions from satellites to be picked up only by specially authorised earth stations. Even if this were not the case and although ideas have changed, it cannot be used as a criterion for deciding whether there is a violation of the Convention in this case and whether the State is liable, because this question must be assessed in the light of the legal rules in force (and as understood) at the time of the relevant facts.*

*The fact that the ITU considers that it is for the administration of each member of the Union itself to take the 'necessary measures to prohibit and prevent the unauthorised interception of radiocommunications not intended for the general use of the public' and that every national administration is empowered 'to lay down the terms and conditions on which it grants such authorisation' means only that, in the framework of the International Telecommunication Convention and the Radio Regulations, States have some degree of discretion in deciding on suitable measures for attaining the objectives of those international rules. The grant of such discretion cannot lead to the conclusion that a measure which is taken on this basis ad appears to be perfectly suited and proportionate to the legitimate objective, viz. in casu the prevention of disorder in international*

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<sup>1531</sup> Mr. Binschedler-Robert and Mr. Matscher.

*telecommunications, is not necessary. Furthermore, the contested measure was not an absolute, unqualified prohibition, but a reasonable response to the international undertakings of the State in question and a response which took account of the legal interests of the transmitting State.*

*On those grounds we consider that there was no violation of Article 10".*

The comparative observations refer to many different types of comparative observations. The government had produced a comparative study in order to discover a "general tendency" in different states, and this provided a grounding for good faith implementation.

However, this type of comparative argument by the other judges did not seem to persuade the Court. It found a violation of the Article. In fact, the Court rejected this argument by relying on the recent study made by the Commission, referring explicitly to different states (France and United Kingdom) from those which the party had examined (the Netherlands, Germany, Finland and the Soviet Union). The Commission's study was more recent.

The judges presenting the dissenting opinion, on the other hand, referred to this same study, and connected it to the fulfilment of international obligations. However, they refused to consider the Commission's comparative arguments to be valid, because the practice in international treaty law proved contrary to the claimed "general practice". Furthermore, the claimed generality would not be a persuasive argument, because, according to them, the breach should be examined on the basis of the "historical context". They also referred to the "subsidiary" nature of the provisions in certain international treaties in order to uphold the competence of the Swiss authorities to decide the case.

**Conditioned by the traditions of the community, political fields of established democracies, in legal and social orders of contracting states no uniform conception of morals, general discourses (case Oberschlick). In *Oberschlick v Austria*<sup>1532</sup>, which dealt with the restriction of freedom of expression of a journalist publishing a text "containing criminal information", one of the members of the Commission of human rights<sup>1533</sup> made a rather abstract "disparity" comparison of legal and social orders in order to arrive to a type of "subsidiarity" of systems:**

*"The borderline between the freedom of information and libel depends largely on the traditions of the community concerned. In some communities it is quite customary to use harsh language, in others one is more polite. In the political field many established democracies consider it an achievement that one can say almost anything about politicians, in other countries libellous attacks against those who perform democratic functions are seen as attacks democracy itself. To decide what expressions are defamatory and what are not we have to take into*

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<sup>1532</sup> A/204 (1995) EHRR 389, 23 May 1991.

<sup>1533</sup> Mr Schermers.

*account that it is not possible to find in the legal and social orders of the Contracting States a uniform conception of morals.*

He continued with the words of the Court of human rights:

*"The view taken of the requirements of morals varies from time to time and from place to place, especially in our area, characterized as it is by a far-reaching evolution of opinions on the subject. By the reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the 'necessity' of a 'restriction' or 'penalty' intended to meet them"<sup>1534</sup>*

Commission's member dealt in his comparison with the disparity of the legal and moral concept of "libel", traditions of the social discourse, ideas of "democratic discourse", "defamation" etc.. On this basis, he considered the idea of the "margin of appreciation" to be applicable to the case, and he transferred the jurisdictional competence to the national system, in particular to its judge. By reference to some other arguments, he did not ultimately find a breach of Article 10 of the Convention.

The European Court of Human Rights, in arguing for the acceptability of the journalists publication, stated:

*"The Court agrees with the Commission that the insertion of the text of the said information in Forum (the magazine) contributed to the public debate on a political question of general importance. In particular, the issue of different treatment of nationals and foreigners in the social field has given rise to considerable discussion not only in Austria but also in other Member States of the Council of Europe."*

*... A politician who expresses himself in such terms exposes himself to a strong reaction on the part of journalists and the public".*

This argument was one of the basis for the conclusion that

*"...the interference with Mr Oberschlick's exercise of his freedom of expression was not "necessary in a democratic society... for the protection of the reputation... of others".*

*There has, accordingly, been a violation of Article 10 of the Convention".*

The European Parliament as a democratic body (case *Castels v Spain*). There are many examples of references to activities of other European systems and international systems, in the form of a *fortiori* argumentation.

The question in *Castels* case concerned a withdrawal of parliamentary immunity

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<sup>1534</sup> Referred to by the Courts in *Müller and others v. Switzerland*, A/133 (1991) EHRR 212, and also, *Handyside v United Kingdom* (A/24) 1 EHRR 737, and the *Sunday times v United Kingdom* (No.1)A/30, 2 EHRR 245.

from one member of the Spanish parliament by the Parliament, because he had written an article to press, which contained accusations against the government.<sup>1535</sup> This resulted in a criminal prosecution and a suspended prison sentence.

A member of the Commission of the European system of Human Rights claimed in his dissenting opinion<sup>1536</sup>:

*"I think that the measure with which we are concerned comes within the margin of appreciation granted to States by the Convention. In addition, this measure does not prove to be contrary to what is necessary in a democratic society. The European parliament, which embodies 12 well established democracies, withdrew his immunity of one of the members for having expressed his views in less dangerous terms and circumstances."*

The European Court of Justice and constitutional traditions, international treaties, analysis of case law in the United States (concurring opinions) (Case Observer). In *Observer*<sup>1537</sup> case the question concerned the legitimacy of the action by the British Court in imposing interlocutory injunctions. The applicants, two newspapers, claimed that these restrictions upon publishing articles concerning the book "spycatcher" (which included according to the government, confidential information) contravened the freedom of expression.

A member of the European Court of Human Rights<sup>1538</sup> referred to the decision of the European Court of Justice<sup>1539</sup>, which had held that

*"as regards Article 10 of the European Convention of Human Rights...its should be noted in the first place that, as the Court has consistently held, fundamental rights form an integral part of the general principles of law, the observance of which it ensures. In so doing, the Court draws inspiration from constitutional traditions common to the Member States and from indications provided by the international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories<sup>1540</sup>. In this connection the European Convention of Human Rights is of particular significance. It follows that, as the Court affirmed in the judgment of 13 July 1989, Wachauf, measures incompatible with the respect for the human rights their in recognized and secured are not permissible in the Community".*

This member of the Court explicitly referred to another international system (the European Community and European Court of Justice), which refers, on the other hand, to the

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<sup>1535</sup> A/236 (1992) EHRR 445.

<sup>1536</sup> Mr. Martinez, L.F.

<sup>1537</sup> *Observer and the Guardian v United Kingdom*, A/216 (1991) EHRR 150, 26 November, 1991.

<sup>1538</sup> Mr. Petiti.

<sup>1539</sup> Case 260/89 *Elliniki* (1991) ECR I-2925 (18 June 1991).

<sup>1540</sup> Expressed also in the case 4/73 *Nold v EC Commission* (1974) ECR 491.

European human rights system itself and the effect of international conventions in general, and, furthermore, to the constitutional traditions of the Member States of the European Economic Community. The argument clearly attempted to establish coherence among all these systems.

This was one of the methods by which the member, unlike the Court, concluded that there had in fact been a violation of Article 10 of the European Convention of Human Rights.

In the same case, a member of the Court<sup>1541</sup>, in his dissenting opinion, referred to the case law of the Supreme Court of the United States:

*"I firmly believe that "the press must be left free to publish news, what the source, without censorship, injunctions, prior restraint". In a free and democratic society there can be no room, in times of peace, for restrictions of that kind, and particularly not if these are resorted to, as they were in the present case, for governmental suppression of embarrassing information or ideas. (Judges Black, J., Douglas, J., In the case about the Pentagon papers, New York Times v US and US v Washington Post, 403 US 713 (1971)).*

On this basis this member (and the joining members) came to the conclusion, contrary to the opinion of the Court, that there had been a violation of Article 10 of the Convention during the whole period, not only during a part of the period.

In the same way, another member of the Court<sup>1542</sup> justified his dissenting opinion with reference to an extensive study of US law:

*"The United States case law cited by Article 19, the International Centre against Censorship has consistently held that the principal purpose of the First amendment's guarantee is to prevent prior restraints. With regard to the national security aim the US supreme court declared in Near v Minnesota (285 US 718) that: "The fact for approximately 150 years there has been almost an entire absence of attempts to impose previous restraints upon publications relating to the malfeasance of public officers is significant and deep-seated conviction that such restraints would violate constitutional right."*

*The other leading decisions of that Court, such as those in NEW YORK TIMES CO. LIMITED V. US (403 US 713 [1971]), LANDMARK COMMUNICATIONS INC. V. VIRGINIA (425 US 829 [1978]), NEBRASKA ASSOCIATION V. STUART (427 US 593 [1976]) and US v. THE PROGRESSIVE (486 F. Supp. 990 [1979]) have consistently required that very strict conditions ('all but totally absolute') must be satisfied before prior restraints can be imposed on the publication of information on matters related to national security. In the words of the NEBRASKA judgment, 'the thread running through all these cases is that prior restraints on speech or publication are the most serious and least tolerable infringement on the First Amendment rights. ... A prior restraint, by contrast and by definition, has an immediate and irreversible sanction. If it can be said that a threat of criminal or civil sanctions after publication "chills" speech, prior*

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<sup>1541</sup> Mr de Meyer, joined by Pettiti, Russo, Foighel, Bigi.

<sup>1542</sup> Mr. Morenilla.

*restraints "freeze" it, at least for a time.' Brennan J., concurring with the judgment, stated 'although variously expressed it was evident that even the exception was to be construed very, very narrowly: when disclosure "will surely result in direct, immediate and irreparable damage to our nation or its people".'*

**General tendencies and developments; similarities with legislations of the past (case Colman).** In the case of *Colman v United Kingdom*<sup>1543</sup> the question concerned the restrictions upon a medical professional's advertising by the General Medical Council, and the acceptance by the Court of the restriction.

In finding no violation of Article 10, the Commission referred to comparative law development, and to general remarks made by the Court of Appeal in its judgment of which the complaint concerned:

*"The Commission has regard to the particular facts of the present case: the applicant was seeking to attract patients. His concern was therefore one of advertisement of his professional activity, a clearly commercial matter. There was not a blanket restriction on doctors' advertising at the material time. He was affected only by the prohibition on advertising in newspapers. From 1987 the matter was under actual review by the Government, the MMC and subsequently the GMC. As the Court of Appeal observed in this case, the question of advertising in the liberal professions has undergone significant developments recently: Only a few years ago any form of advertising, even if only informative in content, would have been unthinkable. Today it is widely accepted, although still subject to some restrictions. Moreover, at the material time, other High Contracting Parties to the Convention maintained similar restrictions over such advertising.*

*In the light of these considerations, and having regard to the duties and responsibilities attaching to the freedoms guaranteed by Article 10 of the Convention, the Commission finds that it cannot be said that the advertising policy of the GMC went beyond the margin of appreciation left to national authorities."*

**The use of individual state system as an argument by an applicant (Case Chorherr).** In the case of *Chorherr v Austria*<sup>1544</sup> the question which arose concerned the fact that the applicant had been arrested, placed under police custody, and called to administrative criminal proceedings after he had demonstrated against the purchase of fighter aircrafts by the respondent state during a military ceremony. He had not ceased the demonstration after a request to do so.

The Court found that there was breach neither of Article 10 and Article 5.

**Context of justification.** In his reasoning, the applicant referred to the practice of the German Constitutional Court to support the idea that the arrest contravened his rights under Article 10

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<sup>1543</sup> A/258-D (1994) EHRR 119, 28 June 1993.

<sup>1544</sup> A/266-B (1994) EHRR 358 (25 August 1993).

of the Convention:

*"[The applicant refers] to a judgment of the German Federal Administrative Court (Bundesverwaltungsgericht) of January 1990 (Entscheidungen des Bundesverwaltungsgerichts, Vol. 84, p.297) in which the Federal Administrative Court found that a plaintiff who distributed leaflets and held up posters should not have been refused access to the Rathausmarkt in Lübeck where a military ceremony was taking place. The Court considered that if the Army uses a public place to obtain maximum publicity for itself, it must accept that critics of the army use the event as an opportunity to express their criticism."*

The Commission did not deal, as such, with the argument put forward by the applicant. However, it found that there had been a disproportionate involvement by the authorities, and that there had been a violation of Article 10 of the Convention not based on 'necessity in a democratic society'.

**Similar factual situations, differences in laws, no genuine European model, comparable experiences, rejection of generality (case *Informationsverein Lentia*). In the case of *Informationsverein Lentia v Austria*<sup>1545</sup> the applicant had been refused broadcasting licences, by the competent national authorities for the establishment of radio and television stations. This refusal was based on monopolistic legislation. The Court found a violation of Article 10.**

**Context of justification.** The government had attempted to argue that a monopoly is not, as such, incompatible with Article 10. This interpretation was based on the "comparative fact" that at the time of the drafting of the Convention, monopolies were allowed in most of the states. Even if the development had been, since then, towards liberalization, no general European standard existed.

The Commission declared, in its opinion, that there had been an interference with the applicant's rights. The Commission referred to the *Groppera* case and the "comparative" observations presented therein. It maintained that monopolies still existed in many states. However, according to the Commission, the real question was not the permissibility of the system of monopolies, but rather the existing system of licencing. Because Austria had no functioning system of licencing, it infringed Article 10 of the Convention.

However, the question arose whether the state had legitimately infringed the right. The Commission made some comparative observations in order to reject the "economic difficulties" argument put forward by the Government, by which the government attempted to maintain the 'necessity' nature of the restriction:

*"The Government has also referred to possible economic difficulties and the*

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<sup>1545</sup> A/276 (1994) EHRR 93, 24 November 1993.

*emergence of new monopolies. In this respect the Commission is aware of the different solutions adopted in Convention States with regard to broadcasting in general. These solutions include systems whereby private broadcasting licences are granted within a system of public broadcasting, for instance by limiting them to special times. The possibility to obtain licences may also vary as to local, regional or nationwide broadcasting. The Commission cannot therefore assume that private broadcasting would necessarily bring about the difficulties indicated by the Government."*

In his dissenting opinion, and although agreeing with the conclusion regarding breach of the Convention, one of the members of the Commission<sup>1546</sup> explained the change in the Commission doctrine. In the present case the Commission, more or less, established a requirement of licencing system contrary to its former opinions:

*"That [earlier] view was based in part on the fact that systems of monopolies then existed in most Member States. It is true that there has since then been a great increase in the access of individuals and organisation in particular of commercial enterprises to broadcasting facilities this has been achieved in various ways. A licencing of private broadcasters is one. Another is the making of contractual arrangements for the sake of air time to programme makers, who recoup the cost by in turn selling space to advertisers Yet another is by conferring a right of reply. Though this is so, the situation remains that in some states and in some regions, monopolies still exist.*

*The Convention must be applied against the background of existing conditions, but it does not seem to me that the time has yet arrived when it can be held that the right to freedom of expression given by Article 10 requires Member States to provide a system under which individuals and organisations can apply for permission to establish broadcasting stations, or that an individual or body can claim that there has been a violation of Article 10 because such a system has not been introduced."*

This partly dissenting opinion gives an interesting glimpse at the evolution of system of the European Human Rights and its relation to the use of the comparative method<sup>1547</sup>.

**Justification.** The Court referred in its reasoning to the Government's argument, however, not being persuaded by it, it made its own comparative observations in maintaining that a breach of Article 10 had occurred:

*"In opting to keep the present system, the State had in any case merely acted within its margin of appreciation, which had remained unchanged since the adoption of the Convention; very few of the Contracting States had different systems at the time. In view of the diversity of the structures which now exist in their field, it could not seriously be maintained that a genuine European model*

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<sup>1546</sup> Mr. Hall.

<sup>1547</sup> See also case *Marckx v Belgium* (1979-80)EHRR 2:330. (Wildhaber, Mahoney/Prebensen).

*had come into being in the meantime....*

*The Court is not persuaded by the Government's argument. Their assertions are contradicted by the experience of several European States of a comparable size to Austria in which the coexistence of private and public stations, according to rules which vary from country to country and accompanied by measures preventing the development of private monopolies, shows the fears expressed to be groundless.*"

**Similar laws, international measures, liberal and general tendencies at the international level, disparity of rules in states in relation to cultural tradition, The Council of Europe as tertium comparationis (case *Casado Coca*). In the case of *Casado Coca*<sup>1548</sup> the Court did not find a violation of the freedom of expression. In this case, a lawyer had been advertising his legal practice in local newspapers. This had resulted in warnings and notices to him from the competent local authorities. His complaints concerning these warnings and notices had been unsuccessful at all stages of the legal procedure. The complexity of the case inspired the parties to make comparative observations on many levels.**

**Context of justification.** The government party to the dispute relied directly upon comparative observations in order to justify the 'necessity' of its action in the context of a 'democratic society':

*"The Government observes that many of the States party to the Convention have restrictions on advertising by lawyers similar to those which in Spain led to the imposition of a penalty on the applicant. Moreover, the Deontological Code of the lawyers of the European Community adopted on 28 October 1988 in Strasbourg by the representatives of the 12 Bar Councils of the European Community and the Conference of European Bar Councils held on 24 May 1991 in Crakow maintained the principle of prohibiting advertising while introducing more flexible rules concerning lawyers' freedom to express themselves in the media to make a name for themselves and to participate in public debate. In line with this more liberal tendency, the Regional Council of the Catalonia Bar adopted new rules on the question leaving only certain forms of publicity still prohibited, including classified advertisements in the press, advertising on radio and television. etc."*

The Commission itself did not take a standpoint regarding these comparative arguments, but maintained that the restrictions were not necessary in a democratic society, and that the infringement of Article 10 had taken place.

In their dissenting opinion, three members of the Commission<sup>1549</sup> found no violation. They referred comparatively to the fact that "*in many of the Contracting states special*

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<sup>1548</sup> A/285 (1994) EHRR 1, 24 February 1994.

<sup>1549</sup> Mr. Danelius, Mr Frowein, and Mrs Liddy.

*restrictions have often been applied to the liberal professions, such as the legal profession". This is why there should be a "wide margin of appreciation" applied. The same idea was expressed by five other members<sup>1550</sup> who also found that no violation had occurred. They added that these practices were made "with the aim of protecting both lawyers who do not have sufficient means to use such methods and the public as a whole".*

**Justification.** The Court looked into, and even accepted, the comparative argumentation made by the Government in finding that no violation of Article 10 had occurred:

*"... Nevertheless, the rules governing the profession, particularly in the sphere of advertising, vary from one country to another according to cultural tradition. Moreover, in most of the States parties to the Convention, including Spain, there has for some time been a tendency to relax rules as a result of the changes in their respective societies and in particular the growing role of the media in them. The Government cited the examples of the Code of Conduct for Lawyers' in the European Community [Strasbourg, 28 October 1988] and the conclusions of the Conference of the European Bars [Cracow, 24 May 1991]; while upholding the principle of banning advertising, these documents authorise members of the Bar to express their views to the media, to make themselves known and to take part in public debate. In accordance with these guidelines, the new rules on advertising issued by the Council of the Catalonia Bars allow the publication of circulars or articles, including in the press. More recently, the Government have begun to study the draft of the new Statute of the Spanish Bar, which permits somewhat greater freedom in this sphere.*

*The wide range of regulations and the different rates of change in the Council of Europe's Member States indicate the complexity of the issue. Because of their direct, continuous contact with their members, the Bar authorities and the country's courts are in a better position than an international court to determine how, at a given time, the right balance can be struck between the various interests involved, namely the requirements of the proper administration of justice, the dignity of the profession, the right of everyone to receive information about legal assistance and affording members of the Bar the possibility of advertising their practices."*

It is interesting, how the Court fell in with the comparative argumentation produced by the Government. On this basis, the Court developed a new doctrine of a margin of appreciation of the Bar authorities. The doctrine of the margin of appreciation was no longer the doctrine to be applied only to autonomous national authorities such as courts, but, for that matter the lawyers' association as well, and perhaps also other autonomous associations.

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<sup>1550</sup> Mr. Geus, Mr. Jörundson, Mr. Soyer, Mr. Hall, and Mr Baxter.

General societal experience, general trends at the national and international levels, other international measures and their travaux préparatoires (case *Jersild*). In the case of *Jersild v Denmark*<sup>1551</sup>, the question concerned decisions of Danish courts maintaining restrictions against the screening of a television program containing racist remarks. Both the Commission and the Court found a violation of freedom of expression.

**Context of justification.** The Government argued that there had been no infringement on the basis of comparative observations:

*"The Government submits in particular that present-day actions against racist activities are based on the international community's bitter experience of the dire consequences of such acts which have led to great suffering. This phenomenon is not only something which belongs to the past but is a reality of today as recent trends in various European countries show. This had led to the adoption of declarations within the United Nations and the European Communities against racism as well as motions in the Danish Parliament condemning all forms of discrimination. The Government agree that it is desirable to give the media as free conditions as possible in order to enable them to report on what is happening in society, but this is not tantamount to giving them a free rein."*

In looking over the necessity of the sentencing of the applicant, the Commission, on the other hand, took into account other international convention, which the Government had ratified and which it had referred:

*"When examining the necessity of convicting the applicant for having aided and abetted the dissemination of racist remarks the Commission cannot confine itself to considering those remarks alone. As they were not made by the applicant himself, there is a particular need to look at these remarks in the light of the context of the programme and all the circumstances of the case. In this respect the Commission has taken into consideration that the Government have ratified the International Convention on the Elimination of All Forms of Racial Discrimination of 1965 whereby they are obliged to "condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races. ... Nevertheless, although the television programme affected the reputation or rights of others due to its discriminatory contents, a fair balance between their rights and the applicant's right to impart information must be struck. The limits of what can be accepted may vary depending on the circumstances of the case."*

After analysing the relationship between the proportionality of the measures compared to the legitimate aim, the Commission found that they were not 'necessary in a democratic society', and concluded that there had been a violation of Article 10.

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<sup>1551</sup> A/298 (1995) EHRR 1, 23 September 1994.

In their dissenting opinion, four of the members<sup>1552</sup> stressed comparative developments in Europe, analysed the contents of the measures subsequently adopted and focussed on developments in relation to other international measures including the European Convention:

*"There can hardly be much disagreement about the seriousness of the threat of racial persecution in Europe. Racially motivated violence poses a constant threat to the lives and security of many groups of people in the European countries. At an international level, States have found it necessary to act against this threat by inter alia introducing the United Nations Convention of 21 December 1965 on the Elimination of All Forms of Racial Discrimination. In Article 4(a) of this Convention the States Parties have undertaken to "declare as an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination ... against any race or group of persons of another colour or ethnic origin ...". The Convention was ratified by Denmark on 8 September 1971.*

They continued with the drafting history of the international measures and the European Convention:

*"It is interesting to note, that during the drafting of this Convention the relationship between Article 4 and the fundamental right of freedom of speech was discussed at length. The opening paragraph of Article 4 provides that the measures the State Parties have to adopt must always have due regard to the principles embodied in the Universal Declaration of Human Rights. This so-called "due regard" clause was introduced by the Third Committee in order to meet objections of those who maintained that Article 4 would violate the principles of freedom of speech and freedom of association. It was interpreted as giving State Parties the right to understand Article 4 as imposing no obligation on any party to take measures which were not fully consistent with their constitutional guarantees of freedom, including freedom of speech and association.*

In examining the conflicting interests of freedom of speech and the security of special groups of people, they referred again to other international measures:

*"These conflicting interests were first considered during the drafting of the Convention on the Elimination of All Forms of Racial Discrimination and again during the preparation of Bill introducing the amendment of the Danish Penal Code and later when it was dealt with by the Danish Parliament."*

Furthermore, in the course of the argument of the Danish Courts, where it discussed the lack of the balancing statements in the film, the members compared the situation to that which prevails under another pertinent international measure:

*"This is very much in line with the interpretation indicated in the preparatory work of the Convention on the Elimination of All Forms of Racial Discrimination*

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<sup>1552</sup> Mr. Gaukur, Jörundsson, Sir Hall, and Geus.

*and of the following amendment of the Danish Penal Code which clearly were not intended to restrict scientific or otherwise serious discussion of problems of public concern."*

The comparative development in Europe was ultimately taken, in the end of the reasoning, as an argument against the interpretation that the applicants would have been sole reasons for anyone experiencing racist actions:

*"The assumption that the sole effect of the programme was to ridicule the persons behind the propaganda appears as purely theoretical. The fact that racism and xenophobia are wide-spread in important sections of the European population shows on the contrary that addresses of a clearly primitive character may be experienced as convincing, despite the lessons of the past."*

Another member<sup>1553</sup> stressed the importance of the obligation of the state to take measures:

*"Article 4 of the International Convention on the Elimination of All Denmark Forms of Racial Discrimination, adopted by the General Assembly of the United Nations on 21 December 1965, makes it obligatory for States party to "declare as an offence punishable by law all dissemination of ideas based on racial superiority or hatred". At international level, therefore, there has been for decades a perceived need to provide a grave sanction against dissemination of racist comments, whatever the motivation of their proponents. The wisdom and experience of the drafters and adopters of that Convention deserve respect."*

However, she came to the conclusion that there had been no violation of Article 10, because the act of the state was proportionate to the aim pursued and it answered a pressing need in a democratic society.

In their dissenting opinions four judges<sup>1554</sup>, on the other hand, considered the value of the international convention in the interpretation of the European Convention in a different sense:

*"The International Convention on the Elimination of All Forms of Racial Discrimination probably does not require the punishment of journalists responsible for a television spot of this kinds. On the other hand, it supports the opinion that the media too can be obliged to take a clear stand in the area of racial discrimination and hatred."*

Furthermore, two of the judges<sup>1555</sup> came to the same conclusion by specifying the role of the international convention in relation to the interpretation (independent from the

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<sup>1553</sup> Mrs. Liddy.

<sup>1554</sup> Mr Ryssdal, Bernhardt, Spielman, and Loizou.

<sup>1555</sup> Mr. Gölcüklü, Russo, Valticos.

national implementation laws):

*"... in particular the 1965 Convention on the Elimination of All Forms of Racial Discrimination. That Convention manifestly cannot be ignored when the European Convention is being implemented. It is, moreover, binding on Denmark. It must also guide the European Court of Human Rights in its decisions, in particular as regards the scope it confers on the terms of the European Convention and on the exceptions which the Convention lays down in general terms."*

Both groups of judges came to the conclusion that there had not been a violation of Article 10.

**Justification.** The Court remarked upon the applicants' and the Commission's comparative reference. Furthermore, it took a standpoint upon the use of these "comparative" analyses, when examining the importance of the question of racial discrimination and of acting in "good faith":

*" ... Nevertheless, the issue was already then of general importance, as is illustrated for instance by the fact that the UN Convention dates from 1965. Consequently, the object and purpose pursued by the UN Convention are of great weight in determining whether the applicant's conviction, which, as the Government have stressed, was based on a provision enacted in order to ensure Denmark's compliance with the UN Convention, was "necessary" within the meaning of Article 10(2).*

*In the second place, Denmark's obligations under Article 10 must be interpreted, to the extent possible, so as to be reconcilable with its obligations under the UN Convention<sup>1556</sup>. In this respect it is not for the Court to interpret the "due regard" clause in Article 4 of the UN Convention, which is open to various constructions. The Court is however of the opinion that its interpretation of Article 10 of the European Convention in the present case is compatible with Denmark's obligations under the UN Convention."*

Furthermore, it maintained, in general, that

*"Bearing in mind the obligations on States under the UN Convention and other international instruments to take effective measures to eliminate all forms of racial discrimination and to prevent and combat racist doctrines and practices, an important factor in the Court's evaluation will be whether the item in question, when considered as a whole, appeared from an objective point of view to have had as its purpose the propagation of racist views and ideas."*

On this basis, the Court came to the conclusion that there had been a violation of Article 10 of the Convention.

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<sup>1556</sup> This is clearly an interpretation of national law in relation to international law. The phenomenon could be called an interpretation of internationalized national law (the interpretation of national law is not allowed, but it can be done, when the national law is internationalized).

### 3.2.4. Conclusions on the European System of Human rights

**Cases law...** In the light of the case studies, one can make several observations.

Firstly, the following types of arguments related to comparative arguments in the work of the European System of Human Rights can be recognized:

- arguments pertaining the general discourse on human rights
- general societal experience
- general principles
- more general conventions
  - as illustrations
  - conventions' travaux préparatoires and context
- tendencies in treaty law
- participation in conventions (in general and in particular)
- comparable experiences
- constitutional comparisons
- tendencies in legislation
- generalities in legislations (or in example systems)
  - at the time of the examined act or in the past or in general
  - at the time when the act is examined
  - general systems
  - general norms
- the system of the party to the dispute<sup>1557</sup>
- case law in general or in a particularly influential country
- comparative studies made by scholars
- comparative studies made by the state
- American case law and scholars
- scientific discussion
- traditions, societal experience, tendencies
- socio-phenomenological observations
- morality and functionality (national judge in better place -argument)

One could claim that the comparative reasoning in the European system of human rights seems to be, in general, an extremely value-based and rather open form of reasoning. The main form seems to be the legislative tendency and traditional legislative comparison, and observations upon the socio-political discourse. However, the United States case law seems to be valuable in problematic cases. It is usually looked into quite thoroughly. However, the existence of formal comparative observations does not necessarily indicate that a systematic study had been undertaken.

When the United States system is viewed analytically, it seems to support more progressive interpretations.

On the other hand, comparative observations do not seem to function as a context

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<sup>1557</sup> For a very good illustration of this type of analytical approach by the Court in case *Delcourt*, see van der Meersch, W.J.G., 1980, pp.325-327.

for any change. On the contrary. Comparative arguments usually support quite conservative solutions. However, occasionally, when the comparative generalities seem to "change" (develop, i.e. the system become more alike), also the doctrine of the European institution changes (interpretation by "*background of existing conditions*", "*stages of development*"<sup>1558</sup>), at least some opinions in the Court and Commission.

Moreover, the degree in the comparative generality seems to be related to the degree in the "margin of appreciation" ("*wide margin of appreciation*", "*margin of appreciation*"). On the other hand, the extreme divergencies ("*moral*") usually result in an argument "*the national judge is in better situation to decide*". In other words, the generality is usually the main argument used, though the qualitative generality plays some role. If there are differences, and these differences can be accepted, the outcome is that of "no common concept in Europe" and the "margin of appreciation".

The justification of a legal particularity due to economic necessity, related to the 'margin of appreciation' or to 'necessity in democratic society', has been breached by introducing legal disparity argument combined with argument by similar economic situation with differences in methods of legislating.<sup>1559</sup>

It seems also that comparative reasoning may be used for and against a particular interpretation. In these types of cases, there are differences in the choices of countries (even

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<sup>1558</sup> On this latter point, see van der Meersch, W.J.G., 1980, p.319.

<sup>1559</sup> Some analysis of the margin of appreciation, see van der Meersch, W.J.G., 1980, pp.330-331. On possible changes in this respect (toward a more universalistic approach) via institutional changes and the obligatory nature of the jurisdiction, see Martens, K.S., 1998, p.10.

Brems, E. (1996, p.240 ff.) has analysed well the common elements and patterns of the margin of appreciation in Court's case law. She has isolated nine factors relevant for the doctrines application (her table of contents):

1. The ground of limitation (2. Para of Articles 8-11), a. The protection of morals/ b. Maintaining the authority and impartiality of the judiciary/ c. National security/ d. The rights and freedoms of others/ e. The prevention of disorder or crime/ f. The economic well-being of the country, 2.. Importance of the rights: a. Freedom of expression/ b. Privatelife/home/ c. Right to fair trial/ d. Freedom of religion, 3. Field of policy: a. Special regime (military, prison)/ b. National authorities better placed to assess the situation (detention, children in care, change of surname, deprivation of property)/ c. Important national policy (cities, alcohol, housing, agriculture, environment, tax, competition), 4. Consensus among the member states: a. Framers' intent/ b. Measuring the proportionality of an interference/ c. Defining the scope of rights/ d. Consensus and evolution/ e. Isolated position based on moral standards/ f. Extended or restricted comparison/ g. Evaluation, 5. The reference to other conventions: a. Broader than the Council of Europe/ b. Only (part of) the member states of the Council of Europe, 6. Internal uncertainty of the norm or practice, 7. The substance or essence of right (criterion), 8. Particular local situation, 9. The exceptional character of the situation

She finds some reasons for the doctrine (ibid., p.293 ff.) in 1. Elements related to the judicial function in general: a. The problem of the interpretation of vague and general notions/ b. The limited control of policy decisions/ c. The issue of judicial restraint, and 2. The particular position of the Court: a. National sovereignty v international human rights protection (The European Convention in international human rights law)/ b. The European system is derivate from and subsidiary to the national system/ c. Elements of interpretation in the supranational context (autonomous and evolutive interpretation)/ d. Cultural relativism of human rights (generally and cultural differences among the contracting states of the European Convention.

We may say that the margin of appreciation is an extremely effective way of avoiding inter-European criticism.

absolutely contrary examples have been used), or a comparison may even be rejected by changing the object of comparison.

The Court seems to rely also on previous comparisons in its case law. Furthermore, cooperation between different institutional actors (the Commission, Court, and governments) in the matter of comparative studies is visible. However, as we have noted, explicit comparative analysis rarely takes place in the Court's justification. And if it does, the reference is highly synthetic.<sup>1560</sup>

Compared, for example, to the European Court of Justice, the comparative discourse in the European Court of Human Rights is much more pluralistic. It demonstrates<sup>1561</sup> how many different types of comparative interpretations it is possible with regard to the same subject matter. This brings some kind of clarity also to the substantive issue discussed, and seems to lead to an discursive type of evolution within the case law. However, it has also been claimed that the role of comparative law in the work of the Court is systematically less important in the work of this Court.

"International comparison" (comparison of international measures) is often made as well. A special feature, related to this, can be noted. It looks as if the relationship between Human Rights Convention and other international instruments relates to the extension of legal sources in interpretation. *E contrario* argumentation by another international measure has supported the inclusion of the travaux préparatoires within the practical legal sources of the European human rights system.

From the normative point of view, one can make following conclusions.

As mentioned, it seems that comparative observations function, in general, quite conservatively. Both disparity and generality support usually the existing case law and the existing stage of legal development in national systems. The only arguments are breaking this feature are the arguments by "European supervision", some kinds of generality in more liberal attitudes, or a liberal tendencies. Furthermore, the balancing of general and individual interests may also support a progressive interpretation of human rights. Moreover, observations concerning the nonexistence of comparable law, or an observation on some kind of general sociological tendency also seem to have less conservative effect.

... **Interviews.** On the basis of the interviews one can make following remarks.

Basically, the material for the comparative studies may be found in the institutions' archives.

The legal basis for in depth consultation of comparative material could be found in

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<sup>1560</sup> Also, van der Meersch, W.J.G., 1980, pp.321-323.

<sup>1561</sup> Van der Meersch, W.J.G., 1980, p.321.

the rules 7:3 and 54:3 of the General Rules of Procedure of the system. The obligation to explicitly state reasons can be based on the Convention ("*judgments shall be pronounced publicly*").

Usually systematic comparisons are not made, because if the case is in accordance with the "pattern" of the Courts case law, it is resolved on this basis. This means, basically, that where there are some differences in European practices, or there is no old case law, comparative studies are made.

External experts are not really used in this system. Sometimes statements have been requested from the UNHCR (United Nations High Commissioner for Refugees), and observations have been made concerning reports of some non-governmental organizations such as Amnesty International. They have given sociological and political perspectives to the systems studied.

The use of comparative law in the European Commission of Human Rights seems to depend on the nature of the case. The basic idea seems to be the finding of the common European standard. If there have been similar types of cases, the comparative material may be already there. However, in these types of situations the information may be checked again. In a "new" case, comparison is usually made.

Comparative observations can arise likewise in a very informal way in the internal workings of the Commission (internal consulting). This is connected to the information deriving directly from the people in the administration. In some difficult cases, the secretary and the members of the Commission can discuss comparative aspects. There is a possibility to make more thorough studies.

The comparative aspects referred to in the assembly meetings also arise spontaneously and in fragmentary form as members seek to explain certain characteristics of a system. This is often based on the personal knowledge of the member.<sup>1562</sup>

If some studies are made, these are included in the report of the rapporteur, which makes it in collaboration with the secretary<sup>1563</sup>. This is basically confidential material. No official reports are published on these studies, unless there is a separate reporting system established. However, these latter types of studies are not connected to any particular case in question. They are provided by the Legal department of the Council of Europe. They are used mainly to prepare recommendations and so on. There is a separate research Unit in the General Secretary. Extensive comparative studies by the Secretary have been made only couple of times during 90's.

The rapporteurs and members of the Commission do not usually undertake systematic studies themselves. However, sometimes they have made such studies individually. In

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<sup>1562</sup> See in tis respect, van der Meersch, W.J.G., 1980, p.318.

<sup>1563</sup> The rapporteur is one member of the Committee. Linguistic abilities often determine the choice of the rapporteur. The level of cooperation between the secretary and the members varies.

the discussions in the Commission there might be comparative aspects taken up based on the information provided by each member.

