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Why Compare?

THE COMPARISON OF laws is a discipline where *methodological and theoretical pluralism* prevails. There are different competing views of what comparative law is and what it is not. In spite of the differences all views are connected by one common feature. Comparative law, like any form of legal research, is normally regarded as an activity that always has an aim. Comparison is not a hobby that the jurist elite can busy themselves with along with (more serious) the doctrinal study of law. Undoubtedly, comparative law is time-consuming and in many respects is a rather challenging way to engage in legal research. But, from the history of comparative law we know that comparison has always had an aim and purpose. This is still the case today.

For example, the learned men in the Greek *Πόλις* of Antiquity were interested in the laws of other city States. For ancient Greeks, the human-made law (*νόμος*) of the city State differed from the law of nature (*φύσις*). Greeks also applied the norms of other city States to their own cities if they considered them applicable. The ancient Romans were profoundly aware of the fact that their law, the Roman law, was their own (*ius civile*), but they understood that law that concerned all people (*ius gentium*) applied also to them. Later this Roman heritage transformed and developed into the medieval *ius commune*.

The term *ius commune* ('common law' in Latin, German *Gemeines Recht*), which is frequently used in comparative law and legal history, refers to the entity that was born in the Middle Ages as a synthetic combination of reinterpreted Roman law (in particular *corpus iuris civilis*), Catholic canon law and the legal study practised in universities. Hence, in German it is also called *römisch-kanonische Recht*, ie Roman-Canonical Law. Now, the Middle Ages is not an accurate expression, but here it refers to the period between 400–1400 AD. The Middle Ages were named at the end of the fifteenth century and the beginning of the sixteenth century by humanists for whom this period represented a period of intellectual regression. In legal history the period is not as 'dark' as its reputation. Roman law was born in Antiquity to begin with, ie in ancient history, which refers roughly to the period between 2500 BC and 600 AD. From the point of view of legal history, the periods cannot be distinctly separated from one another because regional differences were vast. In any case, *ius commune* used by comparatists refers to this later Roman law tradition. More importantly, *ius commune* and the practice of comparing laws with the Continental European legal sphere are intertwined.

I. STARTING POINTS—CREATING ADDED VALUE

Comparative law attempts, in accordance with what has been said earlier, to disengage from the limits of national legal systems (as well as international law, if needs be) that restrict the acquisition of the knowledge of law. Often only when legal systems are examined from the outside, is it possible to see the distinctive historical features, for instance, of the national division between the fields of law, the relativity of legal concepts and the embedded political and social nature of different legal institutions. Law is part and parcel of the society's cultural entirety—law is the law of human communities. Or, as the Latin phrase has it, *ubi societas, ibi ius*: where there is a society there is law. And, this leads inevitably to an unsurprising revelation: human communities are not similar all over the world, thus the law applied to human beings and their social constructions (eg marriage, contract, tort etc) cannot be the same everywhere.

Solutions of one's own legal system that seem natural and self-evident can appear in a new light when compared to solutions in other systems; then it is easier to assume a critical view of their self-evident truth and to conceive their weaknesses and strengths more prudently. Also the foreign influence on one's own legal system becomes visible and can therefore be faced by conscious and critical evaluation. Comparison often works as a legal cultural eye-opener, ie it demonstrates to the comparatist something crucial about law in a surprising way.

The non-national nature of comparative law is considered to facilitate the understanding of foreign cultures and consequently to both promote and facilitate international cooperation. On the other hand, when foreign law is studied, it is very difficult to avoid making unconscious comparisons if for no other reason than that explaining in your own language the content of a foreign law in an understandable form requires implicit comparison. Simply, the translation of foreign concepts and terms requires comparative knowledge about law.

Above all it is a question of how consciously the comparative element is included in the study of foreign law. It is fundamental to comparative law that the comparative element is consciously included in the research design and that the comparatist openly tells the readers what they have done in the study and how they have done it. Covering up research approaches and emphases or upholding a hidden agenda is not a decent research practice in comparative law. Open argumentation belongs to good research practice because it increases the justifiability of the comparatist's reasoning. Correspondingly, clandestineness and hiding one's own research decisions and emphases is bound to decrease their credibility and significance. There are also ethical dimensions of research connected with credibility and significance (more on this in chapter six, section XIII).

Among the legal disciplines, it is expressly comparative law that entertains the comparative element (Latin *comparatio* = comparison), and merely getting acquainted with foreign law or international law is not equal to being genuinely engaged in comparative law. Yet, learning of foreign legal systems and legal cultures is an essential preliminary phase for actual comparative law. As a preliminary phase it is a natural part of the comparative process that always consists of several steps. On the other hand, the differences between describing foreign law and actually comparing it with other law are not overtly dramatic.

In general, the comparatists assume that comparative law is expressly comparing and that descriptive knowledge of foreign law (German *Auslandsrechtskunde*) is a constitutive part of the actual comparative process. So, comparison should produce knowledge with value-added, not only valid, descriptions. Dutch comparative methodologist Maurice Adams compresses it into an essential question: 'What actually is the added value of such comparative exercise?'[1] That is: comparative law should produce some value-added, and by means of comparison it should be possible to surpass the trap of the mere organised description of foreign law. Ideally, the process advances from valid description to understanding and from decent understanding to relevant explaining.

II. COMPARISON AS A CROSS-BORDER FORM OF KNOWLEDGE ACQUISITION

Basically, comparative study is a challenge of identifying differences and similarities as observed above. The fundamental object of comparative law is to acquire knowledge on what separates the legal systems or cultures studied and what connects them and to explain or assess what has caused the differences and/or similarities. The method of knowledge acquisition is comparison (German *Vergleichung*), which is a natural cognitive model of human ability. When we talk about comparative law or comparative study in general, we often forget to mention this natural connection with everyday thinking and intuitive knowledge acquisition. Someone who practises the doctrinal study of law might consider comparison as an 'academic peculiarity', although at the level of basic ways of making sense of the world, this is not the case. To be sure, doctrinal study is much more distant from common sense thinking than making comparisons.

When we in a scholarly context hear the term 'comparative law', some sort of rather abstract scientific method might easily come to mind. As stated above, in reality comparison is in fact almost the most natural method to acquire and increase information about the world that is beyond

[1] 'Wat is eigenlijk de vergelijkende meerwaarde van dergelijke exercities?', M Adams, 'Wat de rechtsvergelijking vermag. Over onderzoeksdesign' (2011) 60 *Ars Aequi* 198.

our own immediate native understanding. Comparison is our inborn constitution for acquiring experimental knowledge and a way of thinking that enables us to acquire practical knowledge. According to the basic definition of Professor Nils Jansen, 'Comparison is the construction of relations of similarity or dissimilarity between different matters of fact'.[2] This is clearly something we do every day by way of asking questions: is this bag heavier than the other one; is today colder or warmer than yesterday; which of these products lasts longer; which of these cars is more expensive; is it more expensive to travel by aeroplane than by train etc.

It is a question of investigating the relations between different matters from a particular point of view: observations concerning difference and similarity are implicitly constructed. Moreover, comparison is also a basic method of scientific knowledge acquisition.

Terminology can be confusing. It seems natural to separate different fields of science and to include legal studies in the entity of all sciences. On the other hand, it is clear that the normative doctrinal study of law, legal theory, comparative law and the history of law are not science (Latin *scientia*) as such. The old Latin name for legal study (and its derivatives in other languages), on the other hand, are derived from the word *prudentia* (Latin *iurisprudentia*), which emphasises *learnedness* and *skill*. Professor Vernon Valentine Palmer from Louisiana fittingly states: 'Omniscience is an excellent end but it is not invariably appropriate and cannot be the everyday standard of comparative law'.[3]

In this respect comparative law preferably belongs to *humanities* studying human culture rather than to the same category as medicine and astronomy. In this book the way of conceiving comparative law familiar to the usage found in many languages is not used; instead, comparative law is regarded as a form of *prudence*, ie jurisprudence understood in a broad manner. This refers to *prudentia*, which is practical wisdom, not to *scientia* (Greek φρόνησις) Yet, we can observe that jurisprudence has several features that are also found in *scientia*: principles in the use of references, obligation to give justification, following of research-ethical principles, methods based on arguments, collective control of the community of researchers and so on. There is plenty of likeness to science, but it is not a question of exact science. In German terminology it is, however, seen as a form of operation that can be described as a member of the family of sciences (*Wissenschaften*).

Some schools of thinking formed by comparatists have also tried to define comparative law as science in a more exacting sense, as was demonstrated in 1987 by the original programme declaration of the Trento circle that was formed around Italian Rodolfo Sacco (b 1923): the five principles describing comparative

[2] N Jansen, 'Comparative Law and Comparative Knowledge' in M Reimann and R Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford, Oxford University Press, 2006) 305–38, 310.

[3] VV Palmer, 'From Lerotholi to Lando' (2005) 53 *American Journal of Comparative Law* 261, 287.

law are all permeated by an aspiration for scientification.[4] Later in the Trento sphere of influence have been included, in addition to the original members (eg Sacco, Antonio Gambaro, Pier Giuseppe Monateri), other researchers who do not attempt to commit themselves to the original programme declaration that was renewed in 2004 by Gambaro and others.

So, the basic cognitive setting in comparison is relatively clear. How do we actually know that something is, for example, cold? How can we maintain that one matter is big while another is small? Before we created a modern absolute thermometer scale, our only way to define cold was to compare it to warm and then conclude what the difference in temperatures meant in concrete terms. In order to know what can be labelled as small, we have to be able to say what is big. Understanding these differences and similarities is not purely a natural and inborn capacity but also a skill learned by experience and enabled by the automatic capacity for comparison of the human mind. It is a question of the perception of the relative position between matters, the basic operation of human observation. The human mind figures out various sorts of proportions very well, ie one grasps relationships that exist between the size, colour or amount of two things.

A. About Proportions

A matter is something in particular because it is something in proportion to something else: the argument that there is 'inefficient and insufficient protection provided by law' in the People's Republic of China has a sensible meaning only if we know what 'efficient and sufficient' protection provided by law means. Mere suggestions are not sufficient. Suggestions have to be proportioned, ie we should say 'inefficient' in proportion to something and 'insufficient' compared to 'sufficient'. The comparatist has to explain the arguments of their comparative study for readers to assess. The reader can in this way evaluate if they would reach similar conclusions on the basis of the same study and similar material.

