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ARTICLES

USE OF THE COMPARATIVE METHOD BY THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

C. N. Kakouris

I. INTRODUCTION

A. *Comparative Research - Notion*

In view of the varying opinions concerning the goals of the comparative method,¹ it is necessary to briefly set out the author's views on the subject for the purpose of this article.

The law is an object of knowledge for the jurist. It is also an object of knowledge for the sociologist (as well as the historian, the psychologist, the politician etc.). The jurist determines what is in force, a concrete rule or a whole legal order. Sociologists and others seek out causes by determining why a rule was introduced or why a legal order took a particular form. The so-called "unwritten law" is also an object of knowledge for jurists. It only becomes an object of knowledge for the sociologist and the others once it has been transposed into written "Judge made" law.

For methodological reasons, the subject of knowledge must always clearly distinguish whether they are acting as jurist or as sociologist. Jurists know that, in order to acquire a thorough understanding of the law, they should comprehend the law from both points of view: they should know what rule has been introduced and also why it was introduced. However, it is not always necessary for them to have knowledge of both of these views. It is usually sufficient for an administrative authority, as well as a court, to know that a rule is in force in order to

¹ G. Benos, *The Practical Debt of Community Law to Comparative Law*, *REVUE HELLENIQUE DE DROIT INTERNATIONAL* 241 (1984).

apply it, with no need in principle to know why that particular rule was introduced.

A specialists in modern comparative law do not confine themselves to what jurists normally do; namely finding out what is in force in each legal system with regard to a particular "subject-matter"² and then comparing the differences between the systems. The jurist first determines the set of socio-politico-economic relations which make up the "subject-matter." As a result, the jurist's approach is not entirely free from the elements inherent in a sociological approach.³

² I shall not consider the distinction between the *micro-comparative* and *macro-comparative* methods, since I feel that the micro-comparative method (comparison of the solutions adopted by different laws for a specific question) must never be considered alone, without reference to the macro-comparative method (comparison between the various legal orders considered in their entirety). With regard to those two methods, see P. DORIS, MICRO-ECONOMIC RESEARCH AND ITS UTILITY IN THE INTERPRETATION OF GREEK PRIVATE LAW 609, NoB (1983) (Greek). This distinction corresponds to the distinction between the *analytical research* and *synthetic research* of P. Pescatore, *Le Recours Dans la Jurisprudence de las Cour a Des Normes Deduites de la Comparaison des Droits des Etats Membres*, REVUE INTERNATIONALE DE DROIT COMPARÉ [R.I.D.C.] 352 (1980).

³ The concept of the "comparative method" described in section I, subsection A constitutes the point of departure for this article. I shall not consider the problems associated with defining that concept. However, for the sake of clarity, it is necessary to view it in contradistinction to the following related concepts:

(a) Comparisons between the institutions and provisions of one and the same legal order fall outside the sphere of comparative law. For example, an argument asserting that when a legislature expressly said so in another related law and says nothing in the law to be interpreted means that it did not wish to say so in the latter, does not form part of the comparative method.

(b) A comparison of a new provision to be interpreted with a previous provision, with a view to educing an argument *a contrario*, does not form part of the comparative method.

(c) Reference to the historical origin of a principle or a provision, as made in the judgment of 25 February 1969 in Case 23/58, Klomp v. Inspektie Der Balastingen, 1969 E.C.R. 43, para. 13, which held that the principle of continuity of the legal system when legislation is amended can be traced back to Roman law (see D.1.3.26 and 28), does not form part of the comparative method.

(d) Simultaneous reference by the Court to the three Treaties establishing the European Communities, and recourse to interpretative arguments based on their ultimate common objective, does not constitute an application of the comparative method. The three Treaties are the TREATY ESTABLISHING THE EUROPEAN COAL AND STEEL COMMUNITY [ECSC TREATY], the TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY [EEC TREATY], and the TREATY ESTABLISHING THE EUROPEAN ATOMIC ENERGY COMMUNITY [EURATOM TREATY]. The Member States in April 1965 later signed the TREATY ESTABLISHING A SINGLE COUNCIL AND SINGLE COMMISSION OF THE EUROPEAN COMMUNITIES [MERGER TREATY] which unified the executive and legislative functions of the three prior treaties. The combination of these

B. *Use By the Legislator - By the Courts*

The legislature and the courts use the findings of comparative law differently. The legislature uses the findings derived from modern comparative law as one of the many elements on which to base its opinion *de lege ferenda*.⁴ In contrast, the courts use comparative law as a method of interpreting the law which *is* in force.

