

TABLE OF CONTENTS

Acknowledgements	xi
CHAPTER 1: INTRODUCTION	
1. GENERAL REMARKS	1
2. COMPARATIVE LAW IN THE CONTEXT OF EUROPEAN LAW	5
3. THE RELEVANCE OF THE STUDY	7
CHAPTER 2: SOME HISTORICAL AND THEORETICAL OBSERVATIONS	
1. PRELIMINARY REMARKS: THE RHETORICAL NATURE OF THE COMPARATIVE LEGAL ARGUMENT	11
2. SOME HISTORY	13
2.1. Early comparisons	13
2.2. Modern comparative law	19
2.3. Conclusions	25
3. TO THE IDEA OF COMPARATIVE LEGAL REASONING	30
3.1. Introduction	30
3.2. Traditional approach	31
3.3. Comparative law argument and comparative legal culture	33
3.4. Comparative law as comparative legal reasoning	35
3.5. Conclusions: the basic structure of practical comparative legal reasoning	50
4. GENERAL CONCLUSIONS	52
CHAPTER 3: COMPARATIVE LAW IN EUROPEAN LEGAL ADJUDICATION	
1. INTRODUCTION	57
1.1. Preliminary remarks	57
1.2. Some “legal” bases for the use of comparative law in adjudicative reasoning	57
1.3. Some observations concerning the material of the study	60
1.4. The use of comparative law in some national legal orders	63
1.4.1. General remarks	63
1.4.2. Comparative reasoning in relation to international legal obligations	69
European law and national legal orders	69
Other types of international obligations	76
1.4.3. Some examples	77
1.4.4. Some general remarks on internal comparison, mixed courts, and private international law comparison	92
2. COMPARATIVE LAW IN THE EUROPEAN LEVEL CASE LAW	
2.1. European Community law	99
2.1.1. General remarks	99
2.1.2. On interpretation in Community law	101

2.1.3. The legal basis for the use of comparative law	103
2.1.4. General remarks on the use of comparative law in the European Community legal order	104
2.1.5. Some general remarks on comparative influences in Community law	105
2.1.6. Comparative reasoning in the realm of international law in the European Court of Justice	107
2.1.7. The use of state legal systems in the absence of international obligations	113
2.1.8. Conclusions	147
On the basis of the case law	147
On the basis of the interviews	149
2.2. The European System of Human Rights	153
2.2.1. General remarks	153
2.2.2. Some examples of comparative reasoning	154
Trial within a reasonable time or release pending trial	154
Corporal punishment in private schools	154
Non-enforcement of access and custody rights	155
Non-recognition of paternity	156
Transsexuality	158
Pre-trial detention	159
2.2.3. Comparative reasoning related to Article 10(1 and 2) ("freedom of expression" and "necessity in a democratic society") in of the European System of Human Rights (Cases <i>Handyside</i> , <i>Engel</i> , <i>X v Germany</i> , <i>Arrowsmith</i> , <i>Glimmerveen</i> , <i>Liberal Party</i> , <i>Barthold</i> , <i>Glaserapp</i> , <i>Markt Intern</i> , <i>Groppera</i> , <i>Autronic</i> , <i>Müller</i> , <i>Castels v. Spain</i> , <i>Observer</i> , <i>Colman</i> , <i>Chorherr</i> , <i>Informationsverein Lentia</i> , <i>Casado Coca</i> , <i>Jersild</i> , <i>Oberschlick</i>)	160
2.2.4. Conclusions on the European System of Human rights	184
On the basis of the case law	184
On the basis of the interviews	187
2.3. Some general conclusions	190
2.3.1. General remarks	190
2.3.2. Some analysis	193
3. "HARD CASES" AND THE COMPARATIVE LIMITS OF EUROPEAN LAW	194
3.1. Introduction	194
3.2. Value based comparative reasoning	195