There is almost a tautology here: comparison (to compare) is the cognitive foundation pillar of comparison. Through comparison and the establishment of concepts, such elementary conceptual categories (in a social sense) as being small and big or slow and quick have been formed. We understand what is republic because we know its conceptual counterpart monarchy. In the law of compensation (or tort law), the concept of intangible damage becomes comprehensible when it is compared to material damage, in property law the concept of immovable property is understandable

[4] The original programme is from 1987 (The Trento Manifesto containing five core theses) and it was signed by eight Italian comparatists; see R Sacco, 'Legal Formants: A Dynamic Approach to Comparative Law (I)' (1991) 39 *American Journal of Comparative Law* 1.

when it is compared to the concept of movable property, a petty crime is understandable when it is compared to a felony and so on.

The conclusion is obvious: the basis of comparative study is not detached from common sense; it is instead the intuitive starting point of *human knowledge formation*. The everyday thinking in itself and the practical knowledge needed in daily pursuits often depend on the intuitive use of the comparative method although we do not consciously think that we are using any special comparative method. Moreover, there is a deeper philosophical kind of proof of a person's existence based on the sheer fact that someone capable of any form of comparison necessarily exists. Paraphrasing (French *je pense donc je suis* or Latin *cogito, ergo sum*) philosopher René Descartes (1596–1650): 'I compare, therefore I exist' ('*Confero, ergo sum*'). This is no more no less but the premier principle of all comparative study (Descartes' *le premier principe*). In short, comparative law is simply an advanced application of comparative knowledge formation.

Now, in comparative law the comparatist consciously tries to find another system to which their own legal system could be compared and it would be possible to look for certain commonalities or differences. When it is a question of a conscious quest for differences and similarities between legal systems as well as for their explanation, we can call it proper comparative law. If in the research, for example, several foreign legal systems are merely introduced and described consecutively or parallel to each other (system A, system B, system C etc), then it is not comparative law because there is no act of comparison involved. Still, a great deal of the legal research carried out under the banner of comparative legal research or comparative law is mainly parallel description of foreign legal systems where comparison is lacking. Often it is the question of mere *Auslandsrechtskunde*, which in fact could in itself be useful information in the drafting of legislation or the application of the law. Also the language of publications has here its own role: a genuinely international study is linguistically comprehensible even for those who are outside the system. Unfortunately, this puts less common languages in a disadvantageous position because it favours more common languages.

So, making comparisons and drawing conclusions on their basis is a built-in capacity in human beings who aim at knowledge. In the same way, everyone who studies foreign law is engaged in first-stage intuitive and the spontaneous comparison of law because the context of their own understanding is based on the epistemology of their own legal system ('pre-understanding', German *Vorverständnis*). This is why comparative law helps them paradoxically to comprehend their own legal system better and improves the possibilities to develop it by enlarging the knowledge basis—comparative law enables us to grasp our own legal system in a different light or reflected in a different mirror. The epistemological idea here is simple: if comprehension of foreign law requires in terms of knowledge

more than the doctrinal study of law in one's own system, it means that law contains culturally bound implicit elements. Law is, in fact, always *law in context*. If culturally bound elements define how law is understood, interpreted and applied, why would the comparatist's own system be some sort of capricious exception in this respect?

> Many comparatists of the twentieth century have underlined comparative law as a study method that offered new stimuli in the comprehension of one's own law as well. Some have gone even further since the concept of shock therapy has been used in this context. The expression 'the laboratory of truth' has been used to describe this dimension of comparative law. Professor Michael Bogdan takes this way of thinking even further: 'a lawyer who has studied only their own legal system, cannot have a full understanding of that system'.[5] Bogdan's point is an important one; by studying only one's own law one cannot gain full understanding of that system. In other words, to perceive completely something that is one's own is possible when one's own is viewed with the eyes of an outsider (epistemic alienation). Metaphorically it is a question of a kind of out-of-body experience and observing the 'legal body' from the outside: *out-of-body-experience* relates to an epistemic feeling of separation from one's own law and being able to view, to an extent, one's own law from an external perspective.

Also in the study of general jurisprudence the comparative approach has plenty of possibilities when study no longer is so bound to the systems of nation-States as it earlier has been. By means of teaching comparative law and foreign law it is possible to transfer the focus of legal study away from learning detailed rules and instead to concentrate on the general principles and features of the legal system. More significance is also given to the international dimension of law as part of instruction and research within all branches of law. Through comparison it becomes possible to proportion the familiar to the unfamiliar—this generates new knowledge and novel insights about law.

Along with the European Union law, European human rights and the globalisation of law, comparative law is more clearly and indisputably constructed on law as a normative phenomenon in itself: different systems contain elements that oblige us to compare. When, for example, the realisation of the harmonisation obligation set by an EU directive in one's own country is interpreted, the realisation of the directive in other Member States has to be studied as well. Implementation norms in other languages can also be inspected to give grounds for making the interpretation. Legal texts that can be studied side by side are simultaneously available in several languages: in essence this is comparing laws and legal languages.

[5] 'den jurist som endast har studerat sin egen rättsordning, inte kan ha fått en full förståelse av denna rättsordning', M Bogdan, *Komparativ rättskunsp* (Stockholm, Norstedts juridik, 2003) 28.

B. Different Needs

Despite their common sense origin, scholarly comparison and everyday comparison have parted from one another. Above all it is a question of conceptual systematicness, clarity and discipline but also of controllability and reliability. Comparison is reasonably easy in physical and chemical sciences because the laboratory conditions can be controlled to a considerable degree. In research concerning the cultural characteristics of people it is impossible to attain full scientific reliability with methods that would be ethically acceptable. Be that as it may, this has not prevented the use of the comparative method in the research of politics and law in the past. In different periods and different legal disciplines there have been different knowledge-interests, which have been and still are possible to satisfy.

> According to the oral tradition of ancient Rome—for such an early period it is difficult to find facts—in the 460s BC, the Romans sent a delegation to Hellas to get acquainted with the legislation of Greek city States in order to gain a knowledge base for the creation of a compilation of laws. The idea was to enact a comprehensive body of laws that would provide not simply for individual cases. This has been reported to be the comparative history of the Twelve Tables (Latin *Leges duodecim tabularum*). These laws have had great significance for the development of Roman and subsequently European law.

> In Iceland around 930 AD a man called Úlfljótr was sent to Norway to learn about law. When he returned after about three years Iceland would go on to have a law and administration system of its own prepared on the basis of what he had experienced and learnt. Úlfljótr is known in legal history as a kind of *lagman*, ie 'a speaker of law' (*lögsögumaðr*).

> Needs for information and the world have changed. For example, the operation of lawyers working in the area of the European Union for the harmonisation of European private law differs from the ancient models because nowadays integration of several different systems is consciously the aim. In other words, the aims and contexts of comparison are different, and they have an effect on what is done and how it is done, ie methods and aims of comparative law have been and still are contingent, not definite.

Now, some fields of knowledge seem to be more relevant for comparative law than others. Legal history teaches the comparatist. History is useful for the perception and explanation of the legal context, but one must beware of slipping into the world of myths and romanticising law. A good example of this is the case of the classic white statues of Antiquity that have since been proved to have been originally painted in glaring colours: it has been difficult for those who had internalised the classic image to accept the crumbling of their own romantic and mythical ideal. The same has applied to many ideas that we have had of Roman law into which illusions and ideals of each period have been loaded while the legal-historic accuracy has been given a minor role.

Finnish legal historian Kaius Tuori has argued that Roman law has always been purposefully interpreted from the viewpoint of present needs.[6] In short, accuracy is good but not always plausible as an aim. Occasionally it is difficult to perceive where we are and where we will go, as Otto Kahn-Freund (1900–79) pointed out: 'Perhaps we should not overestimate the problems of today which may not have been those of yesterday and in a kaleidoscopic world are not likely to be those of tomorrow'.[7]

III. COMPARISON AS THINKING OUTSIDE THE BOX

Apart from the fact that comparative law deals with the acquisition of knowledge for different purposes, it is characterised in a way described above by genuine internationalisation and the attempt to become detached from the epistemic limitations set by one's own legal system. Often, though not always, it is also a question of the *Universalist* attitude to law and legal research that is well described by the American comparatist Hessel E Yntema (1891–1966) in the late-1950s, who stated that 'legal science does not admit chauvinist isolation'.[8] This means that quite frequently comparatists consider that only such study, which is not limited to the law of only one system, may be considered as the real scientific study of law. Notwithstanding, perhaps we should not have as orthodox a view as this on comparison because comparison can be used in many different ways, and they do not necessarily exclude one another. And, it is not a question of competition because national legal study (legal doctrine) has its own natural position and function as well as legitimisation for existence.

It seems justified to argue that comparative law is fittingly described by its desire to detach itself from the mental straitjackets set by national law. According to Yntema, aiming at high scholarly quality in itself was an action in opposition to legal chauvinism: he was well ahead of his time because only now in many traditional faculties of law has the genuine internationality of legal study been understood. But there is more to it. Some romantics who have been inspired by legal history have even sighed for a return to the Continental European *ius commune* tradition.

Regardless of the fruits of the comparative approach, a practising national lawyer may be left wondering about the detachment from the

[6] K Tuori, *Ancient Roman Lawyers and Modern Legal Ideals: Studies on the Impact of Contemporary Concerns in the Interpretation of Ancient Roman Legal History* (Frankfurt am Main, Vittorio Klostermann, 2007). Tuori highlights various implicit assumptions that have actually guided the so-called 'romanistic legal science'.

[7] O Kahn-Freund, *General Problems of Private International Law* (Leiden, Sijthoff & Noordhoff, 1980) 193.

[8] HE Yntema, 'Comparative Law and Humanism' (1958) 7 *American Journal of Comparative Law* 493, 498.

knowledge of their national law. Here we find the heart of the matter. The attempt to break away is important if for no other reason than the fact that national legal systems were not born or have not grown in isolation. Legal institutions and schools of thought and doctrines as well as institutions have affected each other and continue to do so. The legal purity of the national law in connection with regulations, institutions and doctrines is, as it has been often, more a normative fiction than a fact. We have adopted from others a lot more than we can comprehend: many legal institutions are in constant circulation. We are simply not distinctly aware of the layers of loans, borrowings and copying that still exist. Systems are a patchwork of diffusion and interaction as well as of national ideas, ie most national systems are, as are States themselves, *cosmopolitan* as H Patrick Glenn (1940–2014) argued.[9] For Glenn, the idea of the 'Nation-State' has simply failed and we are in need of a cosmopolitan theory of State.