The results of judicial decisions are often similar to the results arrived at by the legislature. This is true not only in legal systems based on the principle of *stare decisis*; this "judge-made law" also exists in the other legal systems. However, there is still a fundamental difference between the actions of the legislature and those of the courts. The legislature brings into force a rule after considering its appropriateness. The courts interpret vague notions or fill lacunae in written law by recourse to the "unwritten law",⁵ which is already in force, by using a "cognitive"⁶ approach. This difference in approach is not theoretical, but real and fundamental.

In order to accomplish its mission, the Court of Justice also uses the comparative method. The purpose of this article is to make some observations on the use of the comparative method by that Court.

C. *Use By The Court of Justice - Legitimation*

First, the Court uses comparative law as a method of interpretation. "Interpretation" includes the filling of gaps in the "written law" which is a "cognitive" process since it adds nothing to the law in force, but merely transposes unwritten law into written case-law.

treaties together is generally referred to as the European Community (EC). However, it is the EEC TREATY which is the most far-reaching and usually is applied when matters fall within its scope.

(e) Examination of the wording of a text of Community legislation in the various authentic official languages in the Community does not constitute an application of the comparative method.

⁴ That is to say regarding the rule which it is appropriate to bring into force.

⁵ As regards the existence of unwritten law, we cannot fail to refer to Sophocles's *Antigone*, verses 456 and 457, "unwritten and unmutable laws of the gods. . . not only today or yesterday but eternally, . . . are living laws and no one knows when they appeared." (Original ancient Greek text omitted, Eds.)

⁶ See also discussion *infra* part II.C.

At this point, the question arises as to what legal basis gives authority to the Court's use of the comparative method. Succinctly, there is no express general⁷ provision which authorizes this use by the Court, although there is an exception.⁸ For the rest, in conjunction with the preamble to the Treaty and Article 2, the Court's authority is based on Article 164 of the EC Treaty⁹ which sets out the aims of the Community concerning the Brussels Convention,¹⁰ in which the Court's authority is founded in Article 5 of the Protocol on the Interpretation of the Convention by the Court, in conjunction with Article 164.

II. THE COMPARATIVE METHOD AND THE COURT

A. *Comparison Necessary By Virtue of Community Law*

The second paragraph of Article 215 of the EEC Treaty provides that the Community must, "in accordance with the general principles common to the laws of the Member States" make good any damage caused by its institutions or its servants.¹¹ That specific reference has not prompted the Court to resort to any sort of "mechanistic"¹² interpretation. The rule which constitutes the highest common denominator is usually,¹³ but not necessarily, followed. The Court may choose the most appropriate rule, and according to certain authors, it may do so even where the appropriate rule is followed by only one Member State. However, a common denominator is not easily found

⁷ See Statute of the International Court of Justice, June 26, 1945, art. 38(1)(c).

⁸ See discussion *infra* part II.A.

⁹ TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY [EEC TREATY] art. 164. Article 164 states, "The Court of Justice shall ensure that in the interpretation and application of this Treaty the law is observed." See also corresponding Articles 31 and 136 of the ECEC TREATY and EURATOM TREATY respectively. For the sake of simplicity, from now on reference shall be made only of the EEC TREATY.

¹⁰ Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 1990 O.J. (C 189) 25.

¹¹ EEC TREATY art. 215.

¹² "Arithmetical" is the word used by Advocate General Lagrange in his Opinion in Case 14/61, *Hoogovens v. High Authority of the European Coal & Steel Community*, 1962 E.C.R. 253.

¹³ For example, the judgment in *Joined Cases 56-60/74, Kampffmeyer v. Comm'n and Council of European Communities*, 1976 E.C.R. 711, para. 6.

either because of the diversity of national provisions¹⁴ or the absence of provisions concerning State liability to third parties.¹⁵

In fact, the principle exists in the Member States that no liability arises from legislative measures, with reparation granted only exceptionally. The sole occasion where reparation is granted is where the legislative measures which caused the damage includes such provisions of reparation. In most actions for damages before the Court of Justice, arguments concerning the illegality of regulations have been pleaded. The regulations are the Community equivalent of statutory laws in the Member States. As a result, the Court has upheld new rules in its case-law.¹⁶ In some instances, a comparative examination is required by provision of secondary law.¹⁷

B. *Comparison Necessary By Virtue of Obligations Under Public International Law*

The Court of Justice regards Community law as domestic law of the Community and not as international law.¹⁸ According to the case-law of the Court, it follows that the general rules of international law are not applicable to matters governed by the Treaty, such as relations between the Member States, or between the Community and the Member States.¹⁹ Examples of such general rules include the objection *non adimpleti con-*

¹⁴ Judgments in Case 68/79, *Just v. Danish Ministry of Fiscal Affairs*, 1980 E.C.R. 501, paras. 22-23; and Case 61/79, *Amministrazione della Finanze dello Stato v. Denkavit Italiana*, 1980 E.C.R. 1205, para. 23. Those judgments did not concern the second paragraph of Article 215.