The comparative information seems to be restricted to legislation and case law. The comparisons are not politically or sociologically oriented. The idea is to find the general legal situation in various states. Other information, such as that concerning the circumstances which prevail in the country, may be included, especially with regard to difficult case. This, it was mentioned, has been the case, for example, in questions dealing with the protection of private property.

The comparative information is usually related to the countries of the Council of Europe, but there have been cases, where, for example, aspects of Chinese law have been observed. European Community law is not directly consulted, though states may often use it in the course of reasoning.

Basically, there is no rule as to the extension of the study. The real constraint seems to be that of time and resources.<sup>1564</sup>

It was claimed that parties very rarely present comparative observations in their preliminary arguments. There can be references to Courts cases, where comparative information is mentioned. However, independent studies are not usually presented. Occasionally, states present such studies, claiming mainly the generality of their system.

One could claim that the comparative studies, presented in dissenting opinions, are also part of the internal discourse of the Commission and the Court, and that comparative aspects have an important role in these internal discussions. On the other hand, the fact that the comparative observations are made in dissenting opinions is due to the fact that a member of a Committee is more free to express his opinion<sup>1565</sup>. The main opinion is usually a compromise, and the decisions follow a particular form. It is difficult to produce common comparative statements and conclusions.

Sometimes, even if the comparative study is made or comparative material discussed, it is not reflected in the justifications<sup>1566</sup>. It was maintained that sometimes they are revealed, especially when very new interpretations are involved<sup>1567</sup>. The reasons for the absence of comparative analysis in the justifications may be found in the general comparative nature of the system. Even if the comparative observations are there always as a background element, they are not seen the central to the justification.

As to the use of comparative observations in the justifications there seem to be no principled obstacles. The main reasons for the lack of open justification seems to be in the lack

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<sup>1564</sup> Usually the case is dealt within 4-5 years. There is a priority system. 11 months is usually the minimum delay.

<sup>1565</sup> This seems to apply also to the Court.

<sup>1566</sup> eg. Criminal processes against a juvenile, Article 6, comparative study made, but not reflected in the decision.

<sup>1567</sup> Mentioned, case on the negative right to unite, the Article 1.

of time and in work pressures. Even if extensive studies in depth might be interesting and illuminating, there are no resources available to make them. On the other hand, parties could produce such a form, if they see in it a possibility for a convincing.

It seems that comparative perspective is necessary. This information reveals the practices of the systems, and changes in societies. This way one can achieve a certain "objective" standpoint with respect to the changes. Difficult cases are often resolved taking into account comparative aspects<sup>1568</sup>. However, it seems to be difficult for the person working in the system to say how the comparative studies determine the results of the case.

It seems that the Committee's main task is to address arguments to the parties, and consequently, states are the audience of the decision. The formulation of the decisions seems to be based on consistency. The principles of interpretation in general derive from the Vienna Convention.

It must be also mentioned that there is a possibility for "intervening" (Article 37 of the Working procedures). Furthermore, the Secretary of the Council of Europe can request reports from the Parties to the Convention on the situation in their legislation<sup>1569</sup>.

The Court, on the other hand, seems to follow social and legal development in Europe. Comparative research ought to be undertaken but the resources are not available for this scale of analysis. The comparative reasoning in the Court seems to be often based on the members' personal knowledge on the legal system, usually with respect to his own system, apart from the information provided by the parties and the Committee and its Secretary.<sup>1570</sup>

It was maintained that comparative aspects come into play when there seems to be a need to change the previous case law. This takes place in very rare cases due to the fact that case law is extensive and developments are slow<sup>1571</sup>. The members of the Court have an occasion followed closely development in the United States. However, no systematic studies are produced on a continuous basis.

Other Treaties can also provide the context for a comparative study. Usually no external systems other than United States system are studied.

The comparative material concerning specific matter would be used if it existed. Indeed, some judges have been already expressed the need for comparative information<sup>1572</sup>.

The Court seems to argue mainly to the parties of the case, whereas dissenting opinions seem to be directed more toward the general public.

<sup>1568</sup> Case on Article 10 (source of the newspaperman).

<sup>1569</sup> Article 57 of the Convention.

<sup>1570</sup> See also, van der Meersch, W.J.G., 1980, pp.321-323.

<sup>1571</sup> Mentioning a case dealing with the problems of transsexual persons.

<sup>1572</sup> Pekkanen, R., On the evolutive interpretation of the European Human Rights Convention [Euroopan ihmisoikeussopimuksen evolutiivisesta tulkinnasta]. In: Lakimies, 1991, p.360.

### 3.3. Some general conclusions

**General remarks.** It can be observed that comparative studies made in relation to systematic preparatory work are strictly legal in all legal orders<sup>1573</sup>. No analysis of sociological or other material of this type was used in any of the courts. However, in the Italian Constitutional Court, the systematic studies seemed to be also connected to the contemporary political discussion of the issue. This was evidently also the case with regard to the "inspirational" consultation of other systems. This type of information on the context is based on the individual knowledge possessed by the person in the administration.

On the other hand, in national systems, the use of comparative law information seems to be rare. Especially for the Italian and French<sup>1574</sup> Supreme Courts, the idea of comparative studies seemed to be fairly alien.<sup>1575</sup> In contrast, in Nordic systems comparative law was used and studies occasionally made. In the English Appeal Courts the use of comparative law is seen to be quite inspirational. However, due to the characteristics of the English system, the comparative observations are provided usually by the parties, and they are considered often explicitly by the judges. As mentioned, in the Italian Constitutional Court the study of comparative law was quite systematic, though the system was at the developing stage.

Furthermore, the use of comparative law does not seem to be strictly systematic, and it is not based on any generalizable characteristics. There seems to be no general "European" standard for the use of comparative observations in different national courts. It is highly dependant upon the discursive forms internal to each system. In regional organizations, especially in the European Court of Justice, the use of comparative law is more systematic than in national systems.

One can note that comparative information is consulted, where an 'international' or more general element is embedded within the case. In this sense, one could claim that national courts use comparative law in cases, where there is a practical or legal connection to the regional or international organizations. However, this is not necessarily so. The interpretative processes build into the regional systems, and the direct applicability of the decision in these systems, seems, on a contrary, to reduce the use of comparative law information, even if the claim was that the internationalization and integration of law may increase the need for comparative law. This does not, however, seem to be the case in the English courts. They tend to compare both international and national solutions in the course of their argumentation.

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<sup>1573</sup> It has been claimed, in the context of Community law, that the studies in each case are very concrete (Pescatore, P., 1980, p.345).

<sup>1574</sup> The Cour Constitutionnel was not studied, but from the information before the Italian constitutional court, one may assume that there is some use of comparative observations also there.

<sup>1575</sup> However, it must be noted that the extreme brevity of the justifications can give a misleading impression about the internal considerations. No indications are found either in the French scholarship (See, Interpreting Statutes, 1991).

On the other hand, the fact that the use of comparative observations was quite *ad hoc* supports the argument that they are used in situations where there are certain fundamentally problematic issues at stake.

It is nearly impossible to make observations on the issue of the extent to which comparative material is used inspirationally in order to find arguments for internal or external justifications. Furthermore, the true extent of the use of the comparative law in internal discussions is also behind the scenes. However, many interviewed persons stressed the fact (likewise in the European systems) that those, who have personal experience and knowledge from their "external" work, use these comparative observations at times, both within internal discourse of the court and in "coffee-table" discussions. This use seems to be connected to their studies, visits to conferences, personal reading etc.<sup>1576</sup>

The fact that the comparative observations were strongly based on the personal endeavour of the individual actors is supports the idea that comparative observations are used as instruments to find arguments for different types of institutional discourses.

One key difference in terms of personal orientation was found between those judges who were professional researches and those who were not. The role of comparative observations was thought of more frequently by the judges who are engaged with academic tasks and have an academic interest in the subject. Furthermore, those who worked on the preparatory stages of the case had considered more carefully the role of comparative observations.

In certain systems there are tendencies to look toward certain systems. The judges in the major European countries are oriented towards other major European legal systems (eg. England toward France and Germany, Germany toward France etc.). The "minor" European legal systems do not seem to really appear as sources for the considerations. However, in some cases the observation depends on the substance of the matter.<sup>1577</sup> This means that there is some *a priori* knowledge of the rules of that system, which has been discussed in public. In regional systems, studies seemed, at least formally, to take into account all systems of the Member States. However, this idea is not really supported by the analysis of the justifications in these systems. Restrictions seem to be ultimately extremely value-based and selective. The orientation may depend on many things. One thing their particular cultural point of view<sup>1578</sup>. Another is the systems specific legal-historical connection.

However, the obstacles for the orientation, in national legal systems, do not seem to differ greatly from each other. The basic problems were seen to be concerned with linguistic

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<sup>1576</sup> On this, see Markesinis, B., 1993, p.622 ff.

<sup>1577</sup> There seem to be some cases, in which abortion cases from the Danish system were considered as a source of inspiration. This seemed to be based on the extensiveness of the discourse on the subject there.

<sup>1578</sup> Also Bredimas, A., 1978a, 1978b.

competencies. The existence of resources (and time) seemed also to be a major obstacle.<sup>1579</sup>

There seems to be always some kind of a legal cultural sphere of operation, which is not abandoned. No *a priori* obstacles seemed to exist for the examination of more distant legal systems. Still, these systems were not studied. The main concern seemed to be related to the legal development of in European states and the United States. Japan was mentioned, especially with respect to competition law. This may be also due to the extent of the commercial relationships (this sense attempts to justify persuasively those cases involving an interest of a party coming from this country).

The premises in English law, most likely because of its commonwealth connections, differs from other European systems considerably.

**Some analysis.** Different types of formulations of comparative reasoning can be identified. There has been argumentation, for instance, concerning "neighbouring states", "leading legal systems", "culturally similar" states, "surrounding states", "over a large area", "tendencies" etc., and many more listed in the conclusive chapter on the European human rights system.

Different types of restrictions make different approaches possible. A more ideological-functional approach makes larger adoptions possible. On the other hand, a more historical approach restricts the adoptions only to those features which derive from purely historical unity<sup>1580</sup>.

Why is it so that in state systems comparisons are not generally used as arguments?

A major factor could be that national courts try to maintain their internal political "formal" integrity. National law is the main feature of this formal political integrity. Another law cannot be used openly, for fear it would jeopardise the nature of the law as a basic element of this political integrity ("constitutionalism", etc.). On the other hand, one could claim that this is simply

<sup>1579</sup> There exists, for example, a Convention by the Council of Europe on Information on Foreign law (1968, Eur.T.S. no. 62, Council of Europe, European Conventions and Agreements II (Strasbourg 1972), Additional Protocol No. 97 (1978). It is a convention on the "horizontal" *ad hoc* information-providing.

The Convention applies to civil and commercial law and to the law of judicial organization. The request can be made by judicial authority, and only where proceedings have been instituted. This is limiting the scope of its application. The Additional Protocol has extended it to apply also to criminal, criminal procedure, and legal aid and advice. The Additional protocol extends the right to request information also to authority or person acting on behalf of a person within official systems of legal aid or advice. Furthermore, the request can be made also where the institution of proceedings is envisaged.

The application can be extended by the parties. The Convention has been ratified also by other states than by European Council states.

Similar types of provisions on information-providing can be found in many European Council Conventions in the field of tax law, penal law, public and international law.

Furthermore, the application of the norms in this Convention has possibly changed due to the internet and databases. In fact, a convention on the database-keeping would be needed.

Regarding the idea that these type of Conventions do not have an effective application, David, R., 1981, p.196, Legeais, R., 1994, p.353. David maintains that basic knowledge have to exist in order to be able to send questionnaires, for example (ibid.). On different information sources, ibid. P.197 ff.

<sup>1580</sup> Kisch, I., 1981, pp.165-166.

based on the fact that the national discourse, even if sometimes analytically restricted, is linguistically the only sensible approach to law.

Consequently, can we say that in those systems where the comparative arguments are used, the political integrity of the system is not based on a formality of law? Or, is political integrity through law somehow something different, and consequently, the idea of formality thus also differs?

In the English system, there seems to be a tradition of using "foreign law" in justifications, whereas in many "constitutionalist" systems this type of use does not appear, at least not openly. The concept of law, in a functional sense, seems to be different. We could claim, for example, that in the English system the institutional and historical interpretation functions in guaranteeing legal-political integrity. This is not only based on the positive form of law. This type of national system we can call "discursive" and not legally political in a strictly formal sense. The argumentation is not necessarily restricted on the basis of some national systematic "legalistic" premise. At the same time, it seems to stress the discursively autonomous nature of the adjudication (i.e. autonomy from other autonomous institutions within the system). This seems to be the feature of the European system of human rights too because of the discursive elements in its procedural rules.<sup>1581</sup>

Finally, we may observe that in systems where comparative law has been defined explicitly as a source of law, and its bindingness is *a priori* defined, this seem to result in its non-analytical use. Namely, the fact that the comparative generality has been legally accepted as a legal premise makes it possible to approach legal justification by referring directly to the general principles without making any contextual analysis in a given situation.

Next we will discuss some "hard cases" within European level systems. These cases deal with the forms of political and economic sovereignty from the point of view of European law.

#### 4. "Hard" cases and the comparative limits of European law

**Introduction.** We have already noted, how traditional horizontal comparisons are related to the basic legal constructions and principles at the supra-national level, they are frequently connected to the tradition in international and regional systems. However, these comparisons are based on some traditional conceptions of legal sources of legal arguments. Traditional comparison includes only the traditional structures of the legal systems' sources such as rules, cases and limited interpretations of that society according to the traditional standards of reasoning.

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<sup>1581</sup> This may change, to a certain extent, when the establishment of the new single Court of Human Rights is fully actualized. Changes discussed in the Human rights information bulletin, No.41, an update on human rights activities within the Council of Europe, July-October 1997, Council of Europe, p.76 on the action Plan and the Protocol No. 11 to the European Convention of Human Rights. These changes came into force at the end of 1998.

The alternative approach, perhaps more profound and more "hard case" related comparison is involved when we arrive at on the frontiers of the modern European legal order, in social, philosophical, practical, and legal terms. Here the comparative argument extends towards concrete sociological, moral and philosophical-practical argumentation, which tends to deviate from traditional comparative argument.

The following cases are concerning, it seems, with the internal problems of European law. The question is about the issue of respective competences between the supranational, national, and other types of traditional forms of organization, as decided on a legal basis by a supranational body. The question no longer seem to be about the "easy" case of comparative "construction", a confirmation of the existence of a traditional legal norm, and the need to convince an international, regional, and national legal audience on this fact. The question seems to be instead about the competence of an institution and a legal system as such, a choice of "law", or rather a "legal system".

#### 4.1. Value-based comparative reasoning

- 4.1.1. "Hard case" I: blasphemy, no general conception of blasphemy, "no uniform conception of morals", morals as *tertium comparationis*, integrity of the legal system, the argument of comparison by opposites, acceptance of the "margin of appreciation", "common supervision", "common understanding of images", "no general functionality of religion"

**General remarks.** The *Otto Preminger Institute* case<sup>1582</sup> in the European system of human rights dealt with freedom of expression. An Austrian association had been announcing a series of public showings of a satirical film of an Austrian artist, with a religious subject matter. Criminal proceedings were instituted, and the film was seized and later forfeited. The criminal proceedings were, however, ultimately dropped. On the other hand, although the forfeiture and seizure were originally effected in the Tyrol area, their application was extended, permanently, to Austria in general.

The applicants argued that the seizure and the forfeiture of the film contravened Article 10 (freedom of expression) of the European Convention of Human Rights.

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<sup>1582</sup> A 295-A (1995) EHRR 34, 20 September 1994.

**Context of justification.** The Commission found a violation of the principle of freedom of expression<sup>1583</sup> based mainly on the ideas of "artistic" methodology, limited publicity, and the general applicability of the restrictions in Austria.

In finding no violation of freedom of expression in relation to the forfeiture (but not the seizure of the film) and in defining the scope of the "margin of appreciation", three members of the Commission argued with the words of the European Court of Human Rights in the case of *Müller*<sup>1584</sup>:

*"With regard to "morals" the Court noted that there was no uniform European conception: the view taken of the requirements of morals varies from time to time and from place to place, especially in our area, characterized as it is by a far-reaching evolution of opinions on the subject. By the reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the 'necessity' of a 'restriction' or 'penalty' intended to meet them".*

What the Court in *Müller* and the members of the Commission in *Otto Preminger* analysed was the "common morality of Europe in comparative terms. However, they found that no such uniform concept exists.

This "disparity" of "European morality" was based on differences in "time and place" (geographical and historical perspectives), which, according to the Court, is typical to "our area" (socio-philosophical argument).

On the other hand, the "margin of appreciation" granted to the Austrian Courts was based on the idea that the Austrian Court, or rather judges, function or work in that particular culture where the "forces" (environment or culture) of the society are seen or experienced more "authentically" (phenomenological argument). This seemed to be based on the fact that the contact with these "forces" was "continuous and direct" unlike the contacts with international judges. There was a premiss that the factuality surrounding the normative decision-making can better be analysed by a person living in direct contact with that cultural sphere.

The members of the Commission continued:

*"It is out of any proportion as an attack against religious feelings and the common understanding of the image of Jesus Christ prevailing in countries, where the majority of people belong, at least formally, to the Christian religion, an image which has prevailed over centuries in objects of art and in the public life of the society in the Tyrol. The presentation of the Jesus Christ in the film as announced would have violated the rights of others who believed in Jesus"*.

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<sup>1583</sup> Seizure: nine to five, forfeiture: 13 to one. Similar suggestions in relation to the announcement were made by the Austrian Advocate General.

<sup>1584</sup> See dissenting opinion of Mr Ercamora, F., Weitzel, MM.A., Loucaides, L., case *Müller and others v Switzerland*, A/133 (1991) EHRR 212.

The following argument was, in other words, based on the comparison of religions (comparative religion argument). This was backed up by the idea of the historical continuity of religious ideas and historical religious culture. This represented kind of integrity of religion as a cultural image, and the role of integrity of religion as a social phenomenon. Furthermore, this was backed up by sociological statistical argumentation. Finally, it involved the assertion of the right to the inviolability of the religious sphere.

The same ideas appeared in the "phenomenological" and value-based argument of another member of the Commission<sup>1585</sup>:

*"Religion does not play the same role in every society in Europe. The protection, which a State may, or must, grant to a religion therefore varies from place to place. Much should be left to the discretion of the national, or even the local authorities."*

In both these opinions, the idea of "disparity of morality", and the authority deriving from it is connected to the disparities of geography and history, which, on the other hand, is a legitimization of the authority of a "social-systemic" national judge to make authoritative decisions.

Surprisingly enough, at the same time, the comparative generality of religious understanding was found in the countries having, "at least formally", a common Christian religion. According to them, there was a comparatively common understanding of this matter in European institutions, which gave to them the possibility of granting competences to the national judge in this sphere and approve the actions taken by them.

It seems that the value-based phenomenological understanding of this common religion, according to the Commission members, made it possible for European institutions to understand the affront to religious feelings and to maintain that action by national authorities was acceptable. On the other hand, the lack of any common morality resulted in the "incompetence" of the European institutions to make such decisions, and this forced them to leave the decision-making regarding the collision of various religious, moral and legal ideas to the national judge. According to these members of the Commission, the work of the artists and the publisher of the work would have disregarded the others religious rights in that area. From this perspective it appears as if the members established another right, namely, the right to the protection of religious feelings. This collided fundamentally with the freedom of expression.<sup>1586</sup>

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<sup>1585</sup> Mr Schermers, H.G.

<sup>1586</sup> This became explicit in the dissenting opinion of Mrs. Liddy:

*"...led me to the conclusion that the seizure answered a pressing social need for the "prevention of disorder" in a locality at the relevant time, rather than being necessary for the protection of the "rights of others"."*

Similar ideas can be seen in the dissenting opinion of some judges of the Court (Pekkanen, Palm, Makaczyk):

*"The need for repressive action amounting to complete prevention of the exercise of freedom of expression can only be accepted if the behaviour concerned reaches so high a level of abuse, and*

On this basis, the members of the Commission thus came to a conclusion to allow a "*margin of appreciation*".

The comparison undertaken by the members was quite extensive in sociological and philosophical terms. They strived to take into account every possible aspect of society in their decision-making, all the possible ingredients of comparative law. They presented different levels of social life in analysing the situation comparatively. However, their analysis was strongly value-based. They did not attempt to really analyse the situation in strictly legal terms, but relied, instead, on the phenomenological and holistic observations which derived from their own cultural background. This way they arrived at the appropriate level of restriction upon the freedom of expression against religious feelings, and established their "European" authority of the case.

Another type of analysis was related to the analysis presented by one of the same members of the Commission:<sup>1587</sup>

*"I find it difficult to accept a general European notion of blasphemy. Like many other words this word should be read in the context of the cultural tradition of the community concerned. It may well be that the same expression is blasphemous in one community, and not so in the other. I agree with the majority of the Commission, that Article 10 is applicable to the case, but in my opinion Article 10(2) justifies the interference. It was prescribed by law and it served the legitimate aim. As to the question whether it was necessary in democratic society opinions may differ... In my opinion the circumstances of this case sufficiently justify them to so conclude."*

This type of comparative argument studies only the legal generality of the concept of blasphemy, which was seen, consequently, to be differently understood throughout Europe. In these circumstances, the competence to decide the case rested on national authorities (a type of subsidiarity), and no violation was thus found. This argumentation also remains situational, and does not rely on any holistic societal analysis.

**Justification.** In analysing the forfeiture and seizure of the film and what constitutes a necessary restriction in a democratic society, the Court of Human Rights used a comparative argument in the following way in determining the content of the principle of "*margin of appreciation*":

*"As in the case of "morals", a concept linked to "rights of others", it is not possible to discern throughout Europe a uniform conception of the significance of religion in society<sup>1588</sup>; even within a single country such conceptions may vary. For that reason it is not possible to arrive at a comprehensive definition of what constitutes a permissible interference with the exercise of the right to freedom of*

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*comes so close to the denial of the freedom of religion of others, as to forfeit for itself the right to be tolerated by the society."*

<sup>1587</sup> Mr. Schermers, H.G..

<sup>1588</sup> The Court referred to the *Müller* case (1991) EHRR 212.

*expression, where such expression is directed against the religion of others. A certain margin of appreciation is therefore to be left to the national authorities in assessing the existence and extent of the necessity of such interference."*

The Court's argumentation was also phenomenological. It took for granted, without any real analysis, the idea of the disparity of morals and religious feelings.

However, we may say that the Court, to a certain extent, defined more clearly the content of the idea of "morals". It maintained that in the case of morals, we are speaking about a relationship of two rights. In other words, in case where morals are involved, the right has to be examined in relation to this other right. This supported the idea presented by three of the Commission members.

On the other hand, the extension of the "*margin of appreciation*" was to be related to the evaluation of the "circumstances". This seemed to relativize strongly the norm underlying the decision. It seemed as if the importance of the freedom in question would demand that the solution be different.<sup>1589</sup> In the end, the substantive solution was based also on the idea that the *national judge was better position to decide than the international judge*".

According to the Court, the forfeiture and the seizure were legitimate, and no violation of the freedom of expression had taken place.<sup>1590</sup>

**Some further analysis.** In this case, the European Institutions argued by reference to "circumstantial" arguments (cultural, social, and phenomenological). By introducing these circumstantial arguments, the Court confirmed that the "meaning" of the same forms of human rights principles may be different throughout Europe.

This case could be analysed in many ways. One could claim that the fact of a Catholic "majority" ("*in the Tyrol 87%, in Austria 78%*") and the desire to protect the religious and social subsystem, with the help of a "right to religion" argument, were simply means of maintaining the subsystem as a functionally accepted subsystem in the society. As the Court maintained, the question is only a "*social need for the preservation of the religious peace*". In this way there was an attempt to maintain the general functionality of the social system.<sup>1591</sup> In this sense, the analysis, at first sight, reveals deep historical, philosophical and social understanding of the roots of the cultural conflicts in that particular area.<sup>1592</sup>

However, one may make another type of legal-functional analysis of the situation.

It looks as if the criticism of the artist was directed against a social institution in

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<sup>1589</sup> This referred, in this regard, to the case of *Informationsverein Lentia and others v Austria A/276 (1994) EHRR 93*.

<sup>1590</sup> The Court voted six to three.

<sup>1591</sup> Mrs. Liddy.

<sup>1592</sup> The statistical argument was, naturally, very persuasive - especially in relation to the Austrian audience.

general. This critique was not based on any factual (at least not explicit) violation of anyone's rights in any concrete sense (whatever had happened in the past). Consequently, we may see the critique of the individual as a functionalist critique against the prevailing institutionalized religion and the church. As it was claimed in the description of the work in the announcement, religion (and the church) may have an oppressive function in society. Concerning the distributor of the film, no intentions other than commercial and discursive ones can be discerned.

Because the critique seemed to be directed against this religious "system" in society and was not related to any "real" oppression, the artist did not produce any indication or examples of the oppressive functions and acts directed against him or against any other person in any concrete sense. If there were some illustrations of this nature, the examples remained unclear. The functionalist critique in the work seems to remain "abstract" as in all artistic production. The critique is directed against the social institution rather than any of its concrete functions.

The normative idea in the case seemed to be that if the individual does not recognize the functionalist traditionality of the prevailing religion, and if this traditionality seems to have a rationale in this society, the functions of this entity are protected in the abstract. Furthermore, it looks like as if the national judge sees the function of this religious group as a main element in the functioning of the society, as some members seem to view it in the European institutions. These types of religious ideas are seen to be essential in maintaining the coherence of the society. This is why the integrity of the person seems to be defensible also in the terms of individual religious rights.

However, the abstract nature of the critique could have resulted also in an idea that no individuals were really harmed. In this sense, the involvement of individual rights of expression, which evidently were at stake, seemed only to constitute a protection of an institutionally established religion and a "symbolic" system.

Nor does the idea of a functionalist abstract critique fit well with the ideas of the European Court, according to which the state judge is in a better position than the national judge to evaluate the situation (because being "*better placed*").<sup>1593</sup> Namely, it is likely that national judges may be more sensitive to the discursive integrity of the system, but in this case the discourse is, in many ways, restricted. The question is not necessarily about any "vital forces" of the society in any dynamic and discursive sense.

Furthermore, against this background, it is difficult to understand, why the Austrian courts, and some members of the Commission, seem to maintain that the functionalist critique oppresses also the religious rights of some individuals in that particular religious society, namely, a "*right to freedom of religion and conscience*". On the other hand, the "*religious feelings*" argument reduces the question to the subjective level without any societal analytical aspects.

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<sup>1593</sup> However, the prevailing forces are, in terms of this idea, connected directly to the legal institution.

Consequently, it could be maintained that the Court compares two functional systems, the Austrian and European human rights one. It recognizes the extension of the religious functional system ("in the Tyrol area", and Austria in general), and concludes that religion has a function in that particular system. However, the problem is that the basic principle of the European Court seems to be the idea that a functionalist critique against a culturally institutionalized social group cannot be made in such an abstract way, and nor can it be made empirically. In other words, the protection of this form of social grouping and religious feelings was granted on a quite abstract basis. There was a strong idea of this type of religious institution as an historical "fact", as some members of the Commission suggested. The idea comes close to the protection of a religion as such, and to the protection of a social grouping and its functionality in general. This functionality of that particular religion was seen to be rational within society. The abstract criticism of this prevailing form of functionality was seen as "weaker".

The decision seems to establish a very obscure religious right based on the historical-rational functionality of a grouping in society. This right seems to override the individual right of expression. It seems to move in some meta-level of European legal culture.

**"Morality" and procedural polycentrism.** In the context of this case, there seems to be some kind of moral autonomy of a national legal system. What is remarkable is also the national-religious connection established in this case. Reasoning based on legal coherence is not applied, but the normative system is contrasted and compared based on the non-comparability of its social autonomy. The national system is analysed with respect to highly extensive philosophical and quantitative sociological terms. The analyses go through a variety of socio-philosophical questions. The comparison constructs and maintains, in a way, some static and permanent systemic identities based on certain societal functions. It confirms also the cultural particularities.

One of the central explicit arguments appearing in this case is the idea of '*societal peace*'.

It is quite extraordinary that societal peace is used as an argument in this case. The conflict between societal actions evaluated in the case may cause, according to the European judges a breach of the societal "*religious peace*". Furthermore, even if the international judges do not seem to be competent to decide the case, they seem to be well aware of the conditions of the society in question.

The claim based upon the disparities which exist between legal and social systems based on morality argumentation has certain characteristics.

First of all, the claim of moral non-comparability establishes morality as a valid legal argument. Secondly, the claim of "moral" disparity between social systems, as a form of "comparison by opposites", is an extremely instrumentalist type of argumentation. The law, in this latter sense, is seen as an instrument of morality, which, nevertheless, is divergent. The

problem is, naturally, who's morality we speaking of ?

The non-comparability of morality is a form of argumentation, which refers to the basic "social life -formative" values of the system, but for that matter also to its recognition. It appears as if there is an establishment of the logic that as no common morals exists, particular morals prevail. To a certain extent, the case recognizes a polycentric form of European law, where the intensity of the national legal system, in representing certain normative standpoints, seems to define the scope of "European law".

In theoretical terms this phenomenon looks interesting. Argumentation is a kind of "saving operation" of the state paradigm of law prevailing. Namely, when the supranational institutional system is maintaining that the particular state legal system can keep its method of regulation without regarding that type of regulation universalizable norm (or "Europeanizable" norm),<sup>1594</sup> it looks as if the Court similarly maintains that the national system is not universalizable (or "Europeanizable") as a legal system. This is, theoretically, a step out from the paradigm of (European) law! This would put the constitutional traditions under a heavy pressure.

This problem is solved by the Court (or by the majority of judges) by explaining the deviance as to be based on particular nature of European morality. Here the question of universalizability of a state paradigm is maintained by associating the universalizability of a state system to the moral evaluation. The conflict between the state paradigm of law and the particular state system, in abstract, is solved by moral argumentation.

Moreover, because this morality seems to be particular in Europe, it does not mean that morality as such would be particular. Consequently, here it is European institutional.<sup>1595</sup>

The strategy of some other judges was to analyse the problem as a question of correct interpretation of a legal form, while some others considered it to be a matter of policy. I think this gives a quite interesting example of the difference conceptions of law in Europe.

Finally, one cannot avoid making the observation that the approach by the Court appears quite absurd<sup>1596</sup>. However, it does seem to be adapted well to a polycentric idea of international and regional law, where the decision-makers in adjudicative processes seem to be the representatives of legal discourses. By this polycentrism any political "burden" of the international, regional, and more particular community is avoided. The international community

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<sup>1594</sup> This concerns also the dissenting opinions.

<sup>1595</sup> In the context of legal theory, this operation transfers the question to be about a conflict between the universalizability of a legal system and universalizability of morals (in legal context). In other words, this European institution is transforming the legal discussion to be a moral discussion by making the distinction between particularity of the European morals vs. morals in general. This way one maintains the universalizability of the state-paradigm of law and the morality as the basis of this paradigm.

This strategy defines one idea of the state paradigm of law.

<sup>1596</sup> A question may come up concerning the moral disparity within the European system. The problem is, however, that a moral disparity arises in a philosophical sense. If we have to speak about morality in some legal-institutional sense, we could perhaps refer to ethics or custom.

is institutionally and legally declared disparate. Consequently, with these types of reasoning, any criticism from the point of view of another particular state, for example, is avoided<sup>1597</sup>.

In legal terms, the question seems to be, in the end, a matter of the recognition of the coherence of the Austrian system. Namely, the fact that three stages of court procedures maintain the solution, where the public authority actions are declared compatible with Austrian law seems to suggest that the European Court was influenced by this type of unanimity. This looks like an empirical basis for the idea of "*a national judge being better placed to make a legal decision*". The case seems to be based on a functional, legally institutional "will theory" of state law. This functionality is related to the fact that the consensus appeared in adjudicative form.

Consequently, what is really the "*margin of appreciation*"? In these terms, the "*margin of appreciation*" seems based on the fact that several levels of Court procedure agree on a certain question. Consequently, one can ask legitimately, what comes first in the European Court of Human Rights in a case; the idea of moral incomparability or the "will of the state" established in the intensity of the national courts in defending the breach of the right? Is the first determined by the second, or vice versa? Or, do we speak about absolute disagreement internal to the European institution. In the latter case at least, the reference to morality go too far. Institutional disagreement does not seem to be a question of morals.

Because the question seems to be about the lack of general moral standards, as expressed by the Court, we may perhaps assume the prevailing idea of particular morals as being determining factors, related to the intent of national legal solutions. Empirically, the problem seems to be related to the idea of the integrity of the legal system as morality, at least in the European Court of Human Rights.

We may also wonder when looking into the substance of the case, how this type of protection of "religious feelings", granted in this case is possible at the same time European society full of many forms of oppression in many other social sectors. Moreover, we can ask, whether, because of the particular nature of the case, the application of this case should be, as has been done, restricted only to that particular society. One should refrain from extending any of the analysis, presented in the case, to other social systems. In this sense, the cases of "*marginal appreciation*" related to the "*national judge being better qualified to adjudicate*" and that fact that "*no uniform European conception of morals exists*" seem to take on some kind of

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<sup>1597</sup> It looks as if it is exactly in this "turn" from the generality to particularity, where the "morals" seems to "be" in this case. It seems that morally the generality is seen to be absurd from the point of view of the particular. We go from the general traditionality to particular traditionality (in human rights).

Politically, this seems very communitarian idea. We can legitimately ask, do we have here a turn, which is typical to European Human Rights thinking at the moment. Furthermore, legal philosophically the idea seems to be related to some kind of postmodern polycentrism. As a normative idea, it is characterized by universal particularity. One may wonder how this philosophy suits to the idea of Human Rights.

normative (even strongly disintegrative) value in European law.<sup>1598</sup>

**4.1.2. The "hard case" II (*Bachmann* in the European Court of Justice): the discrimination on the basis of nationality, maintenance of the disparity of national legal systems because of the "cohesion of a legal system"**

**Introduction.** This case dealt with the question of the compatibility of the Belgian tax provisions with Community law.<sup>1599</sup>

The basic question, presented by the Belgian Court to the European Court in the realm of the Article 177 (the new Article 234, preliminary ruling), was the following:<sup>1600</sup>

*"Are the provisions of Belgian revenue law relating to income tax pursuant to which the deductibility of sickness and invalidity insurance contributions or pension and life insurance contributions is made conditional upon the contributions being paid 'in Belgium' compatible with Articles 48, 59 (in particular the first paragraph thereof), 67 and 106 of the Treaty of Rome?"<sup>1601</sup>*

Even if the main task of the Court was not to

*"make any declarations as to the compatibility of the rules of national law with Community law, ... it may provide the national court with all relevant guidance as to the interpretation of Community law, with the view to enabling that court to assess the compatibility of those rules with the provisions of Community law mentioned."*

The Advocate General based his argument mainly on the previous case law of the Court<sup>1602</sup>. However, certain interesting comparative observations were presented, which had a

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<sup>1598</sup> Some analysis of the case may be found also in Grabenwarter, C., 1995, pp.128-165. He maintains that the Court does not discuss in detail the content and the purpose of the film. Furthermore, the emphasis of the regional circumstances by the Court is remarkable, especially in terms of the use of statistical information. Basically his criticism is related to the extension of the justification.

<sup>1599</sup> Case C-204/90 *Hanns-Martin Bachmann v. Belgian State* (1992) ECR I-249, Opinion of Mr Advocate General Mischo delivered on 17 September 1991.

<sup>1600</sup> As in other cases, I will not go into the details of the facts of the case.

<sup>1601</sup> Free movement of persons workers, equal treatment, freedom to provide services, restrictions, deductibility from taxable income of certain contributions relating to the insurance of individuals, deductibility conditional on payment to an organization established in the territory where the tax is levied, possible justification of the restriction by reason of the need to safeguard the cohesion of the tax system.

<sup>1602</sup> Joined opinions of Advocate General Mischo delivered on 17 September 1991 on case 204/90 *Hans-Martin Bachmann v Belgium State* (1992) ECR I-249, and 300/90 *Commission v Kingdom of Belgium* (1992) ECR I-305.

direct connection to the results of the case. Also some premisses concerning the use of comparative law, which had been expressed in the previous case law, were restated<sup>1603</sup>.

**Context of justification.** The basic "comparative" starting point for the Advocate General, in his opinion, was that the comparative disparity of the laws in question in different legal systems is an irrelevant argument in the case. He maintained that the problems in this case relating to free movements

*"does not arise, strictly speaking, from any disparities between national laws."*<sup>1604</sup>

The question became a matter of vertical comparison between Community law and Belgian law.

However, the Advocate General made some comparative remarks, but based his observations on the remarks presented by Denmark and the Netherlands in the course of proceedings. He maintained that

*"... in those countries the tax exemption of insurance contributions was inextricably linked to the taxation of the capital created at the time when the capital is paid out. That system is regarded in those countries as a carrying over of liability to tax. The insurance companies are obliged to retain the tax at source and to pay it over to the state, to which they are liable to make such payments. Consequently, the legislation has been brought into force requiring such tax to be paid even where the policy-holder no longer resides in the country at the time when the capital is paid out'.*

and he concluded after this remark that

*"There is thus a strong temptation to conclude that the Belgian legislation is objectively justified by the need to prevent tax evasion."*

Furthermore, remarks were made on the fact that

*"In the Netherlands, where similar legislation exists, a person finding himself in the [similar] situation would be able to deduct his insurance contributions from his income tax."*

This argument was combined with the argument presented by the Belgium government on the existence of the bilateral tax treaties between Belgium and some other countries, which would make it possible to deduct the contributions in question. Furthermore, the relationship between countries with certain types of systems would have resolved the tax evasion problem. However, the tax evasion argument by the government was rejected.