> Legal history can present examples of such borrowing on a massive scale. In 1926, for example, Turkey borrowed quite consciously from a foreign legal culture, ie Switzerland, whose Civil Code (*Zivilgesetzbuch*, 1907) it copied and put into force (*Türk Kanunu Medenisi*, revised edition 2002). On one hand, it was a question of the authority that Swiss law, as a law of a technically high standard, had at that time in Turkey. On the other hand, it was also a question of need because Turkey was being modernised and needed to import such legal provisions as it did not have the professional capacity to create those that would fit the State, which had just broken away from the traditions of the Ottoman Empire and was aiming at drastic and large-scale modernisation. The Swiss codification was suitable for reception because it contained fewer provisions and the contents of provisions were scantier than in many other codifications. We may also mention other examples such as Bolivia (1830), the Republic of Haiti (1852) and the Dominican Republic (1854), all of which adopted the 1804 *code civil* of France either in full or almost in full.
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> Adoption of foreign law usually takes place on a smaller scale, as for example the adoption of American institutions and legal-cultural practices. Examples that can be mentioned are class actions or plaintiffs' claims for compensation that have risen sky-high, and which reflect American legal ideas rather than Continental European ones. At present, the plea bargain method is about to start spreading. The EU has brought about a lot of legal borrowing and diffusion of legal ideas. And conformity and points of contact have also been increased by the European Convention on Human Rights and the practice of the European Court of Human Rights. As a result, for example, in European law there are more and more such elements whose thorough understanding requires getting acquainted with their non-national origins and basic ideas.

Why is the crossing of borders the lifeline of comparative law? What is so special about it? This doubt is uttered by legions of national doctrinal

[9] See HP Glenn, *Cosmopolitan State* (Oxford, Oxford University Press, 2013).

scholars. And yes, it deserves to be answered. Let us take an example of an imaginary State that had been surrounded by impervious walls for several centuries. How could any 'jurist' or 'legal scholar' try to tell about their society or even describe it to any outsider? What could they compare their society to, or how could they know what they should tell about their society? Would they be capable of explaining what is considered law in their society, what is the legal system or form of government of the isolated State or what law is like in their society etc?

The description that the above-mentioned person would offer of their own society and legal system would be incomprehensible for other people, because owing to the isolation it would be impossible to describe even simple things; is it possibly a democracy or perhaps a monarchy, is the court system divided into general courts and administrative courts, is penal law severe or lenient etc. (The portrayal could naturally be treated as a detailed description, but it would be essentially slower and also difficult to understand since there would be no comparison standards.) To make it concrete: Islamic law does differ from Western law, but a Muslim jurist is able to describe their law to an American jurist—and vice versa. To think otherwise would mean underestimating the basic human ability to think and learn. Certain commensurability is usually a fact: research interest is focused on an abstractive normative set of rules that is based on certain sources. Of course the content of the rules may differ, the style of normativity may differ, the sources may be different but, still, we are dealing with human societies and organised large-scale normativities.

A. Away from Ethnocentrism

To simplify a great deal, the realisation and comprehension of human matters, even the simple ones, presumes the existence of general concepts that are based on comparison. The fact that we describe, say, German law by saying that it is trying to be systematic and logical and call English common law casuistic and unsystematic presumes the existence of certain comparative background criteria. For example, the difficulty of describing the English *trust* (as a property arrangement where there is double-ownership between the owner and the beneficiary) is mainly due to the fact that there is no similar legal institution in Continental Europe. The functions that are taken care of by trust in England are on the Continent dealt with by other legal measures. Yet, there is comparability and epistemic *commensurability*.

If a researcher is deprived of the opportunity to extend their study beyond of the boundaries of their own community, they are in danger of staying cognitively blind: a Scandinavian jurist who does not perceive their own law as a sibling of other Nordic systems will not understand the legal-cultural position of their own law and a New Zealand lawyer not perceiving

their own law as a form of common law is virtually one-eyed. Comparative law attempts consciously to avoid such blindness and therefore consciously aims at relying on a framework that is comparative.

We can see here more profound dimensions, too. To summarise what was said above: comparison is a natural activity of human consciousness. Understanding an individual fact presumes understanding the facts that are related to the matter. Because it is easier for us to grasp our research topics in a context, a research approach that is international and crosses the borders of national legal systems is needed if we want to maintain that we really know something about law. Comparison is the engine of knowledge without which we cannot obtain knowledge that actually surpasses the knowledge of our limited cultural sphere.

In the end, the attempt to compare law is also a question of the *rejection of ethnocentrism,* or the pushing away of the implicit thought pattern that national solutions are always superior or at least 'normal'. This does not necessarily mean deep commitment to universalism but rather commitment to the fact that in the world of law we can learn from others. On a very general level we can talk about the broadening of consciousness and the cultivation of the ability for legal thinking. Needless to say, these premises are not obvious everywhere in Western culture. For example, the isolationism that is again gaining ground in the United States serves the rest of the world very poorly (which of course is the case with the United States too).

Comparative law is probably the most efficient way to get rid of the national mental straitjacket that restricts the acquisition of legal knowledge in a broad sense. This does not mean, however, the rejection of the national law's normative point of view. The internal legal point of view has, of course, immense practical legal value. Nevertheless, knowledge gathered as a result of comparison can also be of assistance when one's own legal system is being developed. Von Jhering, who was a famous German legal historian of the nineteenth century as well as an expert on universal jurisprudence, reportedly said that, 'One has to be stupid to refuse a fruit if the only excuse is that it has not grown in one's own garden'. The wisdom of this quotation is not decreased even though no one is 100 per cent sure who said it.

However, it is clearly not advisable to borrow and use just anything. Comparison presumes certain basic caution because models copied from foreign legal systems can include endogenous problems that are not known in the receiving country, ie the fruit von Jhering was referring to can also contain harmful 'remnants of pesticides'. Ultimately this does not differ from enjoying the fruit of somebody else's garden: one has to taste and evaluate the edibility of different fruit, to savour the taste and to decide on how best to use them. One should also beware of mistaking ornamental plants for edible ones.

Legal-cultural ways of thinking as well as the legal mentality have their impact. For instance, while the Supreme Court (ie court of cassation) in the Netherlands (Hoge Raad) often has the Supreme Court of Germany (Bundesgerichtshof) as the source of inspiration for its decisions, in the neighbouring country, Belgium, the court of cassation (Hof van Cassatie/Cour de cassation de Belgique) looks for its inspiration from the court of cassation in France (Cour de cassation). Dutch civilist and comparatist Professor Ewoud Hondius fittingly speaks about applicational development of law by means of 'looking over the border'.[10] Often it is a question of selective borrowings, which could also be called 'learning from and with the neighbour'.

IV. BASIC KNOWLEDGE-INTERESTS

The starting point for comparison is quite clear: it is an attempt to acquire knowledge (independent of any specific legal systems) of law by means of comparing laws. Such an aim is very extensive and covers several different fundamental elements. The key point is easy to discern: it is important *to recognise the knowledge-interests* (German *Erkenntnisinteresse*, ie knowing-interests or epistemic interests) of the study, or the motivation for why comparison is carried out, as well as what kind of knowledge is looked for and what is the purpose of comparison. When the approach of the comparative study is decided, orthodoxy in carrying out the ideas of a particular school of comparatists is not prudent. However, commitment to the purpose is crucial so as to not follow an external rule offered by any particular school of thought.

It is essential that the comparison carried out or just the study of foreign law genuinely serves the purpose of the study instead of just remaining self-sufficient decoration or a presentation of unconnected matters, ie ornamenting one's study with trivial foreign law accessories. If comparison does not contribute to carrying out the actual research assignment, it is worth considering whether comparison/study of the foreign law is at all worthwhile. Here, however, we must keep apart the fact that, for example in the doctrinal study of law it is perfectly normal to refer to foreign law or non-national legal literature and to use it as a part of the argumentation in accordance with the ways allowed in the doctrine of the sources of law. But in such cases it is a question of interpretation and systematisation of one's own law, not of comparative legal study. The same difference applies also to private international law, the aims of which differ from genuine comparative law which seeks to understand *and* explain.

[10] E Hondius, 'Rechtsvorming' (2006) 55 *Ars Aequi* 327. The subtitle of this article is 'een blijk over de grenzen', ie look over the border.

We can apply a game metaphor: it is not sensible to referee a basketball match with the rules of football, even though they both are ball games. Mutatis mutandis: it is not necessary for jurists to commit themselves to the theories of comparative law, just as comparatists need not yield to the ideas that the national doctrinal study of law has about the way legal research should be carried out. On the other hand, it is not advisable for the doctrinal study of law and comparative law to drift so far apart that the fruitful interaction between them dies out. Both are established members of the family of legal disciplines. And, possibly, there is a certain special connection still to be seen between private international law and comparative law, although their knowledge-interests clearly differ from one another: practical application versus understanding and explaining.

So, comparative law can be used for many different purposes; therefore it is not justified to define different interests in too limited or exhaustive a way. Albeit, it is possible to distinguish several basic types of comparative knowledge-interests. On the one hand, the comparatist's interest in knowledge acquisition can be integrative or contradictive. On the other hand, the comparatist's interest can be related to a special method that serves the comparatist's purpose and is used to carry out comparison. Comparative law (or merely the study of foreign law) can also have a significant role in legal education. In the following, five basic interests are listed:

Basic knowledge-interests
1. Integrative interest
2. Contradictive interest
3. Practical interest
4. Theoretical interest
5. Pedagogical interest

V. INTEGRATIVITY AND CONTRADICTIVITY

In *integrative interest* the comparatist concentrates on similarities between the subjects compared. This comparison interest can also be called the harmonisation interest of law or the unification interest of law. *Harmonisation* in its modern sense means the general attempt in legal policy to bring about as complete a harmonisation of legal systems or their parts as possible in such a way that the biggest deviations are eliminated and a minimum standard with which all parties must comply is created.

