

# CHAPTER 1

## INTRODUCTION

### 1. GENERAL 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 one asserts that the relative legitimacy of these institutions is connected to this explanation, one may say that this phenomenon requires clarification. One has to "get to the bottom" of European law.

On the other hand, it is not difficult to notice that, in general, 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 book is that comparative law seems to be at the heart of the modern European law or even its postmodern 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

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<sup>1</sup> 'European law' may be defined, in this connection, 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".

cooperation can be called legal order. In a more systematized form, it is a legal system<sup>5</sup>. It may 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 seems to function well, and which 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 of 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?

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

<sup>5</sup> Brusiin, 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 volitative system related to power relationships.

Raz, J. (1971, p.795 ff.) has considered the problem, why one needs 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 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). One 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.1.1.1.)

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 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 (post)modernist world<sup>8</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, one may claim that, in our contemporary society, 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. One may 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 are these "comparative" observations made and expressed?

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<sup>8</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 more 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, R., 1991, pp.394-395. Imitation is a form of social learning (see for example, Miller, N.E., Dollard, J., 1941).

As maintained, one makes these observations because they strike us and because they are interesting. On the other hand, one tries to avoid them if they seem to be too frustrating. Nevertheless, whenever these differences appear, it seems that, almost automatically, one starts to use these observations as narratives in order to amaze or to achieve some other purpose. By using these observations, one 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>9</sup>. One takes 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 correct one - except when we are convincingly 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. One cannot change law(s) solely based on 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 one already has 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 one does no longer discuss the situation where one has to adapt behaviour to the laws of another country, for example, because of our physical or mental attachment to it. The basis of such reasoning has to be examined.

This is the basic theoretical question of this book. 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 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 their actors in general<sup>10</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? Finally, what seems to be the results of these uses to the legal systems, institutions and individuals? Our specific focus is

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<sup>9</sup> On phenomenology and the role of comparative law, see Mössner, J.M., 1974, p.205.

<sup>10</sup> This is in accordance with general neo-institutionalist theories of law and politics.

European law.

This book starts also from the idea that there is, and has to be, a change in the way comparative law is to be seen in the context of contemporary law. The change can be explained in the following way.

Traditionally, comparative law has been comparative law of legal orders. This means that it is still determined by the tradition of 19<sup>th</sup> century legal thought, where law is seen a system of positive legal orders. The 20<sup>th</sup> century comparative law has been concentrating on the comparison of these strong positive cores of legal orders in order to avoid the problems of more discursive approach to the law.

In the context of contemporary legal theory, law is seen discursively determined phenomenon. This means, as maintained before<sup>11</sup>, that law can be seen not only as positive legal orders, but also more as legal systems determined by the systematization discourses in the context of these positive legal orders. Consequently, comparative law has to take into account this development in the contemporary legal thought, and define itself more as comparison of legal systems in the sense of systematization discourses.

This idea is strongly related to the European law. Namely, the evolutive aspects of European legal system are based on the observation of legal discourses, not only related to the underdeveloped and institutional systematization discourse of autonomous European level legal orders (European Community law and European system of Human rights), but also to the examination of the systematization discourses of law in the context of, for example, each domestic legal systems related to the European law. These legal systems include also the law of United States and some other extra-community legal systems, which have traditionally had a strong influence to the European law, especially after II World War.

## 2. COMPARATIVE LAW IN THE CONTEXT OF EUROPEAN LAW

The contextualization of comparative reasoning<sup>12</sup>, as described above, means its contextualization as a practical phenomenon. This requires an examination of the

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<sup>11</sup> See, note 5.

<sup>12</sup> The term "comparative reasoning" is used here because the intention of this study is to examine the argumentative, even "contextually argumentative", 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 argument applies also against another alternative conceptualization "*unificatory interpretation*" (Idem.). To call this process comparative reasoning emphasizes the idea of process rather than the idea of an aim or a result of an exercise.



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

Comparative Legal Reasoning and European Law

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2001, XIII, 337 p., Softcover

ISBN: 978-1-4020-0284-7