¹⁵ See Judgment in Case 250/78, *Deka v. European Economic Community*, 1983 E.C.R. 421, para. 15.

¹⁶ See generally I. DELIGIANNIS, *COMPARATIVE LAW AND INTERNATIONAL LAW* 30 (1992) (Greek), and references therein.

¹⁷ Judgment in Case 110/75, *Mills v. European Investment Bank*, 1976 E.C.R. 955, para. 25 ("the general principles of the law of master and servant, to which the last article of the staff regulations of the bank refers . . .").

¹⁸ This is mainly the reason why it does not, in interpreting the Treaty, use the rules laid down in Articles 31 to 33 of the Vienna Convention on the Law of Treaties, 1969. Vienna Convention on the Law of Treaties, May 23, 1969, arts. 31-33, U.N. Doc. A/Conf. 39/27.

¹⁹ Judgement in Joined Cases 90 and 91/63, *Luxembourg v. Belgium*, 1964 E.C.R. 625. See also, Case 7/71, *Comm'n v. France*, 1971 E.R.C. 1003, para. 23.

tractus, reciprocity, etc.²⁰ No instance of recourse to the comparative method by virtue of an international obligation of the Community is to be found in the case-law of the Court of Justice.

However, sometimes the Court, without being under an obligation to do so, draws from international law rules or principles which may facilitate the interpretation or filling of lacunae in written Community law. Such cases are infrequent, but do exist.²¹ In this context while the Court has not looked to the Universal Declaration of Human Rights, it has referred to the European Convention on Human Rights,²² as only one source of inspiration among others.

C. *Comparison Not Expressly Provided For - The EC Treaty*

1. *Legal Basis*

The second paragraph of Article 215 cannot be interpreted as excluding the use of the comparative method in the area of non-contractual liability.²³ The general competence of the Court to use the comparative method is derived from Article

²⁰ See A. Bredimas, *Comparative Law in the Court of Justice of the European Communities*, YEARBOOK OF WORLD AFFAIRS 322 n.11 (1978) [hereinafter *Comparative Law*]. See also Bredimas, *Methods of Interpretation and Community Law*, 6 EUR. STUD. L. (1978) [hereinafter *Interpretation*].

²¹ The judgement in Case 5/55, *Assider v. High Authority of E.C.S.C.*, 1955 E.C.R. 135, para. 1.4 (In particular paragraph 1.4 refers to Article 60 of the Statute of the International Court of Justice). See also Case 41/74, *Van Duyn v. Home Office*, 1974 E.R.C. 1337, para. 22, which states "... it is a principle of international law, which the EEC Treaty cannot be presumed to disregard in relations between member States ..." (The matter in hand was not covered by the Treaty). Case 374/87, *Orkem v. Comm'n*, 1989 E.R.C. 3283, paras. 30-31, refers to Article 6 of the European Human Rights Convention and to Article 14 of the International Covenant. Case 92/71, *Interfood GMBH v. Hauptzollamt Hamburg-ericus*, 1972 E.R.C. 231, para. 6, which states, "Since agreements regarding the Common Customs Tariff were reached between the Community and its partners in GATT, the principles underlying those agreements may be of assistance in interpreting the rules of classification applicable to it." See also in relation to GATT, Case 266/81, *SIOT v. Ministero delle Finanze*, et al., 1983 E.R.C. 731, Joined Cases 267-269/81, *Amministrazione delle Finanze dello Stato v. SPI & SAMI*, 1983 E.R.C. 801, and Joined Cases 290 & 291/81, *Singer & Geigy v. Amministrazione del Tesoro dello Stato*, 1983 E.R.C. 847. See Joined Cases 89, 104, 114, 116, 117 & 125-129/85, *Ahlstrom, et al. v. Comm'n*, 1988 E.R.C. 5193, para. 18.

²² E.g., Case 4/73, *Nold v. Comm'n of the European Communities*, 1974 E.R.C. 491; Case 36/75, *Rutili v. Minister for the Interior*, 1975 E.R.C. 129.

²³ On the contrary, the second paragraph of Article 215 offers an orientation in favor of a widespread use of the comparative method, see *supra* note 7.

164, which grants it very broad jurisdiction. Under Article 164, "the Court of Justice shall ensure that in the implementation and application of this Treaty the law is observed".²⁴ By virtue of Article 164, the written law of the Treaty, which is supreme among the provisions of Community law, has above it "the Idea of Law", to use Plato's terminology. The Court must ensure observance of that Law. "The Idea of Law" must guide the Court as the polar star guides sailors, to use Stammler's beautiful imagery.