States carry out harmonisation by means of different international legal approaches, but extensive harmonisation of law has been practised within the European Union in particular. It is a question of coordination of many branches of law and of bringing them closer so that major differences are eliminated from the systems (result: *identical* applicable rules). This can be

done when minimum requirements or standards are first created by the help of comparative constructions.

Unification goes a step further; here, the target is not merely minimum standards that concern certain fields or the similarity of certain parts of the legal systems. Here, a more profound legal unification is aimed for (*same* applicable rules). In unification an attempt is made to replace two or more legal systems with a new system that would take the place of the previous ones. Integrative comparison can be used for both purposes. It is also important to realise that neither unification nor harmonisation is a legal choice (how to apply a rule or precedent) or a comparative choice of method but is dictated by political targets set. Comparatists whose background is in private international law tend to be in favour of unification for practical reasons, while late-modern comparatists are considerably more reserved on the topic and feel more sensitive towards legal-cultural differences. Especially critical and postmodern comparatists in particular have underlined contradictive comparison and the existence of legal-cultural differences.

Contradictive research interest pays special attention to differences and emphasises the fundamental difference between systems. In research practices it is a far more rarely used comparative method than the integrative research interest. In general it comes to question when the systems compared are very different in their legal cultures, such as criminal law that is based on Shari'a and Western criminal law. Also, it is fair to say, the basic ideas of critical comparative law have a strong contradictive undertone. This undertone has been, by and large, an epistemic countermove against the earlier harmonisation-oriented practical comparative approaches.

A. The Historical Dimension

Harmonisation is not historically merely a modern legal phenomenon, but instead it is very well known indeed in legal history. It certainly did not begin as late as the European integration of the late twentieth century. The chain of events with legal-historic significance started in the thirteenth century with the importance of research and teaching in Roman law and the Romano-Germanic 'common law' (German *Gemeines Recht*, French *droit commun*, Spanish *derecho común*) that was born from it. In European legal history it is possible to differentiate the birth history of the integrative comparative interest from within the *ius commune* tradition—from the Middle Ages to the nineteenth century—that was born out of Roman and canon law.

It was as late as at the beginning of the nineteenth century when the era of massive national codifications finally brought an end to the soft Central European integration and started to stress the boundaries of national law.

The birth of comparative law in the modern sense was accelerated as a countermove to the underlining of borders and national emphases. In the nineteenth century, private international law as a field of law was born out of the situation where national boundaries had become a problem in contracts and marriages that crossed borders between States and legal systems.

> In the Middle Ages it was typical in legal decision-making to cross national borders when the rule that would probably solve the case was looked for. It is important to notice that at that time jurists studied the legal source material and authorities in order to find from the common *ius commune* tradition a legal rule the same as in their own legal system, not in order to obtain from foreign law inspiration for their own decision-making. Needless to say, the choice of law questions and application of foreign law (ie conflict of laws) is far from the medieval inclusive tradition.
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> The core of the *ius commune* tradition was reinterpreted Roman civil law, which meant that comparison of laws that was applied to find *ius commune* was only governed by public law to a small extent. Although Roman civil law has had a great impact on the development and formulation of legal thinking, from the point of view of public law almost as central a position was filled by the French Revolution and the legislative development that has resulted in the birth of modern constitutional law and administrative law. The historical roots of private law go deeper than the roots of public law, but the growth of the significance of fundamental rights and human rights has evened out the differences between fields of law and added connections between them.[11]

When codifications multiplied and the trend for national legal thinking strengthened in the nineteenth century, the significance of integrative comparative law decreased considerably. *Contradictive* comparative study started to assume a more significant position. With the rise of legal positivism State sovereignty became the basis for legal thinking and international law. Comparative law began to turn into a specialised field whose knowledge-interest became more conscious of nationality. Legal borders were constructed and the study of law started to become increasingly national; instead of an inclusive approach the exclusive approach became the paradigm. Legal and epistemic obstacles were erected alongside the birth of nation-States. Nation-States proliferated across the world from the beginning of the 1800s by replacing old empires and kingdoms and thus wiping away the relatively shared legal-cultural world of *ius commune*. State-entities understood the nation as a sovereign territorial unit with its own ethnic, cultural and legal contents.

So, legislative national needs in particular started to dominate in comparative study; foreign laws and legal institutions were investigated in

[11] For the main features of *ius commune* and how it evolved into legal doctrine in thinking and writing, see F Wieacker, *A History of Private Law in Europe*, trans T Weir (Oxford, Oxford University Press, 1996). The original German version, *Privatrecht der Neuzeit*, was published in 1967.

order to find good (or poor) examples of socio-legal solutions and legal innovations acquired. The fundamental motif was very instrumental: there was a desire to copy (presumably) the best parts of foreign law in order to assimilate them into one's own law. This kind of engineering-type of comparative law is very clearly aware of the differences between systems and carries out instrumental comparison by bearing in mind the development of one's *own* law.

At the same time the colonised regions outside Europe were in many ways force-fed with the so-called civilised, or Western law. Law was sold, bought, exchanged and sometimes stolen: legal inventions have never known of copyright. Humans' sphere of law is permeated by stolen ideas and illicit loans—social innovations travel if people feel like spreading them. However, they do not spread the same way epidemics do, because the needs and objectives of groups of people have an impact on the acquiring and borrowing of social innovations. Law travels but it does not seem to travel simply at its leisure.

Legal historians have described the nineteenth century as a period of great national codifications during which jurists turned their attention to the (internal) interpretation, systematisation and analysis of the codifications produced. At the level of legal practice, persons who had assimilated comparative legal knowledge started to turn into experts who were expected to have an answer to one question in particular, ie how to apply foreign law in cases that crossed the borders of national legal systems. In this kind of instrumentalist comparative law the emphasis was typically on finding differences instead of finding similarities, which had been the case in the previous period.

It is easy to realise that this kind of comparison seems to fall quite naturally on private international law: basically there is no desire to compare and explain as such, but to determine the country whose legislation is applied to international legal relationships (what is the right legal forum, which State's law ought to be applied, what is the influence of the court decision of one State on another State, and so on). Relations between States were elementary and few in number compared to the world today although individuals were not much bothered by borders in those days either: business or love does not much care for distinctions between legal systems. And, here is the thing, private international law, unlike comparative law, is *a field of law*. Private international law is essentially based on national law, which in fact is complemented by European law (which is partly enforced without special national efforts to bring them into force). In short, private international law (or conflict of laws if you prefer) and comparative law should no longer be regarded as natural allies. Their fundamental interests of knowledge are different—and it goes without saying that comparative law is not a field of law but a legal discipline.

B. Recent Integration in Europe

The integration development in Europe has meant that the focus on European comparison is again moving towards integrative comparison, which means that it in a certain sense recalls a kind of new European *ius commune* system. Within the European Union the integrative comparative law interest is manifested in several ways. At its purest it appears in the introduction of the EU Charter of Fundamental Rights according to which the rights are protected in accordance with the competence, functions and the subsidiarity principle of the Union. These rights are said to be based explicitly on the *common constitutional traditions* of Member States and their international commitments, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Council of Europe and the case law of the Court of Justice of the European Union and the European Court of Human Rights. Here, the starting points are by no means confined to any one national system: constitutional traditions are conceived as commonly European.

> In Europe the main question has long been legal harmonisation, which has been less demanding than unification. This is apparent in many central fields of law, such as contract law where the national contractual systems of the Member States are different in many ways. At the Union level some common regulations have been given for certain problematic cases. In practice, such harmonised regulations cover limited fields of contract law, the emphasis being on contracts in consumer law in particular.
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> It is essential to notice that even in cases where harmonised regulations are applied, as a rule they offer the Member States an opportunity to apply other bodies of law, if they so wish. That is why the EU internal market does not have a standardised and comprehensive set of contract law norms that firms and consumers could apply in business that crosses the borders of Member States; however, a proposal for commercial law with this in mind is under discussion. This is a big challenge for the internal market in the Union since the market economy of the Union, which is based on the free movement of goods, capital, services and people seems to require deep legal coherence. At present the European system is more like a *legal kaleidoscope* than a coherent system: there are significant similarities but also discrepancies.
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> Harmonisation based on legal cooperation has been carried out in the Nordic Countries, too. In fact the Nordic Countries have cooperated in legal matters for over 100 years. An important informative background factor has been the Nordic Lawyers' Meeting (organised for the first time in 1870, and at present organised every third year). One example of the influence of Nordic legislative initiatives is that at the beginning of the previous century laws that were very much alike were enacted in the fields of commercial law and contract law (the pieces of legislation are still partly in force). Harmonisation projects were carried out for most of the twentieth century. According to the Helsinki Treaty signed in 1962, Nordic cooperation would be continued in order to attain uniformity of regulation in the field of private law. In addition attempts have been made to establish uniform rules

> relating to criminal offences. Harmonisation has been aimed at in all fields of legislation where it has been considered appropriate. In practice the membership of three Nordic countries in the European Union has complicated the traditional Nordic cooperation in the field of legislation. In fact, the legal integration of Nordic countries has in practice largely been replaced by European integration.

For all actors in Europe, loose harmonisation has not been a sufficient aim in legal policy. Apart from the supporters of deeper integration, in legal disciplines there have been fascinating and far-reaching schools of thought related to the topic. Some intellectual historians of law, such as Paul Koschaker (1879–1951), suggested nostalgically that the development of European legal systems should be built on the foundation formed by classical Roman and Germanic legal features.[12] In the background of the unified European law there are two trends of legal thinking that are influenced by both legal history and comparative law.

C. New or Old *Ius Commune*?

European integration has stirred much interest in the ranks of legal historians as well. On the basis of legal-historical discussion it seems that we can talk about not only the *ius commune* tradition but also about the more recent 'common legal tradition'. It allows for considerable free choice concerning interpretation and allows for a kind of flexible pluralism in legal practice. More far-reaching is the idea of a completely new *novum ius commune* law, which is to a large extent based on a novel legal-culturally common late-modern European law that is the result of the work of courts and different European institutions and legislative instruments (eg the EU Charter of Fundamental Rights). The Union's Constitution project that was rejected in the referendum in 2005 represented a line of strong general harmonisation and even federalism. In the 2010s, the approach has been more cautious; the financial crisis has at least temporarily eroded the legal-cultural impetus of integration. We have heard voices of protest and discontent from countries (eg The Netherlands, Finland), which used to be very active and open in their integration policies.

