

CHAPTER 4

CONCLUSIONS

1. COMPARATIVE EUROPEAN LAW AND EUROPEAN COMPARATIVE LAW

1.1. Preliminary remarks

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 and the planning of the architecture of these institutions on these basis.⁹⁰⁶

In the first type, the role of comparative law as a legal source 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 philosophy of the system (the legal-cultural ideology and theory of law).

In the second type of situation 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 personnel⁹⁰⁷. Consequently, one 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.

⁹⁰⁶ A good example of this architecture is the recent change in the European Human Rights Court, where the renewed rule of the Convention says that in a case one judge should come from the country under examination.

⁹⁰⁷ On the legal traditions and domestic training in the Community system, see Bengoetxea, J., 1993, p.123.

1.2. The intellectual dimension: forms of interaction of arguments and legal systems

1.2.1. General remarks

As it has been shown, the comparative arguments can emerge in the form of generality, diversity, or exemplification⁹⁰⁸. All these forms appear in the work of the adjudicative institutions.

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.⁹⁰⁹ The norm of the case results from these premises in different ways in interaction with other arguments.

The method of comparative law can be traditional⁹¹⁰. Then the legal sources' doctrine, on the basis of the comparison, includes laws and precedents, and scholarly opinions⁹¹¹. However, in European level institutions, traditional comparative reasoning seems to be based on restricted idea of sources of law (for example, usually no *travaux préparatoires* are used)⁹¹². 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 interact 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 préparatoires*. As it has been also indicated, comparative reasoning seems to be related to a quite strict literal interpretation. Tendencies and social

⁹⁰⁸ 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.

⁹⁰⁹ Pescatore P. speaks about the "*transpassability*" ("*transpassable*") of legal systems or their rules (1980, p.358).

⁹¹⁰ 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.

⁹¹¹ Bredimas, A., 1978b, p.325. At the theoretical level, one can make a distinction between ought, should, may, and may not sources (Bengoetxea, J., 1993, p.225).

⁹¹² The lack of *travaux préparatoires* 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.

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 basically by principles and practical arguments⁹¹³. This is what the legal sciences also emphasize.

As 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 level⁹¹⁴. 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 discourses⁹¹⁵. 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 as such. 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 such⁹¹⁶.

⁹¹³ Internal principles, limiting principles, and substantial principles (Koopmans, T., 1991, p.56 ff.). Some classification, Joutsamo, K., *The principles of Community law after the Treaty of Amsterdam* (Helsinki) 1999.

⁹¹⁴ Lando O. explains how the system examines the "fitness" of the Community system with regard to the laws of Member States (1977, p.656).

⁹¹⁵ In comparative reasoning, the disassociation of legal arguments takes place. It happens in the transferring of an 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 explained before.

⁹¹⁶ 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.).

Consequently, one could claim that the institutionally principled approach determines the qualitative adoption of the comparative examples and references. One may say, contrary to the “constructivist” idea, that these institutionalist principles are, in the end, the decisive part of prior comparative evaluations and selection in the European level legal interpretation.

Furthermore, may note that an intellectually oriented European institutional comparative lawyer is not trying to achieve the support of a very extensive legal audience.

1.2.2. The analytical quality of 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, 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”.⁹¹⁷ As 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-orders⁹¹⁸. 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 one may recognize a general conflict inside the general idea of the integrity of European law⁹¹⁹. Here one usually speaks about an ultimate form of non-discursive and instrumentalist approach to European adjudication.⁹²⁰

⁹¹⁷ See, for example, the examination of the case on the inviolability of home.

⁹¹⁸ 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.

⁹¹⁹ 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.

⁹²⁰ 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 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,

1.3. *Motives for comparative reasoning in European law*

1.3.1. *General remarks*

In this connection, the focus is 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 it has been noticed, 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.⁹²¹ On the other hand, it clearly makes it possible for them to make "legal choices". It has been 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.⁹²² There is thus *"pressure to compare the elements of national and EC law"*⁹²³.

However, one may ask how important these national legal systems really are as a source of law for the European-level orders? Namely, even if one recognizes that comparative observations function as some kind of basis of solutions for the European systems, one notes that European orders do not have, necessarily, to reflect their aims and objectives and previous interpretations within national legal systems⁹²⁴. Furthermore, it is generally known that when

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."

⁹²¹ 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.

⁹²² Lando, O., 1977, p. 657, Bredimas, A., 1978a, p. 121.

⁹²³ 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).

⁹²⁴ As it has been noted, that 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.



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