COMPARATIVE LAW AND THE COURTS

T. KOOPMANS*

I. INTRODUCTION

FOR a long time it looked as though comparative law was a matter for academic research, difficult and, surely, very interesting; beautiful to know something about, but not immediately relevant to the daily life of the law. Practising lawyers would admit the importance of comparative law in theory, but they would add that they themselves were, of course, too much occupied with the latest cases on trade marks, or with recent developments in the law of negligence.[1]

Over the last ten or fifteen years the legal climate seems to be changing. There is more awareness that comparative methods may lead the lawyer somewhere, and that comparative materials may be a source of inspiration for legal decisions—whether by legislative bodies or by the courts. This evolution may be influenced by the process of European integration; it may also just result from the fact that we are living closer together (the "global village" situation); it may, finally, be an autonomous process, occasioned by the lawyer's search for fresh perspectives, in particular when completely new legal problems are to be solved.

In the Netherlands we find a striking example of this evolution in the way the New Civil Code was prepared, from the 1950s onwards. It was based on a very thorough piece of comparative research, for example into literature concerning the German and Swiss Civil Codes. Solutions were compared; advantages and disadvantages were put in the balance, particularly in matters of property law and obligations. In England the Law Commission sometimes does the same. The old Dutch Civil Code, of 1838, was essentially founded on its illustrious predecessor, the Code Napoléon, with some additions taken from Roman-Dutch law as it had been applied in the United Dutch Republics before the unitary State was established in 1795. The new Code, however, brings Dutch private law firmly into the Germanic legal family. Obviously, comparative law had its impact.[2]

* Advocate General at the Hoge Raad of the Netherlands; former judge of the Court of Justice of the European Communities. The article is the annotated text of a lecture delivered in London on the occasion of the centenary of the British Society of Comparative Legislation, 6 Dec. 1995.

1. See also Peter de Cruz, *A Modern Approach to Comparative Law* (1993), chap.1.

2. See A. S. Hartkamp, "Statutory Law Making: The New Civil Code of the Netherlands", in *Towards Universal Law, Trends in National, European and International Law Making*, Yearbook of the Faculty of Law, Uppsala, 5 (1995), p.151.

I shall seek to explore whether similar influences can be discovered in the case law of the courts. Do they resort to comparative methods and, if so, for what purpose do they handle comparative materials? In dealing with these questions, I will rely on my own experience: first, as a judge in the European Court of Justice, then as an advocate general to the civil division of the Hoge Raad, a court of *cassation* in the French tradition, whose role is not very different from that of the French (or Belgian) *Cour de cassation*. I shall add, however, a bit of theory—and some speculation about future developments.

II. THE EUROPEAN COURT OF JUSTICE

EVERY discussion of the role of comparative law in the European Community starts by quoting Article 215, paragraph 2, of the old EEC Treaty (a provision untouched by the Maastricht Treaty). The first paragraph of this Article deals with the law applicable to contracts concluded by the Community, and the second paragraph adds:

> In the case of non-contractual liability, the Community shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties.

This is probably a solution founded on embarrassment: the drafters could find no other. Commentators consider it nevertheless an intriguing provision. It recognises, they say, two things: first, that there *are* general principles common to the laws of the member States; and, second, that these principles are a source of Community law. These two considerations have in fact guided the Court of Justice, not only in dealing with tortious liability but also, even mainly, in other branches of the law.[3]

Perhaps this approach was necessary because of the peculiar construction of the EEC Treaty (or EC Treaty, as it is now called). The Treaty consists of many specific provisions on the composition and the powers of institutions, and of detailed rules on economic law, for example on free movement of goods, agriculture and competition. It adds, however, in Article 164, that the Court of Justice shall ensure that in the interpretation and application of the Treaty "the law is observed". It does not tell the reader how this law is to be found, how its substance can be determined: it is just "the law". From the very beginning of its case law, the Court of Justice has held that Article 164 must mean that Community rules, and the decisions, directives and regulations of Community institutions, will have to respect general principles of law, such as are common to the legal traditions of the member States.[4]

3. See Pierre Pescatore, "Le recours, par la Cour de Justice des Communautés européennes, à des normes déduites de la comparaison des droits des Etats Membres" (1980) R.I.D.C. 337.