Consequently, for the Advocate General, the question seemed to become a question

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<sup>1603</sup> For example 120/78 *Cassis de Dijon* (1979) ECR 649.

<sup>1604</sup> This was related to the *Cassis de Dijon* case.

of the vertical relationship between this comparative generality and the general provisions of Community law. However, the Advocate General found an unconditional violation of the central provisions of the Treaty.

**Justification.** The Court agreed explicitly with the argument, which presented comparative information regarding the bilateral tax treaties. Unlike the Advocate General, it found a justification for the derogation from the Treaty:

*"It is true that bilateral treaties exist between certain Member States, allowing the deduction for tax purposes of contributions paid in a Contracting state other than that in which the advantage is granted, and recognizing of the power of a single state to tax sums payable by insurers under the contracts concluded with them. However, such a solution is possible only by means of such conventions or by the adoptions by the Council of the necessary coordination or harmonization measures".*

The fact that the bilateral conventions seemed to be aiming at ensuring the cohesion of the tax systems led the Court to observe that the provisions of the Belgian type

*"are justified by the need to ensure the cohesion of the tax system of which they form part, and that such provisions are not, therefore, contrary to the Article 48 of the Treaty."*

**Some analysis of the case.** Basically, the problem in the case was related to the different treatment of Community actors according to their nationality (whether legal or natural persons). This may not even be, according to Court case law, indirect<sup>1605</sup>. The basic rule is that discrimination on the basis of nationality is not permissible.

Consequently, the problem in the case was that national provisions examined in the case may lead to the *"detriment of those workers who are, as a general rule, nationals of other Member States"*. This was related to the idea that usually the persons who move maintain insurance which they have had in their country of origin, especially life insurance. On the other hand, the Court concluded that provisions of this kind *"operate to deter those seeking insurance from approaching insurers established in another Member State, and thus constitute a restriction of the latter's freedom to provide services."* In this sense, the legislation discriminates also against legal persons of this type.

The idea of the Belgian government was that there is no "factual discrimination", because, first of all, the question is about non-taxable income, and secondly, the idea of non-deductibility could be based on the public interest (monitoring interest, cohesion of the system). These arguments were not fully accepted by the Advocate General and the Community Court.

The Court maintained, however, that even if the basic rule was non-discrimination,

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<sup>1605</sup> i.e. *"Lead to the same result"*, Case 152/73 *Sotgiu v Deutsche Bundespost* [1974] ECR 153.

in some circumstances the decisions can indirectly discriminate against nationals from different countries, especially in the field of tax law<sup>1606</sup>. However, this type of argument cannot be the basis of the decision as such, but the distinction between different nationals must be related to the cohesion of the legal system.<sup>1607</sup>

The introduction of the idea of the cohesion of the tax system meant, basically, that there is "*a connection under the Belgian rules between the deductibility of contributions and the liability to tax of sums payable by insurers pursuant to pension or life insurance contracts*". In other words, the payments paid on the basis of the contract are taxable and the tax deductibility of the contributions paid on the basis of the contract are balanced by the taxation of the payments by the insurer.

Consequently, there is a strict "legal-economic" relationship between these two provisions. This "relativity" was confirmed by the idea that the payments, on the basis of these contracts, are not taxed, if the contributions on the basis of the contracts have not been tax exempted. On the other hand, the main objective is to guarantee the revenue of the state. In general, it seems that a legal and logical relationship between two provisions of the legal system instituted a basis for an exception from the general rule of the non-discrimination between nationals.

On the other hand, the case was established as well on the fact that a state cannot tax a company situated in another Member States. This would mean an enforcement of the tax law of one state by another state, which may generate problems (for example, the enforcement could be contested on the basis of public policy).

On the other hand, even if, or, in fact, because the bilateral conventions exist<sup>1608</sup>, the Community Court considered itself unable to establish the illegality of the provisions of the Belgium law. This was likewise based on the absence of the general Community legislation.

The Court maintained that it cannot guarantee the cohesion of individual tax systems, and that the competence remains the matter of the Member States.

**Conclusions.** What is interesting in this case is that the cohesion of the tax system can be interpreted as a feature of the legal system, which enables persons to move freely. The cohesion of the state tax system guarantees, in other words, the effectiveness of the Community provisions. The state provisions complement Community law, to a certain extent. They guarantee the free movement of natural persons, and their return to their country of origin.

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<sup>1606</sup> The Advocate General considered the case "Avoir fiscal" ( case 270/83 *Commission v France* (1986) ECR 273, para 19 (28 January 1986).

<sup>1607</sup> In the cases dealing with cohesion, the supranational system relativizes (and compares) itself with a subsystem, and gives, consequently, relative autonomy of regulation for the legal subsystem. In this case, however, the capacity for regulation is determined by the *ad hoc* nature of the situation. Any permanent conclusions are neglected.

<sup>1608</sup> i.e. comparison by opposite.

However, the case also maintains the possibility that life insurance etc. is contract with companies of one's home country. It does not encourage the taking of insurance of this kind from the country, where the work is done.

In this sense, it also encourages national corporate structures, which are based on long-term financing.

To conclude, the comparative argumentation undertaken by both Advocate General and the Court, was strongly influenced by the "tax cohesion" argumentation provided by the states taking part in the procedure. These arguments were "legal" in the sense that they concentrated strongly on the maintenance of the internal balance between different provisions of the revenue laws. The state parties presented both observations on their systems, and, for that matter, comparative information.

On the other hand, the Court used, as a direct justification of the "cohesion" principle, the system of international bilateral treaties. It seemed to be possible to use a comparison of international level treaties in interpreting the extension of Community competence.

#### 4.2. **Traditional comparative reasoning: the "hard case" III (*Hoechst* in the European Court of Justice): the inviolability of home, individual protection?**

**General remarks.** The material of the case consisted of one opinion of the Advocate General, and the joined cases of the Court.<sup>1609</sup>

The (European Community) Commission had used its powers by giving some decisions, based on the Article 14(3) of Regulation no 17 of the Council of 6 February 1962, ordering various undertakings to submit to investigation, where their possible participation in agreements or concerted practices, which fixed prices and quotas or sales objectives for PVC and polyethylene in the Community, was investigated.

Five of the undertakings applied to the Court "*for a declaration that the decision addressed to them was void*". In support of their application they referred to the infringement of the fundamental right to the inviolability of the home, to the lack of reasons on which decision is based, and to formal and procedural defects. The refusal to submit to investigations had caused the imposition of fines upon the undertakings.

This complex of cases presented a type of 'hard case', where the question related to the relationship between the economic actors and the legal authority, the latter attempting to

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<sup>1609</sup> Joined cases of 46/87 and 227/87, *Hoechst AG v Commission*, (1989) ECR 2859, 85/87 *Dow Benelux nv v Commission* (1989) ECR 3137, and 97, 98 and 99/87 *Dow Iberica sa, Alcludia sa and Empresa Nac el Petro eo sa v Commission of the European Communities* (1989) ECR 3165, and the opinion of the Advocate General Mischo delivered on the 21 February 1989 (1989) ECR 2875.

find out the premisses of the former's economic activity. The question is fundamental. Economic strategic activity is based on relatively closed system of information, and secrecy regarding some internal functions. Furthermore, private interests and undertakings' interests might coincide. The actions taken by private actors can be based on premisses, which are not accepted by the authority. The task of the authority is to secure the interest of the individuals and the economic community as a whole. There is a fundamental collision of interests.

The interesting point comes up, in other words, where these interests coincide in the form of Commission investigations of the fundamental documents of the economic actor or in the order to submit oneself to these investigations. The principles, law, and their interpretation concerning this collision are put in a discursive manner, which includes all possible arguments supporting the correctness of the decision. From this analysis one can note, how the various comparative aspects are taken into account, and how they function in the process of justification.

Furthermore, the difficult nature of the case derives also from the fact that the case is a "first" of a kind, a case on the inviolability of home claimed by a legal person. No analogous cases have arisen in the history of the system. For that reason, to be able to establish "doctrine" or a "precedent" the Community institutions have to establish reason its decision firmly on the basis of strong and general arguments<sup>1610</sup>.

**Context of justification.** The Advocate General started the explanation of his opinion by explaining his comparative approach:

*"After establishing on the basis of a study of the national laws of the Member States, the European Convention on Human Rights and the Court's case-law that undertakings have a fundamental right to the inviolability of their premises, I shall consider whether that right is infringed by investigations carried out on the basis of the abovementioned provisions."*

The Advocate General explicitly maintained that his approach had to be systematically comparative.

The party to the dispute, the company Hoescht, relied on the fact that *"even voluntary submission of business documents in order give effect to a decision ordering an investigation constitutes a search where the Commission knows neither the precise nature nor the detailed contents of the documents submitted"*<sup>1611</sup>

It claimed that the nature of the investigation was a "search" rather than an

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<sup>1610</sup> One of the striking features connected to this case is the fact that corporations really claim to be subjects to the same protection as the individuals. In previous cases, on the same subject (cases concerning such Commission intervention), no such claim has ever appeared. At the moment it seems that the corporations seem to employ such arguments in European Community law.

<sup>1611</sup> Minutes of the investigation of April 1987, cited at p. 7 of the reply in case 46/87 (see supra n 132).

investigation. This argument of the party was neglected by the Advocate General on the basis of a value-based comparative argument:

*"I cannot accept that reasoning because, as the Court will see later, in all the national legal systems there are investigation procedures which presuppose the cooperation of undertakings, in the context of which the competent administrative authority does not know in advance whether it will find information which will lead to the conclusion that the undertaking has committed an offence and, a fortiori, it is not aware of the nature of that information. Such operations cannot on that ground be regarded as searches."*

The comparative argument was overall in generality form. The interpretation of the nature of the Commissions action was based on the analogy between the generality of the state practices and the Community level.

The use of such an argument was quite natural, because the term, used by the party to the dispute, had to be interpreted according to the traditional legal vocabulary or even by the "common language" found in the practices of the states. A term "search" in the legal context was not seen to be strongly different in the national legal systems than in the "Community language". This way the generality of the legal-linguistic practice resulted in an *a fortiori* form of emphasis within the argumentation.

The Advocate General continued by examining the way the characterization of the documents was to be made in different systems and in different fields of law. Certain differences were recognized:

*"The duties of the Commission's officials are in no way comparable to those of officials of the national authorities carrying out an investigation in a tax or labour law matter. In regard to taxation, the inspectors consider very specific categories of documents, namely accounting ledgers and invoices for purchases or sales whereas, in relation to labour law, it is essentially pay-slips and personal files which are relevant."*

This comparison made it possible to consider the differences between the definitions connected to the different fields of laws, labour laws, tax laws and competition laws, and to discover that the *a priori* preciseness of the definition is dependent on the type of information one is searching for. In the field of competition law, as he explains, the information can be hidden within different types of documents and files. An *a priori* definition is difficult to make. If it would be casuistically defined:

*"they would probably never be able to find indications of unlawful agreement. Such indications are more likely to be found on pieces of paper", often handwritten, such as notes containing cryptical coded references made at secret meetings held outside the undertaking sometimes in a hotel situated in a country outside the Community."*

It is quite easy to see, why the Advocate General decided to make comparisons

with the tax and labour law procedures of the Member States. There are no analogous functions in the field of Community law. This is why the comparisons had to be taken from the national legal systems.

The wide power of examination, also conferred by the Court in several cases, was seen as antecedent even to the principle of confidentiality. This was, on the other hand, explained by the Advocate General, on a comparative basis, to be a common principle applying in Member States:

*"In no circumstances, therefore, it is for the undertaking itself select the documents which it is prepared to submit even if it considered that certain are protected under the general principle of confidentiality common to the legal systems of all the Member States.*

*... it is for the Commission to assess whether or not a particular document contains business secrets the confidentiality of which is protected by a general principle which apply during the course of the administrative procedure."*<sup>1612</sup>

It is not difficult to see why the issue of the "principle of the inviolability of home" arose in this connection. After a brief description of the manner of making "secret" deals and to document them, the Advocate General explains that this

*"... is why I consider that the Commission's officials were also entitled to look into the briefcases of the undertakings' managers and even into their diaries to see if they contain documents indications relating to their business activities."*

In the beginning of the examination of the possible breach of the fundamental right to the inviolability of home, the Advocate General relied, in general terms, upon the national implementation laws. He regarded that

*"In any event, no Member State have adopted, on the basis of article 14(6), measures incompatible with its own concept of the protection due to the fundamental right to the inviolability of the premises of undertakings. Therefore, in all cases in which the Commission calls upon the national authorities to overcome an undertaking's opposition, the protection of that fundamental right will be automatically guaranteed to the full extent provided for in the national legal orders."*

Therefore the question arose, whether the actions by the Commission, where it concerned "merely ... handed files... without themselves searching the cabinets" (including the threats of a fine etc.), violates the fundamental right to the protection of the home. The comparative studies formed a basic supporting approach to this inspection:

*"In order to decide that question it is necessary to consider the situation existing in the national legal systems and the guidance which may be drawn from the*

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<sup>1612</sup> For the latter part, case 53/85 *Akzo chemie v Commission* (1986) ECR 1965 (24 June 1986). Some analysis of this case, see Schwarze, J., 1991, p.12 ff.

*European Convention on Human Rights and the case law of the Court of Justice.*"

The inquiry into the Member States' systems. In the realm of the national legal systems, the Advocate General went through all the national legal systems in the European Community. Here are presented only the essential features of the "traditional" inquiry.

Concerning Belgium, he studied the inviolability of home (Article 10) in the Constitution, its interpretation, and in terms of the laws in force. He found it to be disputable as to whether the provision refers also to corporate and legal persons. The Constitution itself did not give any indication. The laws required, on the other hand, a prior court order for inspections and searches of premises used as private dwellings, however, this did not apply in the field of commercial matters. Competition laws provided powers to search without prior orders. Similar provisions were in force in the laws implementing Article 87 of the EEC Treaty and Regulation no. 17. The latter laws made it possible to even use criminal sanctions in the case of refusal, and to use powers through warrants issued by the head of the general economic inspector.

The Danish system was also studied from the point of view of its Constitution, laws, and Supreme court practice. The Constitution demanded a prior court order, except according to the exceptions provided by a separate law. In the implementation laws, no derogations to that basic principle had been permitted. However, consent by the undertaking may justify a search without a court order. In the context of the case law, the rule seemed to be that the court only scans the existence of the Commission decision without examining the material content of it. Furthermore, it was possible, in the case of refusal, according to the case law impose fines, even where a court order was not issued.

The German law was studied from the point of view of the constitution, laws, the case law of the Federal Constitutional Court, and dogmatics. *A priori* permission was to be given by a court, or, in the case of "urgency", by another body authorized by the law. The dogmatics was quite unanimous on the interpretation that business premisses also included within of these interpretations.

The study of the case law was more specific. The Federal Constitutional Court had made a distinction between the search and the investigation. The Advocate General made an explicit reference to these definitions in English and in German. He interpreted the definitions so that the main rule was that the "cooperative" investigation was allowed, but that it could be "enforced" by periodic penalties or fines based on an "administrative" offence. A steadfast refusal demanded a search warrant by the court with in certain restrictions. On the other hand, the implementation laws of the EEC regulations authorized the president of the "bundeskartellamt" to issue such permission.

Concerning the Greek system, the study was devoted to the inspection of the Constitutional, statutory laws, and Greek Council's opinions. According to the unspecified general opinion, the protection applied also to legal persons. However, legislative practice, in

general, interpreted "home" restrictively by excluding business premises. According to opinion of the Council of Ministers in the realm of environmental law and in competition laws a search of industrial or undertaking premises does not constitute a search of the "home" within the meaning of the constitution.

According to the Spanish constitution and constitutional practice, business premises enjoyed protection. The situation seemed to be quite similar to Denmark. However, the powers in the realm of competition laws were related to the tax authorities' powers, which meant that only the consent of the corresponding state authorities was needed in order to search and enter places where economic activity took place. However, a court order was needed for entrance into the homes of natural or legal persons<sup>1613</sup>.

In France, constitutional protection was based on individual liberty and human dignity. The degree of legal protection varied. The trend in legislation seemed to be towards greater protection of business premises. The analysis of the ordinances by the Advocate General was quite thorough and included direct references. The active searches had been made conditioned upon court orders, and the substance of the application had to be checked in the proceedings. This interpretation was supported also by the recent decision of the Conseil Constitutionnel.

Irish constitutional protection was interpreted textually by the Advocate General. It included legal persons and business premises. In the field of taxation and customs, the powers for an investigation seemed to be quite extensive and without the need for judicial authorization. The same idea applied to competition matters. It is the searched person who has to petition the court in order to avoid criminal sanctions in the case of refusal.

The Italian constitutional protection of the inviolability of home covered also business premises. According to several laws in different fields, a prior court order was not necessary unless the case involved a search rather than "*verifications*" or "*inspections*". In competition law, it was decreed that the power to investigate does not include opening of suitcases, safes and doors, which are locked and which the "*tax payer refuses to open*". *A priori* judicial authorization is needed if there is to be a use of force.

In the analysis of the Advocate General, the Luxembourgian system was assimilated with the system in Belgium. The powers of inspections were to be determined by individual laws. The protection of legal persons was still open in the jurisprudence of the courts. Inspections were relatively openly regulated in many fields of administrative law (taxation etc.). In the field of competition law, powers were extensive being based on the authorization of the Ministry. The laws implementing Community decisions, directives and regulations, in many fields of law, granted extensive powers of access to authorities unless the question concerned private

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<sup>1613</sup> The idea of the home of a legal person is quite interesting in this connection. This analysis, nevertheless, remain unclear.

dwellings.

The Netherlands Constitution recognized such protection, unless the law decreed otherwise. The legislature delegated powers to confer the power of entry upon different authorities. The provisions which did not contain the obligation to have *a priori* judicial control did not apply to legal persons or to places other than the dwellings of natural persons. Furthermore, it presupposed that the occupier had not given his consent.<sup>1614</sup> On the other hand, there was a distinction between private dwellings and other places. The entering of private dwellings was more strictly regulated. There was *a posteriori* judicial control for the entry to business premises.

Competition law, on the other hand, restricted only dwellings from the scope of the right to unrestricted entry.

Portuguese Constitutional protection was viewed quite strictly. This was based on a literal interpretation of the relevant constitutional provision.<sup>1615</sup> However, the situation concerning business premises was seen to be unsettled. However, there were ideas expressed in Portuguese law that consent authorizes the entry.<sup>1616</sup> The implementation of Community competition law authorized fines in the case of refusal of entry by the company.

The Advocate General tried to interpret the system in United Kingdom in the context of the peculiarities of that system. The Advocate General started by referring to the principle of the absolute sovereignty of the Parliament, and to the absence of any positive constitutional system of rights. However, the common law courts had a tradition of ensuring them. Furthermore, the interpretation of the Advocate General was that there is a similar tendency as well in legislative practice.<sup>1617</sup>

The applicability of the inviolability principle was considered first in the sphere of other fields of law than in the field of competition law. Prior judicial control was lacking in all other cases than in a case calling for the use of force. In the field of competition laws, no implementation measures of the EEC regulations had been taken. However, entry was to be

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<sup>1614</sup> This extremely difficult construction has been interpreted weakly by the Advocate General. The actual argument made was the following:

*"The legislature May therefore leave to the executive the power to determine itself, in the abstract, within the framework of the law, cases in which dwellings May be entered. Furthermore, that provision, which contains no obligation of prior judicial supervision, does not apply to legal persons or to places other than the dwellings of natural person and presupposes that the occupier has not given his consent."*

<sup>1615</sup> This referred in particular to Article 34(2):

*"Entry into homes of citizens against their will may be ordered only the competent court in cases provided for by law and in the forms prescribed by law. Under article 34(3), there is a total prohibition of entry during the night."*

<sup>1616</sup> Here he referred to the decision of the Constitutional Court of Portugal.

<sup>1617</sup> For discussion and references, see "Commission's powers of investigation and inspection", House of Lords, session 1983-84, 18th report, Hmso.

authorized by a High Court order. A continuous refusal could justify for the action by the police authorities.

In conclusion, the Advocate General stated that the independent study undertaken by him confirms the Commission's argument that the principle is generally applicable in the "*constitutional traditions of the Member States*". The answer to the question as to whether the principle was applicable in the systems of the Member States in the context of this particular case was negative. In context of business premises, there was a disparity in state practices, or, in the Advocate General's words, the "*situation was not identical*"<sup>1618</sup>. The Advocate General saw the situation in some countries as being indefinite and unclear, and in certain countries negative (mentioning especially the Netherlands and Ireland)<sup>1619</sup>. There he found a general trend of assimilation of home and business premises, although conditioned by procedural prerequisites.

In the light of this conclusion, there was a difference between the applicability of the principle to the private dwellings and business premises:

*"In the economic, fiscal and social spheres, there are, in the various national legal systems, many measures providing for inspections of various kinds from a mere request for information to a search for documents with the help of the police. The terms used to describe such measures vary (inspection, check, inquiry, search...) and do not correspond in all legal systems.*

*On the other hand, even in Germany, Denmark, Spain, France, Italy Portugal, where prior judicial supervision is required by constitutional law, that requirement is not absolute. In Denmark, exceptions may provided for by law. In Spain and Portugal, by virtue of the constitution itself, judicial authorization is not required if the person concerned consents to the search. In Italy, investigations and inspections particularly for economic and fiscal purposes, are governed by special laws.*

*Finally, in the field of competition law, even in Germany and in France, no prior court order is required to enter premises or inspect documents which the undertakings themselves submit. It is only in so far as the inspectors wish to carry out*

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<sup>1618</sup> This view appears quite strange. Why should it be identical? Is it not sufficient that the principle could apply, to a certain extent, or, that the solution in some systems was more persuasive.

The absence of this type of idea seems to be due to the superficial treatment of the subject. There was no normative comparative analysis, where the different solutions were related to each other. On the contrary, the comparative aspects were studied with the same source-dogmatical measure, which seemed to result in a mechanical conclusion concerning the disparity.

Another possibility could have been that different arguments were taken from the different justifications (from cases or travaux préparatoires). On those basis, one could have decided, whether the principle had a role in the Community system as modified by this analytical study.

The study stressing the "generality"/disparity" aspects, as a *a priori* method, is somehow unconventional. It treats the legal situation as generality (or generally disparate), and is not designed to persuade anybody to adopt or not adopt the principle. The comparative study, in a certain sense, produces directly conclusion concerning the existence of the principle or non-existence of it. The intention seems to be making a comparative study, and of deriving from that general-comparative argument, and not to produce a legal argument (with the help of the comparative study).

<sup>1619</sup> "*In which the concepts of "dwelling" and "woning" are defined in such a way that the legal protection of the home is regarded as applying only to the private dwellings of persons living there.*"

*a search themselves for documents which have not been submitted to them voluntarily that such an order is necessary.*

*It should further be noted that, also in regard to competition laws in Spain and Greece, notwithstanding the constitutional requirements, prior court order is required for inspections in business premises, even if they have to be carried out by force.*

*Finally, in the Member States which, like Germany, Denmark and France, make the use of force conditional on the issue of a prior court order, undertakings may be ordered to submit to inspections and to cooperate in investigations under pain of sanctions such as fines or periodic penalty payments without any prior judicial intervention being necessary.*

**The inquiry into the European system of human rights.** In the realm of the European Convention, the Advocate General referred to Article 8(1) of the Convention, which stated that

*"everyone has the right to respect for his private and family life, his home and his correspondence"*

However, he maintained that

*"The European Convention on Human Rights, for its part, expressly provides for the right of the legislature to derogate under certain decisions from the principle of the inviolability of the home. Article 8(2) of that Convention reads as follows*

*:  
"2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedom of others". "*

A study of the case law of this system was absent<sup>1620</sup>. There was no study of the jurisprudence or the interpretation of the principle in the case-law of the Court in the European human rights system. Some dogmatic writings were used, however<sup>1621</sup>.

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<sup>1620</sup> The ECJ does not study the dogmatic systematics of another system, and try to develop it. In other words, there could be a recognition of the fact that an extensive argumentation, on comparative basis, could "problematize" the systems "own" interpretation (of its rules). A "foreign" system could become a source of law of a system, which rules it is not able to interpret, in principle.

This idea may apply also to the relationship between the state systems and the international systems. The study and dogmatics has to be extremely conventional, and open, to a certain extent, if it is to be able to maintain the autonomy of the interpreted system. This explains also, why the comparative studies are many times made in the realm of the principle of the organizational "confidentiality". The "closing" of the systems interpretations by the Community interpreter undermines the complexity and the political nature of the interpretation of the rules. We will discuss this below.

This way the supra-system has to also remain within an extremely "traditional" sphere of reasoning.

<sup>1621</sup> Reference was made in this regard to the book of Mr Frowein on the European Convention of Human Rights (*"Europäischen Menschenrechtskonvention, Emrk-kommentar", Article 8, no 27, 1985*).

The Advocate General studied the case law of the European Court of Justice<sup>1622</sup>, where the compatibility of the Community competition rules with the European Convention of Human Rights had been "implicitly" studied.<sup>1623</sup>

**Conclusions.** These comparative studies resulted in the interpretation of principles and the legal basis of the Community legal order. The Advocate General concluded that the right to the inviolability of the home is one of the fundamental rights, which the "institutions of the Community must respect". On the other hand, he proposed, agreeing with the Commission, that the principle of the protection of business premises should be considered to exist at the Community level. He also referred to the Court's own case law<sup>1624</sup>.

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<sup>1622</sup> Case 136/79 *National Panasonic Ltd v Commission* (1980) ECR 2033 (26 June 1980), and Case 5/85 *Akzo Chemie v Commission* (1986) ECR 2585 (23 September 1986). Also, case 155/79 *A.M. & S. Europe* (1982) ECR 1575. See analysis of the latter, in Koopmans, T., 1991, p.498-500. In this case companies faced with similar kind of investigation had appealed to the protection of the correspondence between client and a lawyer. By asking comparative material from the parties, and by using this comparative material (legislation, academic opinion, and case law), the court did find common principle of confidentiality applicable. Because of the differences, it made an autonomous interpretation.

In the *National Panasonic* case (it was the applicant, which used the arguments deriving from the System of the European Human Rights. The Advocate General Warner analysed, on this basis, the Convention (Opinion, 30 April 1980), and the laws of the Member States, comparatively. According to him "*in general, but not always, the laws of the Member States required a warrant before the entering to the private premises*". Mr Warner came to the conclusion that a warrant is not part of the system, and that the application should be dismissed.

The Court came to the same conclusion, but not, however, quoting Mr. Warner's comparative findings, although it did mention the idea, that the Community observance in accordance with the constitutional traditions of the Member States (as in 4/73 *Nold, Kohlen-, und Baustoffgrosshandlung v Commission of the European Communities* (1974) ECR 491, for example).

Mr. Advocate General Roemer had produced, in case 31/59 *Acciaieria e Tubificio di Brescia v High Authority of the European Coal and Steel Community* ((1960) ECR 71 (84)), a comparative study of the powers of inspection available under national systems of taxation. This was based on the demand of Article 86 of the Treaty on Coal and Steel Community, where the powers of the High authority officials, to make inspections, were determined by reference to the "*rights and powers as are granted by the laws of a Member State to its own revenue officials*". The analytical study was devoted to the provisions in the German *Abgabenordnung* (Code of Taxation) and its commentary (Kühn), French *Code Général des Impôts* and the commentaries in its context (Laroque, P.), articles in Italian Law and the Netherlands' law. The examination of the formal conditions, which should be applied, when requesting information (formality), was concluded by quotation of the German administrative and competition law and its commentaries.

The claim of the undertaking was held to be well founded and admissible. The Court, on the other hand, dismissed the application on a different basis without reference to the comparative material.

<sup>1623</sup> "*Even though in national Panasonic, it was the absence of any communication prior to the investigation which was the subject of the dispute, I consider that it may be deduced from that judgment that in court's view, the powers of investigation provided for in article 14 regulation no 17 fulfilled the conditions laid down in article 8(2) of the European Convention on Human Rights. That conclusion is supported by the case Akzo Chemie v Commission.*"

It must be mentioned that the Advocate General, in interpreting the counter arguments, made also an analogical statement, internal to the system, introducing safety inspections, the idea existing in the European Atomic Energy Community (Article 81 of that Treaty).

<sup>1624</sup> Cases 136/79 *National Panasonic Ltd v Commission* (1980) ECR 2033 (26 June 1980), 31/59 *Acciaier Tubificio de Brescia v High Authority* (1960) ECR 71, and the opinion of the Advocate General Warner delivered on 30 April 1980 in the 136 *National Panasonic Ltd v Commission*.

However, the harmony between the European system of human rights and the European Community system, already expressed by the Court and the way the business premises are generally protected in different Member States, caused the Advocate General to conclude that:

*"the exercise of the powers conferred on the Commission by article 14(3) of regulation no 17 cannot pose any problem in regard to the principle of the inviolability of the home as applied to undertakings notwithstanding the fact that those powers are exercised under threat of a periodic penalty payment or a fine."*

This meant that the principle of inviolability, proposed by the applicants, was not applicable to this case as a valid argument. However, he applied a "principle of cooperation" to the investigation procedures, and, on this basis, concluded that

*"it does not give those officials themselves the right to search cabinets and remove the document from them."*

Furthermore, the "legal protection" of the undertaking was found to be sufficient, if the applicant is able, as it was in this case, to contest the investigation in the European Court of Justice *a posteriori*. On the other hand, if the refusal, by the undertaking results in the use of force in effecting the search, the "national provisions" must be applied, and consequently, prior judicial orders can be obtained.

In the application of these principles it was found that Commission decisions ordering investigations were not unlawful, and that the claims of violation of one's home, in addition to the claims of breach of essential principles of procedure (the principle of collegiality and formality), the use of unlawfully obtained information, the breach of the presumption of innocence, the principle of proportionality, the principle of non-discrimination, the principle of non-retroactivity (*nulla poena sine lege*), and the right to a hearing were dismissed.<sup>1625</sup> Furthermore, the imposition of periodical payment was considered lawful, and the demand for its reduction was also dismissed.

In examining the claim that the principle of proportionality, applied in the Spanish system, was infringed, the Advocate General based his dismissal on the rejection of any "reflexivity" of the Community system towards one particular national legal system:

*"That submission must also be rejected. On the one hand, the validity of Community measures may be assessed only in regard to Community law not in regard to any provision of national law, even a constitutional provision. Similarly, compliance with a general principle of community cannot be made to depend on concepts and rules drawn from national law."*

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<sup>1625</sup> In the examination, the Advocate General used various "internal" arguments of the Community system and different general conceptual evaluations.

**Justification.** In the decision of *Hoechst*<sup>1626</sup>, the Court maintained that the Articles (of the regulations) in question must be interpreted in the light of general principles and the fundamental rights of Community law (as part of the generally applicable principles) and that these Articles cannot be incompatible with those principles. They are *a priori* in accordance with the "constitutional traditions common to the Member States and the international treaties, on which the Member States have collaborated or of which they are signatories"<sup>1627</sup>. The European Convention of Human Rights was seen as particularly relevant.<sup>1628</sup> The Court put emphasis on the right of defence.<sup>1629</sup>

Concerning the principle of the "inviolability of home", the Court maintained that even if it is a fundamental principle in the Community legal order "common to the laws of the Member States in regard to private dwellings of natural persons", the same was not true with regard to undertakings. This is so because (referring directly to the comparative outcomes by Advocate General) there were "inconsiderable divergences between the legal systems in regard to the nature and degree of protection afforded to business premises against intervention by the public authorities".

Similar conclusions were drawn in relation to Article 8 of the European Convention on Human Rights. The Court maintained that

*"the protective scope of that Article is concerned with the development of man's personal freedom and may not therefore be extended to business premises. Furthermore, it should be noted that there is no case-law of the European Court of Human Rights on that subject."*<sup>1630</sup>

However, there was, in all the systems of the Member States (generality), a 'minimum protection'. In all the systems, there was a demand for a legal basis for the interference, and the intervention was not to be arbitrary and disproportionate. This was considered to be a "general principle of Community Law". Furthermore, the rights of the undertakings were to be ensured by the obligation of the authorities to specify the purpose and the subject-matter of the investigation.

These general principles were to be applied in the case. Furthermore, there was also an argument to this effect put forward in the case law.<sup>1631</sup> Moreover, the idea, expressed in

<sup>1626</sup> Case 46/87 and 227/87 *Hoechst AG v Commission*, (1989) ECR 2859 (21 September 1989).

<sup>1627</sup> Referring to case 4/73 *Nold v Commission* (1974) ECR (Judgment 14 May 1974).

<sup>1628</sup> Referring to case 222/84 *Johnston v Chief Constable of the Royal Ulster Constabulary* (1986) ECR 1651 (judgment 15 May 1986). Some analysis, Galmot, Y., 1990, p.257 ff. This case dealt with the equality between men and women and the interpretation on the basis of general principle.

<sup>1629</sup> Referring to case 322/81 *Michelin v Commission* (1983) ECR 3461 (9 November 1983) para 7, and 155/79 *S v Commission*, (1982) ECR 1575 (18 May 1982).

<sup>1630</sup> The Court thus mentions the non-existence of the case law.

<sup>1631</sup> Case 136/79 *National Panasonic* (1980) ECR 2033 (26 June 1980).

competition provisions, was to ensure competition in the market, to prevent violations of the public interest, interests of individual undertakings, and consumers, and the maintenance of the general system.

After the examination of the facts and claims, the Court dismissed the applications, and found that the Commission had not violated these principles.

Similar observations were made in two other cases, decided on the same day, which dealt with the same subject matter.<sup>1632</sup>

**Some analysis; a principle of individual protection vs. protection of business premises?**  
Underpinning the argumentation of the Advocate General, there was a systematic study of the laws of the Member States and the European human rights system. This was reflected also in the Court decision. There was a quite careful and extensive study undertaken of different laws, not only in relation to analogies with competition matters. The study was independent

The extension of the explicit analysis was remarkable. Constitutions were explicitly cited, and all countries were studied. Furthermore, the source structure consisted of laws, case law, dogmatic observations, and even some systematic connections (eg. to UK). Furthermore, some "grouping" was proposed. Furthermore, direct references were taken from certain systems.

On the other hand, no contextual interpretation was applied, and there was a use of a fairly "weak" doctrine of legal sources. No travaux préparatoires were used. The quality of the analysis was based on the institutional approach. A type of idea of legal sources was applied. In this sense, the analysis was traditional.

Consequently, it was not really a surprise that the analysis resulted in a "disparity" conclusions.

The connection between the comparative observations and the general argumentation is, however, interesting.

The argumentation departed from the analysis of the rule and norms existing in the regulation by the Council, which explicitly gave authority to the Commission to investigate. Because there was a dispute as to the extension of this investigating power, the Court had to look into the principle and conceptual context of the case. The Court thus studied the conceptual context.

The Court seemed to examine the principled context in a following way. First of all, it maintained that there is no "common principle of inviolability of the home" which could apply also in the case concerning companies within Member States. It is noteworthy that the principle was not interpreted to be part of the Community legal system as such. The principle common to

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<sup>1632</sup> Joined cases 97/87, 98/87 and 99/87 *Dow Chemical Iberica SA and Alcodia, Empresa para La Industria Quimic and Empresa Nacional del Petroleo SA v Commission of the European Communities* (1989) ECR 3165 (17 October 1989), and case 85/87 *Dow Benelux nv, formerly Dow Chemical (Nederland) bv v Commission of European Communities* (1989) ECR 3137 (17 October 1989).

Member States system was to be respected. It was, in this sense, "external" to the Community legal order.

The Court noted that there are no objections to having the principle of inviolability of home as part of the Community legal order. However, for the above-mentioned reasons the Court found it necessary to limit its applicability in connection to company activities in the Community context. Instead, companies receive other types of protection against illegal interference.

It is interesting to note that the Court maintains that the inviolability of home belongs to the protection of the fundamental rights of the individual within states, and that it refused to grant similar protection for companies.<sup>1633</sup> If application of the principle could be done, the system would arrive at problems concerning the relationship between companies and the individuals in future cases and in legal protection in general.

This idea can be backed up also by the idea of the objectives of competition law as whole. Namely, the objectives and aims of the Community system, by and large, can be interpreted as dealing primarily with the protection of the individuals against the misuses of different dominances in the market. For this reason, there is no room for the similar protection of individuals and companies. This interpretation can be maintained, although the Court argues, on a comparative basis, that protection cannot be analogized to companies, because *"there are no inconsiderable divergences between the legal systems of the Member States in regard to the nature and degree of protection afforded to business premises against intervention by the public authorities"* and that the interpretation *"is not incompatible with the interpretation of the Article 8 of the Human Rights Convention"*. These comparative observations seem to support the objectives of Community competition law.

Consequently, we could claim that the comparative arguments presented in this case support a principle, that a company cannot be given the same protection of information as an individual. This seems to be the "rule by comparison", to which the acceptability of the comparative arguments are reflected. This is the implicit principle embedded in the case. One may say that, in this case, the comparative observations are interacting with a kind of a general principle of individual protection. This principle is embedded in the argumentation on the aims of the European system and competition law. This principle confirms that the individual is considered legally to be the basic object of protection by Community law. Corporations cannot be interpreted as being in the same situation as the individual in the protection of the private sphere. The analogy between the company and the individuals cannot be made because then the Community would equalize the individual and the company. That would generate an unbearable

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<sup>1633</sup> *"The protective scope of that Article is concerned with the development of man's personal freedom and may not therefore be extended to business premises. Furthermore, it should be noted that there is no case-law of the European Court of Human Rights on that subject."*

conflict between legal interests. It would be impossible to interpret the "protectionist" measures with this kind of analogy. There would be a fundamental collision embedded within the situation.

