

CHAPTER 3

COMPARATIVE LAW IN EUROPEAN LEGAL ADJUDICATION

1. INTRODUCTION

1.1. Preliminary remarks

The objective in this part of the book 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 these empirical basis, one is able 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 will, in the end, raise certain issues for the traditional “classificatory” comparative law to be reconsidered, and, furthermore, it will offer reasoned possibilities to rethink the “European” paradigm of law.

Before going into the details of the European level case law, there is a short discussion on the context of this comparative legal interpretation in European legal culture, namely, discussion on the use of comparative law in some European national legal systems.

The examination of the use of comparative law in other types of international organizations is excluded from the scope of this study.²⁰²

1.2. Some “legal” bases for the use of comparative law in adjudicative legal reasoning

The interest of interpreters of law in its comparative aspects has been recognized in modern 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

²⁰² For some analysis, see Kiikeri, M., 1999, pp.312-317.

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 and political studies. On the other hand, there are differences in approaches to comparative legal interpretation, which may be depend upon, for example, whether one is speaking about fields of public or private law, and that of national or international law.

One 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 and virtually necessary.²⁰³ 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 from other legal systems - are not relevant or perhaps not even permitted²⁰⁴. This may be related to the idea that in an interpretation by comparative observations, as in legal drafting too, the question is about the development and improvement of (national) law²⁰⁵. 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.²⁰⁶

On the other hand, in modern legal systems one does not expect judges to know the law of another country.²⁰⁷ Moreover, comparative interpretation may be seen only as a luxurious form of legal analysis²⁰⁸.

As one may notice, however, the reality is more complicated than these assumptions may suggest.²⁰⁹ One may say that if knowledge exists, there are no principled obstacles to use it or,

²⁰³ As one could see, however, to this "rule" there are both normative and practical exceptions.

²⁰⁴ 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.

²⁰⁵ See, Markesinis, P., 1990, p.5 ff.

²⁰⁶ 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.

²⁰⁷ Markesinis, P., 1990, p.4.

²⁰⁸ Marsh, N.S., 1977, p.655.

²⁰⁹ 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.

at least, to consult it. On a contrary, in some cases, it may even be the case that the knowledge of another legal system must be considered positively.

It has been maintained that the legal use of comparative law is connected to the purpose of filling up *lacunae* in the law.²¹⁰ 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.²¹¹

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 a relatively obligatory source of law in a particular system²¹².

For uses of English law in United States, see Winterton, G., 1975, p.73, and in general, Riles, A., 1999, p.221 ff and Zaphiriou, G.A., 1982.

For uses in Holland, see Koopmans, T., 1996, p.545, 551. For example, Hoogeraad, *Van Greuningenv 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. According to this idea, one considers the passive side of the comparison only declaratory. Furthermore, one 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".

²¹⁰ 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.

²¹¹ Marsh, N.S., 1977 pp.664-665.

²¹² 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, pp.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

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 practice²¹³. 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 comparative law both in context and in relation to open justification.²¹⁴

1.3. Some observations concerning the material of the study

The “empirical” material of this part consists of interviews of the judges and administrators, and some legal 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 law²¹⁵. 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

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, pp.133-139. Also, Schlesinger, R.B., 1968, p.72.

²¹³ Trindade, A.A.C., 1977.

²¹⁴ One should be aware of the problem of the different types of “opennesses”, 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 one 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, pp. 257-258).

²¹⁵ 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.

remarks are, at times, made upon the organizational principles.²¹⁶

The results of the interviews have been mainly merged into different analyses of the practical phenomenon and the explanations. Interviews are not reproduced and explicitly referred to.

It must be mentioned also that in relation to some legal institutions, it was easy to obtain access in order to interview judges²¹⁷, 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.²¹⁸ This may be due to many reasons. Analysis of this aspect is not, nevertheless, made here.

The interviews were based on a questionnaire which included certain question related to the subject²¹⁹. The interviews themselves created further questions. It was not possible to ask all

²¹⁶ 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.

²¹⁷ Finland, Sweden, Germany, England, European Courts.

²¹⁸ Italy, France.

²¹⁹ 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?



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Comparative Legal Reasoning and European Law

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2001, XIII, 337 p., Softcover

ISBN: 978-1-4020-0284-7