4. See the famous Case 26/62, *Van Gend en Loos* [1963] E.C.R. 12.

Thus the Court of Justice slowly elaborated such well-known legal principles as equal protection, legal certainty, protection of legitimate expectations, the principle of proportionality, etc. This is not only interesting from a comparative point of view; these principles have pre-eminently practical effects. If, for example, a member State argues that it is allowed, under Treaty rules, to block import of foreign beers for reasons of protection of human health, because beer which has not been made in accordance with its national production standards may contain additives and because some additives, if taken in very large quantities, may be damaging to human health, the Court denies that there is a justification for a total import ban: if *some* imported beers may contain additives, and if *some* additives may be dangerous, it is disproportionate to impose an import prohibition.[5] It is, one might say, like "cracking a nut with a sledgehammer". In a recent case concerning Mars bars, the Court used exactly the same type of reasoning.[6] In German and Dutch law, in particular, the principle of proportionality is very important ("*Verhältnismässigkeit*", "*evenredigheid*"); it also exists in French administrative law, and it may appear in common law systems under the name of reasonableness.

Some cases provide a good illustration of the way the Court of Justice actually proceeds. A most interesting example is how it arrived at its judgment on confidential treatment of contacts between lawyer and client, the *A.M. & S.* case.[7] It concerned a company with metallurgical plants in the Bristol area; the company formed part of a multinational group. Complaints had been lodged with the European Commission about anti-competitive behaviour by the company, which was said to be contrary to the anti-trust provisions of the Treaty; when the company refused to provide information, the Commission sent its inspectors to Bristol to "investigate" on the spot the nature of the competitive conditions concerning the production and distribution of zinc metal and its alloys, and zinc concentrates. The inspectors were, however, faced with a refusal by the company to disclose a number of documents, on the ground that these documents were covered by "legal professional privilege". Under this privilege, it was explained, the exchange of information with one's lawyers is protected from any search or seizure. As the privilege has an "absolute" character under the common law of England and Wales, the company could under no circumstance give access to the documents in question. The Commission did not accept this argument: it considered that the investigation was governed exclusively by Community law, not by English law, and that applicable Community regulations, though giving detailed provisions on

5. Case 178/84, *Commission* v. *Federal Republic of Germany* [1987] E.C.R. 1227 ("purity" of beer).

6. Case C–470/93, *Verein gegen Unwesen in Handel und Gewerbe*, Weekly Bulletin of the Court of Justice 20/95.

7. Case 155/79, *A.M. & S.* [1982] E.C.R. 1575.

investigation procedures, made no reference at all to any kind of legal professional privilege.

When the case came before the Court—formally as an appeal by the company against a Commission decision ordering it to give access to the documents in question[8]—it raised a considerable amount of interest. The British government intervened in support of the company: a principle as important as legal professional privilege could not, it argued, have been eliminated by the mere silence of the Community regulations. The French government, also intervening, contended that rules on the *secret professionnel*, though important enough in criminal matters, could not apply to economic topics such as competition, as the advocates themselves might have been involved in drafting the very contracts whose compatibility with competition rules was in issue. After also having heard the company and the Commission, as well as the *Comité consultatif du barreau européen*, the Court seemed willing to prepare its judgment: Advocate General Warner presented his opinion and judgment was announced. There was, however, a kind of *coup de théâtre*: the Court invited the parties and the interveners to resume written and oral argument on the basis of a number of questions formulated by the Court. These questions sought the opinions of the parties and the interveners on what the Court obviously considered the real issue: not whether legal professional privilege, or *secret professionnel*, could be invoked against the Commission's powers, but whether communication between lawyer and client, in matters relating to competition, was protected under Community law. The parties and the interveners were therefore invited to submit comparative legal materials on the existence, or not, of general principles which could govern such a problem. They duly submitted comparative materials on this point and discussed these materials in open court; it was on this basis that the Court finally recognised a principle of law to be observed under Community law. In this case, the decision-making process illustrated the attitude of the Court of Justice to the use of comparative law.