Furthermore, as the Advocate General notes, the protection of individuals by reference to basic principles must be respected by the Community. The principles of individual protection are superior principles at the Community order. In this sense, the legal protection of undertakings must be accomplished by other means.

It appears as if the comparative reasoning, in this case, appears as a kind of 'contrastive' reasoning. Through comparative observations it was possible to justify the decision of the "applicability" of the principle of inviolability of home. Legally it would be problematic only to refer to the principle of individual protection and to an abstract "possible conflict" between the two spheres of actors in the Community system. This way it was possible to maintain the balance between the different spheres of interests, and, at the same time, implicitly the superiority of individual protection in principle. This idea cannot follow solely from the aims of competition law, but it must be derived from the general aims of the Community system as a whole, because the interpretation is dealing with very fundamental principles of the Community law.

Here we may recognize some kind of a structuration and hierarchization of the norms of the Community system<sup>1634</sup>. The idea that the inviolability of home does not apply to the companies is an indication of "the internal structural principles" of the Community system.

**4.3. Functional comparative reasoning: the "hard case" IV (*Kalanke* in the European Court of Justice):: culture, the use of third law, constitutional generality, rejection of legislative generality, comparison by opposites, comparability, substantive equality**

**General remarks.** The *Kalanke* case dealt with the quota regulation adopted by a German federal state (Bundesland) and its compatibility with EC law<sup>1635</sup>. The question was about the possibility for national legislation to give priority to women in recruitment based on a quota

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<sup>1634</sup> For some remarks on the aims of European Community competition policy, compared with the United States approach, on the social and human demands and, recognition also a non-economic values at stake, see Hawk, P.E., *United States and Common Market anti-trust, A comparative guide*, 1990, p.7, 10.

These are, for example, political and sociological concerns for individual traders, fairness in the market place, equality of opportunity for all commercial operators, legitimate interests of users, workers and consumers (in general the consequences for national social systems), see Commission ninth report on competition policy (ibid., 1980, p.9-11).

<sup>1635</sup> Case 450/93 *Eckhard Kalanke v Freie Hansestadt Bremen* (1995) ECR I-3051, and the opinion of the Advocate general Tesouro delivered on 6 April 1995.

The law applicable was the Bremen *Landesgleichstellungsgesetz*.

system<sup>1636</sup>.

The German Court, when asked for a preliminary ruling was, on the other hand, dealing with the fact that a female person (with the same qualifications as the male applicant) had been appointed to the post in the administrative department of Bremen City<sup>1637</sup>.

The interpretation was of the Directive on Equal Treatment, which provided the derogation from the strict equality principle in a case "*removing existing equalities which affect women's opportunities in the areas referred in the Article 1(1)*". Article 1(1), on the other hand, refers to employment policy. The problem was, basically, how one should interpret the idea of "*measures to promote equal opportunities for women*"<sup>1638</sup>.

The Council recommendations<sup>1639</sup>, concerning affirmative action in equality cases, recognized also the Article in question and the need for action where attitudes, behaviour and structures in society are oppressing women.

The main legal question was, consequently, what type of derogation the national legislator can make from the strict rule of equality based on the Article 2(4) of the directive<sup>1640</sup>.

**Comparative law as an acceptable and non-acceptable legal basis.** The Advocate General rejected some comparative law observations in his analysis of the case:

*"I am also conscious that a position different from the one which I regard as the correct one would be supported, not only by the legislation which is the subject of the main proceedings, but also by a number of measures adopted in Member States of the Community and in non-member countries in order to guarantee, for their part too, not equal opportunities but an equal share of jobs"*

*Nevertheless, I consider that I can and I must resist the temptation to follow the trend, convinced as I am, and firmly so, that I would have to follow it, and propose that the Court should follow it, only if I agree that were the right direction to take".*

At the time of the case, these affirmative measures were in force, in one form or another, in at least France, Denmark, England, Germany and in its states, and apart from

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<sup>1636</sup> In case women were underrepresented, they were to be promoted or appointed instead of male applicant, if the applicants had same qualifications.

<sup>1637</sup> The case had been taken to the *Arbeitsgericht* (the Labour Court), to *Landesarbeitsgericht* (the State Labour Court), and to the *Bundesarbeitsgericht* (the Federal Labour Court), which asked for a preliminary ruling in realm of the Article 177 (the new Article 234) of the Rome Treaty.

<sup>1638</sup> The question was asked because of the interpretation of the Equal Treatment Directive (Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, OJ 1976 L 39/40).

<sup>1639</sup> 84/635/EEC of 13 December 1984.

<sup>1640</sup> There are cases dealing with the question of equality between men and women. Although in different contexts they still include strong comparative reasoning by the parties (case 248/83 *Commission v Federal Republic of Germany* (1985) ECR 1459 (Judgment of the Court of 21 May 1985)). See also, Galmot, Y., 1990, analysing *Razzouk et Beydoun* (1984) Rec 1526, *F.N.V.* (1986) Rec. 3853, *Mac Dermott et Cotter* (1987) Rec. 1468.

countries such as Finland, Sweden, Norway. The last three had applied for the membership of the European Union, and had an extensive and constitutionally coherent systems of equality laws with provisions on positive discrimination<sup>1641</sup>.

On the other hand, the justification of the Advocate General had, as its basic comparative premise, the general constitutional principle of equality (and the idea of comparative constitutional law). He notes:

*"... it is also true that it is one which most affects the principle of equality as between individuals, a principle, which is safeguarded constitutionally in most of the Member States legal systems."*

Both types of comparisons were extremely superficial and formal, and they were supported by subjective arguments.<sup>1642</sup> Any deeper analysis was lacking.<sup>1643</sup>

Now, the quota norm was seen, by the Advocate General, as a positive and affirmative action. Consequently, he concentrated on the analysis of the affirmative action by taking into account the "country of its origin"<sup>1644</sup>. In comparative terms he explained that

*"Affirmative action received its name in the United States from the Democratic administrations of the 1960's, which utilized a typical judicial measure (until then affirmative action had been imposed by the courts of employers responsible for discriminatory conduct) and made it into an administrative instrument...."*

*In fact, quotas and goals are the two systems which have been used in the United States since the late 1960's to pursue the objective of eliminating existing inequalities. ... The case law of the Supreme Court has consistently been hostile to the criterion of strict quotas (see Regents of the University of California v Bakke 483 US 265 1978)... must be transitional (see United States Steelworkers of America, AFL-CIO-CLC v Webster 443 US 193 1979)...*

*In Europe, positive action has begun to take hold or, at any event, to become the*

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<sup>1641</sup> See, for some recent studies, Schiek, D., Buhr, K., Dieball, H., Fritsche, U., Klein-Schonnefeld, S., Malzahn, M., Wankel, S., Frauengleichstellungsgesetze des Bundes und der Länder. Kommentar für die Praxis zum Frauenfördergesetz für den Bundesdienst und zu den Frauenfördergesetzen, Gleichstellungsgesetzen und Gleichrechtigungsgesetzen der länder, mit Beschäftigtenschutzgesetz, Köln, 1996, McCrudden, C., Equality in Law between Men and Women in the European Community, United Kingdom, Commission 1994, Bertelsmann, K., Rust, U. L'égalité juridique entre femmes et hommes dans la Communauté européenne, Allemagne. Commission of the European Community, 1994, Callender, R., Meenan, F., Equality in Law between Men and Women in the European Community, Ireland. Commission 1994, Asscher-Vonk, I., Equality in Law between Men and Women in the European Community, The Netherlands, Commission of the European Community, 1995, Martins de Oliveira, T., Equality in Law between Men and Women in the European Community, Portugal, Commission of the European Community, 1995, Nielsen, R., Equality in Law between Men and Women in the European Community, Denmark, Commission of the European Community, 1995.

In countries like Ireland, Italy, Spain, Greece, the Netherlands (where the discussion has been positive, however, and no obstacles has been seen constitutionally), no such provisions existed.

<sup>1642</sup> "I am conscious...", "I must resist temptation...", "convinced as I am, and firmly so..." , "...right direction to take".

<sup>1643</sup> In this sense, he does not consider constitutions from the point of view of discursive integrity.

<sup>1644</sup> It must be remembered that this analysis seems to have a general importance from the point of view of social policy considerations.

*object of attention at the very time when affirmative action seems to be a state of crisis in its country of origin. Indeed, in the United States, recourse is now had to the criterion of strict scrutiny, whereby rules affecting a fundamental right can be justified only if they satisfy a compelling governmental interest (see, for example City of Richmond v Croson 488 US 469 1989"*

The analysis of the United States relied on the political historical context and tendencies in law, in the light of the case law of the United States Supreme Court. The reasoning was strongly value-based and teleological, and ironic style of reasoning is even visible.<sup>1645</sup>

Furthermore, the Advocate General had an idea of 'perfection' of the formal equality principle found in the constitutions of the Member States. This takes place by introducing the idea of substantive equality<sup>1646</sup>.

"Substantive equality". In the argumentation of the Advocate General, the basic idea, related to the question of equality, seemed to be the idea of "elimination of existing obstacles". This way one could achieve equal opportunities. Affirmative action was designed to abolish obstacles usually by "*granting preferential treatment*". According to him, here a shift towards a "*collective vision of equality*" takes place.

Positive action had, according to the Advocate General, several forms. In the first type, the conditions of disadvantages are abolished with positive action. Causes of "*less employment or opportunities*" are abolished. These types of measures can be associated with vocational training and guidance. A second model aims more at the effective sharing of responsibilities (such as arrangement for working hours, fiscal measures etc).

These two types of approaches strive at achieving equal opportunities, and they lead to substantive equality. Substantive equality is not an immediate outcome, but requires a period of transition.

A third model analysed by the advocate General is the remedy compensating the inequality ("*punitive*"), which, according to the Advocate General, may be related to preferential treatment. This includes the systems of quotas etc. The idea is to achieve equal results. This

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<sup>1645</sup> "*Democratic government...*", "*...administrative instrument*", "*hostile*", "*typical*", "*on the same time ... it is .. in crisis in the country of its origin*".

<sup>1646</sup> This is the doctrine behind the Italian constitution, for example, see Biscaretti di Ruffia, P., 1989, pp.829-834. This means that (Second paragraph of the article 3 of the constitution "*è compito della Repubblica rimuovere gli ostacoli di ordine economico e sociale, che, limitando di fatto la libertà e l'eguaglianza dei cittadini, impediscono il pieno sviluppo della persona umana e l'effettiva partecipazione di tutti i lavoratori all'organizzazione politica, economica e sociale del Paese*". This article is meant to guarantee equality of participation, which would be a guarantee for example, a minimum level of social security. All remarkable social disparity is recognized to mean difficulties for the democratic functioning of state (ibid. p.832).

See also, Martines, T., 1981, pp.239-240.

It seems that substantive equality in its Italian form is strongly related to the guaranteeing of an abstract "political potentiality" of a person in a pluralistic liberal society (ibid., p.240-241).

Crosa, E., speaks (1951) about this article 3.ii as "*l'uguaglianza di fatto*" (p.158).

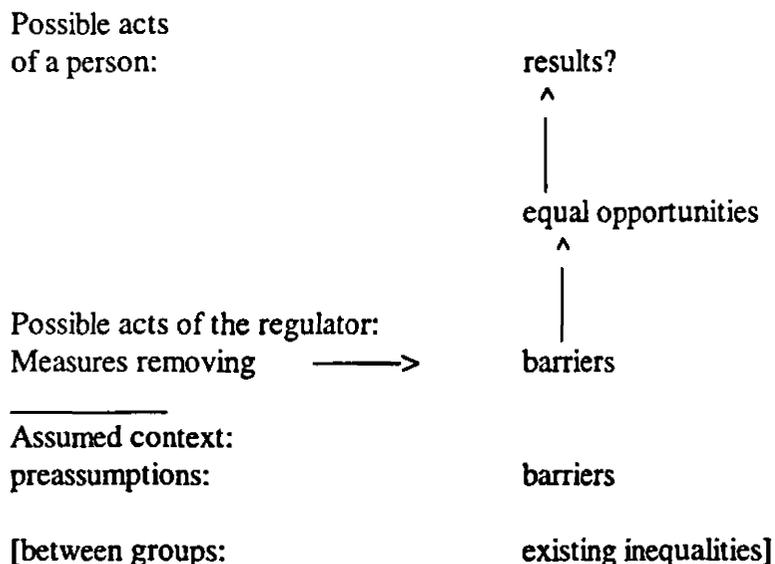
seems to be problematic constitutionally from the point of view of the general principle of equality.

In all types of "positive action", as the Advocate General describes them, the general principle of formal equality is affected. The question becomes whether the preferential treatment is acceptable from the point of view of the formal equality principle, and, for that matter, whether the concrete system of quotas is acceptable according to the directive's derogation clause. The Advocate General assumes, in this sense, that the directives' derogation clause is in accordance with the principle of equality.

The Advocate General departs from the strict formal equality idea, and goes on to discuss what is really meant by the concept of "equal opportunities". The problem is whether "*it means equality with respect of starting points or with respect to points of arrival*". Here the constitutional equality question and the positive action itself in its preferential treatment form (the third type of positive action in the analysis of the Advocate General) are intertwined.

The Advocate General claims that the idea of equal opportunities means putting people in "*a position to be able to attain equal results... and restoring the conditions of equality ... as regards starting points*" ("equal opportunities" means, in this sense, equal starting points). This relates, on the other hand, to the removal of existing barriers standing in a way of the attainment of equal opportunities.

The construction presented by the Advocate General appears like the following:



One notices that a regulative action requires two operations: identification of the barriers and their removal with suitable measures. We come later to this question.

On the other hand, the Advocate General refers also to a previous case of the

Court<sup>1647</sup>, ruled that special rights for women are not allowed because despite the measures "*discriminatory in appearance they are in point of fact intended to eliminate or reduce actual instances of inequality, which may exist in reality of social life*". This case ruled out, from the scope of the derogation and the Community law,

*"shortening of working hours, advancement of the retirement age, obtaining leave when the child is ill, granting additional days of annual leave in respect of each child, payment of an allowance to mothers who have meet cost of nurseries and the like and so on" [!].*

Consequently, the Advocate General argued that only those measures, which attempt to remove the obstacles from equal opportunities can be complied with. This is the idea of "*real and effective substantive equality*", and the achievement of "*actual equality*"<sup>1648</sup>. Only discrimination in "*appearance*" is allowed

*"in so far as it authorizes or requires different treatment in favour of women and in order to protect them with a view to attaining substantive and not formal equality, which would in contrast be the negation of equality"*<sup>1649</sup>.

Furthermore, the Advocate General defines, in concrete terms, the available measures. First of all, measures related to eliminating the unfavourable biological conditions are allowed<sup>1650</sup> (?). Here the Advocate General confirms the idea that preferential treatment cannot be allowed only by considering "*to all women as such*", but only "*specific conditions of*

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<sup>1647</sup> Case 312/86 *Commission v France* (1988) ECR 6315.

<sup>1648</sup> He remarks that "*the ultimate objective is therefore the same: securing equality as between persons*".

<sup>1649</sup> This idea assumes a kind of a automatic realization of the norm. One could ask, why, then, does this matter seems to be structural, and why such strong measures are produced?

It appears as if Advocate General does not want to look at the political development behind all these achievements. He concentrates only to the women/men perspective in an isolated sphere. However, this is not the context of these declarations and provisions of Community and national law. The question is also about a political balance and integrity, not about some kind of a philosophical balance and coherence. The Advocate General does not concentrate on the legal provisions as socio-political norms, but treats them as cultural norms, which, I think, is not the point here.

Furthermore, one could claim that the question cannot be compared so easily with the question of the general equality of persons. The general equality question cannot be analogized with the gender question. This problematic feature is, as well, connected to the idea of using the positive discrimination analogy deriving from the United States practice.

The considerations of the general principle of equality is highly problematic. In connecting the gender question to general equality one actually politicizes the question again. The repolitization can be seen rational, but not from the point of view of the Community system and law.

The strict distinction between law and politics presented here by the Advocate General is very interesting.

<sup>1650</sup> We come to the definition of biological conditions. The Advocate General speaks about "*pregnancy*". That remains the only definition. the question about results of the pregnancy in social life is not treated here by the AG. In general, his conception of the "biological" allows an extremely restricted scope of derogations.

women"<sup>1651</sup>. Quotas are seen "irrelevant" from the point of view of the "substantive equality". Furthermore, the Advocate General maintains, referring to the previous case law, that measures of organizing working hours, structures for small children, and other measures, which enable women to reconcile the "family and work commitments... with each other"<sup>1652</sup> are allowed<sup>1653</sup>.

The Advocate General sees the problems mainly in the fields of historical, cultural and social conditions (?), where one identifies disparity in educational and vocational training<sup>1654</sup>. Furthermore, the Advocate General considers the types of preferential measures as "compensations for the historical discrimination".<sup>1655</sup>

Consequently, the measures allowed in derogation from the directive were those which remove actual obstacles. One of their characters is that they are temporary. The assumption in the quota system seems to be a long-term perspective.

The Recommendations of the Council seemed not to be a clear basis for another type of interpretation. The Advocate General uses also the doctrine of "strict interpretation of derogation from an equal right" and the "principle of proportionality". Furthermore, the opinions of the Parliament and literature, which would support another type of conclusion, were not considered clear enough<sup>1656</sup>. He referred also to the agreement on social policy<sup>1657</sup>.

<sup>1651</sup> Interestingly, "women's conditions" can be separated from "all women as such". Is it not so that "women's conditions" are somehow connected to "all women as such"?

AG continues: "*The rationale for the preferential treatment given to women lies in the general situation of disadvantage caused by past discrimination and the existing difficulties connected with playing a dual role*". ("A dual role of women"?).

<sup>1652</sup> This would seem to suggest, wrongly, that men are not doing also. This seems to relate to differences in social contexts.

<sup>1653</sup> "*Measures relating to the organization of work, in particular working hours, and structures for small children and other measures which will enable family and work commitments to be reconciled with each other*"

<sup>1654</sup> One interesting question related to education is; could it be possible that these educational measures actually reproduce the structural inequalities in the society?

<sup>1655</sup> The problem is at this point in terms of what society reference is made to.

<sup>1656</sup> Court's reasoning emphasised the strict interpretation of derogations, which was only one of the questions dealt with Advocate General's reasoning. However, it is quite difficult to claim that the Advocate General's reasoning did not have an impact upon the Court's decision.

Furthermore, the influence is more visible from the discursive point of view. "European" dogmatics has a tendency to look the decisions based on the argumentation by the Advocate General.

The Court does not seem to have a clear idea of the extension of the derogation. The Court's judgment is very short. It states, basically, that quota regulation treats men and women differently. Consequently, it "involves discrimination on grounds of sex" (Article 2(1) of the directive). The derogation provided in Article 2(4) of the directive is "*specifically and exclusively designed to allow measures which, although discriminatory in appearance, are in point of fact intended to eliminate or etc ... actual instances of inequality which may exist in the reality of social life. It thus permits national measures relating to access to employment, including promotion, which give a specific advantage to women with a view to improving their ability to compete on the labour market and to pursue a career on an equal ... with men.*"

Consequently, the derogation, according to the Court, must be interpreted strictly. National rules which guarantee absolute and unconditional priority for appointment or promotion go beyond promoting equal opportunities.

It must be noted that the Court came to the same conclusion as the Advocate General without referring to his analysis, Case Judgment of the Court of 17 October 1995. Case C-450/93, ECR 1995 p.I-3051.

Accordingly, the Advocate General came to the conclusion that the measures adopted by the federal state were not in accordance with Community Law.

**Some analysis.** The Advocate General claims, in this case, that the candidates (the man and the woman) had equal opportunities. In fact, the Advocate General claims that the candidates had equal opportunities merely because they were qualified explicitly as equal in the employment situation<sup>1658</sup>. On the other hand, he seems to suggest that therefore the measures were designed for aiming at an outcome, not to abolish barriers.<sup>1659</sup>

Here we recognize some problems. The Advocate General claims that, in this case, equal opportunities already existed, and that there were no barriers. This may be the reason, why he is able to claim that the legislator has thought of men and women as groups and concentrated on "*numerical terms*" to ensure an equal distribution of jobs as an outcome.

It is true that this appears to have occurred, if one starts from the fact that the candidates had been qualitatively evaluated as equal and that the decision was backed up by the quota requirements also that the result of the case was that the number of women increased in the organization. Against this background it is understandable, for example, why the Advocate General sees the measures related to education and vocational training more suitable to eliminate unequal opportunities.

However, the problem of the case does not lie in the individual case only. We are speaking about the acceptability of this types of measures in general. One can easily fail to see the single case in question actually as a consequence of some more general measures of equality law

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How strong is the case law on substantive equality? It appears as if the doctrine of the substantive equality has entered permanently to the work of the European Court. The doctrine has been referred by the Advocate General Tesaro again in the case 13/94 *P v S and Cornwall County Council* (opinion on 14 December 1995, ECR 1996 2143), referring also to the case of (West) German Constitutional Court (BverfG, 11 October 1978, in NJW 1979, p.595 et seq.), and in the case 32/93 *Carole Louise Webb v Emo Air Cargo (UK) Ltd* (opinion on 1 June 1994, ECR I-3567). Lately, referring directly to the idea of substantive equality defined in the previous cases, 400/95 *Handels, og Kontorfunktionaerernes Forbund i Danmark, acting on behalf of Helle Elisabeth Larsson v Dansk Handel & Service, acting on behalf of Fotex Supermarked A/S* and opinion of Mr Advocate General Ruiz-Jarabo Colomer delivered on 18 February (Reference for a preliminary ruling: So- og Haldelsretten, Equal Treatment of men and women, Directive 76/207/EEC, conditions governing dismissal, Absence due to an illness attributable to pregnancy or confinement, Absence during pregnancy and after confinement) (1997) ECR I-2757.

Moreover, parties (case T-368/94 *Pierre Blanchard v Commission* (1996) ECR II-41 ( Judgment of the Court of First Instance of 9 January 1996)), and Commission (case 132/92 *Birds Eye Walls Ltd. v Friedel M. Roberts* (1993) ECR I-5579 (Judgment of the Court of 9 November 1993)) have been using it as an argument.

It may have to be used in the case dealing with the reference for the preliminary ruling (case I154/96 *Louis Wolfs v Office National des pensions* (reference for the preliminary ruling from the 11th Chamber of the Tribunal du travail, Brussels) OJ No C-197, 1996-07-06, p.12 (pending).

<sup>1657</sup> Maastricht Treaty, Protocol No. 14.

<sup>1658</sup> The Advocate General states that having the same qualifications "*implies in fact by definition that the two candidates have had and continue to have equal opportunities: they are therefore on an equal footing at the starting block*".

<sup>1659</sup> Note the transfer from the general analysis to the individual case!

previously enacted to abolish the structural inequalities in society between groups.

One could claim that the analysis should have been, instead, based on the assumption that the legislator had in mind the general features of the relationship between the groups and their employment in the design of the general legal measures<sup>1660</sup>, and that these measures had their political and socio-cultural backgrounds. One could claim, for example, that if no preferential treatment provisions (based on attitudes and political conflict resolution) had been available, there could have been no consideration, like in the employment situation there was, of any right to equal treatment. Then the case would have been only a matter of choosing between two candidates. However, in this type of situation, if structural inequalities exist and they could prevail, the man would have been chosen.

The Advocate General seems to suggest that the aim of the legislator, in establishing quotas and preferential treatment, is only to fulfill the quota, and not to balance the structural inequalities ("*numerical terms*", "*punitive measures*"). However, one has to note that the quota in this type of regulatory measure, in general, is not the main aim itself, but a criterion of evaluating the outcomes of the appointment and promotion policy in an organization and in society in general.

Consequently, one could claim also that the Advocate General, consciously or unconsciously, interprets the situation himself in numerical terms (which is quite formal approach), and fails to see the aim of the legislator in removing, in group terms, existing and identified inequalities. On the other hand, he may see that the cultural and contextual structural inequalities recognized by the legislator are some kind of an "*illusion*".

However, the real problem in his reasoning seems to be the fact that he moves the individual case to the interpretation of more general legislative measures and their intentions.

However, the Advocate General notes that also the results have to be taken into account to a certain extent. The substantive consequences could not always be attained only by a "equal footing" approach. The Advocate General finds, in his analysis, that it may be the social structure which results in unequal treatment. Relating this to the case he maintains that woman could have been set aside because of "social" (informal) reasons, even if she has similar qualifications. Then he seems to pose the question as to whether this consideration of the results would be in accordance with Community law? In other words, the Advocate General seems to ask himself whether informal social reasons can be valid in considering the outcome.

Here he seems to make the inductive fallacy again. The Advocate General seems to think that the informal reasons are the informal reasons of the case, not the informal reasons of the legislation in general. One could claim, for example, that, in the legislation, the reasons are not informal ( as the political discourse in general), but they can be also formal, where, for

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<sup>1660</sup> It seems that the Advocate General does not consider important the democratic political bargaining processes and the contextual thinking of the legislator.

example, the "travaux préparatoires" may be used as a source of legal reasoning.

In conclusion, from the argumentative point of view, the recurrence of the idea of the "substantive" in the Advocate General's argumentation seems to diminish its persuasiveness. The constant repetition seems to indicate, and perhaps rightly so, that no real idea of the substantive is communicable. On the other hand, the final analysis does not communicate anything on the acceptability of the general positive discrimination measures, which idea may, to a certain extent, be accepted. However, while the Advocate General seems to refer only to the possibility of "situational" positive actions in the realm of promotion and appointment, his argumentation seems to suggest that no structural inequality "really" or actually exists or that the structural inequalities, which exist, can be maintained.

Furthermore, as maintained, the Advocate General seems to have made an inductive fallacy in the argumentation. Namely, he does not take into account that the equality of opportunities, evidently existing between two applicants in the case, can be a consequence of many factual and socio-psychological determinants. This will be analysed below.

**Comparative generalities and the paradox.** In point of fact, what we are facing here is generality at two levels; some generality of legislation in Member States (legislative)<sup>1661</sup>, and the comparable and general constitutional rule of equality (adjudicative). Now, what the Advocate General proposes seems to be a test of generality of laws in relation to the generality of the principle of equality. He has two level comparative arguments in use.

Because, according to the Advocate General, they are in conflict, to a certain extent, he actually "finds", against all odds, a comparatively general paradox in the legal systems of some Member States. This is why he is forced to extend his argumentation in order to justify the rejection of the generality of laws. Those laws have been made in support of the corresponding constitutional principles (democracy, equality).

By this extended argumentation, the Advocate General starts to determine an "institutional" principle of equality as a basis of the justification (i.e. political dimension)<sup>1662</sup>. He

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<sup>1661</sup>What we are facing here, in the explicit rejection of the generality in legal systems, seems to be also a rejection of the political philosophy of the tradition of comparative law. On a philosophical basis, the Court neglects the material solutions made by the national parliaments on the promotion of the equality of sexes.

In this case, we are facing the question about a conflict between two levels of community law; the national and the Community level. The question becomes ultimate a matter of defining the competence, and a matter of subsidiarity, in a strictly normative sense. In other words, the reliance is not any more in the subsidiary nature of "coherence" of a national system, the national system(s) as legally regulated sources, subsidiarity based on moral incomparability, etc, but the analysis is explaining the basic philosophy of the system as it is attempting to maintain its competence in one field of law, social policy.

<sup>1662</sup>There seems to be a genuine conflict between legislative and adjudicative integrity. The fact that the comparative legislative generality is neglected on the basis of socio-philosophical arguments shows, that the question is about this kind of conflict. Here we are now not speaking about a relationship between normal "legal" interpretation and their semantic-normative conflict, but rather a conflict, which evidently has to do with basic values.

This fact can be explained by the role of comparative arguments. The comparative value is interpreted

actually acts as an interpreter of the constitutions, as a kind of a constitutional court. However, at the same time he reads something into the idea of this principle and constitutional traditions, against the idea of transitivity (i.e. the internal paradox of constitutional systems). He also makes use of, in order to support his argument, external (third law) arguments and analysis. He uses the a "third law" the US law to support his "institutional interpretation" of the equality principle. They are presented by a form of analogical interpretation, and by an enlarging interpretation.

The comparative "generality" arguments and third law arguments, in the Advocate General's justification, reveal the institutionally instrumental thinking concerning constitutional law. From the justification one can note, that the normative message in the argumentation is that the abolition of this type of positive discrimination is considered necessary, despite any circumstances and the legal integrity of any system. It seems to be, according to the Advocate General, fundamentally against European law principles<sup>1663</sup>.

**Substantive equality as a cultural argument.** The Advocate General's strongly principled interpretation leads also to a conclusion that it is determined by the cultural background of the decision-maker. This conclusion is supported also by some ideas presented by the Advocate General.

The Advocate General claims, for example, that discriminatory measures are "*as unlawful today for the purposes of promotion as they were in the past*"(?). Furthermore, some "normative cultural" premises come up in the following way:<sup>1664</sup>

*"In the final analysis, that which is necessary above all is a substantial change in the economic, social and cultural model which will certainly not be brought about by numbers and dialectical battles which are now on the defensive"*<sup>1665</sup>.

In this sense, the justification seems to suggest revolutionary tendencies, for example, from the point of view of welfare thinking.

**The limits of law.** There is also an explicit reference to the "*limits of law*" idea in this case<sup>1666</sup>. On the other hand, one could also claim that because the comparative generality is neglected as

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against another value, which is, on the other hand, based on a more philosophical analysis of the nature of equality. Here the equality does not correspond with the value represented by the legal systems. The second level analogy between the Community system and the general practices of the States does not "fit". The value, in this case, seems to be based on the "autonomous" philosophical considerations related to the fundamental social context of the arguer.

<sup>1663</sup> There could exist an extensive comparative study that has been made concerning these systems. However, in the context of Court working methods, one can doubt whether any really socially coherent study has really been effected.

<sup>1664</sup> One could claim that the Advocate General also attempts to give, in his justifications, some directives for the further interpretation of the Community law.

<sup>1665</sup> What is this cultural change? What would be then the structure of this system?

<sup>1666</sup> Advocate General maintains: "*Moreover, in this saying this [referring to the acceptability of the measures, para 28] I am not referring only to the limits of the law*".

a normative premise, one goes beyond the limits of law in this way as well<sup>1667</sup>.

This "*limits of law*" reference by the Advocate General is interesting. He seems to recognize the value-based nature of the situation, i.e. the fact that there is a choice between two general levels (i.e. state and European level). Undoubtedly, the limits of law, in this case, are related to the choice between two orders on the basis of cultural and value-based premisses<sup>1668</sup>. Moreover, one of the main limits in European law seems to be related to the relationship between men and women.

In conclusion, the recognition of the "limit of law" seems to be related to the question of how the modern constitutional (functional) legal system can be seen from the point of view of Community law (or in general) and what types of "comparative" alternatives we could construct on the basis of socio-philosophical inspections. This relates to conceptions of European comparative constitutional law and to the comparative descriptions of European legal cultures. The question is associated also with fundamental institutional arrangements of European law related to these types of functional fields of law<sup>1669</sup>. Furthermore, we could predict that this may result in legal, at least functionally legal, subsidiarity. Regulation of this type of relationship might be left to the realm of orders other than the European legal order, though it would be directly related to market regulation.

**Functional law.** We have suggested that the Advocate General departs from the legislative (positive) integrity of law, does not keep his distance from constitutional traditions, and ends up

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<sup>1667</sup> One of the problems of comparative generalities, in the case, is related also to the instrumental nature of the law in these "social" situations.

We may note that the Advocate General is using a reference to comparative generality. It seems that the Advocate General is making an over-generalization. This type of argument seems to reflect more his "*tertium comparationis*", i.e., ideology, than a judgment based on the analytical research. The idea of substantial equality refers to practical idea of equality. This practicality is, however, this decision contextualized. In contradiction, every material idea of equality requires its construction on the basis of existing laws and rules of a legal system. That type of equality is generalizable as a legal rule.

It looks as if every time the legal language refers to concepts like freedom or other extreme abstractions ("substantive equality"), we are dealing with the philosophical system, which is referring, on the other hand, to the idea of the stability of a persons world picture and coherent form of life. That is argumentation by authority. On the other hand, we can claim that the argumentation is, however, connected to something permanent. At this stage the legal research becomes part of the anthropological studies. We may start to find the explanations from the personal backgrounds. (For some analysis, see also, Sacco, R., 1991, p.5., also Weiler, J.H.H., 1998, p.p.44 ff.)

<sup>1668</sup> One of the main ideas reflected in this case is the "mate" situation in European law. Namely, it looks as if there are problems in regulating more specifically the relations and positive discrimination in the Community level, because of political and legal-systematic problems. At the same time, regulation made at the national level seems to be *a priori* unacceptable. What is then the way legally to deal with this?

For the changing situation, however, see below.

<sup>1669</sup> In a case of philosophical autonomy, we are coming to the edge of legal constitutional culture as such. Here we are faced with really hard cases. Here takes place a disclosure of a "social theory" of law. Here the European Community system comes from the possibility (via analogy with states) into the field of necessity (claiming not a "descriptive" non-comparability, but "normative" one). European law has to interpret here its own premisses, and where the states as a possible source of law. Here takes place the interpretation of the European constitution.

in the field of the functional application of law. This way we end up with different approaches to the functionality of law. We may start to identify, in European legal culture, different forms of functional approaches to law.

We may notice that the functionality approach for the Advocate General seems to be related to the deregulative approach, which intends to transfer the discourse on structural inequality to another level of regulation than the state law, towards "informal" measures.

We may wonder if this is the solution for the structural inequalities in society. Isn't it so that normative involvement occurs anyhow at some functional level? In other words, the deregulation of one level encourages regulation at some other level (via some other type of regulation).

On the other hand, from the point of view of the positive legal system, we clearly recognize the attempt to separate the regulatory relationship between the legal systematic and more informal level.

It is evident that there is an attempt, in this case, to reproduce one type of approach to the functionality of law. It does not seem to be allowed, legally, to maintain systematic arrangements, which create "*artificial inequalities in order to "correct" the social relationships*" (between men and women and perhaps between some other groups of people as well).

This type of idea may lead to a comparative legal culture, where these types of positive actions cannot be comparatively identified.<sup>1670</sup>

**A systematic interpretation?** One could claim that the idea of substantive equality expressed by the Advocate General refers to the reflexive nature of European law. The decision based on the doctrine of substantive equality has to be seen as an expression of a non-generalizable norm. This can be explained in the following way.

The recognition of the problem expressed by the German Court, in the realm of Article 177 (the new Article 234) of the Community Treaty, seems to be a recognition of the idea that the law of the German "Land" is contrary to the general principles of law. The German Court seeks the solution of the European Court in order to solve the problem, because the internal measures (constitutional provisions and textual and contextual interpretations) cannot justify the deviation from a strict interpretation of the law. The answer to the question by the Community Court is clearly a recognition of this "problem situation".

One may end up with a "reflexive concept" because, as we will see, in some other the Member States at the moment, there is no need to apply the general principle of equality to positive discrimination measures, because the laws effected by the Parliaments concerning positive discrimination are seen to be "constitutional" within these systems. The laws, in

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<sup>1670</sup> One may maintain, for example, that according to this kind of social ideology of the European law, certain social rights do not belong to the constitutional essentials of the system (Rawls).

democratic systems, represent the "substantive" and political integrity of the system<sup>1671</sup>.

Consequently, it seems that the comparatively general constitutional principle of equality is an insufficient legal basis, at the European level, for a general prohibition against positive discrimination in all the Member States.

In conclusion, it can be suggested that the European Court, in this example, is more interested in the particular procedural problem-solving, in the particular legal system asking the question, rather than in the general applicability of the European norm.

The decision of the European Court could be, consequently, left, as a substantive legal decision, to the realm of the polycentric and reflexive idea of European law, where the law is relativized on a situational basis<sup>1672</sup>.

**Epilogue I: Structural inequality.** The reasoning of the Advocate General establishes the grounds for various types of questions. One of the most interesting is the idea of structural inequality and informal reasoning in the society and its regulation.

Equal opportunities for female applicants, in general, could be seen as a result of the fact that there have already been, in the promotion processes etc., preferential measures taken. In general, preferential treatment may put women in the situation where they have equal opportunities available and they are able to show their equal qualifications.

On the other hand, we could claim, from the socio-psychological point of view, that women may see their opportunities in the labour markets more realistically, if there is favourable attitude expressed in the legislation, apart from political and socio-cultural spheres. This way, they may apply for jobs, which, in the case of non-existence of the preferential treatment, would be seen somehow, to be necessarily as "mens jobs".

Furthermore, the idea that the promotion by "education and training" is the sole basis of equality may be contested. Namely, it seems that training etc., is usually undertaken by persons in order to realize some of the career plans, consciously or unconsciously. Training that does not relate to any plans does not seem to be beneficial training at all. Because of this, women may not choose to take part of any training because they do not see any real possibilities for the realization of their plans. Any choice of training and must be optimal and in accordance with the aim pursued.

In fact, one could even claim that women, not having realistic support from society in the form of strict measures of legislative and political processes, for example, may turn instead towards men-dominated structures ("men's society") and start to treat such structural inequalities

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<sup>1671</sup> The idea is that women and men, for example, can be substantively equal in different ways. One possibility seems to be a 'natural' equality based on a group identity, another perspective stresses more the discursive equality. The latter stresses more the processes in achieving the equality.