In practice, the big financial and institutional crises of the past few years have brought up many obstacles for schools of thought that promote profound legal-cultural unification. Although *ius commune* is an educational historical analogy, its real weight as a common legal-cultural basis for the modern Union is unavoidably vague. On the other hand, if *ius commune* is the source of legal-cultural inspiration, mainly in connection with legal

[12] Koschaker considered Roman law essential in the attempt to try to rebuild a common European legal culture; see P Koschaker, *Europa und das römische Recht* (Munich, Verlag Biederstein, 1947).

methods and legal mentality, the situation is different. In the context of the contents of substantive law there is hardly any sense in going back to the old. Dutch Professor Martijn Hesselink: 'Why should the future resemble the past ... study of legal history is unlikely to provide current lawmakers with clear-cut answers'.[13] There may be a lesson for comparative law here. The usefulness of legal history cannot and should not be denied, but neither can it be regarded as the storage room of legal ideas where future decisions are stocked and from where whatever is needed can be fetched at will. Legal history should not be pruned down into empty concepts into which present-day jurists referring to the legal-cultural nostalgia inject a content that seems best suited at that particular moment.

In any case, in European legal harmonisation it is essential to observe the active role of the courts. Integrated law is created by means of not only treaties and statutory law but also by interpretations made by the high courts. Particularly the Court of Justice of the European Union has in this respect had an important role in the application and creation of law.

In accordance with Article F(2) of the Maastricht Treaty of 1992 in regard to the European Union, the Union valued as general principles of Community law the fundamental rights in the form in which they were guaranteed in the European Convention on Human Rights and in the form in which they appeared in the shared constitutional traditions of Member States. The Court of Justice of the European Union created this principle in the *Stauder* case by talking about human and fundamental rights specifically as a part of common general legal principles.[14] It was not only a question of substantive law, but the Court expressly brought up the need for comparative examination in the belief that it was

> impossible to consider one version of the text in isolation but requires that it be interpreted on the basis of both the real intention of its author and the aim he seeks to achieve, in the light in particular of the versions in all four languages.

In other words, versions in different languages had to be compared so that a kind of shared European core could be constructed comparatively.

According to an interpretation practice established in the EU Court, fundamental rights have for quite some time been considered to be a central part of such general supranational principles of law as to be guaranteed by the EU Court. The Union Charter that came into force later institutionalised the settled case law that the Court had already earlier assumed. Already, at a quite early stage, the EU Court had based its interpretation on stimuli that has been offered by international human rights and the common constitutional traditions of Member States.

[13] M Hesselink, 'Non-Mandatory Rules in European Contract Law' (2005) 1 *European Review of Contract Law* 43, 62 (he continues: 'And from which historical periods should we borrow our rules for the future?').

[14] 29/69 *Stauder v City of Ulm* [1969] ECR 419.

A classic example would be the case of *Internationale Handelsgesellschaft* in connection with which the EU Court ruled that fundamental basic rights are such principles of law that their observation had to be secured in the legal system of the EU.[15]

The court stated in the *Hauer* case that being aware of the fundamental rights of the Member States presumed that the viewpoints of the constitutions in States were studied.[16] The Court aimed at resorting to the comparative approach when interpretation was needed or gaps in law were found. National systems indicated, on the one hand, what kinds of interpretations are possible and, on the other hand, what kinds of problems could be related to different interpretations. For example, in the administrative process, in connection with principles related to administrative law, the praxis of the EU Court includes a landmark case, *Transocean Marine Paint Association* concerning the hearing procedure.[17] The other party to the case considered that its procedural right to be heard had been violated. The problem was that EU law did not contain a regulation on hearings: for the proposed decision the Advocate-General of the Court ran through the systems of Member States and constructed the proposal on the hearing principle prevailing in Member States (six out of the nine States that at that time were in the EU). Importantly, the proposed decision was produced by means of comparative deduction.

In the *Transocean* case EU law had detected a gap, but the situation had to be solved in a uniform way. Even though the Court in its decision did not refer to argumentation that was built on comparison performed by the Advocate-General, it can be considered that the judicial core of the case was partly built on the comparative study of the legal systems of Member States. The foundation of this comparative law-finding is basically the same today.

> The Court's interpretation ideology of legal policy presumes comparative law has not changed although there are already 24 official languages in the Union. For example, in the case *Commission v Finland* in 2007 the Court stated:
>
> Although the Finnish version of that provision contains no reference to the requirement that overheads be allocated 'pro rata' to the operation in question, that fact is of no consequence, since it follows from settled case-law that Community provisions must be interpreted and applied uniformly in the light of the versions existing in all the Community languages and since, in this case, the language versions other than the Finnish expressly refer to the requirement that overheads be allocated pro rata or proportionally to the operation in question.[18]

[15] Case 11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125.

[16] Case 44/79 *Hauer v Land Rheinland-Pfalz* [1979] ECR 3727.

[17] Case 17/74 *Transocean Marine Paint Association v Commission* [1974] ECR 1063.

[18] Case C-54/05 *Commission v Finland* [2007] ECR I-2473.

> In its preliminary ruling in *Nowaco* the Court stated that precedents for 'all the other language versions' are already established legal practice (*settled case law*).[19]
>
> All these judgments uphold the basic idea that brings up the need for comparing laws: 'impossible to consider one version of the text in isolation'.[20] In practice, this means that the national lawyer of a Member State must master other legal languages as well as to be able to really grasp EU law. In this case comparative law, or comparing different text versions (practical comparative legal linguistics), is an auxiliary tool in the interpretation needed in finding a solution.

The legal dimensions of the European Union differ from public international law in many ways. From the point of view of comparative law, it probably is sensible to perceive that the Union law is a legal system of its own kind (Latin *sui generis*) and ultimately serves integrating Europe. To reach the aims of integration, Member States have voluntarily restricted the sovereign rights that they have according to the traditional international law. The treaties are laws that are directly applicable in Member States as are the legal rules (regulations) of the Union: they are not separately enforced in the Member States. This is where the secondary law of the Union differs from the norms of international law: regulations are immediately enforceable whereas directives leave certain national leeway as to how to achieve the aims set by the directive.

The special features of EU law are clearly demonstrated by, for example, the fact that the EU Court applies methods of interpretation that differ from national methods and approaches of legal interpretation. The fact that European judicial argumentation about law is teleological (ie goal-oriented) is demonstrated in particular in cases in which the Continental European civil law and English common law characteristics of both the source of law and the tradition of legal interpretation are often reflected. In addition to these, in recent years the use of argumentation that is based on human and fundamental rights has increased, although it has not altered the basic picture of legal culture in EU law: from the point of view of legal culture EU law is a kind of a 'megamix'. Accordingly, there has been a tendency in comparative law to perceive EU law as a mixed legal-cultural form, a hybrid between the legal cultures of the Member States and EU law and the European Convention on Human Rights.

In addition, it is important to note that it is not simply a question of how courts or legislators operate. In the context of the European Union a kind of semi-official doctrinal harmonisation has been performed; the best example of this might be the *Common Frame of Reference* (CFR) that has been formulated for contract law. It was formulated by the order of the Commission

[19] Case C-353/04 *Nowaco Germany GmbH v Hauptzollamt Hamburg-Jonas* [2006] ECR I-7357.

[20] See also eg Case 55/87 *Moksel Import und Export* (1988) ECR 3845 at [15]; Case 268/99 *Jany and Others* (2001) ECR I-8615 at [47], and Case 188/03 *Junk* (2005) ECR I-885 at [33].

and by means of a European research community. It was preceded by a project called *Principles of European Contract Law* (PECL), which, however, remained less comprehensive in coverage. Preliminary projects were undertaken in the early-1980s, under the leadership of Professor Ole Lando from Denmark (the so-called Lando Commission).[21] These ventures have brought the European researcher community to the forefront of non-national legal development, simultaneously increasing the importance of comparative law as a tool of integration.

If and when CFR is not actually statutory law, then what is it? Roughly, it is a 'toolbox' whose aim is to help in the development of pan-European law. CFR is not legally binding, but national legislators can apply it when they implement directives nationally. According to the initiative of the Commission (2001), CFR had to contain clear definitions and common terminology for the fundamental concepts of contract law. The intention was to increase convergence between the contract law systems of different countries.

In 2009, the international academic network of researchers revised and published the *Draft Common Frame of Reference*, which contained principles, definitions and model regulations for European private law. Definitions contain important legal terms, such as 'contract' and 'damage'. The Commission applies CFR as a tool: the intention is to create more coherence in European private law.[22]

A more recent proposition for a *Common European Sales Law* (CESL) proves the value of CFR as a construction method even after the proposal was withdrawn in December 2014. The Common European Sales Law was meant to become an optional contractual system alongside the national systems of the Member States—it could have been applied if the parties agreed on it. In any case, CESL is a tool for legal harmonisation, which tries to diminish the difficulties caused by national legal systems, and which seeks to govern the buying and selling of goods in the European Union. A crucial idea of CESL was that businesses ought to identify the provisions of another Member State's applicable law and negotiate this law. This, in turn, would have remedied the problem of consumers facing fewer choices at higher prices in their domestic market. The CESL proposal offered traders the choice to sell their products to citizens in other Member States on the legal basis of a unified 'set of contract law rules, which stand as an alternative alongside the national contract law' (alternative legal regime). The proposal did not gain uniform support and it was withdrawn and a new modified proposal is to be expected. For example, the UK did not support it because it regarded it as too incomplete, unworkable in parts, uncertain as well as unclear.[23]

[21] Underlying ideas on the basis of PECL, see O Lando, 'Principles of European Contract Law: An Alternative or a Precursor of European Legislation' (1992) 56 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 261.

[22] *Draft Common Frame of Reference* (DCFR). Full Edition. Principles, Definitions and Model Rules of European Private Law. This massive (6563 pages) collection is edited by the Study Group on a European Civil Code, and Research Group on EC Private Law (Munich, Sellier, 2009).

[23] See eg G Dannemann and S Vogenauer (eds), *The Common European Sales Law in Context: Interactions with English and German Law* (Oxford, Oxford University Press, 2013).