III. THE PROBLEM FOR NATIONAL COURTS

NATIONAL courts work against an entirely dissimilar background. Their legal systems have existed, as systems, since what English judges call "time immemorial". For continental Europe the general assumption is that legal provisions governing citizens' behaviour have been laid down in exhaustive sets of rules, in particular in the codes: civil code, commercial code, penal code, etc. During the nineteenth and early twentieth centuries national systems of law developed, founded on national codes adopted by national parliaments and applied by national courts. Traditionally, therefore, national courts move in a legal setting shaped by national institutions

8. Commission Decision 79/760 of 6 July 1979 (1979) O.J. L199.

and developed as part of national history.[9] At first sight there can be hardly any reason to look beyond national frontiers. Recently, however, things have begun to change. I should like to emphasise that this change cannot be due exclusively to the influence of European law: there are important reasons why the courts tend to rely more and more on comparative methods. These reasons are connected with the general evolution of society in our part of the world.

The first element of this evolution is the birth and growth of completely new social problems, resulting from developments occurring in all our countries: biotechnology; new forms of communication; the crumbling power and weight of the traditional authorities in moral matters—churches, schools, parents and uplifting books; urban decay and the reappearance of ethnic ghettoes in the great cities; pollution of the air, the soil, the water; migration on an unprecedented scale. These are common problems.

The second element is the growing incapacity of the political institutions to find the necessary solutions to these problems. Sometimes they are not interested because the problem does not fit into the political pattern, as the traditional political dividing lines (left/right, etc.) do not apply. Sometimes politicians prefer to wait, as they cannot find in society a consensus on any workable solution. As a result no legislation will be adopted, though the situation may be deteriorating. The courts, however, cannot afford to wait: they have to decide their cases.

The third element is, then, what one could call the courts' equipment. The traditional judicial tools, such as codes, statutes, precedents, etc., will not be very helpful for the precise reason that the problems are so new and so different.[10] Sometimes it may be possible to extrapolate solutions which were initially intended for entirely different situations; but this method will not always work. A good example of the insufficient adjustment of our legal system to new developments in society is the mass phenomenon in modern private law: in contract law, because of uniform conditions of contract on a large scale, for sale, insurance, banking transactions, motor car repairs, etc., with the result that essentially collective occurrences will have to be reduced, in law, to contractual relationships between individuals; in tort law because of catastrophes of a kind and on a scale hitherto unknown, as in Bhopal or in Chernobyl, or in cases like that of the *Amoco Cadiz*, where accidents to oil tankers result in pollution of enormous coastal areas.

As a result of these developments, courts will in many instances be looking for new inspiration. And that is where comparative law comes in. I

9. See Helmut Coing, "European Common Law: Historical Foundations", in Mauro Cappelletti (Ed.), *New Perspectives for a Common Law of Europe* (1978), p.31.

10. See my "Judicial Activism and Procedural Law" (1993) 1 Eur. Rev. Private L. 69.

shall illustrate this with reference to some of the problems the Netherlands Hoge Raad has had to solve.

IV. NATIONAL COURTS: NON-EXAMPLES

COMPARATIVE law can be used by the courts in at least two different ways. Courts may rely on comparative materials in order to *find* a solution to the problem they are faced with; but they may also refer to comparative law in order to *justify* a solution arrived at on different grounds, for example on the basis of their interpretation of national law.

A famous example of the second approach occurred in the Netherlands in 1943, when the Hoge Raad held that the damages that could be recovered in the case of a traffic accident included those for what was called "immaterial damage": nervous shock, distress, loss of beauty, etc.[11] The Court said this was so under the Dutch Civil Code, and it added: "This is also in accordance with legislation or case law in neighbouring countries." This somewhat mysterious afterthought can be fully understood only when one consults the opinion of the advocate general, who discussed in detail the state of French, Belgian, German, Swiss and English law. In the court's judgment, foreign law is simply an additional justification.

This mode of reasoning is fairly common. Sometimes one can understand the plight of the poor judge. Take, for example, actions for what is called "wrongful life": a handicapped child claims damages from a doctor, or even from his own mother, for the distress he suffers because of being born. I shall say no more about it than that judges will, in these embarrassing cases, be happy to find that claims of this nature have been dismissed in Germany and in the United States.[12]

A method consisting of relying on comparative materials in order to justify the solution is not always interesting from a legal point of view. Very often, the court might have used a different argument to arrive at exactly the same decision. In the 1943 judgment on "immaterial damage", the Hoge Raad might also have said that its solution squared with the general system of the Civil Code; or that people generally expect, in our type of society, that damage of this kind will be compensated; or that there is no good reason to opt for a different solution. It is more or less a matter of judicial rhetoric.