<sup>1672</sup> The problem of any comparatively reflexive system, using the substantive argument, is transformation of the political reflexivity into institutional reflexivity based on interpretation by its internal professional principles.

as opportunities as such (self-instrumentalization). In this case, women may begin to determine their "life-plans" based on the men's preferential treatment, and attempt to benefit from this by choosing a "life-plan" which can guarantee them the (even very basic) social status which they want to have. This may lead to reinforcement of certain types of social structures.

We can develop this idea further. It may be that men also start to orient themselves away from this developing "female social structure", like, for example, from emerging female "family life" and other "non-organizational" activities. This may take place because their opportunities seem to be determined only by their possibilities for participation in organized social life.

On the other hand, the "cumulation" effect can be visible. The organizations with preferences for men may start to increasingly accentuate this phenomenon with the outcome of increasing alienation of men from other activities other than that organization. Here we face a development towards a highly organizationally structured society. This type of phenomenon is visible for example in post-industrial societies, where strongly alienated forms of organization demanding unconditional working hours and the demand for relocation appear. In this way the distinction between groups such as men and women, deepens., especially, if no corrective measures are available. The cumulative effect is, in this sense, the increasing loss of possibilities for both men and women. This is conditioned "externally" and is not based on discursive forms of 'life-planning'.

On the other hand, "women" (in the strong group identity sense) may organize themselves in the "external" sphere of socio-organizational life, whereas men lose their possibilities for turning back to the non-organizational forms of social cooperation. On the other hand, auto-justification, by both groups, turns out to be about the deviating roles in society. They both attempt to justify their role in their own spheres of their social activity. This may destroy all possibilities for discursive compromises between these groups, in both the private and political spheres, and lead to political and social conflict.

We may also maintain that one of the aims of equality legislation is also to guarantee the existence of certain types of female perspectives in public organizations, which otherwise could be excluded on the basis of prevailing attitudes.<sup>1673</sup> In other words, the question may not be only a matter of equality between men and women, but also between different types of female perspectives within the public organization. Discrimination may not be exercised only by men, but, for that matter, by women preferring those women's perspectives which maintain the structural inequality. It is a fact that the real-value perspectives from women's emancipatory movements appear rather from the group of women who are strongly active in the political sense,

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<sup>1673</sup> On differences between women, Nieminen, L., 1996, pp.30-31.

This is also related to the fact that it is not only women, which may defend women's rights, but it can be also men who do it.

rather than those organizing their life on the basis of prevailing societal structures<sup>1674</sup>.

To conclude, it seems that the clear aim of equality legislation of this type, in general, is to guarantee the security and predictability of female employment in the labour market and in this way to prevent situations of absolute choice (between career and non-career). This would be only encouraged, if stressing the importance of education as a basis for the equal opportunities in the labour market<sup>1675</sup>. On the other hand, it may function also as guaranteeing different perspectives in general in public organization.

**Epilogue II: a vertical comparative analysis.** The starting point of the "vertical" analysis is the observation of made by Finnish constitutional Committee on the relationship between positive discrimination and the constitutional principle of equality in the realm of the enactment of the "Law on the Equality between Men and Women"<sup>1676</sup>:

*"According to Article 9.4. of the Law on Equality Between Men and Women, one cannot consider as discrimination those plan-based measures, which are aiming at a realization of the objectives expressed in this law in practice. The purpose of Article 5 of the Constitution, expressing the general equality norm, has commonly been considered to be the prevention of actions which place citizens or groups of citizens in a relatively better or worse position. The Constitutional Committee has on different occasions expressed the opinion that the general equality principle does not presume that all citizens should be treated similarly in all respects,*

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<sup>1674</sup> This idea is in accordance with the development of institutionalization and legalization of politics in contemporary society.

<sup>1675</sup> The interesting fact is, similarly, that the aim of avoiding clear choice situations and guaranteeing the security of women in labour markets may also be based on an idea of cohesion of the legal system, provided by stressing the importance of long paid maternity leave, which try to make the return to the labour markets possible even after longer periods of absence. Many obligations related to this may be directed to the employees in order to secure this type of legislative cohesion. Unfortunately, the liberalization and minimum regulation of social policy and positive action is diminishing this type of thinking, and women, to avoid part time employment and insecurity, are obliged, in contemporary society, to choose between career and the family, for example. This is more striking in the situation, where the rate of employment increasing. It seems that, in modern society, these types of consistencies can be designed only in political processes. Their maintenance does not seem to be possible by any premodern forms of thinking, or by strict natural ideas of equality. (Some analysis of the social law coherence, Bogdan, M., 1996, p.5-6, and especially, Nieminen, L., 1996, p.27 ff.).

Similarly, also a male may have to turn to his wife, for example, when he has got no financial support from private or public funds for finishing his Phd thesis after 4 ½ years. Another possibility is the bank and social security, which is used many times. This is one of the problems of strictly formal science policy. It suits to societies, where the life-plan realization is determined by overwhelming ambitiousness or maintenance of types of social structures.

<sup>1676</sup> The Constitutional Committee of the Finnish Parliament, Helsinki, 13 May 1986, Statement nro. 1, 1986, p.3. The Scandinavian constitutional tradition was not taken into account by the European Court. However, on interesting question may be asked in connection to this statement. Finland and Sweden joined the European Union from 1995, and accepted European case law in the form of "*acquis communautaire*". Now, when accepting the case law, including also the *Kalanke* decision, did the Finnish government, for example, accept also the substantive equality decision unconditionally? On the other hand, if we could claim that the prevailing constitutional doctrine was different in Finland, was there a internal constitutional conflict already in place at the time of the accession? On the other hand, could it be possible to apply a European doctrine of such a kind "retroactively" in order to claim the invalidity of the Equality law, and the invalidity of the Committee's statement too?

*unless the relevant circumstances are similar. The Committee considered, in its Statement no. 1/1975 vp., that the improvement of welfare opportunities of a certain part of the people, and that way the increasing of societal equality, was not in conflict with equality, even if all citizens did not have similar possibilities to get, with equal conditions, the rights and benefits described in the statute. Because the realization of the equality between men and women, in practice, also by preferring the sex in weaker position, is based on the aim at increasing equality, the proposed statute [the law on the Equality between Men and Women] - in so far as it aims are concerned - is not problematic from the point of view of Article 5 of the Constitution<sup>1677</sup>. The Committee pays attention, however, to the fact that, on the individual level, the preferential treatment based on the plans [proposed in the law] may seem to constitute unreasonable discrimination. Because of this, one has to pay special attention to the absolutely undefinable nature of the concept of "plan". This is why one should consider whether there is a need to regulate - separately in the corresponding laws - the planned actions by the public institutions, and whether other types of actions - based on the above mentioned plans - should require a priori acceptance of the Equality Authority."<sup>1678</sup>*

There is a distinction made between different welfare state cultures in Europe<sup>1679</sup>. This may be related, in turn, to certain questions.

The normative sphere of public "social" action (welfare policies etc.) is strongly related, in Western culture, to the questions of charity. This may be due to the fact that the strong social bonds, which are the underpinnings of social regulation, seem to be connected to some basic systematic normative presumptions<sup>1680</sup>.

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<sup>1677</sup> Preferential treatment is not, in principle, in conflict with the idea of general equality.

<sup>1678</sup> This is the idea that further discussion and more specific compromises are needed in respect of preferential treatment in public institutions.

<sup>1679</sup> See, for example, Kosonen, P., 1996, p.16-17, p.150-151, and Rokkan, S., 1981, and Nieminen, L., 1996, p.28 ff. (referring to Esping-Andersen, G., Three Worlds of Welfare Capitalism, 1990 and his distinction between liberal, conservative, Latin, and social-democratic types of welfare regimes).

On legal philosophical development in this century, see Strömholm, S., 1980.

<sup>1680</sup> The social questions are related, because of the different scope of pluralism, to different actors in society. Furthermore, the religious systems in general, in western welfare history, have had their organized forms of care-taking.

The ideas on solidarity have had also its pre-Christian religious connotations in Europe. The concept of "civilized nations" of Roman thinking was connected strongly to the similarity of religion (see Watson, A, 1993).

Use has been made on, Engels, F., Ludwig Feuerbach und der Ausgang der Klassischen deutschen Philosophie [Ludwig Feuerbach ja klassisen saksalaisen filosofian loppu, Helsinki, 1976], p.84 ff, Brunner, O., Sozialgeschichte Europas im Mittelalter (Euroopan keskiajan sosiaalhistoria, 1958), pp.142-143, Turner, P.S., Max Weber. From history to modernity, Bo-Chiahsiar, Social discipline in the reformation. Central Europe, Le Goff, J., Medieval civilization, Robinson, O.F., Vergush, T.E., Gordon, W.M., An Introduction to European legal history, 1985. Sjöholm, E., Sveriges medeltids lagar. Europeisk rettstradition i politisk omvandling (Lund) 1988., especially, pp.8-20, ed. Tiihonen, R., Supremacy. European model [Herruus] (Helsinki) 1994, I-II.

The history of trust in England seems to indicate that the changing role of capital had its relation to the emerging state based system during the 16th century reformation in England. Similarly in Scandinavia.

Some good examples of the Italian and comparative legal and political philosophy, discussion in the beginning of the century, Luzzati, L., God in Freedom. Studies in the relationship between church and state (NY) 1930. Annexed with an extremely interesting discussion on the book (ibid., pp.527-560).

We can maintain that the Nordic tradition of the welfare state has stronger historical roots than usually is proposed, at least in Finnish debate<sup>1681</sup>. The traditional approach to the welfare state is usually connected to 19th century nationalism, which rightly brought it into the democratic consciousness in many countries<sup>1682</sup>. However, the formation of the ideology can be traced further behind, to the reformations in the 16th century.<sup>1683</sup>

We could say that the real differences in Nordic history as compared to the other forms of welfare histories is related to the fact that the state took over church functions, and these functions were integrated to the functions of the state<sup>1684</sup>. On the other hand, development since was characterized by lesser conflicts between the church and state, which was one of the basic issues in many other European countries, and is still (especially in United States and, for

<sup>1681</sup> Similarity between Nordic States, and the concept of Nordic, see Trägård, L., 1997, p.263, 282. For the concept of Nordic and development, Östergård, U., 1997, pp.29-71. On Nordic ties legally, see Zweigert, K., Kötz, H., 1987, p.288, 291, 295.

<sup>1682</sup> The role of Peasantry etc., Trägård, L., 1997, p.257. Also Stråth, B., Sørensen, Ø., 1997, p.7. The Scandinavian welfare state in general, see (ed.) Nordström, B.J., Dictionary of Scandinavian history, London, 1986, pp.625-627.

For some considerations on the development in 19th century, see Wieacker, F., 1990, p.61.

It can be claimed that in Southern Europe the democratic duty and liberty have been associated strictly with the "intermediation" between religion and the secular power, whereas these concepts, in the northern part of Europe, have been part of the internal discourse inside the state or related to nationality. This can be one of the reasons why more instrumentalized forms of social regulation have been accepted in recent history.

This can be associated with the idea that the state had strong economic role, which, moreover, increased in the age of the nationalism. This caused different functional views of the state to emerge the end of 19th century. We could, for example, claim that the liberal separation of the state and religion resulted in a certain overemphasis of the pure liberal economic role of the state during that time. Furthermore, this type of economic-political state had a tendency to involve matters of the religious pluralism by propagandist means by claiming the identification of the racial, religious and economic policies, as happened in the post-first world war Europe in many countries. The contrastive religious arguments got involved strongly with economic-political questions, both in "internal" and in international affairs. This was related to the strong discipline of the international legal-economic structures.

In Northern Europe, economic activity has not been so strongly connected to the religious questions internally, but in those states the religious homogeneity has been taken, in political terms, as a self-evident fact. In this sense, the functional forms of law have been developing in the realm of political state. This has also made it possible to unify many family law questions, whereas the integration in continental Europe has started on the basis of political and commercial integration.

<sup>1683</sup> Thorkildsen, D., 1997 (Religious Identity and Nordic identity), Östergård, U., 1997 (The geopolitics of Nordic identity, from composite states to nation-states. Political and religious characteristics), and Aronsson, P., 1997 (Local Politics, The invisible Political Culture, p.173 ff.).

This idea could explain, why the changes and deregulations seem to be difficult for the Swedish society, for example. In Finnish society the deregulation in political sphere seems to be easier, because the Finnish system was in 19th and 20th more or less a result of the modelling according to Swedish system. This type of change in the reflexivity seems to be easier in a situation, where integration is strongly geared towards general European integration.

On the development in Scandinavia since 17th century, see Glendon, M.A., Gordon, M.W., Osakwe, C., Nutshell, 1982, p.28. In general, Gallo, P. Grandi sistemi Giuridici, Torino, 1997, p.219 ff.

On the division in European economic and social structures since 1500, Szücs, J., 1996, p.15.

<sup>1684</sup> Trägård, L., 1997, p.260. Also Nieminen, L., 1996, p.32.

Reasonable distinctions are made according to the state, not on the basis of the religion. See also, Zweigert, K., Kötz, H., An Introduction to comparative law, II ed., Vol II, Oxford, 1987, p.295. On the formations of states in general, see Wieacker, F., Foundations of the European legal culture, p.49, in: European legal culture.

In England, and the catholic conception, see Jones, G., History of the law of Charity 1532-1827, Cambridge. 1969, p.3-10

example, in Italy)<sup>1685</sup>.

In general, what we can recognize here is that charity types of thinking in the field of social policy are more typical in the United States and in South European systems, whereas in the highly centralized state system in Northern Europe, political openness and efficiency thinking is more visible.<sup>1686</sup> The Northern European systems can be seen as outcomes of particular type of political integrity and the concept of centralized political forces, which was not disturbed by the division between different conceptions of "sovereignty", the more democratic one, and the other more religious one, the latter stressing the importance of liberal principle of non-involvement of the state to "social" and ethical affairs (the principle of subsidiarity)<sup>1687</sup>.

These modern Nordic ideas can be, for that matter, related also to the gender questions prevailing in these countries<sup>1688</sup>.

The deregulation of the welfare state is, consequently, not purely an economic or legal-political phenomenon in Nordic countries. We may say that it touches deeply upon the concept and idea of a democratic state, if not even the sovereignty of the democratic parliament<sup>1689</sup>. The deregulation of the welfare state seems to be more easily achieved in strongly political or more liberal systems, where the forms of welfare thinking are not so strongly anchored to the concept of state, or in the social-capitalist traditions. One could claim that in the United States, for example, the idea of strong welfare policies has not been taken extremely

<sup>1685</sup> Trägård, L., 1997, p.260.

Concerning the reformation and law England, see Moccia, L., 1981, p.160-161. On the resistance to "Reception", *ibid.*, p.164.

<sup>1686</sup> See, Kosonen, P., 1996. On 19th century policy ideas related to charity in Sweden, see Trägård, L., 1997, p.258. Centrality and functionality approach, *idem.* No tested assistance idea (*ibid.*, p.254). Pragmatism in general, Stråth, B., Sørensen, Ø., 1997, p.16. See as well, Zweigert, K., Kötz, H., 1987, p.288.

<sup>1687</sup> For the idea of social integrity in the Swedish context, see Trägård, L., 1997, p.273.

It is not difficult to see, why the basic rights did not achieve such an importance in the modern Nordic states as they did in France, or in contemporary Germany. They seemed to be the third dimension in the tense relationship between church and state, between the European "powers".

One could also associate this, historically, with the early existence of the agreements between the nobility and king. In fact, Northern European development lacks this type of tension in any politically visible way.

<sup>1688</sup> Trägård, L., 1997, p.274, 278

From the point of political history one can also make the observations that, whether we are speaking about social movements in general or in particular gender movements, the northern countries have a more vivid history. The gender movements have been and are strong political movements. The questions of equality and certain preferences are as well part of the political integrity of the system, which is not the case in southern countries (*Gender and Politics in Finland* (ed. Keränen, M., Aldershot) 1992). This is kind of a basis of a democratic political peace.

<sup>1689</sup> Centrality of State, Trägård, L., 1997, p.283, Stråth, B., Sørensen, Ø., 1997, p.6, also Zweigert, K., Kötz, H., 1987, p.288, no formation analysis, though. Neither in David, R., Brierley, J.E.C., 1978, p.113.

On the post Maastricht welfare state, Bislev, S., *European Welfare states: Mechanisms of Convergence and divergence*, EUI working papers 97/24, European University Institute, Robert Schuman Centre, 1997, p.2- p.11, and democracy, p.26. *Welfare state and European development*, Rhodes, M., *Globalization, Labour markets and welfare states: a future of 'competitive corporatism'*, EUI working papers 97/36, European University Institute, Robert Schuman Centre, 1997.

seriously because of the polycentric nature of the concept of the "political" itself<sup>1690</sup>.

The importance of the strongly established secularized state in Northern Europe is a phenomenon which importance is not stressed sufficiently when planning integrative actions in the European sphere<sup>1691</sup>. The parliamentary state as a socioeconomic actor, owing much its previous religious homogeneity and democratic development has generated forms of regulation incomparable to rest of the Europe. The idea of cultural homogeneity separated from the democratic state, prevailing idea in continental Europe, does not seem to have a strong role in traditional Northern thinking.

Against this background, one may see many problems in understanding the aims of the European integration and deregulation. Namely, European integration stresses the importance of political, religious and even racial questions in economic integration. This must be seen in the context of continental history. The idea is the enforcement of equal opportunities in spite of these features. We could claim that these are the features which in a homogeneous Northern European context are recognized irrelevant because of the pragmatism of the political discourse, even if it is recognized that these distinctions are important for the European integration. However, social regulation deriving from the diverse historical context of the Northern European countries definitely has already given space to the continental type of liberalization entering into the traditional forms of Northern systems. As biproducts, we see artificial importance being placed upon the questions of race, religion and ethnic background.

To conclude, one can wonder whether the Nordic countries must give up their traditional forms of welfare regulation and its integrity, or whether this type of comparative aspect will be taken into the European level discussion so as to maintain the idea. The latter alternative would be the best solution in order to maintain the coherence and discursive integrity of European law in general<sup>1692</sup>.

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<sup>1690</sup> The United States can be seen as a constitutionally pluralistic society. Religion is not a reasonable distinction. Many questions in USA have been related, however, to the racial questions. These questions have enabled the legal actors to consider and reevaluate the question of social opportunities, when the pluralism has made obstacles to more "holistic" social regulation by the state (Brown case and the subsequent case law).

The United States' system is an example of a system where the function of the liberal state is to secure the pluralistic society. It may be exactly due to this why unable to regulate welfare matters so profoundly. The "care-taking" systems seem to be part of the function of the liberal societal actors ("charity").

<sup>1691</sup> Problems in European Union, see Trägård, L., 1997, p.284 ff., Stråth, B., Sørensen, Ø., 1997, p.23

<sup>1692</sup> An example of the analysis of the positive social political actions related to the nature of the social relations between men and women in Sweden and Finland, see Tyrkkö, A, Anpassning mellan arbetsliv och familjeliv i Sverige och Finland, In: Dilemmaet arbetsliv, familjeliv i Norden (ed. Bonke, J.) Nordisk Ministerråd, TemaNord 1997:534, Socialforskningsinstitutet 97:5. The article represents the differences in Sweden and in Finland in relation to, for example, the working hours regulation, and the economic insecurity and opportunities for public employment, which result in more asymmetric relationships between men and women in both family and working life (ibid., pp.142-143).

In the field of social regulation, one could also speak of a "capacity" approach adopted in these countries (On the capacity approach, see Sen, A., Inequality reexamined, 1996).

The current discussion on the welfare state, in both political and legal spheres, seems to be contrary to its main idea. The idea of the welfare state is used as a justification for a more liberal approach, and the introduction

## Conclusions. What does the substantive equality really mean?<sup>1693</sup>

of the "social law" seems to diminish its role in the political processes as a practical phenomenon. The question seems to be either about the securing of the some acquired benefits, or about their deregulation. The welfare state, however, seems to be a politically functional phenomenon deriving its nature from democratic compromises and balancing. Any normative idea of the welfare state seems to be strange. The welfare state is a political process, which does not get attached easily to any ideas of principles and construction type of legitimacy.

A curious phenomenon in the contemporary European development is that there seems to be a tendency to deregulate exactly those forms of regulation, which have proved to be the most successful in constructing a socially sensitive democratic national state. The tendency seems to be towards forms of regulation, which have proved to be problematic from the democratic point of view.

In this connection, attention has been paid also to the Judgment of the Privy Council of The United Kingdom, case *Mataleen v. Pointu* (P.C.) 1997 Nov. 26,27; Dec. I; 1998 Fed., 18, W.L.R. 19, June 1998, p.18- (Appeal from the Supreme Court of Mauritius). The judgment of their Lordships was delivered by Lord Hoffman. In this case, there is an extensive analysis of the principle of equality, and its relationship to democracy. See especially, p.26-27.

<sup>1693</sup> The idea of substantive equality is a philosophical problem. The analysis of substance has a long history (Leibnitz, Locke and Kant, see Abraham, W.E. Oxford Companion to Philosophy, 1992, pp.358-359, also Dizionario Enciclopedia EGH, 1931). Substance (substantive equality?) seems to something extremely resistant to change. In this sense, equality would be a basic norm. However, the questions can be asked; equality of what? Any discussion on substantive equality without a criteria for its relevance other than "human nature" (substance or ratio) seems to instrumentalize, contrary to the 'idea' of substantive equality, human beings as a 'thing' to be discussed without a genuine relational attitude. Ultimately we are dealing with an idea extremely ideal in nature, perhaps about thye ultimate form of ideality and determinism. The question is about something which has content and meaning (and equality of that).

Etymologically history is interesting both from the Latin and Greek perspective.

Before the religious and scholastic interpretations were made, the substance was dealt by Aristotle. He saw it as something basic, essence and natural, divided into material and real (*ens quod per se subsistit et sustinet accidentia*). Justice is to treat alike and unalikes alike, according to their essential difference. This applies to people and things, and situations. The essentially is the problem. For example, the distinction between men and women was seen as essential in theory, as well in practice. We may say that, in this sense, there was a 'thing' character of human beings.

This idea was later connected to the sholastic doctrine, based on many "spiritual" arguments on the basis of the hierarchy. Scholastic interpretation saw it as something other than material (Giovanni Scoto Eriugena: "*quod semper id ipsum est vera substantia dicitur*", De div. Nat. vol I, p.65). For Descartes in the Principia philosophiae "*Per sostanza non possiamo intendere altro che una cosa la quale esiste in modo da no aver bisogno di nessui altra cosa per esistere. E la sostanza che non ha proprio bisogno di alcuna cosa si pu'ò intendere solo come unica, il che `e Dio*". If we make a distinction between the material and "thinking" type of substance (spirito), we can ask, who's substance is it ("*res quae solo Dei concursu egent ad existendum*").

Spinoza described it as "*per substantiam intelligo id quod in se est et per se concipitus* (Ethics, Vol I, prop. III), because "*gacies infinitis modis variet tamen semper aedem*" (Spinoza, Epistola, p.64).

Kant, by following the scholastic interpretation, discussed substance as an ultimate centre of force used in grounding change-producing actions and causalities. One could also make a distinction between material substances and spiritual substances.

It has been also maintained that we may speak about physical arithmetic, something-I-know-not-what (Locke).

Modern substance may be defined as the the "real nature" and "essence" of the things. The idea prevailed through the centuries in the continental political, religious and legal thinking.

However, one may pose a question, or formulate it in another way, as to substantive equality. Could we say that the question is not about equality at all, but about inequality? In other words, the modern legal systems, in point of fact, create inequalities too, and also balances them (or, by it the inequalities, as its creation, are balanced in the political discourse). There are no modern legal system which would create equality (Olaus Petri: "*the biggest justice is the biggest injustice*"). The law is not relating to equality, but rather, to inequality and to the balancing inequalities in a politically integrative way. If we would have a principle of substantive equality, we would only have to wait for a "fire from heaven".

To see the balancing as historically "punitive" is too logical. The question is about the discursive

It appears as if support for this type of principle cannot be found in the comparative political and legal sphere. There seem to be problems of the comparability of socio-cultural policies. It looks like the idea of substantive equality is related to a non-discursive and quite instrumentalist approach to law. The application of such principle seems to be related to a strict and logical principle of equality. The generality of this type of principle and its application are conditioned by the phenomenological idea of law<sup>1694</sup>, which does not seem to comply with more reasonable applications of law.

On the other hand, the idea in *Kalanke* could be interpreted against the contemporary development towards governmental legislation in Europe. If this development is combined with the more political concept of gender equality, it could be true that this political type of equality could threaten and render unpredictable the whole idea of equality. In this sense, some protection of men could be preferable in the way the Advocate General suggested. Then the question is no longer about the discursive form of political equality, but a governmental and non-discursive form.

Furthermore, it has to be remembered that the political type of equality we have preferred is also combined with many other forms of legal regulation (coherence of legal system). If these types of regulations are increasingly deregulated, the basis of the political and discursive equality in national states is difficult to maintain.

In conclusion, the fact that more "procedural", discursive, and reasonable approaches seem to be preferable also in Community law may be related to the recent "change" in the *Kalanke*, "doctrine" by the European Court of Justice. The Court explained the acceptability of the quota-system in relation to same legal measures as in the *Kalanke* case, in the following terms:<sup>1695</sup>

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substance as a modern substance. Any informal and substantive equality which prevails societally, must be balanced with public and social considerations in order to avoid structural inequalities. This generates possibilities for a liberating approach to the instrumentalization of human beings.

<sup>1694</sup> *Responsa prudentum*.

<sup>1695</sup> Case 409/95 *Hellmut Marschall v Land Nordrhein-Westfalen* (Reference for a preliminary ruling: Verwaltungsgericht Gelsenkirchen, Germany, equal treatment of men and women, equally qualified male and female candidates, Priority for female candidates, Saving clause) (not published) (Judgment of the Court of 11 November 1997).

Also Opinion of Mr Advocate General Jacobs delivered on 15 May 1997. By going through the previous case law, Advocate General Jacobs concluded, however, that the directive precludes such a priority provision of national law. He saw the case as being similar to the *Kalanke* case, contrary to the argument presented by Austrian, Finnish, Norwegian, Spanish and Swedish governments, according to which in this case there was no absolute priority. He also referred to the opinion of Mr. Tesauero, regarding the analysis of 'equal opportunity'.

An interesting point was raised by the French government. It claimed that the question is about preciseness of the national provision. It maintained that the national provision seems to be against the legal certainty. This idea seems to be quite formal.

The Advocate General Jacobs recognizes the 'competence' problem in European policy formulations between the legislature and adjudication, and even proposes some kind of a "margin of discretion" for the Member States. The idea remains, however, unclear.

No comparative observations, like *Kalanke*, were presented. However, the parties referred

*"In paragraph 16 of its judgment in Kalanke, the Court held that the national rule which provides that, where equally qualified men and women are candidates for the same promotion in fields where there are fewer women than men at the level of the relevant post, women are automatically to be given priority, involves discrimination on grounds of sex.*

*However, unlike the provisions in question in Kalanke, the provision in question in this case contains a clause ('Öffnungsklausel', hereinafter 'saving clause') to the effect that women are not to be given priority in promotion if reasons specific to an individual male candidate tilt the balance in his favour.*

*It is therefore necessary to consider whether a national rule containing such a clause is designed to promote equality of opportunity between men and women within the meaning of Article 2(4) of the directive"*

and it continued after examining the Kalanke case and arguments put forward by several parties as follows:

*"Unlike the rules at issue in Kalanke, a national rule which, as in the case in point in the main proceedings, contains a saving clause does not exceed those limits if, in each individual case, it provides for male candidates who are equally as qualified as female candidates a guarantee that the candidatures will be a subject of an objective assessment which will take account of all criteria specific to the individual candidates and will override the priority accorded to female candidates when one or more of those criteria tilts the balance in favour of the male candidate. In this respect, however, it should be remembered that those criteria must not be such as to discriminate against female candidates."*

*It is for national court to determine whether those conditions are fulfilled on the basis of an examination of the scope of the provisions in question as it has been applied by the Land."*

This type of argumentation does not refer to any legislative integrity of the national legal systems. However, it refers to the idea of the adjudicative integrity of a legal order by proposing a more dynamic interpretation of equality. It contains some observations of the "societal" aspects, which may provide arguments for future cases.<sup>1696</sup> On the other hand, it

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continuously to international arrangements, where there are provisions on the acceptability of quotas. In a separate analysis, Advocate General Jacobs considered the relevance of these international arguments for the interpretation. He saw them as being extremely vague (?) and unhelpful. Furthermore, they were more permissive than mandatory.

<sup>1696</sup> The considerations of the integrity of legal systems could be related to the argumentation of some parties by international treaties.

It is remarkable how one may arrive to such a different solution in a similar situation. The Court and nor the Advocate General in *Kalanke* gave indication that the situation would have been different if such a procedural rule existed.

See some analysis of the "societal" aspects, see Ellis, E., 1998, pp.404-406. Holtmaat, K. (The Power of Legal Concepts: The development of a Feminist Theory of Law. In: International Journal of Sociology of Law, 1989, p.499) maintains too:

*"The concept of legal equality and that of equal rights cannot serve as a leading substantive principle and/or strategic concept for the role which law could play in breaking open power relations between men and women."*

"creates" some kind of comparability between the legal systems in realm of European order, because it solves the problem between basic premises by referring to procedural norms.<sup>1697</sup>

Finally, in the renewed Rome Treaty (Article 2: basic principles) the equality between men and women has been taken explicitly as an objective of Community policies. However, unanimity is required from the Council in taking measures dealing with sexual discrimination (new Article 13). Nevertheless, the new Article 13 (and especially the new Article 141.4) may encourage affirmative action. Article 141.4 provides that

*"With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers".*

Consequently, it seems that *Kalanke* remained as a "side-step" in the history of European law.

#### 4.4. Conclusions on the "hard cases"

Before the "hard case" studies we asserted that the question concerned the internal problems of European law and the relative competences of supranational, national organizations, decided on legal basis by a supranational body. The question was not, evidently, about "easy" cases of comparative "construction", but about a choice of "law", or, we should say, a choice of the preferences of "institutional facts" in European law.

What kind of choices we are talking about?

We may summarize the analysis with the following indicators: Case (Case), Type of Comparative Rationality (CompRat), Norms Compared (NorComp), Result of Comparison (ResComp), Legal Fictions Compared (LFicComp), Preference (Pref), Field of the Subject-Matter (FieSubjM), Legal Principle in question (LePrin). Special remarks (Rem) are made in the end to stress the instability of this idea.

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<sup>1697</sup> For the idea that the comparison between formal procedural norms is easier in comparative law, see Kulla, H. (Referring to various authors (Schwarze, Stark, Madeira, Siedentopf)).

Case	CompRat	NorComp	ResComp	LfcComp	Pref	FieSubjM	LePrin	Rem
<i>Otto-Preminger</i>	value-based	Morality State laws	Disparity Disparity	Religion - expression	Religion?	Politics? (Political acting?)	Right to religion	Dis-senting opin.!
<i>Bachmann</i>	value-based,	State laws - Internat. law -	Internal sys. consistency Generality	State - Community	State	Economy (Taxation)	Sovereignty of state	Federalism?
<i>Hoescht</i>	traditional	State laws (Statutes, Constit.)	Generality	Home - Company	Home	Economy (Business secrecy)	Individual protection	
<i>Kalanke</i>	instrumental	Functional law of states (Statutes- Constitut.- Third law-	Generality Opposite, Generality, Example)	Men - women	Men?	Politics? (Posts in admin- istration?)	Substantive equality	Already changed?

What can we say on the basis of such results? Many conclusions could be made. Here, only some remarks are presented.

We could claim that the legal ideological structure or the European institutional legal identity is represented by this diagram. The picture shows how, with a comparison of different types of norm sets, one has been able to confirm a solution in a conflict between different types of institutional legal fictions.

In the hard core of traditional European law there seems to be the economic sphere, which is regulated by the principles of individual protection and state sovereignty. In both cases, Community law, for example, has been refraining from touching them by maintaining the consistency of the state system, or by stating that it respects the legal principle in state systems (the principle of the inviolability of home). Other type of organization (the European Community itself or an economic community) is not able to claim the same type of competence. The Community has confirmed its autonomy also in this "negative" sense.

The margins (or limits) of European level law come up also when approaching the political sphere, where the disparity of state law is confirmed by the principles of substantive or more material equality, and the protection of religious feelings. Here the limits of political action were confirmed in attempts to secure some administrative power by political means, and in attacking the main form of religion in a particular society. In both case, the idea was to change

any formal idea of equality towards non-politically determined formal equality.

It seems that where we enter the economic "hard core" of European level law towards a more political sphere of action, we arrive at a more institutional type of law not supported by any generality in positive law of the states, or by supported by extremely instrumental type of comparative reasoning. Here we recognize also a strong "federalist" attack, based on some kind of "informal" idea of equality, against those state polities which are still based on strict formalism and institutionalized discourses. Nevertheless, religious protection (*Otto-Preminger*) came under heavy criticism, also by the judges themselves in the dissenting opinions. Furthermore, the rule in *Kalanke* case has been changed to a certain extent. On the other hand, we may say that the current discussions on federalism may touch upon the consistency and sovereignty principle of taxation. These tendencies reveal the current instability of these types of discussions.

These observations have been made in the realm of European level institutional law. The hard core of the relationship between state supremacy and individual protection should be studied in the realm of the national legal systems.<sup>1698</sup>

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<sup>1698</sup> However, the recent *Pinochet* case in the House of Lords (see, analysis above) is definitely such as case. It deals exactly with the relationship between individual protection and the state autonomy, immunity, and supremacy. It seems to make clear that the hard case in international law are not resolved by international law comparison only, but the sovereignty of parliamentary states can be the basis for judging also the relationship between the sovereign and the individual in the political sense. We may note, that the *Pinochet* case was decided by a comparison of various measures of international law, and, on the other hand, by referring to the sovereignty of Parliament.

## 5. Comparative European law and European comparative law

Basically, there seems to be two dimensions to the European comparative interpretative practice in an institutional sense. The first dimension is the reasonable orientation of legal actors, in legal institutions, and in one form or another, towards other legal systems in an intellectual sense and the use of these observations in legal reasoning, argumentation and justification. The second dimension is related to the "importation" of domestic legal actors to the supranational institutions.

In the first type, the role of comparative law, as a legal source, is depends on the material and intellectual resources of the institution and its actors. Moreover, the adaptation of comparative arguments to the justification requires certain characteristics of the system, and the philosophy from the point of view of the legal-cultural ideology and theory of law.

In the second type of situation, the lawyers, as such, function as "comparative" dimensions of the system. The persuasiveness of this type of comparative system depends strongly on the characteristics and qualities of its personnel<sup>1699</sup>. Consequently, we may say that the quality of a lawyer, as a domestic and culturally attached lawyer, influences "comparatively" the work of the institution. In this sense, one could claim, that the more the lawyer (a judge or administrator) is attached to the basic cultural values and "customs" of his/her national context, the more influential he/she is in the institution, "comparatively". On the other hand, the more susceptible the lawyer is to foreign ideas, or more he/she is relying on the institutional and organizational authority, the weaker the "comparative" influence is.

### 5.1. The intellectual dimension: forms of interactions of arguments and legal systems

**General remarks.** As we have seen, the comparative arguments can emerge in the form of generality, diversity, or exemplification<sup>1700</sup>. All these forms appear in the work of the adjudicative institutions.

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<sup>1699</sup> On the legal traditions and domestic training in the Community system, see Bengoetxea, J., 1993, p.123.

<sup>1700</sup> It has been claimed that Courts comparative considerations do not lead to real imitation (Bredimas, A., 1978b, p.322., analysing case 7 and 9/54 *Steel industries in Luxemburg* (1955-56) ECR 175, and Advocate General Roemers analysis, opinion on 8 February 1956, p. 210 ff. (*"for all these reasons I therefore consider that comparisons with related features of national law cannot be decisive with regard to the question with which we are concerned"*, *ibid.*, 213).

This may be so in explicit comparative reasoning. However, the reality seems to be different.

The descriptive analysis of the comparison usually consists of the description of the *tertium comparationis* and statements on comparability or non-comparability. The prescriptive part may include the recognition of this generality, disparity, or the example as a legally relevant idea. This is attached to the statement of its acceptability.<sup>1701</sup> The norm of the case results from these premises in different ways in interaction with other arguments.

The method of comparative law can be traditional<sup>1702</sup>. Then the legal sources' doctrine, on the basis of the comparison, includes laws and precedents, and scholarly opinions<sup>1703</sup>. However, in European level institutions, traditional comparative reasoning seems to be based on restricted idea of sources of law (for example, no *travaux preparatoires* are usually used)<sup>1704</sup>. On the other hand, one may observe that in English systems the analysis of case law is the main method of comparative reasoning.

Comparative arguments usually interacts with socio-philosophical and principled legal arguments. They are combined with legal principles, some kind of coherence (consistency) argumentation, moral arguments, and also with other types of legal instruments deriving from the international legal community (such as international law arguments and "third countries" analysis). Furthermore, one may recognize some kind of alternateness between comparative argumentation and the intention of the national legislator. In this sense, they are alternative also in relation to *the travaux preparatoires*. As we have also indicated, comparative reasoning seems to be related to a quite strict literal interpretation. Tendencies and social contexts are seen extremely holistically in connection to comparative observations.