In order to perform this mission, the Court may²⁵ use the comparative method, thereby examining the laws not only of the Member States but also those of non-member countries. Indeed, the Court uses the comparative method frequently.

2. *Teleological Interpretation and The Comparative Method*

The comparative method is in the service of teleological interpretation.²⁶ The Court constantly uses teleological interpretation. This interpretative method seeks to apprehend the meaning of law in the light of its purpose, its "τέλος". When a specific provision is being examined, for example, one forming part of a regulation, it is fairly easy to identify its "τέλος", and thereby, determine its specific meaning. The specific "τέλος" of the provision, must be regarded as integrated to with the general "τέλος" of the regulation as a whole. The interpretation becomes more difficult in the case of a Treaty provision which falls within the general "τέλος" of the Treaty or of the three Treaties, as found in several judgments of the Courts.

Further, teleology provides a guide for the interpretation of vague notions. Also where a lacuna is found within the written law, teleology acts as a guide to fill that lacuna with reference to the general principles of law. The case-law of the Court thus

²⁴ EEC TREATY art. 164.

²⁵ According to M. Hilf, *The Role of Comparative Law in the Jurisprudence of the C.J.E.C.*, LA LIMITATION DES DROITS DE L'HOMME EN DROIT CONSTITUTIONNEL COMPARE 549 (1986) (Que.) "The Court has a legal obligation to consider national traditions and concepts." It bases that obligation on the principle of solidarity laid down in Article 5 of the EEC Treaty and on the fact that European integration cannot become a reality otherwise than in a "comparative atmosphere."

²⁶ See also YOKARIS, *THE COMPARATIVE METHOD IN PUBLIC INTERNATIONAL LAW AND IN EUROPEAN COMMUNITY LAW* 26 (1985) (Greek).

brings about "harmonization" and may even act as a "replacement" of national legislations.

To this end, the judges of the Court of Justice, setting aside their personal beliefs, must arrive at criteria by reference to the beliefs and common values of the people of Europe. This process is comprised of two stages: first, the Court refers to the legislation of the Member States in which those beliefs and convictions are reflected. If the first method does not bring results, the Court then refers directly to the convictions, beliefs and spiritual attitudes of the peoples of Europe.

The first stage is the legal application of the comparative method. It is evident by observing the manner in which the comparative method is utilized by the Court, that the Court uses teleological interpretation. This method of interpretation provides the means by which the Court is able to draw upon the convictions, beliefs and spiritual attitudes of the people of Europe, since the materialization of those convictions and beliefs in a particular way of life constitutes the aim pursued by the three European Communities.²⁷ If the comparative approach is unsuccessful, if no explicit rules exist on a particular issue in the laws of the Member States, or if the rules which do exist are inconsistent or contradictory, the Court must then refer directly to those convictions and beliefs of the peoples of Europe.

From a cultural point of view, difficulties arise from the fact that while the peoples of Europe share the same fundamental conceptions about humanity, there are also differences which mark the particular identity of each region. These differences must be respected. This multi-cultural approach also imbues the work of the Court. Each case requires the Court to identify what constitutes the resultant vector of those differences, the "τελοζ", which will guide its decision. In this respect the Court must act as though it were the consciousness of Europe.

The fact that the comparative method is used in conjunction with teleological interpretation explains why the Court sometimes dismisses the rule of the common denominator and adopts the rule most conducive to the ultimate objective of Community integration. This methodological approach by the Court

²⁷ See BREDIMAS, *Comparative Law*, *supra* note 20, at n.73.

has sometimes been criticized as being merely "empirical",²⁸ because it does not always adopt the rules which are most widely in force. The opposing view states that the comparative method cannot be "static", and rather that it must include a teleological element in the comparison.²⁹ The search for rules in force in the Member States, as well as non-member countries, is cognitive. However, in the case of lacunae, the choice of what must be recognized as constituting the law in force in the Community involves a creative element.

Both stages described above involve difficulties varying in nature. The second stage involves the difficulties outlined above, which are universally recognized.³⁰ The difficulties inherent in the previous stage, namely the "scientific-cognitive" stage, are not always present. Nevertheless, they do exist, in so far as the perception of the concepts and rules of another legal system largely depends on the legal system from the standpoint of the perceiver, "the subject of knowledge." By contrast with the natural sciences, there is no common international legal terminology, except to the extent to which some uniform law appears to exist.