Therefore, it is more interesting to look at cases where the court really needed the comparative approach, or where it deliberately refused to be impressed by solutions found in foreign law systems. I shall give an

11. *Van Kreiningen* v. *Bessem* Hoge Raad, 21 May 1943, Nederlandse Jurisprudentie (N.J.) 1943, 455.

12. See C. J. J. M. Stolker, "Wrongful Life: The Limits of Liability and Beyond" (1994) 43 I.C.L.Q. 521.

example of each of these two situations. (They are not difficult to find, although examples hardly abound.)

V. EXAMPLE I: THE DES DAUGHTERS

THE background to the first example is this. From 1953 to 1967 a drug called diethylstilbestrol, or DES, was prescribed as a sedative for pregnant women. It was supposed to prevent miscarriages. Instead, the daughters of the mothers who used the drug developed a special form of cancer in the urogenital system when they became adult women. These DES daughters, as they were called, sued the ten pharmaceutical companies which produced and marketed DES tablets in the Netherlands at the time, claiming damages for personal injury on the basis of tort ("illicit act" under Dutch civil law).[13]

The case was dismissed by the district court and by the Amsterdam Court of Appeal, on the ground that none of the victims could prove which of the manufacturers had produced and marketed the drug their mother had used. Other arguments had been discussed by the parties, but the decision of the appeal court was founded exclusively on the impossibility of the DES daughters identifying the relevant manufacturer. This line of reasoning was then attacked by the daughters in *cassation*. It was a completely new problem.

The Advocate General, Mr Hartkamp, had discovered that a similar case, *Sindell* v. *Abbot Laboratories*,[14] had been decided by the Supreme Court of California in 1980. The California Court was faced with the same problem: very serious damage caused by a drug; certainty that the defendant companies were the producers and distributors of the drug at the time; uncertainty as to which victim suffered damage as a result of the action of which company. The Court held that in such a situation, where the individual manufacturer cannot be traced but must be considered to be part of a group of manufacturers causing the damage, each company is liable according to its share in the market. The Court's view was probably influenced by the idea that the damage resulted essentially from a certain production process used by a number of producers. In this view, group damage was caused by a group of manufacturers. The individual manufacturer should therefore be held liable to the same degree as it had benefited from the production and marketing of the drug. This "market share liability" has been followed by other State courts in the United States but not, or not yet, in Europe. The Advocate General argued in favour of the same

13. *DES-Daughters* Hoge Raad, 9 Oct. 1992, N.J. 1994, 535.
14. 607 P.2d 924 (Cal. 1980); cert. denied 449 U.S. 412 (1980).

solution for the Netherlands, so that the Court of Appeal's judgment was to be annulled, the case being remanded.

The Hoge Raad did not follow its advocate general. To the amazement of most observers, it went one step further. It founded its solution on a provision of the New Civil Code to the effect that, if it is likely that damage results from two or more events, and if it is established that the damage has actually arisen from at least one of these events, the tortfeasors (those who caused these events) are jointly and severally liable for the entire damage.[15] This provision had always been assumed to cover completely different situations, such as several people firing rifles or throwing stones in the same direction. The Hoge Raad acknowledged as much; but the Court added that the present situation lay beyond the range of conceivable situations at the time the Code was drafted. In a rare discussion with its advocate general, the Court rejected market share liability. Using a clear policy argument, it said:

> it is unsatisfactory that this system lays the risk of insolvency of one of the producers, and also the risk that a producer has ceased to exist or can no longer be traced, on the victims and not on the producers. It is also burdensome that the victims will have to bring claims against as many producers as possible and that the market share of each of the producers will have to be established in the litigation between the victims and the producers.

In other words, whatever the importance of market share for mutual recovery between the manufacturing companies, the victims need not be concerned by it: they just claim the full amount of their damage from any of the manufacturing companies.

The opinions of the Dutch commentators are sharply divided. For many authors, the Hoge Raad went one step too far. The alternative for them is, however, market share liability. The view of the lower courts denying any responsibility on this ground has not attracted any favourable comment so far.[16]

In short, the Hoge Raad founded its solution on a Code provision intended for a different situation, rather than on solutions recognised elsewhere. Its critics, however, find their inspiration in comparative law.