Even if there is an interaction between comparative arguments and other types of arguments, it appears as if comparative argument has often quite decisive role. However, when comparative arguments are used, the basic normative statements are usually justified, in the end, by strong principles or practical arguments. In this sense, interpretation seems to be determined

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<sup>1701</sup> Pescatore speaks about the "*transpassability*" (transpassable) of legal systems or their rules (1980, p.358).

<sup>1702</sup> Bredimas A., claims (1978b, p.323) that comparative law is not traditional because of a lack of common highest or lowest denominator. However, in the tradition of comparative law this could be claimed to be a "rule" also. Furthermore, a certain "creativity" is part of the tradition. (About this creativity, see *ibid.*, p.324.)

Now, as well as in the international Court, also in the European system the acceptability is considered in relation to the institutional or European institutionally dogmatic opinion.

<sup>1703</sup> Bredimas, A., 1978b, p.325. At the theoretical level, we can make a distinction between ought, should, may, and may not sources (Bengoetxea, J., 1993, p.225).

<sup>1704</sup> The lack of *travaux preparatoires* can be explained by the fact that they belongs to another type of political discourse, and they appears too functional from the point of view of the European legal level.

basically by principles and practical arguments<sup>1705</sup>. This is what the legal sciences also emphasize.

As we noted, the use of comparative law, in the European legal orders, at least, assumes a vertical comparison. The comparative interpretation of Community norms, for example, means analogizing and comparing the outcomes of the comparative studies in relation to the systematic premises at the Community level<sup>1706</sup>. In this sense, it is quite evident that where the interpretation of the principles of the European level systems is supported by comparative considerations, these legal principles, in the context of European law, are different from the principles related to the national discourses<sup>1707</sup>. This may be observed, for example, in the *Hoescht* case at the European Community level. In this case the principle was recognized, but because it was considered to be something outside the aims of the Community system, and, consequently, a matter for national legal systems, it was only "respected", but not seen as part of Community law. This view supported by traditional comparative studies.

Consequently, many of the comparative principles do not have the necessarily common features with the principles supported by the open national dogmatic legal discourse. In an extreme case, in the European human rights system and in the realm of the "*margin of appreciation*" idea, these institutional principles remind us more of an evaluation of the constitutional and national legal systematic principles as such<sup>1708</sup>.

Consequently, one could claim that the institutionally principled approach is determines the qualitative adoption of the comparative examples and references. We may say, contrary to the "constructivist" idea, that these institutionalist principles are, in the end, the

<sup>1705</sup> Internal principles, limiting principles, and substantial principles (Koopmans, T., 1991, p.56 ff.).

<sup>1706</sup> Lando O. explains how the system examines the "fitness" of the Community system with regard to the laws of Member States (1977, p.656).

<sup>1707</sup> In comparative reasoning the disassociation of legal arguments takes place. It happens in the transferring of a legal concept, rule of principle, or decision from the national systems to the European systems, from another European system to another European system etc. These different types of legal arguments do reappear, consequently, in another context where they are designed as we have explained before.

<sup>1708</sup> Furthermore, the common constitutional traditions, and some principles related to that, must be distinguished from the basic principles of Community law (Pescatore, P., 1980, p.353). These are, for example, the principles concerning structure of the Community law, freedom of movements, and non-discrimination principles. What is meant here by institutional principles are the "common core" principles (good faith, judicial security, proportionality) deriving from national experience (ibid., p.352).

It has been suggested that there are three major reasons for the great expansion of judicial review in Europe today:

- the emerge of a new form of government
- the new importance of Human rights
- transnational pluralism

Sound governance is not considered any longer from the view point of the "separation de pouvoirs", but rather from the point of view of "checks and balances". It is claimed to be a safeguards against abuses by the political branches (Capelletti, M., 1990b, p.431 ff.).

decisive part of prior comparative evaluations and selection in the European level legal interpretation.

Furthermore, we may note that an intellectually oriented European institutional comparative lawyer is not trying to achieve the support of a very extensive legal audience.

**The analytical quality of the comparative arguments, the "stages of coherence", and the legal integrity of systems.** When the courts, at the European level, take a step towards analysis of different legal systems, the more coherent, *a priori*, the European law can seem. On the other hand, where the legal systems appear analytically irrelevant, we may speak of a weak idea of coherence at the European level.

Furthermore, where the comparative studies play only a contextual role, there seems to be, at the European level, evidently an attempt to avoid the problems within this weak idea of coherence (or even possible incoherence?). At the same time, one attempts to maintain the idea of European level adjudicative integrity. If the national legal systems (principles) and their legislation are extensively analyzed, the idea of legislative integrity seems to prevail. In these cases, the European level is determined strictly by the idea of generality, and the national legal level maintains its relative "authority".<sup>1709</sup> As we have noted, this is not usually the case.

Furthermore, in the case of comparison by opposites, where the comparative analysis and some generalities are explicitly rejected, the idea seems concerned solely with the integrity (functional autonomy) of the European level-orders<sup>1710</sup>. Where this type of "adjudicative principle of integrity" is prevailing, the European level institution is making a strong value-based judgment despite the legislative integrity. Here we may recognize a general conflict inside the general idea of the integrity of European law<sup>1711</sup>. Here we usually speak about an ultimate form of non-discursive and instrumentalist approach to European adjudication.<sup>1712</sup>

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<sup>1709</sup> See, for example, the examination of the case on the inviolability of home.

<sup>1710</sup> In the "cohesion of the legal system", argument is embedded the idea of incomparability. This is related to the cases which demonstrate the limits of legal systems. The cohesion explains the system as a complete system, both formally and functionally.

In cases of coherence argument, the legal systems, or legal orders, are chosen in the realm of the political integrity.

<sup>1711</sup> The problem of comparatively reflexive legal systems is the turning of the political reflexivity into professional institutional reflexivity based on the internal autonomous institutional interpretation.

<sup>1712</sup> Judge Pescatore, P. (1980, p.359) speaks about this phenomenon, albeit, in different terms, as follows:

*"Mais nous avons vu, que la méthode comparative peut également servir de manière toute différente: lorsque l'analyse comparative révèle les disparités et les contradictions irréductibles, sur*

## 5.2. Motives for comparative reasoning in European law

**General remarks.** In this connection we will concentrate on the use of comparative law in European level institutions. The analysis of the possible uses in national legal systems is discussed in the last chapter of this work.

In the European level orders, as we have seen, comparative law has different types of functions in legal reasoning. The European "systems" are comparative systems. The nature of these European systems, as comparative systems, is related to the fact that they have been practically "constructing" themselves on the basis of national systems, and they reflect directly the traditions of the national conceptualizations.<sup>1713</sup> On the other hand, it clearly makes it possible for them to make "legal choices". We have noted, on the other hand, that comparative law is used mainly in order to arrive to an interpretative method rather than to a substantive solution as such.

It has been maintained that the function of comparative law in the European orders is to make the interpretation fit within the laws of the states, supply material for the "right" decision, establish the common core of the systems.<sup>1714</sup> There is thus "*pressure to compare the elements of national and EC law*"<sup>1715</sup>.

However, we may ask how important these national legal systems really are as a source of law for the European-level orders? Namely, even if we recognize that comparative observations function as some kind of basis of solutions for the European systems, we note that European orders do not have, necessarily, to reflect their aims and objectives and previous

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*certain point, entre les droit des Etats membres, la Cour s'en sert comme d'un "reduction à l'absurde" pour justifier le choix de solutions communes, destinées à dépasser les contradictions des ordres juridiques nationaux. Les amateurs de philosophie pourraient y trouver une application du schéma de pensée dialectique, en ce sens que les contradictions entre thèse et anti-thèse se résolvent ici dans une synthèse réellement nouvelle.*

*L'auteur de ces lignes espère avoir pu montrer combien la méthode comparative, qui a déjà montré une extraordinaire fécondité scientifique, se révèle également utile lorsqu'elle est appliquée dans le contexte, très concret, des travaux d'une juridiction de caractère multinational qui, par sa constitution même et par sa vocation, doit être riche diversité des droits nationaux dont elle tire son inspiration."*

<sup>1713</sup> On the interactivity, see Koopmans, T., 1991, p.53. Pescatore, P., speaks about justificatory, apologetic, and constructive approaches (1980, p.357). Furthermore, he makes a distinction between contrastive ("*repoussoir*") and adoptive ("*réception*") ideas.

<sup>1714</sup> Lando, O., 1977, p.657, Bredimas, A., 1978a, p.121.

<sup>1715</sup> This concerns many fields of law, for example, environmental protection, and social policy, connected especially to the "exemptions" such as Article 30 and 59 of the Treaty (see, Dehousse, R., 1994, p.7).

interpretations within national legal systems<sup>1716</sup>. Furthermore, it is generally known that when one uses many arguments (systems), it is many times a sign that no real confidence is attached to any one of them. Even if, at first glance, and in quantitative terms, it seems that the confidence of the European orders is on the national state systems, in the so-called "hard cases" we have recognized a different version of the story.

One may say, in general, that the state systems serve as an analogy as long as they can be instrumentalized according to the basic principles of the European system<sup>1717</sup>. Still, is it possible to identify some characteristic motives for these "instrumentalizations"?

**The forms of traditional "self-construction", control of compliance, and integrative interpretation.** As maintained, one of the motives appear in the traditional claim that comparative law can be used either to fill up *lacunae* or to construct some principles for interpretation. Comparative argument, in its open form, seems to be a constitutive argument.

This type of constructive use can be divided into the use of pre-implementation material and the use of post-implementation material.<sup>1718</sup>

In the use of pre-implementation material, the Community institutions, for example, attempt to cover legal provisions, on which basis one could be able to justify an interpretation of a general principle in the European system. As we have noted, however, this type of "self-construction" is only a justificatory operation. No real resemblance can be found between the principles at the national and regional levels.

In the case of post-implementation comparison, on the other hand, the law of the Member States is usually considered from the point of view of the effectiveness of the

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<sup>1716</sup> As we have noted, comparative justifications do, on the other hand, reproduce the state paradigmatic thinking of law. On the other hand, the fact that the decisions reached do have a direct impact to the law of the national legal systems does "resubstantialize" these systems.

See Shapiro, M., 1980, pp.541-542.

<sup>1717</sup> The external and instrumental point of view to the national systems can be seen, for example, in the idea that the national systems function, to a certain extent, as "*laboratories for the legal solutions*" (Lando, O., 1977, p.645). Interestingly enough, the persuasiveness and the great role of comparative law, at the European level and in the international systems is based on the fact that it functions in finding out "tested" forms of law.

The main features of instrumentality are embedded within the idea that the systems (and its institutions) actions are backed up by an examination of different possibilities and choices of the norm. This means choices, in the European context, between different systems, their norms and their interpretations etc. (Mössner, J.M., 1974, p.220).

<sup>1718</sup> In the practice of the Court, the use of post-implementation material seems to contain analysis of the national jurisprudence including elements of Community law. In fact, it has been claimed that the special emphasis in the institutional study is on the cases decided after a preliminary ruling has been given (*Note d'information...*, p.3).

Such traditional self-construction has been identified in questions of legislation, administration, and fundamental rights (Pescatore, P., 1980, p.357).

Community measures, or the correctness of the implementation<sup>1719</sup>.

However, it looks like the Community Court, for example, has to take into account the post-implementation measures as well, if it is to interpret the national legal systems in an integrative way.

The ultimate means of self-construction seems to be the justification of European-level competencies by identifying comparative tendencies in the sociological and "scientific" sense. This helps the institution to justify its function in the European sphere (for example, by defining the "enemy", which can be tackled only on that level).

**Maintenance of "reasonable autonomy", and the role of comparative considerations substituting the "*travaux préparatoires*".** The question of the non-existence of the *travaux préparatoires* brings up the problem of sensible interpretation. This may be related to the motives for the use of comparative law.

We have noted, in the Community system, for example, that the non-existence of *travaux préparatoires* and any interpretation by the intention of the legislator guarantees the exclusive and practical competence and possibility for the European Court of Justice to interpret Community law. There are restricted possibilities for traditional dogmatics (based on ideas concerning sources of law) to interpret Community law, whether we are speaking about lawyers of different institutions in general or in national courts. As we have seen, this is not exactly the case in human rights system. There the *travaux préparatoires* play a role. However, also in that system, the role of this material and the "intention" of the Parties is diminished where the situation has changed, and where comparative observations come into play.

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<sup>1719</sup> This is, however, not very easy to determine. To a certain extent, every post-implementation practice must be effecting on the interpretation of Community law, or European Law in general, if the states have some autonomy to maintain the coherence or the margin of appreciation of its own legal system (according to European level systems), and even without them.

How should one take this into account the implementation material? Could it be used as material in a comparative interpretation?

Basically it is quite impossible to consider post-implementation practices as a source of law, in terms of the traditional theories. Namely, the implementation material is conditioned by how the supranational bodies consider the validity of that law and those legal norms. Furthermore, while most of the rules in the Community system, for example, are teleological. This it means that the states do not really have any exact idea as to the correct implementation. The States cannot claim, according to the system, any correct implementation. If comparative observations are made, it is only for practical purposes.

In the Member States implementation laws comparisons can be made, even if their legal function is quite problematic. Studies could be made to map some alternatives for implementation.

The Commission has some times presented post-implementation material as an argument in a case, relating mainly to the question, whether the Member States have sought to utilize derogation clauses (Directive Article 2(2) of the Directive No 76/207).

The "comparative *travaux préparatoires*", on the other hand, make a reasonable yet autonomous justification possible. The Court may justify the decision in difficult cases by the examination of the comparative pre-implementation material. On the other hand, the parties to the disputes may refer to comparative observations in order to support their main arguments. The use and evaluation of the comparative material of this kind transfers the question of sovereignty and autonomy to a question of the autonomy of the comparing institution.

It is clear that the reflexive relationship between the regional systems, such as European Community, and state systems would not function in legal terms if the *travaux préparatoires* were too extensive. Namely, the possibility for a reinterpretation of European law would endanger the usefulness of the European norms in the internal regulation within states. On the other hand, the European system would be not able to control this interpretation (on the basis of the Article 177 (the new Article 234), for example). The interpretative competence would be automatically, to a certain extent, transferred to the national level. This possibility of "formative" directing by the Court of Justice by the preliminary ruling process would be endangered.<sup>1720</sup>

Consequently, we may say that, for example, the Court of Justice constructs its own "*travaux préparatoires*" autonomously by means of comparative observations. Comparative law substitutes the *travaux préparatoires*, but in an extremely dynamic way and without any need to have an idea of the legislative intent.<sup>1721</sup> This fact underlines - additionally - its autonomy as a legal institution and as an actor of the Community legal system.<sup>1722</sup> Furthermore, it maintains the teleological premises of the system in general. This "reconstructive" approach to the sources of law (i.e. kind of a "functional source of law") leads to a politically and legally dynamic and functional system. The legal "traditionalization" is in the hands of the process in the Court of Justice<sup>1723</sup>. As observed before, this leads to institutionalist traditionalization of the comparative law in general.

This feature is related also to another benefit of "comparative *travaux*

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<sup>1720</sup> Millett, T. (1988, p.163 ff.) Also maintains that the methods of interpretation of the Court of Justice are conditioned by characteristics of European legislation. If this construction is lost, it would be a risk to the "system".

<sup>1721</sup> This may be associated also with the avoidance of national conceptualizations. As we have seen, one of the basic ideas behind the choices of comparative reasons for the argumentation in the Community system seems to be the avoidance of nationally-loaded expressions. By finding disparity, the Community institution, in a reasonable way, can depart from any particular influences and is able to construct an autonomous European conceptualization.

<sup>1722</sup> Concerning the autonomy functions, see Pescatore, P., 1980, p.356.

<sup>1723</sup> Comparative law as a source of law seems to move on the same level as the precedents in international and regional legal systems. They seem to be a source of arguments, which complement and balance the institutional self-referentiality of using only case law as a source of law.

*preparatoires*". By the comparative observations the Community Court deconstructs the legal language of the national legal systems, and they become "invaded" by the instrumentalist Community conceptualization.<sup>1724</sup>

The question of autonomy can be approached also from another perspective. Namely, the use and making of comparative observations in the justification and even in the dissenting opinions indicates the fact, that comparative observations have been considered. This, on the other hand, gives indication to the national level that comparative considerations have already been made, and that they are not necessary in the implementation of the "supra" national norms. This gives further autonomy to the European-level legal orders.

**The implementation of changes in a persuasive way; the strength of the normative solution.** The idea of comparative law theory<sup>1725</sup> that comparative arguments are used usually in a situation where changes are needed, applies likewise to the European legal orders<sup>1726</sup>. A good example of this was seen in the "double comparison" undertaken by the Advocate General in *Kalanke* case, who used the law of the United States to determine the direction of the change, contrary to the "internal comparison" between the Member States of the European Community<sup>1727</sup>. By the institutionally qualitative approach the Community institution can direct the change and even propose quite "new" ideas concerning the allowed and prohibited types of legislation in the Community system. One could claim that comparative surveys make feasible teleological justification and formulation of norms and decisions<sup>1728</sup>.

The ultimate "change" in the comparative "directing" is naturally the "self-construction" or maintenance of the European institutional framework or the re-definition of competencies in the European sphere. In this sense, comparative argumentation does not have to

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<sup>1724</sup> On the other hand, because the legal argumentation of the national courts is determined more and more by the Community (and in general, the European) conceptualization, this guarantees the interpretative autonomy of both orders in relations to legal dogmatics. From the discursive point of view, this abolishes the interpretative possibilities of the lower level actors in the Community system.

<sup>1725</sup> This is contrary to the regulative ideas concerning normal analogy.

<sup>1726</sup> The fact that internal working methods change and that the styles of discourse in the courts change can hardly be attributed to comparative law as such (Like Bredimas, A., 1978b, p.322).

<sup>1727</sup> This particular feature proves how the European system is reflexive also in the "external" legal sense and not only in the "internal" legal sense.

<sup>1728</sup> It gives the European judges perspectives upon a legal problem (Pescatore, P., 1980).

Comparative law is a source of unwritten Community law. It also functions in restricting elements of the case (Bredimas, A., 1978b, p.332).

be, in itself, extremely "radical". The disparity in the comparative situation, on the other hand, seems to be related to substantial "conservativeness".

Also the non-justificatory use of comparative considerations makes possible a teleological formulation of the justification, and a possible change. When one knows the features of the existing systems and one knows the dominant arguments used in the systems, one is able to formulate a radical justification, which is more easy to fall in with. It is possible to think that the judges need to observe the context into which the interpretation is "transplanted". This way there is a possibility to take into account the particular features of each legal system, and formulate the justification and the interpretation so that the norm is easier to place within a national system. This often gives the impression that the European Court functions as a forum of "*legal innovation*"<sup>1729</sup> (which, in turn, is associated with the "precedential" thinking of the European Court<sup>1730</sup>).

These ideas also seem to have a relationship to the "contextual" (socio-phenomenological) tendency argumentation.

**The stability function: the strength of the argument, relative stability and the judicial self-restraint<sup>1731</sup>, and the relative dynamism.** Comparative considerations, in connection to an interpretation of a legal norm in the European level institutional context, is a way to evaluate the legal "strength" of the (interpreted) norm in the realm of European law.<sup>1732</sup> In reasoning, on the

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<sup>1729</sup> Pescatore speaks even about linguistic reformulations in order to find a persuasive formulation (1980, p.356).

This can be the process of creating also an artificial language (see Sacco, 1991, p.18). That is to say, the role of the interpreter is becoming extremely central, even linguistically.

<sup>1730</sup> See, Pescatore, P., 1980, pp.356-357.

<sup>1731</sup> See also, Doering, K., 1987, p.58. Wiklund, O. (EG-domstolens tolkningsutrymme, Stockholm, 1997) has made a study on the judicial discretion of the European Court of Justice and its limits. He starts from "realistic approach", which takes into account the structure of norms and the division of powers between states and EEC as the basic determinants of the limits of this discretion. The study is "institutionally realistic" ("political" and "moral") rejecting a "positivist" approach.

Wiklund emphasizes the (institutional) problem of division of powers as the basic problem. He notices the strong role of the European institutions in the integration process, but rejects the doctrine of supremacy of European law. He claims that the extensive use of discretion (pragmatism and effective protection of private individuals) by European Court has led to restrictions of the procedural and constitutional autonomy of the Member States. He claims that the critical legal scholarship should be activated in relation to the law-making activity of the European Court in order to secure the legitimacy of the European Court.

It looks like Wiklund, quite formally, underestimates the "coordinative" function of the European institutions, and "equalizes" the functions of national and European levels. He does not seem to accept any distinction between the issues of regulation. He also considers the concept of norm and the constitutionality in quite "holistic" way in the European legal discourse. Furthermore, he seems to emphasize the maintenance of the legitimacy of the European Court as an objective in itself.

<sup>1732</sup> Pescatore, P., 1980, pp.355-366.

other hand, it seems to strengthen the legal argument, but can be also some kind of a sign of judicial self-restraint. This latter feature is visible especially in the European human rights system.

In this sense, the use of comparative law can be, to a certain extent, associated with the recognition of the "intentions" of the states, at least formally. Every time one deviates from the "autonomy" of the supranational European system, the question is about recognition of the states as legal actors<sup>1733</sup>. In this sense, comparative reasoning seems to be used, where the aim of the system is to "translate" the normative idea into the language of the traditional national lawyer in order to persuade that audience. This traditional audience is persuaded (although superficially) by this establishing of an relationship and identification of the state legal systems. In this sense, comparative law at least looks like an argument for the maintenance of the integrity of the state legal systems.<sup>1734</sup>

This idea can be associated with another phenomenon.

There seems to be, in some fields of law, a strong priority given to the national legal systems. This may have to do with the regulated use of comparative law in certain fields of law. As we have seen, comparative law is a legally-regulated source in the field of international law in general<sup>1735</sup>, and in the European Community system in the fields of responsibility questions (Article 215). On the other hand, Community law recognizes the possibility of using comparative observations in certain cases relating to constitutional traditions (Article F, the new Article 6, and the case law). What does this tell us about comparative law in this legal order or such legal orders in general?<sup>1736</sup>

One could claim that the source nature of comparative law is legally recognized in the fields of law where the system should, basically, be convinced not only of the particular

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<sup>1733</sup> The European comparative argument is extremely conservative (as are comparative legal studies in general). All substantive questions seem to be beyond the comparative legal research. The comparative argumentation is strictly positively oriented. This "equality of legal systems" oriented research cannot go beyond the "diplomatic" recognition of states, cannot be analytically open, and cannot sometimes even express studies openly.

<sup>1734</sup> This takes place, for example, by revealing fundamental differences between the legal systems (Pescatore, P., 1980, p.359).

This is the idea of the relative stability for the European order in relation to the national legal systems.

It is quite clear why the use of comparative law concentrates on the European States. This is determined by the legal and political integrity and equilibrium demands. It is, as well, rhetorically persuasive. The use of comparative law is not determined by the interest to information and new models.

On the other hand, the fact that United States appears a model, in many decisions, seems to be the outcome of the earlier adaptations of law. Furthermore, it is used settling problems of strong value conflicts.

<sup>1735</sup> Comparative law can be associated with the recognition of the intentions of the states. Every time one deviates from the autonomy of the supranational European system, the question is about recognition of the states as legal actors.

<sup>1736</sup> Some analysis of the question already in 1944, see Gutteridge, H.C., 1944, p.8.

correctness of the solution, but, for that matter, on the general correctness of the solution too. In other words, these fields of laws are the most sensitive areas of law. They seem to be the most universal fields of the contemporary modern legal system, close to the fundamental legal identity.<sup>1737</sup>

On the other hand, the idea of including comparative law within the regulated sources seems to also introduce some dynamics into the system. This dynamism is designed to guarantee the idea that the system takes into account the general development of law (comparative law opinion), and constantly corrects itself in relation to these developments or undevelopments. In other words, this regulation is the normative functional arrangement in the realm of functional legal systems. It introduces an idea of relative dynamics in these fields of law.

In reality, however, the legal basis approach does not necessarily function in this manner. The legal basis seems to be only an *a priori* recognition of the generality. In fact, it may generate more institutionalized instrumentalization of law.

On the other hand, in those fields of law, where the use of comparative law seems to be only practical, the interest seems to be only to guarantee the effective justification of the solution, or to design the context of implementation or to persuade the parts of the audience (such as like parties) as maintained before.

The fact that the European courts do not so openly interpret national systems may be also related to this idea of relative functionality. Because comparative observations are mainly a matter of the institutional context of justification, and the relative dynamics-approach does not seem to function, it is possible to claim that the relationship between national and European-level orders is increasingly determined by an idea of legal institutional balancing.<sup>1738</sup>

**The comparative reasoning directing future interpretations in national and European systems.** One of the functions of the use of comparative observations may be seen in the attempt of the European courts to direct, "contextually", future interpretations of the national courts<sup>1739</sup>.

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<sup>1737</sup> See also, Galmot, Y., 1990, p.259.

<sup>1738</sup> This occurs in the same way as the national courts balance the national legislature by relying on comparative observations, as explained before.

<sup>1739</sup> For some indications of this type of strategy, see Pescatore, P., 1980, p.354. This type of function is seen by Pescatore as "rationalization".

In this connection, the idea is about the intentionally strategic argumentation by the European courts. Here I do not mean the evolutive aspects, which may be identified in relation to the dissenting, partly dissenting or Advocate Generals' opinions.

Namely, the explicit reference to some national systems, or to the conceptualization deriving from them, may direct the national judges (or even legislatures) to look to these systems in the future interpretations (in legislation, for example).<sup>1740</sup> This can be recognized also from the tendency type arguments appearing in connection to the comparative legal (and socio-phenomenological) arguments<sup>1741</sup>.

This type of rationale may apply also to the discourse between the political and the legal at the European level. As has been noted, the European Court of Justice, for example, has had a fruitful discourse with the European legislature in cases, where legislative measures were needed.<sup>1742</sup> The Court can, by comparative perspectives, indicate the direction for the legislation without having to adopt an "external" interpretation as such or to function as a legislature.<sup>1743</sup>

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<sup>1740</sup> Comparative law is "legal cooperation". It makes the cooperation between courts much easier, for example, in the realm of the Article 177 (the new Article 234) in The European Treaty (Pescatore, P., 1980, p.359).

It has been even suggested that national courts should look the comparative studies presented by the European Court of Justice on several issues in considering the interpretation of law. The national courts should benefit for the stock of comparative studies in European context (Galmot, Y., 1990, p.261).

It is also interesting to ask, what role could the interpretations of the state legal systems have in the dogmatic interpretation of the particular systems of Member States' rules and norms in national legal discourses. Could the description of the European Court be used as an argument in the national dogmatics as a legal argument? As we have seen, this has been done by the English Courts. The question is also about the role of institutional comparative legal studies in the national legal discourses.

<sup>1741</sup> In fact, we could claim that the tendency types of institutional, phenomenological and professional arguments are the ultimate forms of comparative arguments. The question always remains: are there really tendencies? Can tendencies be imposed? Tendency type arguments seem to be narratives of the contemporary European world (or about the past?).

It is also another question as to what purposes this tendency information is put. Does one really attempt to really maintain the integrity of the legal systems, or is the "tendency" information based on attempt to find out more persuasive forms of argumentation and more "adaptable" and "attractive" solutions.

However, there is also a possibility that "tendencies" actually represent and define the basic values to be taken into account in the future. With these types of arguments the decision-maker defines its basic distinction. In this sense, the tendency functions also in teleological perspective, and makes one able to structure the reasoning in the future, without making it necessary to refer to any historical considerations. Furthermore, the legal sovereign may actual define its basis and scope and function, an even its fundamental meaning (the institutional existence) as such, on these basis.

<sup>1742</sup> See, Berlin, D., Interactions between the law maker and the judiciary within the EC. In: Legal Issues of European Integration, 1992 (17-48).

<sup>1743</sup> This seems to apply also to the *Pinochet* case.

As we have seen, the comparative argument does not have to play always a direct and decisive role. The comparative argument may be a form of a legal soft rule.

It seems also to be quite clear that the comparative reasoning cannot have a great role in a situation, where the law - which should be compared - seems to be instrumental itself. The forms of law, which are designed either to correct or change etc. unwanted situation (social engineering) - or to delegate competences - are problematic. These types of rules are related to rules containing general clauses etc. In these cases, it is problematic to identify any general - or even particular - features of law. One has to identify the system as a whole.

### 5.3. The institutional dimension: some analysis of the function of institutional comparative law in European law

**Institutional reasoning in European law.** Comparative reasoning in the European Community institutions - and this applies, to some extent, to the European human rights system and national legal systems as well - seems to be based on the "common legal cultural tradition" assumption<sup>1744</sup>. This can be noted from the fact that, in relation to comparative studies, no general sociological, cultural, or political studies (and neither examinations of *travaux préparatoires*) are made. These types of comparative observations often relate to the phenomenological observations of law by the persons in organizations and decision-making institutions. European comparative reasoning is the "institutional professionalistic" and value-based comparative reasoning<sup>1745</sup>.

The value-based and institutional-phenomenological nature of European comparative reasoning may be related to certain communicative problems. First of all, the argumentation, in institutions by institutional actors, may be based on an incomplete understanding of the integrities of the overlooked systems. This may be a result of the lack of information on the relevant elements in legal systems. On the other hand, the incompleteness of the information may be accepted intentionally. This may be due to the effectiveness demands of the legal order, but also a result of the pathological tendencies in the organization ("attempt to avoid problems"). Thirdly, the value approach may come into a play because of the exclusion of the comparative information as relevant information as such.<sup>1746</sup>

In these types of cases the justifications become extremely affective.

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<sup>1744</sup> The effectiveness of this argument derives exactly from this fact. It assumes, and its addressees (audience) assume, a holistic understanding of the different dimensions of European discourses.

<sup>1745</sup> Also Koopmans, T. on "institutional specialism" (1996, p.546). Concerning the "phenomenology" of comparative law, see Pescatore, P., 1980, p.338 ff. On the "pre-institutionalized" form of this type of "comparative law", see Gutteridge, H.C., 1944, p.9.

As we have claimed, value-based decisions can be seen especially in cases, where the comparative generality is neglected as a legal basis. This is so because then the question concerning a particular problem is generalized being connected to all legal systems of the Member States. Here the whole orientation of the tendency is declared unacceptable, and not only the rules of the particular system as such. Here the comparative influences are strongly determined by the traditional orientation of certain systems.

<sup>1746</sup> If vertical comparability is neglected, it means, in a way, that the systems regulated are not seen as equal any longer. Because of some traditional context, the models must arrive from one context, which remains, in this sense, superior to others.

This explain for example the fact, why the US system is taken as a comparable and referential system in the cases where the vertical comparability is neglected. The US system hides the fact that one of the internal systems, where the model is coming from, is the contextual basis of justification (see *Kalanke* case).

**The structure of the European level institutional comparative law.** To explain the phenomenon of institutional comparative law, one could make a distinction between different arguer-audience relationships internal to the European level legal institutions. We can consider these auditories as parts of the formation of the institutional opinion.

First of all, it looks as if the judges are the audience for determining the correctness of the expertise (internal-institutional or external institutional) comparative studies (including Advocate Generals' comparative opinions). Furthermore, all comparative reasoning presented by the parties is directed to the judges.

This means, for example, that, in the European institutions, the final discourse on the acceptability of the relevance of the comparative information takes place in the internal discourses among the Court members.<sup>1747</sup> The European Court of Justice in particular restricts clearly and effectively the use of comparative observations, even if it sometimes expresses the influences explicitly in a shortened and rather embellished way. As we have seen, the Advocates General and members presenting the dissenting or partly dissenting opinions are able to make more open statements<sup>1748</sup>.

The transitivity relationship between national dogmatics and the institutional (external or internal) experts is indirect. This is exactly one of the reasons why we cannot speak of a direct communicative relationship between national and institutional actors. However, the information still flows from the national dogmatics to the expertise institutions. The specialized expertise-institutions function as an institutional expertise opinion. The experts regulate what is considered to be correct, acceptable and relevant information for argumentative purposes internal to the institution.

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<sup>1747</sup> It can be claimed that the principle of confidentiality, some courts, concerning the availability of the comparative information makes it quite impossible to evaluate the influences deriving from different systems (the "diffusions of law"). However, what one may do is to evaluate influences based on other arguments related to comparative legal evaluations.

One may assume also that the idea of restricting the publication of comparative material is based on the interest of limiting the possibility of an impression that a system is a direct source of the solution.

Also questions about different cumulative effects, in the interpretations, seems to be hidden. For example, it seems to be impossible to know about the further implications of the comparative observations in subsequent case law. This is related to the problems of interpreting decisions in general, and their aims. Consequently, the "best argument" remain unknown.

On the other hand, the role of the institutional relationships is difficult to grasp.

It might be exactly the consequence of the informal and instrumental use of the comparative observations, why the relationship between the Community law and national legal systems is difficult to establish in legal research (On this difficulty, Bredimas, A., 1978a, p.103).

<sup>1748</sup> It seems, however, that in the earlier days of the Community order, for example, the practice of autonomous use of comparative material seemed to be more casual and common.

Where the European level courts rely on either the expert studies (whether internal or external), or on the relatively contingent observations by the judges themselves, it means that the relationship between the Court and the national dogmatics is not systematically direct either. Courts are not the direct audience of the national dogmatics.

Institutionalistic comparative law guarantees the efficiency of such studies. On the other hand, the information is under the institutional control. This way the court, for example, goes beyond the criticism of misinterpretation of national or comparative discourses. This is a form of the reflexivity between these two levels of legal orders. Furthermore, in having the comparative discourse institutionalized, the choices of the persuasive way of reasoning can be selected more efficiently. One is able settle on the type of argumentation which is most suitable for the interested audience.

Now, some special remarks have to be made concerning the relationship between the Advocates General and the Court of the European Communities and on the European system of human rights.

As we have noted, more "qualitative" generality and divergency arguments can be found in the justifications by the Advocates General. However, it is not self-evident that these analyses have a normative value for the Court. They can be adopted or not. In point of fact, it looks as if some of the reasons, and especially the comparative observations presented by the Advocates General, do not appear in any form in the justification of the Court, even if the normative conclusion is the same. Clearly, the reasoning of the Court seems to be extremely formal.<sup>1749</sup>

This does not, however, mean that the comparative observations would not have any impact on the normative conclusions of the Court, or that they have not been used in the internal discussions. On the contrary. It seems that the comparative observations are relevant arguments and that the Court has different types of principles and sees the functions of the reasoning differently.

However, it is quite difficult to find any general features of the influences of the contextual comparative law upon the justifications of the European Court of Justice. It seems that the success of the comparative analysis is related to its concordance with the accepted 'internal'

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<sup>1749</sup> For some analysis of this relationship, see Pescatore, P., 1980, p.346.

principles more than to the idea of "direct derivation"<sup>1750</sup>. It seems clear that the Court attempts to maintain the autonomy of the order by interpreting the comparative observations in accordance of the principles of Community law (its aims etc.).

In this sense, the relationship between the Advocate General and the Court appears also normatively transitive. In cases, where the solutions are the same, the comparative observations by the Advocates General, are likely to be agreed with. However, if the Advocates General enter too strongly into the comparatively based observations, the Court may neglect the comparative analysis as irrelevant or unacceptable. This rejection could be based, one could imagine, on too much emphasis on the "one-country-as-a-source" idea. Too much significance attached to one country in the comparative analysis can be contrary to the principles of the Court. These types of analyses may be taken into account, but they are not, as such, seen in the reasoning as an explicit reference to one legal system.

On the other hand, one could claim that, in some cases, the material norms referred to just do not seem to be suitable to the European context. The restrictions, based on this substantial inacceptability, are usually made in the context of the institutional framework (the internal discourse), or in the consideration of the relevancy by the Advocate Generals. However, it is interesting to note, that also the Court, in a substantial sense, may reject the proposals of the Advocates General based on comparative studies.

In the European Court of Human Rights the situation seems to be slightly different from the European Court. It seems that the comparative observations by the Commission and parties have generally a great impact upon the justification of the Court. This has evidently to do with the "balancing" role of the Court. On the other hand, the comparative analysis, in the dissenting opinions, seems to represent reasoning, which has been presented already in the "internal" discourses. In the dissenting opinions, judges are more free to take examples from different national systems. They tend to represent the alternative possibilities in legally reasonable way, which may be contrary to the general case law or against the interpretation of the Court in that particular case. This seems to indicate that also in the internal discourse of the European Court of Human Rights, comparative analyses are discussed, but that the Court does not wish to bring these observations to light as a matter of principle.

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<sup>1750</sup> One interesting subject, in Community legal research, would be the idea of how the opinions of the Advocate Generals are used, as legal formants, in different decisions over a certain period of time. In general, this would be a study of the role of different institutional sources. These types of studies do not appear in the traditional dogmatic approach to the Community law. The rule oriented studies do not reveal anything on the argumentative strategies.

On the other hand, the fact that these observations appear many times in the dissenting opinions seems to suggest that the comparative observations are presented exactly in the situations, where there is strong disagreement. This can be supported as well by the fact that the parallel justifications agreeing with the main justification and solution do not seem to include extensive comparative observations. It seems to be clear that by comparative observations the judges, having separate opinions, seek the adherence of the traditional national audience or the comparative opinion as an alternative to the institutional opinion. This way these types of comparative law observations may give dynamism to the system in an evolutive sense.

The relationship between the Advocates General and the European Court of Justice is especially interesting from the point of view of argumentative functionality. One could see different types of discursive principles behind their justifications, or even two types of discourses. The Court is stressing clearly the efficiency and the autonomy of the European legal order. On the other hand, Advocates General tend to be more oriented towards the Member States and represent the Member States in the Community level.