3. *Indicia of The Use of The Comparative Method In Judgments*

How can it be established that the solution adopted in a judgment is the result of a prior comparative examination? Is it possible to determine in which legal order the Court found a given general principle?

The prior comparative examination is either expressly mentioned in certain judgments or apparent from a clear component of other judgments or, presumed from the Court's known general attitude.

As a rule, the Court does not make detailed reference to any comparative examination which preceded its judgment. An exception to that rule is illustrated by the judgment in Case 7/

²⁸ L.J. Constantinesco, *Traité de Droit Comparé*, LA MÉTHODE COMPARATIVE 355 (1974) (Fr). See also PESCATORE, *supra* note 2, at 353. SACHPIDIDOU, THE LIABILITY OF THE E.E.C. BY VIRTUE OF LEGISLATIVE MEASURES 133, 136 nn.49-50 (1985).

²⁹ DELIGIANNIS, *supra* note 16, at 32 n.92.

³⁰ BREDIMAS, *Interpretation*, *supra* note 20, at XV.

56 *Algera v. Assembly of the Europ. Coal & Steel Community*, 1957 E.C.R. 39, [in particular pages 55 and 56, opinion at page 69, in particular, page 80)], where a classic form of comparative examination is found on both the part of the Advocate General and the Court.³¹ Not only is there usually no detailed reference, but there is no reference at all. However, where an express reference is made, it is usually succinct,³² and only in some cases more extended references are given.³³

Authors have attributed this silence or understatement in judgments to various reasons, such as the difficulty in determining the rules in force in the various legal systems.³⁴ However, it appears that the Court does not hesitate, where it is necessary, to set out its comparative law findings.³⁵ In certain cases, a reference to comparative law in the decision is unnecessary because the comparative examination was not made in order to choose between the varying legal systems' approaches; but, rather to inform the Court about the political and sociological implications that a potential judgment would have within the Member States' legal systems.³⁶ This attitude reflects the Court's concern in respecting cultural differences.

Although a prior comparative examination often cannot be inferred from the judgments, the following elements show that the examination is almost never omitted.

³¹ See also Judgments in Case 155/78, *Miss M v. Commission*, 1980 E.C.R. 1797, para. 19; Case 811/79, *Amministrazione delle Finanze dello Stato v. Ariete*, 1980 E.C.R. 2545, paras. 10-11; Case 826/79, *Mireco v. Amministrazione delle Finanze dello Stato*, 1980 E.C.R. 2559, paras. 11-12; Case 155/79, *AM & S Europe v. Commission*, 1982 E.C.R. 1575, paras. 18-21; Joined Cases 303 to 312/81, *Klockner-Werke v. Commission*, 1983 E.C.R. 1507, para. 45; Case 168/82, *European Coal & Steel Community v. Ferriere Sant'Anna Spa*, 1983 E.C.R. 1681, para. 15; Joined Cases 205 to 215/82, *Deutsche Milchkontor v. FRG*, 1983 E.C.R. 2633, para. 30; Case 374/87, *Orkem v. Commission*, 1989 E.C.R. 3283, para. 29. In the judgment in Case 43/77, *Industrial Diamond Supplies v. Riva*, 1977 E.C.R. 2175, there is a departure from national law.

³² E.g., judgments in Case 135/83, *Abels v. Bestur van de bedrijfsvereniging*, 1985 E.C.R. 469, paras. 15-17, and Joined Cases 205 to 215/82, *Deutsche Milchkontor*, 1983 E.C.R. 2633.

³³ Case 155/79, *AM&S Europe v. Commission*, 1982 E.C.R. 1575, paras. 18-21 & 26; Case 826/79, *Mireco*, 1980 E.C.R. 2259, paras. 10-16.

³⁴ Deligiannis, *supra* note 16, at 24 n.60; Pescatore, *supra* note 2, at 346.

³⁵ See generally cases cited *supra* notes 31, 32.

³⁶ See Case 21/76, *Handelskwekerij g.J. Bier v. Mines de Potasse d'Alsace*, 1976 E.C.R. 1735, para. 23.

The opinions of Advocates General often compare various features of different national legislations and case-law, as well as academic legal literature.³⁷ Frequently, the Court asks for its Research and Documentation Service to carry out a comparative examination concerning the specific problems which arise in a case. On other occasions, the Court asks the Commission³⁸ as a party, or as *amicus curiae* in preliminary-ruling proceedings, for information on the law in force in the Member States. The parties, or *amici curiae*, also on some occasions, provide information on the law in force in various legal systems, particularly on more general questions.³⁹ However, even where such information is not provided, the parties set out their views and arguments in the context of the legal order of their own countries.⁴⁰ Thus, they indirectly provide information on that legal order.