VI. EXAMPLE II: THE PRINCIPLE OF EQUALITY

SINCE 1983 the Constitution of the Netherlands provides that all persons on Dutch territory shall be treated equally in equal situations. And the

15. Art.6:99, Civil Code (*Burgerlijk Wetboek*).

16. See E. Hondius, "A Dutch Case: Pharmaceutical Companies Jointly and Severally Liable" [1994] Consum. L.J. 40. See also case notes and comments in (1994) 2 Eur. Rev. Private L. 409–469.

provision adds: "Discrimination on grounds of religion, philosophy of life, political conviction, race, gender, or on any other ground, is forbidden." Dutch observers were quick to point out that this provision (which many of them disliked anyway) could not work. If, the argument runs, discrimination can be established on "any" ground, the law could never differentiate between categories of persons: not between adults and minors, between bankrupts and others, between employers and employees, etc. Such a system, they said, was devoid of meaning; it could never be applied in practice.

These dissatisfied lawyers should, however, have looked at the legal systems of countries with a greater experience in the field of equal protection, especially the United States and the Federal Republic of Germany. German constitutional law is of particular interest, as it explicitly recognises two types of situation: it refers to specific grounds of discrimination as well as to a general equality rule. Article 3 of the Federal Constitution, the *Grundgesetz*, provides in section 1 that all human beings are equal before the law; it adds in section 2 that men and women have equal rights, and in section 3 that discrimination on grounds of gender, race, language or religion (and some other characteristics) is forbidden. The Federal Constitutional Court, and German literature, developed a very clear conception of the difference between "general" and "specific" equality rules.

In the case of a specific prohibition, like man/woman, any form of differentiation on this ground is forbidden, except in some very narrowly defined cases. Men and women must, for example, always be treated in the same way for the purposes of employment; however, the nature of the job to be performed may be such that it excludes the members of one of the sexes. When we take an example from English life, namely the English pantomime, you could not possibly have females playing the very ugly sisters of Cinderella. In such a case the nature of the job may sometimes allow a kind of rider to the strictness of the equality rule.[17]

For differentiations and distinctions not covered by a specific prohibition, the legal situation is not the same. The basic assumption is that rule-givers and decision-makers (Parliament, city councils, the administration) are free to differentiate between categories of citizens. Differentiations should not, however, be arbitrary; they should have an understandable link with the problem or the situation they are intended for. Every time a differentiation has been made, which is not struck down by a specific prohibition, the courts should therefore check whether it is founded on reasonable and objective grounds. For the purposes of education of children or for tax purposes, it may be possible to distinguish between married and unmarried people; but for the entry to city parks, or for the use of

17. See also Art.2, s.2, EEC Directive 76/207 on equal treatment of men and women in employment (1976) O.J. L39.

public transport, such a distinction would be arbitrary, as no reasonable and objective ground can justify it.[18]

The American Constitution has only one general rule on equal protection, in the XIVth Amendment. However, in American case law the results are not very different from those prevailing in Germany. That is so because some distinctions, for example those founded on race, are assumed to be in principle illegal: in the language of the US Supreme Court, these distinctions amount to "suspect classifications". For other classifications, those who attack the constitutionality bear the burden of proof that the distinction is unreasonable and arbitrary. If no reasonable ground can be found, the distinction is discriminatory. The distinction between rich people and poor people may be justified, for example, for matters of social assistance ("welfare", as it is termed in the United States), but the same distinction constitutes a forbidden discrimination if applied to voting rights. There is a reasonable and objective ground for the distinction for purposes of welfare, not for the right to vote.[19]

Thus the principle of equality implies that differentiations which are not explicitly forbidden by a specific prohibition are allowed unless they are arbitrary. This view of equal protection found its way into the case law of the European Court of Human Rights and into the decisions of the UN Human Rights Committee. The European Court held, in the *James* and *Lithgow* cases, that a distinction made by the applicable legal provision amounts to a discrimination in the sense of Article 14 of the European Convention on Human Rights if the distinction "has no objective and reasonable justification". This is, for example, the case, says the Court, if the distinction "does not pursue a legitimate aim", or if there is "no reasonable relationship of proportionality between the means employed and the aims sought to be realised".[20]

In the Netherlands the Hoge Raad ultimately adopted the same view, after an initially unhappy start and some peregrinations. In a recent series of cases the Court expressly relied on the European Court's decisions. In one of these cases it held that a distinction between married and unmarried teachers, for determining the level of salary, was contrary to the principle of equality: no objective and reasonable ground could be found for this distinction.[21] The defending public authority, the Island authority of

18. Thus the Federal Constitutional Court as early as 1951: *Entscheidungen des Bundesverfassungsgerichts*, 1, 10 (*Südweststaat*).