In any case, the CFR is interesting but from the point of view of legal linguistics also quite prone to criticism: it was prepared and produced in English, but in fact its contents have in many places been reasoned in legal German and French, not in common law English. Furthermore, the result was not what was expected, because the extensive publication only contained the general part of the project. This did not necessarily serve the objective, which was to simplify legislation that concerns contract law. Nevertheless, as a comparative law project CFR is somewhat unique; it succeeds in indicating what possibilities an integrative approach that crosses national borders could have. This is proof of the boon and bane of comparative law.

D. The International Dimension and Knowledge-interest of Comparison

Sometimes legal scholars have difficulties telling international and comparative law apart even though there are obvious differences between them. Comparative law differs from public international law to a certain extent, in the same way as it differs from private international law. In spite of the differences, comparative law can be a kind of medium or help-tool for the international fields of law that are normatively oriented. For example, comparative law can assist international law institutions, such as the United Nations, by analysing obligations under international law in the systems of different States. Comparative law is also often in instrumental use, when international treaties are being drafted. By means of it common standards and practices can be located. Also other points of contact between comparative law and international law that are even clearer exist.

Within public international law, the integrative interest is familiar from the Statute of the Court which governs the operation of the *International Court of Justice*, which is an organ of the United Nations. According to Article 9, the members of the Court have to represent 'the principle legal systems of the world'. In Article 38(1) the fundamental rule specifies the legal sources, which the Court must apply when deciding disputes submitted to it. The first source mentioned is international conventions (subarticle (a)) and international custom, as evidence of a general practice accepted as law (subarticle (b)). Besides international conventions and custom, in Article 38(1) subarticle (c) '*the general principles of law recognized by civilized nations*' are mentioned as sources of law.

International Court of Justice: Statute of the Court Article 38(1)

1. The court, whose function is to decide in accordance with international law such disputes, as are submitted to it, shall apply:
   (a) International conventions, whether general or particular;

(b) International custom, as evidence of a general practice accepted as law;
(c) The general principles of law recognized by civilized nations.

In addition to conventions, the article distinguishes customary law and principles of law. The concept 'civilised nation' that reflects the aura of the so-called new imperialism (1870–1914) has undoubtedly lost its earlier significance. Nevertheless, when no solution to international legal dilemmas is found from the texts of agreements or customary international law, it is possible to look for the solution in the national principles of law, which nations generally acknowledge in their own legal systems. Nowadays the expression 'international law, as recognised by the principal legal systems of the world' is used instead of referring to the English expression 'civilised nations' or the corresponding French expression '*nations civilisées*', which are not only legal but also value statements.

The international principles of law to which the article refers are part of national legal systems, and therefore finding such principles presumes comparative examination of the existing legal systems. Up till now the judges and jurists have been said to be mostly guessing what these principles might be. Integrative comparative law would be needed in examining the content of the principles to which the article is referring. Often the case has been that an international judge or arbitrator has settled for the principle of law taken from their own legal system without checking if the same principle is recognised in other legal systems. The principles provided by the article have so far remained open to interpretation and the use of comparison has remained unsystematic.

General principles of law complete the entirety of international law formed by contracts and customary law. They offer a possibility to deal with such subject areas of international importance that have not yet been thoroughly regulated by the norms of customary law or international agreements. Principles that are included in the national legislation of all or most States can be considered generally recognised legal principles; in other words, knowledge acquisition of some sort by comparison of laws is inevitably needed. On what other grounds could any legal principle be claimed to be common to all if not on grounds of some kind of comparison?

In public international law, general legal principles referred to in the article have been of importance when problems with the relation of international organisations with regard to their own employees have arisen. For example, good faith (Latin *bona fides*) and hearing both of the parties (Latin *audiatur altera pars*), which was the issue in the above-mentioned *Transocean* case, have been among the principles applied.

To genuinely understand customary international law, one has to get acquainted with practices applied by States; then it is possible to give an answer to the question: when can a custom be considered binding

international law or when is a custom '*a constant and uniform usage*'? Only when States act in a particular case recurrently in a particular way, which is considered binding also in international law, is it a question of customary international law with clear normative significance. On the other hand, it has to be noted that when a particular practice is considered part of customary law, every State is not invariably required to follow the practice. Albeit, general acceptance of a practice is sufficient if behaviour deviating from the practice is considered to be against usual practice (Latin *opinio iuris*).

It has to be also noted that if departing from the practice is frequent and on a large scale, the case might well be that a new practice is being formed. The new practice can then gradually replace the old practice as part of customary international law. An example of a practice that is so far debatable but which may still become accepted is so-called *peace enforcement*. In practice, the UN has given its forces more extensive authorisation than is used in peacekeeping in a situation where peace has not yet been restored. Grounds for extended application of military force have been found from the provisions of the Charter of the United Nations.

Perhaps the best-known example of customary international law is *humanitarian law*. International humanitarian law (or laws of war) refers to law with which an attempt is made to ease the effect of armed conflicts. The purpose is to regulate the methods and means of warfare. In defining these norms, court judgments and writings of leading experts are used as subsidiary sources of law.

In the last few centuries there have also been successful attempts to codify customary international law into international agreements. In this way disputes on the contents of customary law are alleviated and States perhaps become more willing to involve provisions that they have themselves been explicitly approving. Distinctions are difficult to draw when it comes to customary international law. Sometimes the issues of the tradition and principles of international law can become intertwined.

In the by now classic ICJ case on *Fisheries*, Norway tried by means of a law to draw its limit of territorial waters in a way that the UK considered to be a violation of international law; it exceeded the limit of three nautical miles, which the UK considered to be the limit in international law.[24] However, there was no certainty about the validity of the three nautical mile norm, and Norway argued for special protection of the coastal fjord region. The ICJ found that the Norwegian law on the matter was not contrary to international law, although it violated the practice of international law (the ICJ was sceptical about the source of law value of the custom), because there were in the Norwegian solution—in any event—special grounds that were considered reasonable (principle of equity).

[24] *Fisheries Jurisdiction (United Kingdom v Norway)*, Judgment (18 December 1951) ICJ Reports 1951, 116.

In other words, comparison of laws is a useful method if we want to find out generally what the concepts and institutions of customary international law are made of. In both cases mentioned, comparison starts with the assumption according to which there are included in the written law or legal practice of different countries more general supranational principles of law, which it is possible to utilise when looking for the contents of international law. For example, analogies from the national system to the international can be used in interpretation. However, when principles found from national legal systems are applied in international law, the filling of gaps in law has to be performed with a certain caution, and the aim must be that the national solution fulfils the requirements of international law.

> In this connection we can mention also the WTO, the World Trade Organisation, whose objectives include solving disputes in the field of international trade. The WTO attempts to solve disputes in international trade relations on the basis of a special conciliation procedure. The WTO has developed a common legal basis for solving disputes because the solutions made by the WTO leave considerable scope for interpretation. It is a question of a novel *lex mercatoria* or customary commercial law that crosses borders and includes, for example, international arbitration agreements and the practices of liability distribution that are in fact observed in international contractual situations. When judging questions concerning proportionality, necessity and balancing comparative law may be a helpful tool because these legal terms, which are crucial in the WTO system, may have different meanings in different systems even though they are apparently (linguistically) identical. Comparisons are helpful for structuring and rationalising the process of interpretation of WTO rules. Moreover, sometimes the rules and principles have been borrowed and distilled from national legal systems.[25]

The basis of the acceptance theory, ie *opinio iuris* (the sense of legal obligation, Latin *opinio juris sive necessitates*, ie 'an opinion of law/necessity'), on the *iuris* that the practice that is generally accepted can become a binding international law is probably not so weak a criterion as it might at first seem. It simply requires sufficiently wide acceptance among States, in which case it can turn into customary international law. Hence, it also binds the States which themselves have not accepted the custom. The most important function of *opinio iuris* could be that it prevents practices that are generally unacceptable from turning into customary international law. From the point of comparison, essential here is the fact that the behaviour of different States in the matter in question has to be comparatively studied before it is possible to claim that a particular custom is generally accepted.

The argument that a practice is sufficiently widespread and strong is, unavoidably in the end, based on comparative study. And even then it is

[25] See eg D Palmeter, 'The WTO as a Legal System' (2000) 24 *Fordham International Law Journal* 444.

not an evident thing that *opinio iuris* exists: for example in the *North Sea Continental Shelf Cases*, the ICJ held that States' 'frequent or habitual performance of certain actions does not, by itself, establish opinio iuris'.[26]

We can detect similar dimensions in the sphere of Islamic law where comparative law also has practical legal effects and functions. The significance of comparative law is due to the supranational nature of Islamic legal culture and the fact that enactment and application of modern law has to be coordinated with Islamic law. It is essential to compare modern law and Shari'a law (in Arabian 'the path to water') in order to be sure of their compatibility. It is a question of making interpretative constructions in which practices of not only the schools of Islamic law but also different States that belong to the sphere of Islamic culture are viewed. In practice, the importance of comparison is also underlined by the fact that fields regulated by modern law are considerably more extensive than those of Islamic law, where the scope of regulation that Islamic law covers directly is mainly limited to questions of family law and certain parts of criminal law. It is rather a question of harmonisation related to the way of thinking and basic ideas of Shari'a.

E. Other Dimensions

Above, particular attention has been paid to European law and public international law. Already for a long time there have been actors other than the European ones, such as, for example, the above-mentioned WTO. In this connection we can mention the *International Institute for Unification of Private Law* (Unidroit), which is important from the point of view of comparative law and is an independent intergovernmental organisation. Its aim is to investigate the needs and methods with which it is possible to modernise, standardise and coordinate private law, especially international commercial law. Unidroit was founded in 1926 and initially operated as an auxiliary organ of the League of Nations. In 1940, it restarted its operation. The membership was limited to States, the number of which is at present 63.