The comparative method is underlying in all cases due to each judge's different legal training, knowledge, approach and reasoning⁴¹ which reflects the legal system of his country. The deliberations are enriched by the diversity of the contributions made by the judges. The Court's deliberations constitute a living comparative law in action.

If these various factors are borne in mind, even in those judgments where no specific mention is made of them, it is possible to perceive elements which are derived from comparative law. For example, the principle of solidarity is embodied in Article 5 of the Treaty; however, the manner in which it is expounded in the case-law, particularly the case law saying that the obligation of cooperation rests not only on the Member

³⁷ The first cases in which the Advocate General made a comparative examination, and no express reference thereto was made in the judgement, include Case 14/61, *Hoogovens v. High Authority of ECSC*, 1962 E.C.R. 253; Case 13/61, *Bosch*, 1962 E.C.R. 45, Opinion at 56, 59-1; and Case 90/74, *Deboeck v. Commission of European Communities*, 1975 E.C.R. 1123, Opinion at 1138, 1141-42.

³⁸ See Case 155/78, *Miss M.*, 1980 E.C.R. 1797, para. 19.

³⁹ *E.g.*, Judgment in Case 108/81, *Amylum v. Council of European Communities*, 1982 E.C.R. 3107, 3113-3114. In the Judgment in Case 155/79, *AM&S Europe*, 1982 E.C.R. 1575, the Court reopened the oral procedure in order to obtain further clarification on questions of comparative law.

⁴⁰ Compare these views with those espoused by G. Benos, *supra* note 1.

⁴¹ For example, A Jurist's logical reasoning is deductive for those jurists from the Continent and Scotland, and inductive for those jurists from England and Ireland.

States but also on the institutions of the Community vis-a-vis the Member States, recalls the "Bundestreue" of the Federal German State.⁴²

Finally, it must be observed that is the term "comparative" is construed very broadly will include every external influence. For example, initially the presentation of judgments was close to the German model. Later, it was modified in line with the needs of the Court, but without ever going as far as the system of "converging opinions", guarded by the House of Lords.⁴³ Moreover, the judges' method of interrupting oral argument by asking questions did not emerge until after the accession of the United Kingdom and Ireland.⁴⁴

4. *Other Observations*

The foregoing observations have highlighted a number of features of the Court's use of the comparative method. The following are additional observations.

The comparative method, which is currently used in the field of private law, has been adopted by the Court in the fields of administrative and constitutional law.⁴⁵ This method is not carried out in a vacuum, that is to say for administrative issues, a comparison of only the administrative laws of the member States, and for civil issues, a comparison of only civil laws. This result follows from the fact that the comparative method is used for the teleological method and that the ultimate "τελος" is the resultant vector of a multi-cultural collection of beliefs of the peoples of Europe.

That is also the reason why the comparative examination also extends to the unwritten rules forming a part of the various legal systems. It is true that investigation into unwritten law is not easy where an unwritten principle has not yet been recognized in the case-law of the country concerned, and consequently comparative examination is restricted in that aspect.

⁴² As pertinently observed by Thejmen Koopmans, *The Birth of European Law At the Crossroads of Legal Traditions*, 39 AM. J. COMP. L. 493, 502 (1991).

⁴³ This system is much more apparent in the U.S. Supreme Court.

⁴⁴ Previously, the Court had been described (in French) as "muette".

⁴⁵ DELIGIANNIS, *supra* note 16, at 34; Pescatore, *supra* note 2, at 359.

The Court has on several occasions noted the independence of Community law from the laws of the Member States.⁴⁶ At first glance, it seems paradoxical that the Court should use the comparative method, by referring to national laws, with a view to then interpreting Community law in an independent manner. However, such recourse to national laws, for the sake of information, does not amount to a negation of independence. It merely means that the comparative method underpins the teleological method of interpretation.

That is why the Court does not limit the comparative method to the laws of the Member States. However, when it compares only the Member States' laws, it does not consider itself bound by the result of its comparative examination, even where a uniform law exists in all the Member States.⁴⁷ Since it is merely obtaining information, the Court may adopt a solution which is neither the highest common denominator, nor one of the solutions adopted in the law of one of the Member States.

The Court has never admitted that its decisions are the result of a comparative examination constituting the legal basis for a rule or an unwritten principle to be in force; their legal basis resides in the fact that they constitute general principles of law. For example, the Court has not taken as the legal basis for the principle of the protection of human rights the minimal protection common to the constitutions of the Member States. The Court was only "inspired"⁴⁸ by the constitutional traditions common to the Member States, which allowed it to find that the rules on the protection of human rights form an integral part of the community legal order.