Even if the function of the Advocate General is to give an advisory opinion to the Court, his opinions are public, and one can hardly overestimate their function also as justifications of the cases, as we have maintained. However, they have also the function of achieving the adherence of the general legal and general public audiences, and they do not function only in convincing the Court as to the acceptability of some solutions<sup>1751</sup>. Here we come to an interesting point.

To a certain extent, the role of the Advocates General, in arguing to the comparative, and even national audiences, can be seen as a way of avoiding the criticism against the Court itself in another way. It seems to persuade the audience by explaining that the comparative observations have been made, and that the decision is not based solely on institutional principles. Furthermore, it is quite evident that the effectiveness of the Court's argumentation is related to its shortness in relation to the justifications made by the Advocates General. As we have seen, the relationship between Advocate General argumentation, in relation Courts argumentation, is also less persuasive because of the breaks and jumps in the analysis. Its shortness and reduced analytical nature make Court argumentation seem more compact. The fact that the Court is making value-based limitations upon the argumentation, and that seems to

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<sup>1751</sup> In this sense, it seems to be acceptable to study of the role of these opinions in the justificatory processes, and to examine the functions of the differences and similarities of these opinions and the Court's judgments.

analytically examine the Advocate General's statements and evaluate them normatively, increases the authoritative force of the Court's argumentation. It then looks like the outcome of more careful consideration rather than a mechanical adaptation of reasons. This can be seen exactly in the cases of the comparative reasoning in the European Court (likewise in the Court of Human Rights)<sup>1752</sup>.

In conclusion, however, we may say that Advocates General do seem to have in mind a larger audience. The Court, on the other hand, seems to be institutionally and procedurally (formally) closed, and it attempts to maintain the authority and integrity of the system. If the Court does discuss the question on a comparative basis, it does so restrictively. However, the combination and interaction of these two institutional actors produce a reasoning related to same large audience as in the case of the Advocates General.

#### 5.4. Conclusions

**The function of comparative law in the evolution of European law.** As we may notice, European level systems seem to have an idea of "evolutive" interpretation. The systems tend to keep open changes by identifying, on a situational basis, the disparity and generality existing in the systems. This is part of the "legal functionality". This means that the "stages" of European legal development are examined all over again by comparative means. The idea is to establish well functioning norms in each stage of the evolution. The comparative observations function in checking the "evolutionary" stage of European law<sup>1753</sup>.

Furthermore, comparative law is an extremely important factor in the legal drafting of situationally determined European rules. Moreover, one could see similar functions in the dissenting opinions, and Human Rights Commission and Advocates General argumentation, which may be used as a store of alternative arguments.

Comparative law seems to function as a means of coupling of a system to another system. This coupling takes place in a process where the terms and the solutions of some "trans-

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<sup>1752</sup> The analysis of the comparative observations can be rich, but not that rich. As is well known, the persuasiveness can be diminished where the analysis is too long. This is related to the restriction of the analysis of the legal systems to the traditional basic legal sources.

<sup>1753</sup> See also, Schermers, H.G., 1979, p. 169 ff., and Galmot, Y., 1992, p.258.

ferring" systems are translated into the language of the "receiving" systems.<sup>1754</sup> This is true especially in a situation where the comparative examination is contextual, and where the comparative examinations are followed by a norm selection. In an extreme form, comparative law functions as a means for the construction of the European-level system architecture. This way institutions transfer the different traditions of the European state paradigm to the European level. On the other hand, the European systems function as a kind of normative "implanters" of various solutions in national systems to different systems<sup>1755</sup>, at least in a formal sense. As we have seen, different reflections transform the European legal systems in different way, and different national legal systems have an influence in different fields of law etc. This depends upon the general orientation of the institutional actors too, as we have mentioned.

On the other hand, where the changes in European law, through the comparative law of the Member States, can be seen as less "integrative" and the argumentation less "persuasive", so-called "third law" comparisons may appear relevant in justifying the drastic changes to the European legal systems<sup>1756</sup>.

**Problems of evolution?** As we have seen, the function of the comparative interpretation, in a positive sense, is to reveal the heterogeneity of the European legal language, and in this way to provide a context for the justification of the normative choices. However, as the study of the European-level adjudication indicates, the comparative studies are not often revealed.<sup>1757</sup> This leads to the observation that it is quite impossible to understand the normative choices of the courts. The courts' decisions have to be interpreted "autopoietically", in relation to the jurisprudence found in its own case law.

In this sense, the European legal jurisprudence seems to be discursively oppressive. It determines the "traditional" use of language by imposing its "legal language" upon the national, comparative and general legal discourses in general, but maintains the understanding of the "real"

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<sup>1754</sup> On the use of receiving and transferring, see Kamba, E.J., 1974, p.23.

<sup>1755</sup> Concerning the spill-over effects, see Schwarze, J., 1991, p.15 ff., Gordon, A., 1998, p.255-256. Also, Galmot, Y., 1990, p.261.

What we have to remember is that the question is not only about implanting some positive formulations, but also implanting new approaches to law (some methods of interpretation, for example, teleology) and certain type of institutionalism and division of powers, and, in the ultimate sense, the ideas on social justice.

<sup>1756</sup> It seems to be clear, in relation to the *Kalanke* case, for example, that when the "internal" comparison does not result in a principally accepted form of legal basis, resort is then to external comparison. This may be associated with the idea that a legal order seems to be obliged, in European law, to make decisions and to reproduce itself as a superior order.

<sup>1757</sup> Pescatore, P., only the "iceberg" (1980, p.358).

normative choices in its internal sphere. In this context, we are discussing the normative choices of the models on which the Court builds up its interpretation.

Why would this be important? Why would it be important to know, which comparative choices the Court has made in the institutional context?

The idea behind this interest is that the European jurisprudence is extremely dynamic. To a certain extent, the decisions, in many cases, are not "permanent". The preliminary material consists of possible premises for system-understanding. The study of these internal comparative explanations and descriptions would be important, because they have a tendency to remain and to become "ontologized". This is why the context of the explanations behind the normative decisions must be revealed so that there remains a possibility to reconstruct also other types of comparative explanations, and to reveal the possible misunderstanding internal to the institution<sup>1758</sup>.

On the other hand, the validity of the use of comparative legal observations in the European Courts is related also to the interpretative status of the judge. The basic idea is, as we know, that the European judges should not normatively interpret the legal systems of the Member States. In fact, however, this type of interpretation is unavoidable. Furthermore, we know that the judges have a tendency to interpret comparative material based on their phenomenological understanding and also quite "politically".<sup>1759</sup> Here the question of the nature of the comparative studies becomes relevant, if we have to examine the ability of the administration to really present correct interpretations of the national systems, even with regard to their own national systems. There is always the possibility of a "wrong" interpretation, especially, if we think about the "tendency" analysis, which seems to be part of the socio-political comparative observations also<sup>1760</sup>.

To conclude, there seems to be, in general, a reluctance to have the comparative discourse within the European legal institutions. One could even claim that the idea is to avoid scientific discussion of the issue. At least, the European institutions do not encourage the development of the comparative legal discourse in Europe. This seems to be strange, especially

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<sup>1758</sup> If it is so that the comparative argument is related to the inventive side of law, and, as we have seen, the organization uses it in the internal discourse rather than in the external justificatory discourse, it is a case in point of autopoietic organization. It changes and develops the law by closing itself normatively.

<sup>1759</sup> See also the discussion of Weiler, J.H.H., 1998.

<sup>1760</sup> For some aspects, see Hunnings, 1996, p.171. For an indication of the strong value-based method of comparative interpretation in general by European judges, see Mancini, G.F., 1998 (especially the comparative observations on pages 33-39).

because the issues of comparative law, which are many times instrumentalized, are usually somehow "unclear" from the legal scientific point of view.<sup>1761</sup> Consequently, no critical and analytical perspectives are usually available in everyday discussion. This means, on the other hand, the disappearance of a genuine attempt at a scientific comparative discourse. At the same time, one is not able to take comparative law seriously as an argument. The lack of internal and analytical comparative law discourse causes a lack of persuasiveness of these arguments. This, in turn, generates a lack of an essential dimension for the development of the national legal systems.

## 8. Conclusions on European law

**General remarks: toward a "reflexive" theory of European law.** One could easily come to the conclusion that the only way to have genuine "European legal studies" would be to undertake sociological studies on the institutionalized forms of legal decision-making in Europe. However, the legal system(atization) approach is preferred, in this connection, and some remarks can be made on the legal dimension of institutionalized comparative law in general, from the point of view of the legal discourse theory.

The identity of European law may be seen in the "comparative formations", as we have maintained. This identity is not necessarily related only to the normative outcomes of the comparisons, but, for that matter, to the types of comparative processes and comparative formulations themselves attached to these "substantializations". This kind of concept of European legal identity deviates from the traditional "paradigmatic", ideological, dogmatic, and political ideas of identity. It is based on the idea of the discursive identity. Consequently, when we speak about the European legal orders, we seem to speak about relatively autonomous orders and legal cultures.

This comparative relationship between different European legal orders can be, moreover, characterized as reflexive. In the realm of this comparative reflexivity, there seems to be linguistically (performatively) formalist systems, which, on the one hand, are flexible in their historical interpretation of law. At the same time, there seem to be systems where the linguistic formalism refers rather to the weak role of "common language" as a legal measure, and, similarly,

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<sup>1761</sup> The idea of *ad hoc* requests for comparative studies from different scientific institutions indicates that some scientific "correctness" is wanted.

However, one has to remember that the comparative observations are still made in the organizations, and these studies are not necessarily revealed to the public or to researchers.

sticks strongly to the legal-historical and dogmatically defined conceptualism (and “substantialism”).

To make it possible to merge these types of systems into one “European” perspective requires the idea of discursive reflexivity. This way we end up with the idea of comparative discursive reflexivity of legal systems. This comparatively discursive reflexivity can be analyzed in the following way.<sup>1762</sup>

First of all, the systems seem to identify each other mainly via their institutional margins of law. This seems to be due to the fact that legal institutions are, at the same time, liberative (opening) and deliberative (closing). They interpret their “own” rules and formulate norms, but are open also to “external legal information” in quite a “genuine” sense (unlike independent or dogmatic academic comparative law studies). On the other hand, when institutions are using comparative law as a source of law, they are not always able to be open in relation to public discourse (i.e. to be discursively liberative). In general, as we have stressed, in the using of comparative observations, the discursively liberative aspect gets diminished. In fact, any use of comparative observations seems to lead to institutional legal conducting mechanisms, even if, from a purely formalist legal point of view, the use of comparative law seems to be important for the continuity of the legal system as such. This idea is also related to the fact that comparative observations are strongly directed only to the institutional legal audience. The problem is that there seems to be a gap between legal professionalism and other types of audiences.

If we would maintain this institutional centrality, we would have to centralize this type of discursive reflexivity also. Consequently, we would have to also give preference to legally professionalist and instrumental institutional systems. However, it is argued that European law cannot be (in a democratic sense) institutionally centred, and the gap between the general public (legal) discourse and the institutional professionalist discourse has to be avoided. We must take the European comparatively reflexive discourse to the margin of law. This can be done in the following way.

It is maintained, firstly, that it seems that comparative law may be used only in hard

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<sup>1762</sup> Some suggesting a strictly normative theory on the relationship have used concepts of “parallel” and “exclusive” powers, see, Bieber, R., *On the Mutual Completion of Overlapping legal Systems: The Case of the European Communities and National legal Orders*. In: *European Law Review*, 1988 (147 ff.). It seems that in this theory, the distinction between order and system is not analytically relevant. It also assumes strong “commonness” in relations to concepts and norms.

For the problem of “commonness”, see Legrand, P., 1996, p.54 (especially p.56).

cases, if parties accept and demand the use of comparative analytical observations and the decision-maker chooses to do so or, as in European Community law, there are institutional forms for this use. When this use is not demanded (i.e. the argumentation by parties is based mainly on extremely "common sense" reasoning by practical-teleological arguments), the decision-maker may not use them. On the other hand, when the comparative analysis is considered a sensible and reasonable approach to the situation, it may be included within any justification. The use of comparative law seems to be, in this sense, an alternative and a marginal phenomenon.

Secondly, we may also challenge the centrality of the hard cases of law (related to these comparative observations) from the point of view of an idea of legal culture in the following way.

Now, in "normal" legal decision-making, judges decide cases by making interpretations based on usually quite well-justified, albeit conflicting, opinions of the parties of the case. However, if one is not able to find, on the basis of the parties reasoning, the essential elements for an interpretation and there is a problem in the reasonability of interpretation, one may take up, in the absence of other "new" material, comparative observations. However, at the same time one steps out of the hard core of the positive formal legal culture, as we have maintained. Moreover, if comparative argument is taken up as a best argument, the decision-maker clearly moves in the margins of any legal cultural perspective at least in a formal way.

When we have an "easy case", to be decided on a conventional (legal traditional) basis, the parties are usually not discursive in any traditional sense. On the contrary, in these types of cases the parties seem to be extremely instrumental in their legal argumentation. The established forms of reasoning and doctrines are maintained as best arguments. In fact, then the cultural (institutional) contextuality is more decisive, and we may even claim that the societal structures of authority are decisive for the "substance". In this sense, it seems interesting that a certain degree of political instrumentality seems to be a phenomenon on the hard core of the legal culture. In this sense, we could identify legal culture as politically contextualized social phenomenon. We actually could speak about an instrumental game of law as a hard core of a legal culture. However, this does not seem to be correct. Namely, we easily come back, in this type of institutionalist legal theory, to the margins of law.

However, in the realm of the discursive theory of law, we could instead replace the idea of the "political" with the idea of finding finer meaningful distinctions. In this sense, the hard core of the legal culture seems to be a search for the distinctions relevant to the interpretation of law. The extent to which this can be done is determined by the discursive sensitivity of the

parties and judges, but also on their idea of discursive integrity. We come to this later on. Nonetheless, in this connection we may say that if we really try to grasp the idea of how the coherence of law, legal systems, or cultures seem to be maintained, we may adhere to the idea that this process takes place within the discourses in an equal and integrative way. Within this type of maintenance, the “legal” parties justify analytically their opinion (in a reasonable way). In fact, the task of the judge, in these types of cases, may be determined by the task to “guard” that the legal discourse deals also, and mainly, with the hard core of the traditional legal opinions prevailing. In the traditional legal sciences, this seems to be the role of legal dogmatics and also legal theory.

The idea in this kind of integrative and equal discourse seems to be, consequently, to interpret legal culture as a discourse. The institutional discourse may, in this sense, show itself only as an institutional hard core of the legal culture. In this type of institutionally “marginal” interpretation, however, one may move towards the hard core of the legal culture as such. The institutional discourse may be instrumentalized as such.

Now, in this type of institutional discourse, comparative arguments may have an open role. However, these institutional discourses are still at the “margins” of the legal culture in any substantive sense. They are marginal from the point of view of the general legal discourse, and their role is to be decided on the basis of further development, discourse in dogmatics and legal theory etc.. Furthermore, from the point of view of the traditional theory of legal discourse this should be so. One does not aim to speak to a more general audience than to the quite-restricted legal audience.

In this sense, we may remain in the realm of the comparatively discursive reflexivity of law.

How could we then see the hard core of European law from this point of view?

Because European-level norms are more or less comparatively (and institutionally) constructed, no real “hard core” seems to exist. In the realm of the European norms, one seems to be unable to reach any self-sufficient clarity. European level law is reflexive law as such. Also the institutionally determined comparative interpretation seems to indicate this. The process is not an analytical discourse based on comparative analysis, but institutionally and, at most, traditionally determined comparative justification. It is very difficult to reach the traditional sphere of law in general. The comparative observations do not seem to go towards any finer sensitivity of the legal situation analysed in an equal and integrative discourse. On a contrary, the comparative analysis shows itself in many ways as an superficial confirmation of the homogenized

legal past, which is instrumentalized by means of institutional authority. In this sense, it moves in the margins of law.

Could we claim, however, that the European legal principles could be some kind of central (cultural) "structurants" of European-level law?

We know that the scope of European legal principles is not clear. Their use seems to represent a hard case, as we may see also from the extensive but, nevertheless, traditional use of comparative law in their interpretation. The "discursive game" seems not to be about finer distinctions, but usually about the European self-construction or the "balance" between these spheres as an aim as such. The political game seems to be also seen as a game of statal and governmental self-recognition. The change of the "spheres" from national to European takes place many times in this interest (one is able to see the state systems holistically, and to avoid genuine discourses). However, this type of legal-political game is not, in any way, linguistically or culturally contextualized in the traditional discursive sense.<sup>1763</sup> It is institutional-professionally determined. The institutional self-reproduction seems to be exactly the hard core of the European law. The European level fills up the "lacunae" of the national legal systems and their hard cases by its institutional appearance. One discusses, on these bases, something, which has not been taken up in national legal systems as a relevant subject.

Consequently, in many ways, European level law moves in the margins of discursively conditioned games of legal interpretations. Its principles are in the margins of law. In a best situation, when dealing with comparative aspects in these processes, we may come to a value-based discursive legal process. Nevertheless, these institutionally conducted processes do not seem to strive towards the hard core of law or traditional legal culture in this sense. They are not discourses on the hard core of value-based language.

The hard core of European law and legal culture is in its institutionalist possibility.<sup>1764</sup> Comparative law is a legal source in European principled institutional decision-making, because it is considered a balancing element in the very strong institutional performances in the case there is no hard core linguistic or any other type of sources for the discourse. The use of comparative law attempts to balance the principled institutional decision-making, but many times fails to do so because of its incomplete understanding of comparative law (seeing it not as a discourse, but a form of conceptual framework).

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<sup>1763</sup> Pescatore, for example (1980, p.358) speaks about discursivity, but seems to refer only to the institutional discourse as a discursive approach.

<sup>1764</sup> This is maintained, for example, by Weiler, J.H.H., 1998, analyzing Mancini, G.F., 1998.

On the other hand, where the European institutional law is directed to the national legal systems, it is redefined in the terms of the national legal conceptualization and interpretation of the national legal institutions and dogmatic discourses.<sup>1765</sup> The arguments deriving from the European regional discourses interact with the arguments in the legal-political discourse of rule creation and legal discourse of rule application, the results of which depend on the internal discursive culture of the adapting system. However, in the factuality of a system or systems, the "descriptions", cannot be genuine arguments, for they do not represent a basis of a consensus as an immanent form, but rather, as mentioned before, they are quite contingent adaptations. If the factuality of legal systems enters into the legal discourse of another system, it has to be rerationalized in its own discourse. This is the other side of this reflexivity.<sup>1766</sup>

**Could there be any justification for the (institutional) non-discursive reflexivity? We may ask whether the closed comparative reflexivity of European legal institutions could be justified in legal terms?**

We have already found some reasons for it at the European level. For example, one may emphasize the idea that the European level orders close themselves mainly because there is an attempt at its reproduction as the only legitimate authority (the argument of institutional integration). The clear references to state legal systems and, moreover, the analysis of particular

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<sup>1765</sup> Reflexivity is a simple result of the fact that all norms at one level (international-EC, EC-national etc, national-national) have to be transformed in the formal and substantial level of the system concerned (domestication/internationalization).

See the concept of domestication, de Boer, Th.M., 1994, p.18. This is kind of a "logical process".

Some discussion on the influences of European Community law to national legal systems, see Koopmans, T., 1991, pp.505-507.

<sup>1766</sup> In this sense, one may understand, for example, why the European Court speaks about the autonomy of the European legal order, and not about the autonomy of the European legal system. Even if the European legal order (Community law) can be normatively considered to be as an autonomous order, it is not so conceptually, procedurally, organizationally, and, in addition, jurisdictionally. The idea of "legal order" seems to be an explanation for the fact that the legal "system" is unsystematic in nature, and that the systematization itself takes place in genuine legal discourses. The Community order uses these discourses instrumentally. This way the autonomy can be defined as instrumental autonomy. This idea suits well to the idea of the nature of European legislation as instrumental and teleological legislation. For the nature of interpretation in Community order and legal system, see Daig, H-W., 1981, p.402 ff.. There has been also use of the expression "Le système juridique communautaire", see for example, Wilmars de, J.M., 1991). For the autonomy, see Mortelmans, K., Community Law: More than a functional area of law, less than a legal system. In: Legal Issues of European Integration, 1996/1 (23-49) maintaining that the national legal systems do not fulfil all the criteria set by legal theoreticians (referring to Bengoetxea, J., who sees, on the other hand, the Community system not fulfilling the criterion of a legal system). Also, Schilling, T., The Autonomy of the Community legal Order: An Analysis of Possible Foundations. In: Harvard International Law Journal, 1996 (389-409), who studies the autonomy of the Community law on the basis of the original Treaties, its further development, its natural law status, its international law status, and comes to the conclusion that international law functions as the only basis justifying the autonomy of the Community legal order from the national legal systems, which also seem to function as the *Kompetenz-Kompetenz* instances of this *melée*.

legal social systems, would drop off the force of its interpretation to the extent that the system would lose its reproductive status in the social system. In other words, the "legal sovereignty" idea may serve the purposes of integration. Non-referentiality at the national level may also be based on this idea, but in an extremely formal sense.

In the case of European Union law, this is particularly visible. The only way to establish a "new" legitimate order is to maintain some degree of closeness in the situation, where the social system seems to be, in many ways, disintegrated. In this way it is possible to weight up effectively (in political discourse) the conflicts internal to the European systems, and to maintain relatively acceptable solutions and argumentation. The disparity of discourses and the non-existence of the general European discourse can function as a legitimation of this instrumental closeness.

On the other hand, one justification could be derived from the idea of the internal problems of the balance of power in the national legal systems, as we have maintained. The national adjudication has to, increasingly, follow the globalized legislature to that same sphere of rationality. We could say that any method of balancing this development is justified. In national legal institutions, the idea may be related also to the "internal" balances. Namely, by the closed use of comparative material one tries to reproduce the idea of the traditional "material" supremacy of parliament.

Another justification is related to the nature of legal justification as such. This will be dealt in the last chapter more thoroughly.

However, it is exactly these features which speak also for a relatively open comparative reasoning. Firstly, one could say that the general legal discourse is the only way to harmoniously develop the European legal systems. If the substantial comparative reasons and analysis are exposed to the light, the discourse on them creates the dynamics essential for the development of the European legal sphere. Secondly, re-founding the traditional forms of legal sources, the states and perhaps the normative social subsystems, functions to stabilize the legal framework of Europe before it becomes heavily overloaded by instrumental and ideological afflictions<sup>1767</sup>. Here we could claim that even if the reflexive relationship between systems would seem only to maintain the autonomy of the legal systems and orders, and even if the relationship would be legally indirect, it still would be based on the principle of the adjudicative integrity of

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<sup>1767</sup> It can be noted how comparative observations are sometimes related to the legal "sub-systems" too. In some cases, there has been a comparison between the rules of the lawyers associations. These sub-systems maintain a relative autonomy in deciding on their internal rules.

law.

In the end, we may claim, from the point of view of legal theory, that “European institutional” law is, in relation to its comparative approach, deliberative in general. The general discursive coherence is not, and does not seem to be able to be, the main aim and principle of European adjudication.<sup>1768</sup> The legal theoretical perspective is in many ways restricted. There is no attempt to create a more discursively extensive analysis of the system in general. The adjudication of this kind, apart from the English approach, does not aim to relate itself to the “total” system. This type of legal theoretical idea leads to the fact that no liberative perspective exists. At the European level, this, on the other hand, results in a non-discursive approach to legal adjudication and has its influence also within national systems oriented to a formal use of European-level decisions.

**Integrative reflexivity and European comparative rules.** We have seen that even if the coherence of a legal discourse is the basic theoretical normative premise of European law, the evolution of law and legal systems is a continuing process, and the idea of coherent closeness of legal systems and the law, as a discourse, does not exclude the possibility that the perlocutionary sphere of social normativity (“results of law”) is taken up to be a question for the legal discourse. These normative “perlocutions” of legal systems can be adapted also to the political discourse and, in the global sphere, to the discourse of international and regional systems. These latter systems, in particular, create their immanent propositions in relation to genuine legal discourses *a posteriori*.

The basis of this rationalization of the “factuality” of another legal system takes place, as we have seen, in the realm of the comparative legal discourse. The comparative law discourse is an attempt to rationalize the adopted arguments, and even their choice and reformulation, and generality conclusions. This way there seems to be a creation of a “hypothetical comparative rule” for the use of the regional or domestic legal discourse, which can, consequently, function as a basis of a consensus.

One could claim that the basic ideas behind the application of the comparative rule, as a hypothetical legal rule, which can enter into a legal system as a rational legal argument, are constructed in a process based on the principle of discursive integrity of the particular legal-political community. The social and legal consensus is on this principle. On the other hand, the

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<sup>1768</sup> In relation to the English system one may have, however, a contrary opinion.

study of the application of this legal principle of discursive integrity, and the comparative legal discourse, explains, how the legal normative principle of integrity can be seen in different legal systems of regional or international communities. The legal discourse may “socialize” the integrity principle by explaining the normative nature of this integrity in legal terms (the nature of the comparative rule), and by explaining the intentional forms of integrity as a teleological aim of a system. In this sense, it looks like the comparative discourse aims at a common legal understanding of the legal and social nature of integrity as a comparative law principle.

On the other hand, in the realm of the legal discourse, one finds also the limits and nature of the consensus on this integrity. The legal discourse rationalizes the comparative rule of integrity and the comparative legal rule so that it can be seen to be rationally adaptable (or non-adaptable) in different regional and domestic discourses of law as argument of law.

Consequently, there is the possibility to arrive at an immanent form of law as the premises for an interpretational process. The legal discourse brings to the light the existence of an integrative rule of law, which can serve as a legal basis in a particular legal system. This way the comparative legal integrity could be used even as an argument in the practical legal discourse of application as such<sup>1769</sup>.

Consequently, we could maintain that the idea of the European comparative dogmatics, founded on the examination of the European legal integrity, consists in the identification of hard cases, and marginalities as the basis of the decisions, and identifications of the fallacies of the problems of comparative reasoning in legal decisions-making<sup>1770</sup>. This is discussed more thoroughly below.

There is also another factor. In the field of legislation, the transfer of sovereign powers from national systems to the European Union creates obstacles for national parliamentary systems to regulate certain fields of law. However, the fact that comparative law is embedded in the instrumental work of the European Court, and to the work of European institutions has certain consequences.

The legal and customary basis of the use of comparative law, in European law, gives the states the possibility to exercise their own "option" policy in a legal sense, and even to have an effect at the European level, based on the respect the principle for legal integrity in its

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<sup>1769</sup> One could say that where the aims of a general system starts to determine the aims of the sub-systems, rationality is not the basic determining factor in the relationships of the sub-systems of general system.

<sup>1770</sup> We will discuss this more thoroughly in the end of the work, but here we can say that the comparative dogmatics of this type seems not to have possibilities to really propose legal solutions as such.

legislative form. If the states are able to regulate, for example, the constitutional way their own normative system, they can have an impact upon the marginal observations of the European Union system (by, for example, introducing aspects deriving from the "traditions of the Member States"). On the other hand, many other unofficial aspects may have an impact upon the European system. By regulating the margins of their own system, they are able to regulate the European system too. This can be seen already, and especially, in these countries with special constitutional controls strong enough to regulate the law. In other words, because the legal orders at the European level seem to be relatively dependent on states and their legislative integrity in comparative terms, it means that states may shape the European level only by shaping their own legislative and adjudicative systems. It is not only the constitutional traditions, which are on the basis of the possible influences, but other types of regulations may become relevant for comparative law as well.

This means that the only way to regulate the European system is not by external (political) regulation but also the internal (comparatively legal) one.<sup>1771</sup>

The two spheres of systems, national and European, function, in other words, in a relationship of a mutual co-variation based on the principle of legal integrity.

In conclusion, as we have maintained, these ideas of comparative reflexivity and legal integrity lead to certain scientific pressures for comparative research, and some rethinking of the role of comparative legal research. One could maintain that the comparative discourse has to be found again as a scientific discipline. Traditional comparative law is needed. The instrumentalization of comparative law in the European institutional architecture is, to a certain extent, a supportable element of modern comparative law. However, one has to maintain the traditional concept of European law, where the different socio-cultural and systematic aspects are taken into account. As it has been maintained, this approach can be called critical comparative law. This type of idea is strongly related to the comparison of social policies, to the "instrumentalist" sphere of modern law.

On the other hand, one could propose that different legal institutions should increase the use of consultative forms of scientific research external to their internal institutional arrangements, and, in other ways, create an impact upon the comparative legal discourse in Europe. This should take place especially in the realm of the forms of social law. Another possi-

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<sup>1771</sup> One could claim that the main idea in the future European discourse will be based on the new coming of the parliamentary democracy.

bility is that comparative research is taken more seriously in the internal work of the institution.

**European comparative dogmatics and the vertical comparisons.** Questions of "comparative dogmatics", described above, are strongly related to the idea of "vertical comparison". The idea (presented, for example, in the Community legal order) that comparability does not have to be quantitative but qualitative<sup>1772</sup>, functions already as a premise for vertical comparison.<sup>1773</sup> Namely, one may ask, how could it be possible to have a dogmatic and theoretical discourse on European law and its function if vertical comparisons are ruled out and considered unacceptable, at the same time the European institutions and legal decision-makers do utilize comparative legal observations in defining different vertical relationships?

I contend that it is not possible to exclude vertical comparative research from contemporary European comparative legal research. It seems that vertical comparisons have to be included within the comparative law framework in order to produce some useful knowledge on the functioning of European law, and to be able to critically look over law in its contemporary form as a comparative legal discourse. This is so in its educative, legislative and adjudicative form of legal discourse.<sup>1774</sup>

How could this be done?

Now, the restrictions, in comparative law studies, are restrictions upon the relevant and essential legal systems (or orders), and the conclusion of the comparative argument is the choice of a doctrine. From that choice the legal order derives the legal solution. Even if, from the point of view of comparative law, the legal systems cannot be chosen (there are binding legal systems, and non-binding legal systems), legal systems (and their rules and interpretations) may be chosen as arguments against some other systems, or in order to establish a critical relationship internal to a (European) legal order.<sup>1775</sup>

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<sup>1772</sup> As, for instance, was maintained in case *5/55 Assider* (1954-56) ECR 135 per Advocate General Lagrange. A general principle is not necessarily the solution accepted in the highest number of states (very detailed analysis of some national and international orders, pp.147-149, some analysis, Bredimas, A., 1978a, p.120). The idea is to avoid imitation and mechanical observations, and even evaluate and shape systems (*idem*).

The question is claimed to be a matter of fundamental and technical differences (Bredimas, A., 1978a, p.121).

<sup>1773</sup> On the problems of comparability, see Dehousse, R., 1994, p.17. For some theoretical remarks, see Sacco, R., 1991, p.7.

<sup>1774</sup> See some analysis on the interpretation of ECHR precedents on national systems, Martens, S.K., 1998, p.13.

<sup>1775</sup> As we notice, comparative argument in itself is a form of establishing the authority of its user. As in all arguments, the arguer uses the authority of the legal systems in justifying its decision and convincing the recipient of the acceptability of his decision and his authority. However, unlike in any other type of legal argument, the legitimacy of

Where the dogmatics would not comply with the type of comparative coexistence chosen by the court, it may have to examine the harmony all over again. This is the basis of European legal dogmatics, the comparative dogmatics of European law. Furthermore, the comparative dogmatics can suggest "hard core" norms based on "generality" or disparity. On the other hand, the European courts may either accept or neglect these arguments.

The task of this comparative dogmatics seems to be examination of the legal quality of decisions in relation to the use of traditional legal sources. On the other hand, in case the justification is restricted to the internal use of the institution, the only possibility is to examine the acceptability of this restriction, and to take a more system oriented approach. This way the dogmatics may orient itself to a more critical examination of the philosophical, sociological or political premises of the courts. Only this way can the dogmatics establish its opinion on the hard core of European law.

This serves also national decision-making, legislation, and dogmatics. By knowing the discursive quality of the hard core standpoints made by the European level institutions, national dogmatics, legislation and legal decision-making can establish its opinion on the issue, evaluate those aspects in discourses on that level, and use the outcomes of this discourse critically as the basis of its interpretative function in a coherent way. In this way there is a discursive maintenance of the coherence of the whole European law<sup>1776</sup>.

As we can see, the transformation of the rules from one level to the other takes place after a comparative discourse. This is to say that the comparative discourse is a legal transformative discourse, which seems to be a neutral (descriptive) discourse on the comparability and the substance of the general norm, without an idea of direct applicability of all general norms at the international level. The comparative discourse is a discourse where the integrity of all the legal orders is taken into account.<sup>1777</sup>

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these legal systems is related to their binding character in particular. In generalizing this binding character of some systems via itself, the system establishes a two pole system of bindingness, where it is itself binding as a adjudicative system, and the other systems as legislative systems.

This feature creates a polycentric system of European law in the long run. Certain rules are binding both in national legal systems, and also in the European level. Furthermore, they are *a priori* identical in both systems. In other words, this establishes also the European system as a two level system. In these fields of law, there are no conflicts between the different levels of law. These fields of law are, in fact, the hard core of the European law.

<sup>1776</sup> It is clear that because this relationship between these systems is reflexively regulated (European law), the use of these interactive elements of comparative law is difficult to analyse. The reflexive relationship, between these systems, is sometimes instrumental, sometimes traditional, etc.

<sup>1777</sup> Future comparativist are claimed to be economists, sociologists, statistician, etc, in order to find the relationship between law and existing social needs. See Lando, O., 1977, p.651.

We have drawn, and could draw, moreover, many conclusions on the basis of this work relating to the incomplete nature of the European concept of law, to the teleological nature of European law in general, to functional subsidiarity and liberal equality, to the nature of individual protection, to the European legislative and adjudicative integrity, to the "autopoetics" of the European institutional discourses, to polycentrism, to the tendency of minimum regulation visible in European law, to the distortions of communication in the European legal discourse, and basically, to different political philosophies and concepts of democracy. These topics will become more important in the realm of the possible deepening and enlarging of the integration in Europe, European Monetary Union and expected institutional changes<sup>1778</sup>. However, real suggestions are not made, even if there has been criticism and prospects for a change, which may set a scene for various proposals.

Nevertheless, we may briefly summarize the main concrete problem.

We could maintain that the problem of modern European law is not solved by the "reluctance" of the European Courts, by the fear of judicial activism and an attempt to guarantee the position of the European institutions on a "federal" basis.<sup>1779</sup> European law needs "radicalized processes", which are beyond seemingly radical, but basically conservative, political ideas in contemporary European law. The problems of functional law and its role in "comparative systems" like European law must be resolved by functional means if the political sphere does not do so. Moreover, because we are moving in the realm of institutionalized comparison, the functionality has to be connected to the institutional functionality. This may be, however, too much to ask.

Related to this, it is generally agreed that the current problem of the legitimacy of the European Union system is dependent on its ability to take into account any social rights in its decision-making. Furthermore, the basic problem of the system is the increasing democratic deficit of the state systems in the Union, which is reflected also in the European level democratic deficit. This is due to the fact that governmental legislation is gaining a central role and the national parliaments are becoming administrators of Union law.<sup>1780</sup> Furthermore, Union law is inc-

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<sup>1778</sup> For some analysis of the post Maastricht crisis, see Weiler, J.H.H., 1995.

<sup>1779</sup> See, for example, Mancini, G.F., 1998, and commentary, Weiler, J.H.H, 1998.

<sup>1780</sup> In general, Cirdell, K., 1991, p.718. See also, Mancini/Weiler discussion 1998.

We may claim that the constant normative tension between two spheres of regulation, state and Community, waters down many progressive developments in the field of social rights. This tension causes the inability to take seriously social improvements, and may, in the long run, lead to frustrations.

The following analysis is based on the idea, that the implementation of European law has to be

reasingly, especially in the case of monetary Union<sup>1781</sup>, thus Europeanizing national legislation.<sup>1782</sup> Monetary Union is also likely to lead to some kind of federal structures.

From the point of view of the welfare system, this question is apparently central. Liberalization and deregulation are not checked from the point of view of the legislative integrity and continuity of the system, but the governmental proposals can break drastically new ground for the national systems in relation to the implementation. On the other hand, it is difficult for the parliament to look over the nature of the expert governmental proposals connected to the implementation of the laws. The validity of these proposals is based on the implementation of European law, control over which is not within competence of the Parliament.

Further analysis of these aspects is not provided in this work. The final remarks are related only to comparative law.

**Conclusions: contemporary comparative law.** As we have seen, comparative law has to do, on many levels, with constituting elements of law. Historically one can see how comparative law had an extremely important role in the construction of the identities of the state legal systems and a stabilizing function in the legal consensus-creation on the question of the nature of legal systems. We have seen that contemporary comparative law moves in the realm of this structure of the state paradigm of law. This state paradigm of law, at the moment, consists of both states as a legal system and of the international systems as legal orders. These legal orders are the marginal subsystems in the state paradigm of law.

On the other hand, the disparities and generalities in the realm of comparative law have been made normatively relevant by reflecting them within the *a priori* institutionalized general principles and common traditions, and to concepts like coherence, morality and

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considered as legal administration. The ideas on administration can be applied to the analysis of the phenomenon.

The powers of government do not increase only in the field of the traditional legislation. They do also, by "semi-comparative" considerations and arguments, define, in the European Courts, the idea of national legal systems (as we have seen in the *Bachmann* case in the European Court of Justice). This is related to the system of intervening in the legal processes. Governments are the ones which "systematize" national legal systems in these European legal institutions by explaining what is, and what is not, relevant in that particular connection.