The Member States of Unidroit are from five continents and represent different legal, economic and political systems as well as different cultural backgrounds. Unidroit has developed for international commercial contracts principles which are model rules concerning the sale of goods and the offer of services. With these instruments standards have been created which legislators in different parts of the world have used as *models* for their own regulations. In addition, model rules have been made available for parties

[26] *Germany v Denmark and the Netherlands*, Judgment (20 February 1969) ICJ Reports 1969, 3.

to different types of commercial contract, when they have not been able to name the model rules as the law that is directly applicable to a particular clause of their contract. In such cases reference to Unidroit standards has been included in the contracts; it is a question of a kind of complementing regulation. Unidroit represents soft international legal harmonisation, a kind of new *lex mercatoria* that concentrates on certain legal problems. And it has used an integrative comparative approach as a tool for reaching it aims.

VI. PRACTICAL v THEORETICAL APPROACH

In many academic disciplines the practical and theoretical are rather sharply distinguished from one another. In comparative law, however, sharp demarcation does not seem to stand on firm ground. Occasionally, the results of academic comparative law can as such be used to serve practical purposes. In turn, sometimes academic research can benefit from information produced for practical purposes. This means that these two basic comparative interests cannot be completely separated from one another. Yet, we can say that the purpose in the practical study approach is comparison that directly serves legal policy and the drafting of statutory law or judicial decision-making. In it, an attempt is made by means of comparing legislation or precedents to create a sufficient knowledge base on which a new government bill, legislative amendment or foreign inspiration for a problematic legal interpretation can be based.

A. Practicality

Practicality refers to something which is governed by practice rather than theory. This feature has normally been a part of the comparative law approach: comparing has been concerned with something deemed as practically useful. Comparison may be part of legal problem-solving '*as a tool of construction*' by means of which it is possible to attempt to fill gaps in the law/legal system. This kind of problem-based comparison is not necessarily limited only to legal culture, although the best-known example is from common law.

> The example to which modern day comparative law literature often refers is the famous decision in *White v Jones* by the House of Lords. In that case arguments formed by means of comparative law were used in the construction of the decision. Lord Goff remarked on the matter as follows: 'the question is one which has been much discussed, not only in this country and other common law countries, but also in some civil law countries, notably in Germany'.[27]

[27] [1995] 2 AC 207.

> In the UK, reference to foreign law is not often direct; instead, foreign law is utilised by means of the literature on comparative law, as for example in *McFarlane v Tayside Health Board*, where the House of Lords referred to Continental European precedents, the *ius commune casebook* (*Casebook on Tort Law*) and other comparative literature.[28] So, common law seems to be capable—independent of the way of reference—of making use of the experiences in other legal systems. The basic idea appears in *R v Kingston* where Lord Mustill stated: 'In the absence of guidance from English authorities it is useful to inquire how other common law jurisdictions have addressed the same problem'.[29] This way of thinking recognises the legal-cultural similarity of common law systems, although of course there are differences between different countries.

However, attitudes in the common law world vary. In the judicial culture of the United States the attitude to the use of comparative arguments has generally been quite negative, because the mentality in their legal culture is extremely nationalist. In the words of Antonin Scalia, who is a prestigious conservative judge in the Supreme Court of the United States:

> We judges of the American democracies are servants of our peoples, sworn to apply (...) the laws that those peoples deem appropriate. We are not some international priesthood empowered to impose upon our free and independent citizens supra-national values that contradict their own.[30]

For a comparatist, it is curious how Scalia automatically assumes the special nature of American legal culture because 'the values of others' are not like 'their own values'. (Drawing a conclusion like that would require comparison, which Scalia is lacking—in other words, he simply assumes that there are differences.)

Scalia undoubtedly supports a nationalistic legal idea, according to which judges shall be faithfully and strictly bound to the law that is in force in their State—ultimately the Federal Constitution. According to him, this means that courts in their decision-making are not allowed to refer to nor even to look for support or inspiration in arguments of comparative law. But, it is not only about Scalia. It is more extensively a question of the idea of dissimilarity of American culture and of emphasising the thesis of individuality in the field of legal culture. It is fair to note that this thesis is controversial even in American legal culture: not all American jurists agree.

> On the other hand, it can be stated that attitudes in the United States have not always been this reluctant. In the renowned *Miranda* decision by the US Supreme Court on the rights of the arrested person, the famous Chief Justice Warren stated: 'The law of the foreign countries described by the Court also reflects a more moderate conception of the rights of the accused as against those of society when

[28] [2000] 2 AC 59.
[29] [1995] 2 AC 355.
[30] A Scalia, 'Commentary' (1995–96) 40 *St Louis University Law Journal* 1119, 1122 (speaking extra-judicially).

> other data are considered'. The law of foreign countries constituted a comparative supporting argument in the forming of the preliminary ruling. By means of comparison (looking at foreign systems) the underlining principles of the United States' own law were specified and supported, ie the Court did not use foreign law as a source of law but rather as a source of judicial inspiration.[31]

In practical comparison the aim is to instrumentally benefit from foreign rules, legal principles or established legal practices either as such or when applicable as in the above-mentioned cases of the International Court of Justice and the EU Court. Also the European Court of Human Rights has to be mentioned in this connection because it has often used comparative arguments in its decision-making. The fundamental starting point is obvious: the reason for the practice of practical comparative law is, first, in obtaining practical aims, ie in problem-solving. The need for practical comparative law is easy to justify by the division of labour and the role that has been given to the doctrinal study of law in this division, in the case of courts through the assumption of justified legal reasoning, and in legislation by the attempt to create better regulation. Furthermore, private international law is a good example of practically oriented comparison that has a practical legal interest in problem-solving.

Now, practical comparative law settles for a lower methodological and theoretical standard than the more demanding comparative law research, which seeks not only to understand but also to explain. In practical comparative law the aim is not to study foreign law at the level of legal culture, but to get acquainted with the legal texts of foreign countries and the surface of their legal system. And the idea of private international law about 'authentic interpretation' of foreign law remains a dream in most cases. On the other hand, practical comparative law can also have a connection with the doctrinal study of law, in which case the aim is to solve common problems with interpretation related to the application of domestic law on the basis of foreign examples. In such cases, however, direct argumentation concerning the content of domestic law cannot in most cases be done; instead, the comparative observations are more like additional or persuasive argumentation.

Practical comparative interest is often characterised by a close connection with immediate political objectives behind legislation. In legal history one of the best-known examples is the Napoleonic *Code civil*. In the nineteenth century, it became a kind of superbly popular legal export item. The *Code civil* was adopted in several countries, not only in Europe but also in South America. It is worth noting, however, that this codification was by no means a purely French innovation. It is partially based on the older European legal tradition, ie *ius commune* whose roots again are found in the Roman law

[31] *Miranda v Arizona* 384 U.S. 436 (1966).

of late-Antiquity and the French regionally differentiated customary law (French *pays de coutume*) from the end of the eighteenth century.

From the history of constitutional law we can present as an example of practical comparison the Japanese *Meiji* Constitution of 1889, which was directly copied from the Constitution of Prussia. Another example is the Constitution of Russia of 1993 into which the Constitutional Court system was adopted as an institution—with some modifications—from the German 1949 Constitution (*Grundgesetz*). The Swedish *Ombudsman* institution has been borrowed by dozens of systems in different modified versions of the original.

For example, in the guide for drafting government bills in Finland (HELO, 2004), which is widely used in Finnish law drafting, the starting point is that there should be sufficient information on 'foreign legislation related to the matter' in the proposal.[32] In the practical survey, foreign law should be clarified also so that corresponding projects, either already in force or in preparation, particularly in the Nordic countries and the Member States of the European Union, are presented. Comparison has to be followed up if the government proposal contains solutions that have been influenced by foreign models.

According to the HELO Instructions:

> the Bill should contain information on foreign legislation to the same point, as well as pending legislative projects in other countries ... the purpose of this information is to provide the reader with an outlook to various legislative solutions to the same problem, a mention should be made of whether the foreign examples have had an effect on the solution reached in Finland.[33]

At its best this kind of comparison is competent *Auslandsrechtskunde*—at its worst it is superficial description on the basis of the scarce English language material that is easily found on the Internet and which is sometimes of dubious quality. Often the fault is not with law-drafting personnel performing the background study but is due to political urgency and scanty resources.

The connection between comparative law and practical aims and goals is explained by comparative law's capacity to offer for solution possibilities that exceed the horizon of experience that there is in a single legal system. For example, in the case of courts, at its simplest the whole system of jurisdiction is based on the principle that courts know the law (Latin *iura novit curia*). So, by means of comparative law it is possible to enrich and extend the storage of legal ideas and innovations that is available for those who develop and maintain the legal system. In this respect comparison, that is a result of a practical comparison, also enables efficient search of 'better' or at least different solutions. Another common reason is the need to fill the gaps.

[32] Available also in English: *Bill Drafting Instructions* (Helsinki, Ministry of Justice, 2006).
[33] ibid 14.

B. Theoreticalness

Usually, *theoretical* refers to things which relate to general principles or ideas rather than the practical use of those principles or ideas. However, in comparative law theoretical does not mean the same as hypothetical, ie something which exists only in theory. Yet, the actual state and role of scholarly comparative law in the development, assistance and criticism of legislation, normative customs or supranational court decisions has remained rather modest. This, however, is not necessarily due to the fact that there would not be the desire or ability to engage in comparative research. Mostly it is a question of the timetables being too tight and the personnel resources available in law-drafting too small. The same problems of course apply to drafting the legislation in general, not only to comparison. As to courts, urgency and the piling up of cases are the problems preventing time-consuming comparative research, which aims for deep-level understanding and explanations.

The theoretical research implies that research serves theoretical interests and that the amount of legal knowledge is increased. The theoretical approach attempts not only to search and locate differences and similarities in the positive law, cases or doctrines studied, but also to explain their reasons. In addition to how, also *why* is a question that needs an answer. Here a big step is taken over and past the knowledge-interest of the private international law: to solve a problem by applying law is different from understanding and explaining why there is a problem at all.

> It is a question of the researcher studying foreign legal order to examine questions that are basically theoretical or to systemise law structurally, its concepts and models in the background. An example of the latter is the work *Bringing in the People* by Markku Suksi on the forms and practices of the referendum.[34] There a referendum typology was constructed, which meant that this constitutional institution was theoretically typified into idealised types. By means of the typology that was created, the study material was analysed for a more profound further study. In the voluminous book about the Europeanisation of Nordic property law written by Johan Sandstedt, two different legal-cultural approaches to ownership were studied: the substantial way to emphasise ownership as a whole and the functionalist way to break ownership into different functional relations.[35] Sandstedt looks at and compares the Nordic approach with the Continental approach. The conclusions made by Sandstedt challenge the traditional Nordic understanding of property law in a way that is based on the settings and ideas of comparative law.