Applying the principle that the most appropriate rule for the Community must be sought, the Court accepts the common denominator in certain judgments. In some other judgments

⁴⁶ One of the consequences of this independence is to be found in that the national courts, applying Community law, for example a regulation, are not entitled to supply lacunae in such law by reference to national law. Judgement in Case 159/73, *Hannoversche Zucker v. Hauptzollamt Hannover*, 1974 E.C.R. 212, para. 4.

⁴⁷ *Contra* Pescatore, *supra* note 2, at 35.

⁴⁸ Judgments in Case 11/70, *Internationale Handelsgesellschaft Mhb v. Einfuhr*, 1970 E.C.R. 1125, para. 4; Case 4/73, *Nold v. Ruhrkohle Aktiengesellschaft*, 1974 E.C.R. 491, paras. 13-14; and Case 44/79, *Hauer v. Land Rheinland-Pfalz*, 1979 E.C.R. 3727, paras. 15, 20 & 22.

the Court prefers a solution based on national law, while in others it may take no account of national law⁴⁹ or completely distance itself from all national solutions. For example, with respect to the important questions of what consequences flow from the annulment of a provision which breaches the principle of equal treatment, the comparative method had shown that in the Member States it was considered that the annulment created a legal void which only the legislature was empowered to fill. Nevertheless, the Court followed a different course: it has stated that until such time as the legislature has adopted new rules, the provision most favorable for one category of persons is applicable also to the victims of discriminatory treatment.⁵⁰

In certain cases, the result of the comparative examination was unusual. In one case, the court decided that the protection of a right based on Community law did not require a uniform rule common to the Member States and, despite the divergence between the laws of the Member States, it held that it was incumbent upon the Member States to regulate the recovery of national taxes collected in breach of Community law.⁵¹ In another case, the divergence found to exist was a decisive argument for concluding that there was no lacuna in a directive.⁵²

D. *Comparison Not Expressly Provided For - The Brussels Convention*

Article 5 of the Protocol, which provides that the Court has jurisdiction to interpret the Convention,⁵³ does not mention the comparative method. However, where the Court applies the

⁴⁹ Judgment in Joined Cases 44, 46 and 49/74, *Acton and Others v. Commission*, 1975 E.C.R. 383, paras. 15-16.

⁵⁰ For example, the judgments in Joined Cases 75 and 117/82, *Razzouk and Beydoun v. Commission of the European Communities*, 1984 E.C.R. 1509; Case 71/85, *Netherlands v. F.N.V.*, 1986 E.C.R. 3855; Case 286/85, *McDermott and Cotter v. Minister for Social Welfare and the Attorney General*, 1987 E.C.R. 1453; Case C/262/88, *Barber v. Guardian Royal Exchange Assurance Group*, 1990 E.C.R. I-1889. See also Y. Gamot, *Réflexions Sur Le Recours au Droit Comparé par la C.J.C.E.*, REVUE FRANÇAISE DE DROIT ADMINISTRATIF [R. FR. D. ADMIN.] 255 (1990).

⁵¹ Judgment in Case 826/79, *Mireco*, 1980 E.C.R. 2559, paras. 10-11.

⁵² Case 135/83, *Abels v. Bestuur Van de Bedrijfsvereniging*, 1985 E.C.R. 469, at para. 17 states, "It may be concluded that if the directive had been intended to apply also to transfers of undertakings in the context of such proceedings, an express provision would have been included for that purpose."

⁵³ See *supra* note 10 and accompanying text.

Brussels Convention, it necessarily carries out a comparative examination since the terminology of the Convention is based on that of the national laws, even if the aim is to define a concept of the Convention, which in principle is autonomous from often divergent meanings which the same term has in various national laws.

Where the Court finds that a term used in a provision of the Treaty, of secondary law or of the Brussels Convention has an autonomous meaning, it concludes that the provision does not refer to each national law for the meaning of that term. Rather, the Court determines the term's specific meaning to be the same throughout the Member States, but not necessarily different and wholly distinct from the meaning which it has in all national systems of laws.⁵⁴

E. *Classifications*

While it is not the aim of the present article to list or categorize the judgments of the Court in regard to the use of the comparative method, the foregoing observations on its judgments show that various classifications are possible on the basis of a number of criteria:

- Judgments concerning general principles and those concerning the interpretation of specific provisions.
- Judgments which limit the comparative method to the laws of the Member States and judgments which also ex-