<sup>1781</sup> The following ideas are based also upon assumption that European Union law becomes increasingly central because of Monetary Union.

<sup>1782</sup> It is problematic to evaluate the "increasing" Europeanization of the national laws. There are always the qualitative and the quantitative aspect to this. However, if 80% of the volume of the national legislation is based on European regulation, there must be something correct in the Europeanization thesis. (See, Mancini/Weiler discussion 1998).

substantive equality or by just practically accepting them by institutional actors<sup>1783</sup>. The comparative approach has shown its alternative nature in relation to any "sovereignty" ideas ("will", "intention", etc.).

The uses of comparative observations have resulted in definitions and the establishment of institutional arrangements, but, for that matter, also the maintenance of the relative autonomy of the state legal systems as relevant systems in determining the questions of economic, social, human rights policies at the European level. Furthermore, by comparative reflections one has been able to solve different competence questions.

The internationalization and the Europeanization of law seems to increase the relevance of comparative law. This is due to the fact that increasingly one arrives at "system-selection" situations, where several "competent" systems exist, and where the competencies have to be defined. We have already made some remarks on this the chapter above.

Comparative reasoning has, as we have seen, a kind of mediating function between systems. Comparative law within legal reasoning makes it rationally, i.e. reasonably, possible to make legal choices in cases where the systematic legal arguments (deductive-logical measures) do not provide answers to the particular legal question. Comparative aspects determine, in contemporary Europe, for example, the basic procedural, conceptual and jurisdictional ideas. The constitutional ideas in Europe are based on comparative aspects, and they are dynamically interpreted this way. Comparative law has a function in defining the hard cases of the contemporary legal systems, cases dealing with basic problems of the society. The normative results, however, appear quite conservative.

On the other hand, states in many ways confirm their international identity legal systems (and their own limits of sovereignty) on a comparative legal basis. This concerns likewise the relationship between systems such as the European Union and the United States.

Comparative law is, consequently, functioning in the constant rejustification of the law on the basis of foreign experience.

There are, in other words, several "cases" of comparative law<sup>1784</sup>. In a legal case, comparative law functions as a source of law. In a "new case" comparative law is a practical argument. In an "existential case" comparative law is the basis of the creation of the identity of the system as a procedural entity and a linguistic system. In an "authority" case the subsidiarity

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<sup>1783</sup> For common traditions determined by the Roman law origins of a common tradition, for example, case 23/68 *Klomp v Inspectie* (1969) ECR 43.

<sup>1784</sup> These can be called the "hard cases" of European law.

and "substantive" issues are examined.

The basic premise of the use of comparative law in substantive norm construction is difficult to define because of the closed nature of its use. It is, in many ways, a subjective and institutional method of reasoning. Furthermore, the increasing flow of information, also in the field of comparative law, has resulted in a tendency toward the sketchy use of comparative information. As we have seen, because of the increasing possibility for quick transmission and receiving information the traditional seekers of legal and legally related information, including comparative law, have come to be replaced by institutional self-sufficiency. The doctrinal analyses are left out, and the legal decision-making institutions collect and analyse the information themselves. The law in these institutions becomes a professional enterprise, and the institutions close themselves normatively. The discursive analyses disappear. This is one of the basic problems of comparative law at the moment. The comparative information gets instrumentalized more easily. The comparative information becomes merely practical information.<sup>1785</sup>

On the other hand, one could claim that different legal subsystems are also entering into the sphere of comparative law. This means that comparative law will be opened up, and may become more than traditional comparative contract law or comparative constitutional law. It would consist of various forms of national and international processes<sup>1786</sup>. This is a real breakthrough for comparative law. Comparative law can be understood also to be comparative research of differentiated legal procedures in a certain global area.<sup>1787</sup>

Moreover, what we have seen, in the case of institutional comparative law, is the phenomenon of the institutional systematization of legal systems.

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<sup>1785</sup> This is also connected to the "data processing" of the comparative information. For traditional approach, see Cottin, S., 1996, p.403. The Recommendation No. R (92) 15 and the explanatory memorandum (Council of Europe, 1994) does not really discuss the legal problems of data-processing, but only the technical aspects. The legal aspects should be taken more seriously.

In general, because of the speed of different information channels, one seems to be able to reproduce, as an historical entity, all kinds of systems. In this process, however, one emphasizes particular and simple systems, the role of the pure normative systems. This is so, because they are the only systems, which do not cause frustrating analysis, or "unpractical" historical reproductions. When this is realized in the "formal" modern institutions, which are oriented to maintain themselves and which are not able to maintain the rationality of particular actors and systems, decisions become irrational and impulsive, a kind of "system movements" (mass movements).

<sup>1786</sup> This is so, because constitutional adjudication is more related to the deliberation on general aspects of law than a normal application of legal statutes and legislative propositions. Hence, it is natural that comparative law has a more important role in the constitutional adjudication.

<sup>1787</sup> On the other hand, the normative closeness of modern law functions in a rather strange way. Modern law is its own critic. The generalizations of norms (principles) and generalizations of legal systems (general principles) are the internal critics of legal norms and legal systems. On these bases, the modern law self-observes and self-regulates. In this sense, comparative law has a particularly important role. It produces generalizations and disparities in order to balance this internal dialectic of modern positive law.

Consequently, one could maintain that contemporary comparative law is institutionally controlled. Comparative receptions are controlled and reflected with regard to functionality of the supranational systems. The supranational institutions define and redefine comparative generalities and divergences. The comparative adaptations take place according to the conditions established by the supranational legal institutions. Generalities are adaptable and acceptable, and the divergences maintain comparative divergency. Comparative law has come from autonomous, institutionalized and academic comparative law towards institutionally-controlled comparative law.

Comparative law, in the more "post-modern" form in differentiated discourses, might have an extremely important role in the legal discourse when differentiated particular discourses start to assert their identity and essential features in a more analytical way. In this process, the state law and particular legal "sub-systems" in society might become closer to each other. However, the main condition of this is that one comes clean with change in the idea of comparative law, i.e. that comparative law corresponds more to the general development of differentiation of functional systems, and does not stay as a system of national legal systems only.

This idea is devoid of empirical data. "Comparative international law", comparison of international treaties and their provisions, seems to be a useful method in resubstantiation of national law at the moment. By collecting comparative evidence from the international and its implementing legal orders one seems to be able to arrive to kind of an idea of international legal community. This development is still in an evolutive stage, but one can notice that pure comparison of national systems in interpreting national or international rules seems not to be less popular in cases, particularly where new cases come into question. Traditional comparative law, based on state-paradigmatic assumptions, seems to be a conservative way of attempting to maintain the traditional structures and doctrines in the internationalized law. Comparative international law provides an effective means to justify, for example, the deviation from the strict doctrine of state sovereignty. In this sense one could maintain that we are living in a transitional period. This idea needs, however, further development, which is not made here. What one could say is that it seems to be based on an extremely strict internationalized positivistic approach. It assumes a very common sense interpretation of international treaties and conventions. On the other hand, it seems to be able to react to societal needs and changes taking place in the international sphere and internationalized legal thinking.

What we can say, in the end, is that comparative law has to find its relative autonomy from the contemporary international, national and supranational discourses by starting

to consider itself as a part of the legal discourse as a legal argument and as a legal source. This takes place by newly establishing connections with the legal philosophical, legal sociological and legal historical discourses and reasoning, as I have tried to do. Only in this way can law maintain its character as a possibility in the contemporary "Europeanization" and "internationalization" of law. If this is not done, the internationalization, related to the closing up of the institutional considerations in the realm of increasing flow of information, closes the national legal systems from each other as forms of discourse. We may call this some kind of a "blocking effect".

A concrete aspect of this is the inclusion of "vertical" studies in the realm of comparative law concerning the principle of discursive integrity, as we have suggested. This would mean critical examination of comparative law, not only in scientific sense and national legal discourses, but also in international and regional legal systems.

Finally, it seems that the question of "highmodern" comparative law is no longer about the Germanic, Latin, Anglo-Saxon, or Scandinavian traditional distinctions or about a common European legal culture based on these classifications, but that something else is essential in this respect<sup>1788</sup>. It seems that the key distinction goes somewhere in the sphere of the discursive concept of law. As we have identified, there are different types of these discourses used differently in legal systems<sup>1789</sup>.

On the other hand, the second integral criterion for comparative law is evidently related to the distinction between the systems, which stress liberal aspects and make a clear distinction between informal and formal regulation and those systems where these characteristics are not so much emphasized. As we have indicated, the differences may be associated with the differences in historical development. In some systems, there is no "homogeneity" idea. They consist of different levels of regulation, as the all-encompassing principle of subsidiary indicates<sup>1790</sup>. On the other hand, the Nordic legal culture, at least, seems to be related to the idea of a legally homogeneous state, which, on the other hand, is related to the strong legalistic tradition and social functionality of law (some kind of legal "realism"). In spite of the continuing liberalization taking place in the Nordic society, I do believe that this idea of law is still prevailing.

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<sup>1788</sup> On the "Kulturvergleichung", see Häberle, P., 1994, p.16.

<sup>1789</sup> It looks like the socio-legal discourse can, in some states and political systems, consist also of discussions about duties, and not only about the liberties. The explanatory style seems to be different when duties are discussed in connection with freedoms.

Because of this difference, the discussion on the inequality cannot take place, in the European legal context, only on the basis of the liberal conception of law. Furthermore, because of the differences in tradition, the duties cannot be only a matter for liberal actors. The state has to play a role in the European law in these spheres of law.

<sup>1790</sup> For the lack of religious hierarchy idea in the Nordic system, see Stråth, B., Sørensen, Ø., 1997, p.12

The only problem is how to define it in the future, instrumentally or in a value based way.

Furthermore, the idea that certain types of policies are possible only in certain types of social systems and in the realm of certain type of constitutional thought, is not very far from the consideration of this last idea in general. It seems that Nordic constitutional thinking may entail more functional constitutional thought concerning political integrity than in most of the European states.

#### **IV. EPILOGUE: What kind of institutional justification is comparative legal justification?**

In the end, we try to formulate some regulative ideas for the comparative justification in institutional law. Here we come to some ideas on the relationship between comparative discourse and the institutional procedures in general. However, it may be not so difficult to find some empirical "comparative" evidence relating to these remarks. Some systems may function like this, as we have suggested.

The inclusion of comparative law to the sources of law (regulated by standards of reasoning) has been considered in the theoretical chapter on comparative legal reasoning. However, one question remains: what kind of legal justification can comparative justification? Namely, where the source of law doctrine and the standards of reasoning speak, basically, about the acceptability of comparative argumentation and its role in legal justification on traditional basis (i.e. traditional legal discourse theory and comparative law), the analysis of its justificatory aspect refers, we may say, to its basic conditions in relation to discourse ethics as such. In other words, where the traditional theory of legal justification replaces it in relation to the traditional method of legal justification, the value-based theory speaks about the relationship between comparative justification and general "discourse" ethics.

However, I still think that this latter "value" analysis is possible only in the context of empirical data, and not on the basis of philosophy and phenomenology as such. This is why this analysis is replaced after the empirical survey and analysis of the functionality of comparative law in contemporary legal orders. Only in this way is one able to confirm and augment this theory of comparative legal justification in a critical way.

In practice, as we can note from the empirical survey and from the traditional approach to comparative law, the reasons for the use of comparative law as a source of legal

argument has been related to many types of “integrations”, to plain “utility”, or to substantial or formal authority. However, these justifications for the use of comparative law have not yet, one may say, told us anything about the reason why comparative law really should be used as a reason in justification. The idea of integration and utility seem to be extremely situational, practical, and functional justifications for its use, as we have maintained. In fact, on that basis one could still easily claim that comparative law does not, whatsoever, nature of a real legal source.

However, the use of comparative law in institutional legal justification seems to indicate that the user of these types of arguments has moved towards a theoretical level of the legal phenomenon and also towards a general legal discursive sphere. In this sense, for example, a traditional comparative listing of legal systems and their description in rather mechanical ways, by using exclusive generalizations, seems to be based more on the “contextual” premises of the comparativist. The comparativist seems to reproduce his “natural” and traditional (cultural) context. Here his context is the value-based premise of the classification and selection, and other systems are only instruments in this type of value-based classification and systematization. As maintained, one does not really take part in the legal discourse, but actually tries to avoid any legal analysis. This seems to apply also to the sketchy use of comparative observations in legal decision-making. Also in this sense we may ask, whether comparative law could have any real role in legal decision-making.

Any institutional and instrumental (non-discursive) use of comparative law, on the other hand, does not seem to guarantee the rationality of the legal order. On the contrary, it, in many ways, leads to irrationality at least from the point of view of the legal discourse, because it means effective exclusion of, for example, national legal discourses, and results in, and is based on, strict hierarchical forms of institutional organization. The institutional forms of the use of comparative law do not prove anything about the flexibility, informational openness, susceptibility, and sensitivity of the institutional legal order. In fact, it seems that more unsystematic and inspirational forms of the use of comparative law in a legal organization seem to indicate more discursive flexibility of an order.

The use of analytical comparative exemplifications seems, nevertheless, to relate more to the discursively “jurisprudential” and legal theoretical perspective. Namely, in this type of use there is an attempt to theoretical understanding of the legal phenomenon in question (vs. A specific national dogmatic contextualization) and, furthermore, the legal phenomenon is related

to the "total system" of theoretical perspectives.<sup>1791</sup> Moreover, we may say that in an analytical exemplification by comparative arguments, the decision-maker approaches the "common sense" analysis, and explains more clearly the value-based issues involved in his thinking.

Now, we can make attempt to formulate an analysis in the context of the question asked. First we do this in the light of some rules of value-based theory of legal justification<sup>1792</sup>, secondly from the point of view of the idea of utility, and thirdly, in relation to the philosophical analysis of the institutional discourse as such.

From the legal theoretical point of view (regulative dimension) it has been maintained that "*every speaker may only assert what he or she believes*". In this sense, in using comparative legal arguments, one has to believe firmly that one sincerely understands the idea of the foreign norms. This can be related also to generalizability. One has to be ready to apply generally the comparative rules achieved. Problems may be noted, however, if we ask the question "to what audience is one really arguing?".

On the other hand, the fact that comparative arguments strive to a more "theoretical level" or are plain linguistic-analytical arguments is also justified according to rules of justification. This can be the case at any point of the legal discourse. Naturally, one could also challenge the legal source nature of the comparative law in any form of an argument.

On the other hand, because everyone taking part in the discourse should also "*give reasons...when asked to do so, unless she can cite reasons which justify a refusal to do so*", the claim of not really knowing the content of foreign norms can be a justification for a refusal to carry on in the analysis of the foreign system.

Comparative observations may also be problematised at any point of the discourse. They are not any "final" arguments. If the justification is carried on by comparative arguments and their use is challenged, a full statement of reasons must be given in order to justify the use of comparative law as a legal source. This is related to the nature of comparative law arguments as "special" arguments<sup>1793</sup>. However, as we may understand, this may result in unbearable problems to the rationality of the discourse (efficiency etc.).

Because the question, in the introduction of comparative premises, seems to lead to unequal treatment of persons, justifications for their use has to be presented also on these bases.

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<sup>1791</sup> We have spoken about this "total" system idea in the beginning of this work, see footnote 14.

<sup>1792</sup> Alexy, R., 1989, pp.297-302.

<sup>1793</sup> "*Special legal argument forms must have the reasons for them stated in full, that is, must achieve saturation*" (Alexy, A., 1989, p.302).

This relates to the use of comparative observations in general. They are not really the (norm) topics under discussion in a process of discourse. In general, it seems that, in a legal discourse, the maker of comparative observations has an extremely strong burden of proof.

The use of comparative arguments may be justified also by the fact that at least “*one universal norm must be adduced in the justification of a legal judgment*”. This seems to be the case of with “hard cases” lacking sensible reasons in traditional sources of law. In another context, we have already spoken about the exhaustion of other sources before comparative observations may be used. This seems to be a firm rule for comparative justification.<sup>1794</sup>

Foreign precedents seem to be at the heart of the exemplified comparative justification. Consequently, from the point of view of some rules on the use of precedents, the question can be asked, whether foreign precedents should be used, if one’s “own” precedents do not exist?<sup>1795</sup> Firstly, we do not assert that a deviation from a foreign precedent should be justified. The burden of proof is on the other side, on the one explaining the content of the precedent. However, we could claim that a general rule that “*precedents should be cited*” does not seem to apply as such. Nevertheless, we could produce some justification for the use of foreign precedents. For example, it must be maintained that the analytical quality of the reasoning may be better achieved by an analysis based on precedents. This is especially the case, if no precedents or doctrinal analysis exist in the one’s “own” legal context.

We may relate our analysis also to the question of “why are comparative observations utilizable?” (utility dimension).

As we already indicated in the study of the analogical argument in general, comparative observations, according to our opinion, seem to help the decision-maker to “structure” his legal reasoning (schemes).<sup>1796</sup> Comparative arguments function as some kind of “beginnings” for the reasoning and provide starting points for the structuring of reasoning. We may say that they help the decision-maker to conceptualize the legal situation. This takes place in relation to analytical comparative considerations, and may be based on some historical or other reasons which associate comparative observations “rationally” with systematic reasoning. Then also the legal audience may understand, what one is speaking about. However, this is a strongly

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<sup>1794</sup> “Whenever dogmatic arguments are possible they should be used”, even if “every dogmatic proposition must be able to stand up to systematic testing in both the narrower and the wider sense” (Alexy, R., 1989, p.301).

<sup>1795</sup> Alexy, R., maintains that “if a precedent can be cited in favour of or against a decision it should be so cited”, and that “whoever departs from precedent carries a burden of argument” (Alexy, R., 1989, p.302).

<sup>1796</sup> Varis, M., 1998, p.101 ff.

value-based situation.<sup>1797</sup>

This type of “structuralist” utility has to do usually with the fact that other legal systems and orders may be the only legal instances, where such a legal question (a new question) has been asked and resolved. In this sense, comparative observations function as a source of information in a case where the “orthodox” sources of the system do not explicitly give any answer. This may be the case where no statutory law has been enacted, for example.<sup>1798</sup> Secondly, the utility may be related to the fact that the comparable decision-maker, which is considered, may be a authority on the question for some reason. This could be a case, for example, even if the dogmatic of legal scientific authorities have been dealing with the problem.

In general, we could say that the rules of legal justification do not seem to give any satisfactory results in relation to comparative reasoning in the process legal justification. The utility idea may, however, function as some kind of a basis for the justification. However, it seems to lead to extremely subjective standards.

It seems that in the comparative justificatory processes one may easily get into a separate comparative law discourse in the realm of the legal process, which cannot be prohibited as such, but may easily be rejected on the basis of procedural economic premises. On the other hand, if such a separate discourse is effected, the task of the procedural leader (the judge) seems to be only to maintain the centrality of the “internal” premises, and ask, for example, questions like “can we not find these types of ideas also in our own legal system (or in our own legal discourse)?”

Now, we may try to perceive the idea of comparative legal justification exactly in this type of discursive context (discursive dimension). Namely, we can start to analyse the legal justification process (the legal institutional process) from the point of view of the use of comparative observations. The empirical observations we have made may give us valuable indications.

Let us imagine two persons come to a court with their conflicting claims. We may say that the more intense the conflict is, i.e. more interests and values are involved, the less the

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<sup>1797</sup> This is not disproved by our remarks that comparative observations appear usually in dissenting or similar types of argumentation. In fact, we may claim that the dissenting opinions have an evolutively structuring role in the evolution of the case law. The dissenting opinions may help the decision-making institutions to start their line of argumentation in a next case based on observations by the dissenting judge, for example. Furthermore, if he has been arguing analytically by comparative remarks, the decision-making institutions has in fact already a “stock of arguments” for its use. Furthermore, the parties may start also from these premises.

<sup>1798</sup> It could be claimed that comparative law has, and actually can have, a role in systems where no *travaux préparatoires* are available or in general use.

other party may be ready to try to find the "correct traditional interpretation of law" on the basis of a complete collection of traditional legal sources. This is so, because, even if he recognizes the line and the logic of the traditional interpretation, he may feel that the traditional interpretation is not satisfactory for him. His aim is to win the case.

In this type of strong value conflict, one may try to claim a special character of the case, and that something deviating exists in relation to former cases and traditional interpretation of traditional legal sources. On the other hand, usually, in this type of case, the other party to the dispute argues strongly for the traditional sources and for a traditional interpretation.

We could actually identify this situation as a kind of a strong *a priori* inequality in front of the law. Namely, the first party may recognize *a priori* the traditional line of interpretation, but he feels that the case is important and his interests are immense and that there is a difference in situation from the existing "similar" cases. However, at the same time, he trusts the intellectual institutional legal system and its ability to recognize the difference between his situation and other previous cases.<sup>1799</sup>

Consequently, the need for an analytical approach is stressed by the first party. In this situation, he may take up examples from comparative law to prove his point. He wants, in order to feel as if treated in an integrative way, an analytical approach to the largest possible extent.<sup>1800</sup> In this type of situation, the claim is that the legal situation should be "changed" analytically, because it is felt that the traditional forms of interpretation (and sources: statutes, cases, doctrinal analysis) do not bring the "correct" solution in that particular case.

This brings us to another idea, which may relate to interests of analysis in general. Namely, it is possible that intellectually-oriented lawyers, for example, may recognize an idea of "reasonable equality" as a main principle of procedure. This means that they may accept

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<sup>1799</sup> This seems to indicate, for example, that a strongly normative, value-based- theory of legal justification assumes a strong institutional attachment.

<sup>1800</sup> In fact, the idea of inequality of this type corresponds quite well with the situation, where we are dealing with any accusatorial cases (for example criminal cases). Procedurally, the defendant or the accused is more or less required to establish a justification for the act he is alleged to have committed, and that the accusation is unfounded. This is, for example, the reason, why in criminal law the principle of the presumption of innocence exists as a premise imposed by most civilized legal systems. It tries to diminish the influences of an oppressive situation (individual against a legal system as a whole) and bring the defendant to a more or less equal situation with the accusatorial system (or with the public sphere).

In other words, in our case the inequality before the law arises on the basis of established case law or prevailing interpretation (legally intellectual situation). In criminal law cases, usually, the law is strongly established (moreover, even defined by restricting principles like *nulla poena sine lege* or the principle of legality). This means that, in criminal cases, the justification of the case is legally quite simple (and also that the emphasis is usually in the proving of facts). The legal justification, the findings of law, are usually accepted to be quite straight forward. Even the loser of the case usually accepts the authority of the positive law *a priori*.

the idea of discursive law, and more than that, the idea of discursive integrity of law. In this type of situation, the parties are willing to analyse the traditional sources of law, and - in addition to that - other types of sources, if they provide better or more reasons and more analytical approaches for the deciding of the case. This, in fact, means that they are willing to discuss the case analytically, and not to rely only on traditional sources, which, with a method of analogy or enlarging method, may bring a result to a question. However, they want a discussion on the subject related exactly to the subject, and they want to have the case reasonably justified in order to be able to, firstly, accept the solution as rational, and secondly, in order to maintain the discursive integrity of law.

We may ask, in what type of situations would one start to think these two last premises? We may say that in these types of situations, the parties take some kind of a risk in trusting the institutional system and its value-based analytical capacity (institutional law). On the other hand, they also trust in their ability to provide material for the discussion. It means also that these premises may come up in extremely difficult and unclear situations. However, the essential idea is that, in these types of cases, the parties are, to a large extent, transferring the authority to the institutional decision-maker, letting it ultimately speak about its values. However, they trust it because it takes into account any arguments put forward by the parties, and is not institutionally instrumental.

Now, as we have seen, those cases where comparative observations appear more than relevant, are the "hard cases" of equality questions and those pertaining to fundamental values. Furthermore, they are often cases, where, procedurally, the parties' and all represented interests' (for example, in a form of intervention) integrity is attempted to maintain. This seems to indicate that, in the use of comparative observations, we are faced with integratively discursive cases.

In these types of cases, one demands an intensely reasonable approach from the decision-maker, and consequently, a clear expression of the value-based premises. It seems that this type of process is based on some kind of discursive saturation rather than only upon systematic saturation. On the other hand, in these discursively equal and integrative processes, the demand for reasoning may be satisfied only by going beyond all the exhausted traditional sources. There has been already some kind of systematic "saturation".<sup>1801</sup> When reasonableness is

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<sup>1801</sup> As we know, in European-level legal orders this exhaustion takes place quite quickly because of the strong formality.

demanding from the decision-maker, he has to make comparative observations in order to maintain the integrity of the loser of the case, but also the discursive quality of the decision and justification in general (institutional opinion).

In fact, if the comparative observations would be accepted by the parties in their argumentation, and the decision-maker, in his justification, would not consider them, it would be likely that the decision-maker did not convince the parties in a reasonable way. In order to avoid this type of situation, when parties take up comparative observations, one should make at least a reference to the national discourse on the subject and to the differences related to the compared systems on some essential point, when rejecting them as relevant arguments. Where even the loser of the case seems to know the law and its line of reasoning, it is extremely difficult to convince him on the basis of an unanalytical (perhaps domestic analogical) approach. Only in this way may one maintain the intellectual and substantial authority in a case.

Consequently, we may note, how, in some cases, and in some types of systems, the "saturation" in legal justification may be achieved only by including comparative legal observations in the justification (or argumentation). In order to maintain the discursive integrity of the party, but also the legal order, one may be obliged to go beyond the traditional sources, and use arguments which structure and reflect the essential question to be considered. As we may also notice, these types of comparative considerations may be taken up in cases where we are dealing with a hard question but, moreover, also with parties willing and obliged to discuss the situation in a reasonable way (also with comparative observations). This explains why we are usually looking into a legal discourse between professional lawyers or, more commonly, into a discourse in realm of a scientific-analytical philosophy of legal dogmatics.

This means, basically, that even in a systematic approach to law there may be a place for comparative law arguments, and a kind of a priority of foreign precedents, especially in cases where domestic precedents do not exist.

In conclusion, we may say that the situations where comparative law may be used or even should be used as arguments of justification are those situations of discursive processes of hard cases where the integrity (and equality) of law is attempted to maintain on many levels. In these types of discourses, one attempts, reasonably, to balance systematic, coherent, logical, and extremely well-justified points of views. Furthermore, the parties taking part in these kinds of cases have a discursive attitude. In these types of hard cases, where parties seem to agree about the need for a reasonable solution - for example, by bringing the comparative observations into the discourse themselves - the decision-maker may have even a weak obligation to use

comparative law in justification.

This is why we may say that comparative law, as a method of justification, seems to be a kind of an “optional”, “consensual” and “discursive” method of legal justification - apart from being a special case of allowed legal sources. Furthermore, if we have a discursive point of view upon the law, we may also consider it as an “institutional” source of law. However, this does not mean that it is an institutional source in a sense of discursively closed systems.<sup>1802</sup>

Nevertheless, we have to stress the fact that the source and justificatory value of comparative law cannot be considered - as many comparative lawyers seem to do - on the basis of balancing, integrating, or choosing legal systems etc. This is why we have to also emphasize the idea that if the situation is not “consensual” in the way we have just described it, i.e. the need to make comparative observations does not arise from the discursive quality of the process itself (in the way explained above), the decision-maker, using comparative observations must at least justify the use of these types of methods of justification by considering, at a minimum, the standards of reasoning developed in this work.<sup>1803</sup> This is due to the unsystematic nature of this type of source.

Finally, we could ask, does one even have to go to comparative law as a source of law. One could discuss the issue on the basis of moral or other types of practical arguments? These two types of reasoning (justifications) seem to be, to a certain extent, alternatives. The answer to the question seems to be that the former leads to a discourse on law. The use of comparative law seeks to give an answer to the question of “what is the law?”, and not to the question “what is moral and practical?”.

Accordingly, the basic answer to the question “*To whom one justifies the decision in order to maintain the integrity of law*” could be the following one:

*“I always think that the most important person is the person who is going to lose the case. I feel I ought to explain to one who has lost, why a judge, who has never met these parties before, has come down on his opponents side.*

*This is the person who wonders, why he got the judgment wrong”<sup>1804</sup>*

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<sup>1802</sup> This idea seems to relate to legal formalism in a strongly linguistic and procedural sense, and not to legal formalism as legal systematic terminology.

<sup>1803</sup> This seems to correspond to the Alexian rule regarding special justification of the changes in the method of justification.

<sup>1804</sup> Lord Justice Schiemann, Court of Appeal, 25.3.1997.

## Summary of the thesis

### **“THEORY AND PRACTICE OF COMPARATIVE LEGAL REASONING. FROM INSPIRATION TO RATIONAL LEGAL JUSTIFICATION”**

The thesis is an examination of the nature of comparative legal reasoning within the contemporary theoretical and practical debate. The first argument of the thesis is that comparative law can be classified as a relatively autonomous legal source. The second argument relates to its qualitative nature as a legal source. Namely, the argument is that comparative law should be used consulting all legal audiences (ideal rule), and that its analysis should be based on a rule of transitivity (material rule). The analysis of these rules is presented in the thesis, and the practical implications of these rules are related to the contemporary discussion on legal sources and legal justification. Moreover, these observations in theory are reflected upon in the contemporary practice of the legal orders in Europe.

The first point of departure is the theory of legal discourse. Thus, the thesis is commencing with a brief analysis of the role of legal sources within this theory. A principle of “discursive integrity” is recommended as the basic principle for a rational legal discourse. This principle is, in this connection, briefly analysed. However, its basic idea is that this principle is to be explained in the course of the study relating to various issues in the legal discourse.

Secondly, the idea of comparison is examined in a light of certain linguistic aspects. Here the idea of comparison is analysed from the point of view of some theories from the etymological and rhetorical tradition.

The third part of the study is an historical analysis of comparative law. Here the focus is on some classical writers (*Aristotle, Cicero, Machiavelli, Bodin, Montesquieu*), and an analysis is made of the characteristics of these periods (ancient, medieval, early modern, and modern legal thought). At the end, some conclusions are drawn as to the role of comparative law in the 19th and 20th centuries and on the nature of the history of comparative law in general. Ultimately, it is claimed that 20th century comparative law is a period of institutionalized comparative law.

The fourth part of the thesis consists of the analysis of the 20th century discussion concerning the theory of comparative law within the context of institutionalized comparative law. Here the focus is on the traditional discussion of the nature of comparative law, its methodology, its relationship to various other forms of social-scientific disciplines, its basic distinctions, its function in general, and on contemporary critical comparative law. Special attention is paid to the theories of legal transplants and to the theory of legal formants.

Consequently, the analysis moves towards the ideas of comparative law as a discourse within the general legal discourse concerning the nature of comparative legal arguments, and comparative law as a legal source (as explained previously).

The second part of the thesis provides empirical analysis of the functions of comparative law in various legal institutions. After a brief discussion of the role of comparative law in the legislature, analysis is made of the usage of comparative observations in the context of discovery, context of justification, and the ultimate justification of legal decisions in the course of legal adjudication. This discussion is based on the case law material deriving from the supreme courts of various European countries (England, Finland, France, Germany, Italy, and Sweden). Some other state legal systems are also shortly considered (such as the Netherlands and the United States). However, the main text-critical analysis focuses on comparative argumentation within the European legal institutions (such as the European Court of Human Rights and the

European Court of Justice). The conclusions of this chapter are connected to the analysis of some interviews, which were made in these courts in the course of this research project.

The final analysis concentrates on particular questions such as the freedom of expression, taxation, the inviolability of home, and the equality between men and women. This material derives from the European-level institutions. Consequently, some conclusions are drawn concerning the "substantive" character of European law in general.

At the end of this chapter, there are some considerations as to the role of comparative law in European law. Questions such as "what is the meaning of comparative law for the relationship between state legal systems and European level legal orders" and "what is the role of comparative law in European legal evolution?" are asked and answered. Ultimately, these conclusions are set forth by means of a model of European law. Some questions are also asked regarding the future perspectives upon European law.

The final remarks relate to the problem of whether comparative law can have a role in the legal institutional processes and justifications of legal solutions. The overall answer is associated with the idea of the discursive integrity of law.

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### European System of Human Rights:

- Mr. Leif Berg, Clerk in the *Commission of Human Rights*
- Mr. Matti Pellonpää, Member of the *European Commission of Human Rights*
- Mr. Raimo Pekkanen, Judge in the *European Court of Human rights*

### European Community:

- Mr. Leif Sévon, Judge in the *European Court of Justice*
- Mr. G. Federico Mancini, Judge in the *European Court of Justice*
- Ms. Benita Broms, Clerk in the *European Court of Justice*

### Germany:

- interview in the Supreme Court (*Bundesgerichtshof*)
- Ms. Helga Seibert, Judge in the Constitutional Court (*Bundesverfassungsgericht*)

### Sweden:

- Mr. Hans Danelius, Judge in the Supreme Court (*Högsta Domstolen*), Member of the European Commission of Human Rights
- Mr. Anders Knutsson, Judge in the Supreme Court (*Högsta Domstolen*)

### Finland:

- Mr. Gustaf Möller, Judge in the Supreme Court (*Korkein oikeus*)
- Mr. Per Lindholm, Judge in the Supreme Court (*Korkein oikeus*)
- Mr. Juhani Walamies, Clerk in the Supreme Court (*Korkein oikeus*)

### United Kingdom:

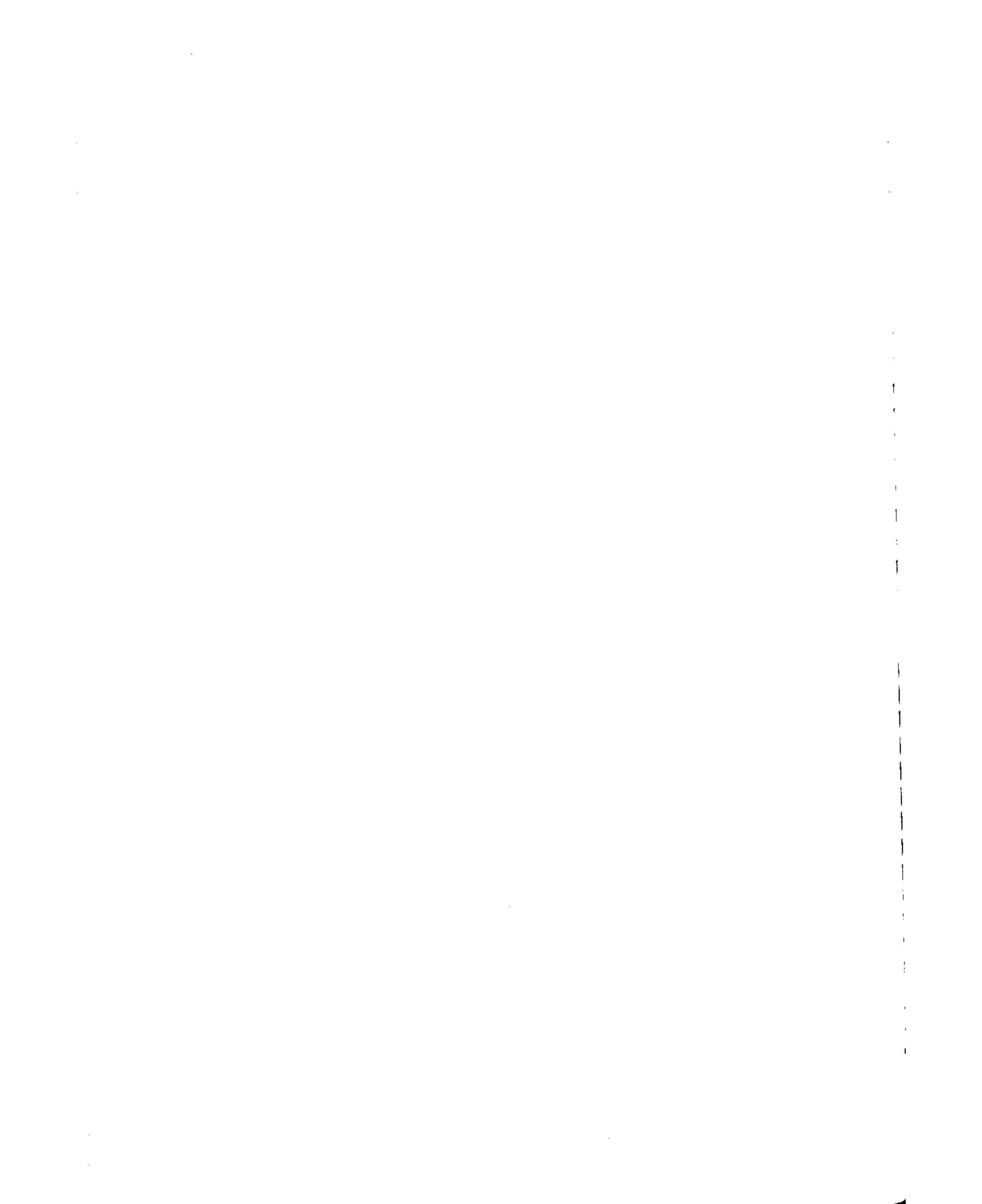
- Lord Justice Schiemann, Judge in the *Court of Appeal*
- Mr. Andrew Mckowen, Clerk in the *House of Lords*

### Italy:

- Mr. Massimo Bonomo, Clerk in the Court of Appeal and Supreme Court (*Consigliere in Corte Cassazione*)
- Ms. Elisa Bianchi Figueredo, Clerk in the Constitutional Court (*Corte Costituzionale*)

### France:

- Mdm. Sylviane Dayant, Clerk in the Supreme Court (*Magistrate Auditeur á la Cour de Cassation*)



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