

## CHAPTER 2

### SOME HISTORICAL AND THEORETICAL OBSERVATIONS

#### 1. PRELIMINARY REMARKS: THE RHETORICAL NATURE OF THE COMPARATIVE LEGAL ARGUMENT

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 (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.

One has to remember, however, that the analytical quality of comparison may be irrelevant to its persuasiveness<sup>28</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>29</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 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 one is basically speaking about a justification by comparison by

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<sup>28</sup> Perelman, Ch., Olbrechts-Tyteca, L., 1969, p.245.

<sup>29</sup> For more discussion, see below.

opposites. These two types of arguments may appear in synthetic or in analytical, rich or non-rich forms.

One 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>30</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>31</sup> and on concepts and "dogmas" internal to the value-based comparative argument and legal tradition. Here the idea of "coherence" is contacted.

These types of reductions should be, nevertheless, justified.<sup>32</sup> Usually, however, these identities are not analysed and reproduced explicitly.<sup>33</sup>

In comparative legal reasoning, the question is usually about partial identity (as opposed to complete identity)<sup>34</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 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>35</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 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>36</sup> The analyses of the criteria uncover the argumentative structures, that is, the elements upon which

<sup>30</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>31</sup> Perelman, Ch., Olbrechts-Tyteca, L., 1969, p.210. Identity is a result of a relation to something. Identity is itself an abstraction.

<sup>32</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. One 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>33</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>34</sup> For these terms, see Perelman, Ch., Olbrechts-Tyteca, L., 1969, p.211 ff.

<sup>35</sup> Perelman, Ch., Olbrechts-Tyteca, L., 1969, p.211.

<sup>36</sup> Perelman, Ch., Olbrechts-Tyteca, L., 1969, p.211 ff.

the ordering itself is based. The predominant - and often incompatible criteria then come to light.<sup>37</sup>

## 2. SOME HISTORY

### 2.1. *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>38</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. One 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.

It has been claimed that Jean Bodin's comparative approach demonstrated some kind of a theory of continuity.<sup>39</sup> One 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>40</sup>

In his comparative approach, Bodin did take 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 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 climactical context was used in connection to analyses of legal

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<sup>37</sup> Perelman, Ch., Olbrechts-Tyteca, L., 1969, p.211 ff.

<sup>38</sup> Valladão, H., 1961, p.99. For more detailed analysis, see Kiikeri, M., 1999.

<sup>39</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>40</sup> For some analysis, see McRae, K.D., 1979, p.A24.

institutions.<sup>41</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>42</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 monarchy.<sup>43</sup> On the other hand, his theoretical concept was morally neutral, accepting any type of sovereign as a sovereign.<sup>44</sup> The functional problems were the problems of (functional) rules rather than matters of fundamental premises.<sup>45</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>46</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. His comparative approach must be seen part of his desire to apply his concepts to a "comparative" reality of a European legal world.<sup>47</sup>

In the practice of 16<sup>th</sup> and 17<sup>th</sup> centuries, the idea was that foreign authorities could be referred to (especially the *communis opinio totius orbis*) when 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>48</sup>

<sup>41</sup> Bodin, J., 1955b, V.1.

<sup>42</sup> Also, McRae, K.D., 1979, p. A13.

<sup>43</sup> Bodin, J., 1955b.

<sup>44</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>45</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>46</sup> McRae, K.D., 1979, p. A 14.

<sup>47</sup> McRae, K.D., 1979, p. A 20.

One 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 also been maintained that *Republic* would provide many ideas for reformation of the national state (also in the form of European integration, McRae, K.D., 1979., pp.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" (Bodin, J., 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.

<sup>48</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,

Comparative law was considered as a necessary ingredient in the practical and theoretical activities of jurists.<sup>49</sup> The main purpose was to find the "similarities". The differences were the "*varietas in unitate*".<sup>50</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>51</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>52</sup>

One of those who applied a comparative approach to the consideration of the Lex Mercantile and the principles of European private law was George Joseph Bell.<sup>53</sup> He himself called it the "common jurisprudence of Europe".<sup>54</sup>

p.480).

<sup>49</sup> Gorla, G., 1982, p.129.

<sup>50</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>51</sup> Gorla, G., 1982, p.130.

<sup>52</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>53</sup> Mr George Joseph Bell (1770-1843).

<sup>54</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.*, pp.3-4). "*the law 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



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