TABLE OF CONTENTS

vii

3.2.1. Hard case I (<i>The Otto Preminger Institute</i> in the European system of human rights)	195
General remarks	195
Context of justification	195
Justification	198
Some further analysis	199
“Morality” and procedural polycentrism	201
3.2.2. Hard case II (<i>Bachmann</i> in the European Court of Justice)	204
Introduction	204
Context of justification	204
Justification	205
Some analysis	206
Conclusions	207
3.3. Traditional comparative reasoning	208
3.3.1 Hard case III (<i>Hoechst</i> in the European Court of Justice)	208
General remarks	208
Context of justification	209
The inquiry into the Member States' systems	211
The inquiry into the European System of Human rights	215
Conclusions	217
Justification	218
Some analysis: a principle of individual protection vs. protection of business premises?	219
3.3.2. Hard case IV (<i>Albany</i> in the European Court of Justice)	222
General remarks	222
The facts of the case	223
The context of justification (the Advocate General's opinion)	224
The Court's reasoning	227
Some other studies	230
Some conclusions	234
Collective agreements and competition law; basic rights, market rights, and the hierarchy of these rights based on the idea of functional interpretation	236
General conclusions	241
3.4. Functional comparative reasoning: Hard case V (<i>Kalanke</i> in the European Court of Justice)	242
3.4.1. General remarks	242
3.4.2. Comparative law as acceptable and non-acceptable legal source	243
3.4.3. “Substantive equality”	245

3.4.4. Some analysis	249
3.4.5. Comparative generalities, the paradox, and the use of third law	251
3.4.6. Substantive equality as a cultural argument, the limits of law, and functional law	252
3.4.7. A systematic interpretation?	254
3.4.8. Epilogue I: Structural inequality	255
3.4.9. Epilogue II: a vertical comparative analysis	257
3.4.10. Final conclusions	262
3.5. Conclusions on the hard cases	265

CHAPTER 4: CONCLUSIONS

1. COMPARATIVE EUROPEAN LAW AND EUROPEAN COMPARATIVE LAW	269
1.1. Preliminary remarks	269
1.2. The intellectual dimension: forms of interaction of arguments and legal systems	270
1.2.1. General remarks	270
1.2.2. The analytical quality of comparative arguments, the "stages of coherence", and the legal integrity of systems	272
1.3. Motives for comparative reasoning in European law	273
1.3.1. General remarks	273
1.3.2. The forms of traditional "self-construction", control of compliance, and integrative interpretation	274
1.3.3. Maintenance of "reasonable autonomy" and the role of comparative considerations in substituting <i>the travaux préparatoires</i>	275
1.3.4. Implementation of changes in a persuasive way; the strength of the normative solution	277
1.3.5. The stability function: the strength of the argument, the judicial self-restraint, and the relative dynamics and stability	278
1.3.6. Comparative reasoning directing the future interpretations in national and European legal systems	280
1.4. The institutional dimension	281
1.4.1. Institutional reasoning in European law	281
1.4.2. The structure of the European level institutional comparative law	282
1.5. Conclusions	286
1.5.1. The function of comparative law in the evolution of European law	286
1.5.2. Problems of evolution?	287

TABLE OF CONTENTS

ix

2. CONCLUSIONS ON EUROPEAN LAW	
2.1. General remarks: toward a “reflexive” theory of European law	289
2.2. Is there justification for the (institutional) non-discursive reflexivity?	294
2.3. Integrative reflexivity and European comparative rules	295
2.4. European comparative dogmatics and vertical comparisons	298
2.5. Conclusions	299
 EPILOGUE	
1. CONTEMPORARY COMPARATIVE LAW	303
2. WHAT KIND OF INSTITUTIONAL JUSTIFICATION IS COMPARATIVE LEGAL JUSTIFICATION?	307
 LITERATURE	317
INTERVIEWS	329
INDEX	331



<http://www.springer.com/978-1-4020-0284-7>

Comparative Legal Reasoning and European Law

Kiikeri, M.

2001, XIII, 337 p., Softcover

ISBN: 978-1-4020-0284-7