⁵⁴ In its judgment in Case 29/76, *Lufttransportunternehmen GmbH and Co. Kg v. Eurocontrol*, 1976 E.C.R. 1541, para. 3, the Court states: "The concept in question (civil and commercial matters) must therefore be regarded as independent and must be interpreted by reference, first, to the objectives and scheme of the Convention and, secondly, to the general principles which stem from the corpus of the national legal systems." See also judgments in Case 43/77, *Industrial Diamond Supplies v. Luigi Riva*, 1977 E.C.R. 2175, paras. 22-24; Case 133/78, *Gourdain v. Franz Nadler*, 1979 E.C.R. 733, para. 3; Case 150/77, *Bertrand v. Paul Ott Kg*, 1978 E.C.R. 1431, paras. 19-20; Case C-26/91, *Handte v. Traitements Mecano-Chimiques des Surfaces*, 1992 E.C.R. I-3967, para. 20. The judgment in Case 34/82, *Peters v. Zuid Nederlandse Aannemers*, 1983 E.C.R. 987, para. 14, adds a further argument based on the practicability of the interpretation adopted.

amine the laws of non-member countries⁵⁵ or international law.⁵⁶

- Judgments which apply⁵⁷ and judgments which ignore the common denominator.
- Judgments which generally or specifically mention the comparative method.⁵⁸

III. CONCLUSION

European integration is achieved by secondary legislation (secondary community law), in particular by regulations and directives, which are substituted for, or bring about the harmonization of, the legislations of the Member States. Comparative scrutiny of the legislation of the Member States is preliminary to the adoption of Community measures, particularly in the case of directives, for which comparative information is essential.

There exists "quasi-harmonization", which is brought about by the case-law of the Court of Justice. This "quasi-harmonization" also requires comparative research into the legislation of the Member States. Comparative examination has a specific

⁵⁵ Judgment in Case 48/69, *Imperial Chemical Industries Ltd. v. Commission of the European Communities*, 1972 E.C.R. 619, in which United States legislation is considered in the Opinion of the advocate general; judgments in Joined Cases 17 and 20/61, *Klochner-Werke v. High Authority*, 1962 E.C.R. 325; Case 6/72, *Europemballage Corporation and Continental Can Company Inc. v. Commission of the European Communities*, 1973 E.C.R. 215; Case 24/71, *Meinhardt v. Commission of the European Communities*, 1972 E.C.R. 269, para. 6; Case 17/74, *Transocean Marine Paint Ass'n v. Commission*, 1974 E.C.R. 1063; Case 108/63, *Merlini v. High Authority of the ECSC*, 1965 E.C.R. 1. The English law principle of estoppel was recognized before the accession of the United Kingdom to the community. The case law which upholds the "limited" direct effect of directives is in fact based on this principle, although that fact is not expressly stated.

⁵⁶ See *supra* note 18 and accompanying text.

⁵⁷ See *supra* notes 49-50 and accompanying text.

⁵⁸ Examples of general terms:

a. Elementary principles of law. Judgments in Case 32/62, *Alvis v. Council of the EEC*, 1963 E.C.R. 49; and Joined Cases 42 and 49/59, *Snutat v. High Authority*, 1961 E.C.R. 145;

b. General principles of labour law. Judgments in Case 18/74, *Syndicat General du Personnel v. Comm'n*, 1974 E.C.R. 933, para. 10; and Case 175/73 *Union Syndicale v. Council of the EC*, 1974 E.C.R. 917, para. 14;

c. General principles even in the absence of provisions. Judgment in Joined Cases 3-18, 25 and 26/58, *Erzbergbau and Others v. High Authority*, 1960 E.C.R. 173.

function in the activities of the Court which gives rise to the particular features of the way in which the method is applied.

Tangentially, the relationship between the Court and national legal systems is not a one-way relationship. The Court is inspired by national laws, while national laws are influenced by Community law. Moreover, national legislatures take account of the fact that national laws are inserted in the framework of the Community's legal system, which is a quasi-federal system. In turn, national administrations and national courts interpret national law in the light of Community law.⁵⁹

National courts, bound by the decisions made by the Court of Justice, apply in cases governed by Community law principles which are unknown to national law for example, the principle of proportionality, are made familiar with those principles. This familiarization leads to the application, by osmosis of those principles, such as that of proportionality, on the part of the national courts in cases which are governed by national law. This is a further sign of the interpenetration which both results from and participates in the movement towards European integration.

⁵⁹ They are also under a legal obligation to do so, as the Court has held in the Judgments in Case 103/88, *Fratelli Costanzo v. Comune di Milano*, 1989 E.C.R. 1839, paras. 28-33; Case 14/83, *Von Colson and Kamann v. Land Nordrhein-Westfalen*, 1984 E.C.R. 1891, para. 26; and Case C-106/89, *Marleasing v. Comercial Internacional De Alimentacion sa*, 1990 E.C.R. I-4135, para. 8.