However, there are some genuine differences between interests. In short, theoretical comparative law cannot be immediately justified by practical

[34] M Suksi, *Bringing in the People—A Comparison of Constitutional Forms and Practices of the Referendum* (Dordrecht, Martinus Nijhoff, 1993).

[35] See J Sandstedt, *Sakrätten, Norden och europeiseringen—Nordisk funktionalism möter kontinental substantialism* (Stockholm, Jure Förlag, 2013).

reasons. The desire to understand and explain differs inevitably from the desire to solve legal problems. On the other hand, it is difficult to think of such a comparative law study that would not have some relevance from the point of view of legal practicalities. Perhaps some utterly postmodern legal-theoretical comparison can have results that are difficult to utilise practically. And it deserves to be underlined that the benefits from comparative legal history are not often instrumental.

Although the theoretical approach clearly aims at increasing the amount of knowledge, it can also offer material for the improvement of the knowledge basis for comparison that is carried out for legislative interest. The theoretical approach is based on the idea according to which not even the national legal system is (as far as knowledge is concerned) an autonomous entity that is separate from other legal systems. Legal systems of other States too may be using legal approaches/socio-legal solutions, which are built around a bundle of legal thoughts that may be of the same type. In theoretical comparison, legal problem-solving of this kind can be theoretically examined, and hence, therefore, the content of the basic solutions in one's own legal system can be more clearly perceived. The foreign law acts in such cases as an intellectual mirror for one's own law or, as the German saying has it: 'im Fremden Spiegel sehen wir das eigene Bild' (ie in a foreign mirror we see our own image).

As demonstrated above, it is obvious that it is not possible to fully succeed in keeping the practical and theoretical comparison interest apart. Theoretical comparative law can also use a normative approach, which is typical of a practical approach (eg a provision of public international law). In the same way integrative and contradictive comparison interests are inevitably approximate basic classifications that are partially overlapping. It is a question of the *basic orientation* in the research interest, ie what is the aim of comparison (why comparison is carried out at all). It is useful for the researcher to recognise their own basic orientation because it has an impact on the type of methodological choices that are sensible and justifiable to make.

VII. PEDAGOGICAL—COMPARISON IN TEACHING AND LEARNING LAW

Comparative law pedagogics refers to the art of teaching, ie it concerns the principles of teaching comparative law and foreign law. However, comparative law as such is also a method used in legal teaching. The pedagogical interest at the base of comparative law is related to acquiring better understanding of one's own legal system and to the development of a critical approach to one's own law. Both these dimensions naturally reduce often implicit ethnocentric attitudes and facilitate non-national research and the conception of law. In a world that is more and more vehemently

internationalising, such knowledge that contributes to the understanding of the views and legal concepts of others is required.

Basically, it is a question of an ability to understand foreign law and legal culture in the form it takes in the basic assumptions and understanding of others. It is a question of an ability to make conclusions that are at least reasonably correct in the sphere of foreign law, as well as legal thinking in general and in the legal language that is typical of a particular foreign legal culture. There is a distinct difference from private international law, where the aspiration for authentic interpretation does not assume a committed attempt to understand and explain the cultural social interaction between law and the human being.

The further apart the legal systems in question are in a legal-cultural sense, the more significant a position the knowledge of comparative law (or foreign law in general) assumes. This is illustrated, for example, by the collision of Islamic and Western concepts of justice: discussion on mere principles is difficult enough because there are such significant differences in basic concepts and approaches to law. In such cases knowledge of the concepts and origins of Islamic law is cognitively and often also strategically vital for a Western lawyer. Discussion and making one's own points of view comprehensible become easier with contextual knowledge. Islamic legal culture is one of the major legal cultures of the world, and general knowledge about it cannot be anything but useful for a Western lawyer: merely the existence of already relatively numerous Muslim populations in the non-Muslim countries causes a need for knowledge. When the cultures of the people meet, then also their legal cultures meet. This meeting is not necessarily conflictual as to its nature. Islamic banking is but one example showing that reconciliation between legal cultures is not impossible.

> Islamic and Western law seem to be legal-culturally conflicting although in the reality of the world's law overlapping and hybridity is more likely. Sometimes hybridity can be seen in the positive law. For example, in the Ghanaian Constitution, Acts, decrees and corresponding norms that are on a lower level than Acts, the common law that was in force until 1992 and the customary law of Ghana are recognised as sources of law. Just as in the common law culture, the judgments passed in superior courts have a great significance as precedents. Customary law on the other hand refers to traditional law and Shari'a law, which are followed by ethnic groups in different regions. The judicial organisation of a Western style is complemented by institutions that are applying law and are considered to belong to the sphere of the customary law of Muslim judges and chieftains' councils. The whole entity represents clear intra-State legal pluralism based on statutory law, too. Moreover, it is not only about internal pluralism in Muslim countries but also about the migration of people and their ideas about law.

It is, for example, considerably easier for civil servants who become involved in European administrative law to operate successfully as part of a multicultural legal environment if their legal knowledge is not limited to their own

legal system. The judge who is applying the marital right to property to a Muslim family benefits from knowledge about Islamic law: they understand argumentation that is based on Islamic law better and are at least to some degree capable of appreciating the significance of such arguments from the point of view of the person who presents them (this does not mean accepting those arguments or granting them a role as sources of law). Foreign legal cultures can be taken into consideration as evidence concerning the beliefs held by parties, even if they would not be given legal significance as a source of law.

In addition, the study of comparative law material (foreign rules, doctrines, cases, ideas etc) has a significant role in the modern jurist's ability to think. Getting acquainted with the law and different legal cultures of other countries improves the ability for first-rate legal thinking, and argumentation becomes more versatile when different points of view are taken into consideration. If students are offered the models of one country only, their knowledge capacity for versatile argumentation weakens. Comparative law opens up legal thinking but it certainly does not mean that foreign law would gain the position of source of law as such.

From the point of view of law, teaching comparative law may have a key role for the legal mind. An effective law curriculum of today suited for globalisation is one which can stimulate students to learn legal thinking, not only the legal rules of a country. Comparative law and/or foreign law and even an approximate knowledge of different foreign approaches to similar types of questions may be regarded as a valuable tool for the construction of *a pluralistic legal mind*, which is prepared to look over the borders of legal systems. Non-national laws, customs and legal doctrine are good material for learning for anyone who seeks to cultivate a pluralistic legal mind for the twenty-first century.

Comparative law material and foreign language studies are of great pedagogical importance. And it is noteworthy that a particularly profound study of foreign law is not needed here: if a student gets acquainted with the history as well as general grounds and typical features of, say, the common law by means of comparative law literature, it becomes easier to approach the law of Great Britain, Canada, New Zealand and the United States as well as the law of all these countries that have been influenced by the common law for one reason or another. The significance of non-national legal general knowledge should not be belittled in the present-day world. The obvious fact that law and legal ideas travel when people travel should also be taken into account: the global world of law is also a world of migrating law.

> The objectives of pedagogical comparative interest are better realised if comparative law is not given a minor role or labelled as a curiosity in legal academia, but if it is instead included from the very beginning in the study of national and supranational law. This applies both to public and private law. There are strong

grounds for this in the very nature of law, which has never stopped at national borders, or as Professor Heikki Pihlajamäki argues: 'Of its basic nature, law is an international phenomenon, not national; and by political decisions it can be confined only to a certain extent'.[36] Legal norms and doctrines travel with the salesman just like technical inventions; it is almost impossible to stop them because a human being is instinctively interested in new things, and our capacity to adapt is considerable. Sceptics undoubtedly have a point when they doubt things like legal transplants' simplified assumptions of similarity or legal convergence of European law, and yet, the reality of human capability ought not to be denied: the legal-historical evidence is overwhelming.

It is, for example, considerably easier to understand basic institutional decisions of constitutional law if one is acquainted with a number of other basic models (British parliamentarianism, US presidentialism with its separation of powers, French semi-presidentialism etc). In the same way, several of the most central principles (eg the principle of constitutionalism and the idea of public administration laid down by law derived from that principle) are supranational by nature. Principles adopted in different countries can be used to facilitate interpretation of law and the theory of administrative law in other countries although the principles in question would not be exactly the same. And this does not concern only one field of law, but, for example, the Norwegian application of the principle of rule of law can be perceived with more insight if it is related to, for example, the German or English version of the same legal basic idea: there are similarities *and* differences.

In the same way, for example, for the comprehension of contract law it is of great benefit if one recognises the difference in the concept of a contract between civil law and common law. There are differences in attitudes to the basic legal-cultural factors: why is bona fides important in Continental Europe but not so important on the other side of the Channel? Why is a literal interpretation of contracts in favour in the UK? Why are commercial practices of such a big significance for the British? And so on.

What is said above does not, however, mean that it would be possible to lump together, say, all the Member States of the European Union and to talk about a reasonably uniform European contract law on the level of legal maxims, for example. This is verified by a very massive work that is based on comparative law and earlier operations of the Lando Commission and which has been published in three massive volumes, namely *The Commission on European Contract Law*, *Principles of European Contract*

[36] 'Oikeus on perusluonteeltaan kansainvälinen, ei kansallinen ilmiö, ja sitä voidaan kahlita poliittisin päätöksin vain tiettyyn rajaan asti', H Pihlajamäki, 'Vertaileva oikeushistoria muuttuvassa maailmassa' (2009) 38 *Oikeus* 420, 423.

Law I & II and III.[37] Later developments that led to CFR prove that comparative law has the ability as a supranational constructive method to promote harmonisation. To what extent convergent legal texts can create coherent legal culture is quite another question; a question of politics rather than law. In any case, it is useful to grasp that also projects like this are bound to contribute to learning new forms of legal thinking that are not otherwise available to the internal gaze of the national legal doctrine.

[37] Ole Lando and Hugh Beale (eds), *The Principles Of European Contract Law, Parts I and II* (The Hague, Kluwer, 2000); and Ole Lando, André Prüm, Eric Clive and Reinhard Zimmerman (eds), *The Principles of European Contract Law, Part III* (The Hague, Kluwer, 2003).