19. See L. Lusky and M. Botein, "The Law of Equality in the United States", in T. Koopmans (Ed.), *Constitutional Protection of Equality* (1975), chap.2.

20. European Court of Human Rights, 21 Feb. 1986, *James*, Ser.A–98, and 8 July 1987, *Lithgow*, Ser.A–102.

21. *Mathilda and Others* v. *Rooms-Katholiek Centraal Schoolbestuur and Another* Hoge Raad, 7 May 1993, N.J. 1995, 259.

Curaçao, had argued that there was a reasonable ground, as married teachers could be held liable for maintenance allowances and unmarried teachers could not; but the Hoge Raad found that the dividing line between those who are liable for maintenance and those who are not does not coincide with that between married and unmarried people. As the case came from the Netherlands Antilles, it was not decided on the basis of the Dutch Constitution (which is not applicable there), but by applying the standards of the UN Covenant on Civil and Political Rights, in particular the equality rule of Article 26.

Here, comparative methods helped to pave the way.

VII. CONCLUSION

IN quoting Dutch cases I do not intend to imply that other national courts take a different line. On the contrary, I firmly believe that all courts are very much, as the French would put it, "*dans le même bain*" (literally: in the same bath). Very recently, in a case on solicitors' negligence, characterised by a lack of suitable precedents, *White* v. *Jones*, the House of Lords used comparative methods by assessing solutions adopted in other legal systems, particularly in German law.[22] One of their Lordships explicitly referred to literature in the field of foreign and comparative law.[23] When trying to understand the judgment, I found it quite remarkable that the majority opinions (it was a three–two decision) so clearly emphasise some of the points I had been considering in my recent research activities: for example the idea of legal evolution ("The law has moved on from those days", says Lord Goff when discussing an 1861 case); the analysis of the role played by solicitors in society; the appeal to solutions developed in other branches of the law, and in other legal systems; and, finally, the question whether such solutions fit, more or less, into the system of liability under English law. The case is also interesting because it results in protecting legitimate expectations—or, at least, expectations that three out of five law lords considered legitimate.

Reconsidering the examples I have given, one may be tempted to think that the future belongs to comparative law. And perhaps that will be so. There have always been certain fashions in the way courts proceed to find the applicable legal rules and principles. In the nineteenth century history was very much the fashion, in particular on the Continent: history of the codes, pre-existing Roman law traditions, Pothier on obligations,[24] etc. Our own century discovered society: it wondered how the law works, what its economic context is and how legal decisions can be adjusted to social

22. *White and Another* v. *Jones and Others* [1995] 1 All E.R. 691.

23. In particular to B. S. Markesinis, *The German Law of Torts: A Comparative Introduction* (3rd edn, 1994).

24. I refer to R. J. Pothier, *Traité des obligations* (new edn, 1873). Pothier lived from 1699 to 1772.

needs; and it saw the judge as a kind of decision-maker, or even as a "social engineer".[25] The twenty-first century may become the era of comparative methods. As we share so many difficult problems of society, and as we live closer and closer together on the planet, we seem bound to look at one another's approaches and views. By doing so we may find interesting things—but we may also find ways to cope with the tremendous legal challenges that seem to be in store for us.

Our problems of society increase as our certainties in religious, moral and political matters dwindle; and more and more problems are common problems. The search for common solutions is only slowly beginning. It is my conviction that the legal profession has its own share of responsibility for the outcome of this process.[26]

25. See Roscoe Pound, *The Spirit of the Common Law* (1921), chap. VIII.

26. See also A. W. Heringa, "The Separation of Powers Argument", in R. Bakker *et al.* (Eds), *Judicial Control: Comparative Essays on Judicial Review* (1995).