

The CJEU and Comparative law in the Creation of New Jurisprudential Principles. A Case of Judicial Manipulation?

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Comparative law is obviously not considered a source of law that a court can apply to resolve a dispute (except in the context of a conflict of laws). In the common law world, conversely, courts can absolutely draw inspiration from a foreign solution, because it is not about the source, but about resolving a specific dispute, on the basis of facts. Thus, solutions are borrowed freely, although it is true that this is mostly the case in private law. In these legal systems, there is nothing that prevents transplants.

Administrative law does not follow the exact the same reasoning, and anyway, the issues are clearly different. This discipline has deep national roots, as noted by Ulrich Scheuner¹ and Jean Rivero². Firstly, administrative law is one of the areas where “the national traits of a people and of a state are expressed more strongly”³ and it is “to a large extent the expression of national characteristics”⁴. Wouldn’t it be shocking if the administration and the administrative court applied a foreign rule to the resolution of a dispute? The contribution of comparative law can therefore only be limited. Thus, administrative law, even less than private law, does not lend itself to comparative law. The absolute rule is that the national administrations must apply national law and the administrative court's main role is to enforce national laws.

The use of comparative law by the court is the subject of intense debate today, but mostly outside France. Meanwhile, the French administrative court now makes extensive use of comparative law, but without making this the

¹ U. SCHEUNER, « Der Einfluss des französischen Verwaltungsrechts auf die deutsche Rechtsentwicklung », *DÖV*1963, p. 714 ff quoted by J. SCHWARZE, *Droit administratif européen*, 2nd edition., Bruylant, pp. 102-103.

² J. RIVERO, *Cours de droit administratif comparé*, Paris, Les cours de droit, 1957-1958, p. 18 ff.

³ U. SCHEUNER, « Der Einfluss des französischen Verwaltungsrechts auf die deutsche Rechtsentwicklung », *ibidem*, p. 714.

⁴ *Ibidem*.

subject of scholarly discussion. The circulation of judicial solutions and techniques is not new. As Jean Rivero reports for France: “The Council of State is open to certain foreign jurisprudences. If we are to believe President Letourneur, manifest error of appreciation has a lot to do with the example of the Swiss Federal Tribunal, and the jurisprudence of the International Tribunal of the ILO; according to President Braibant, it is at the origin of the principle of proportionality”⁵. Thus, while principles and solutions circulate, regarding the contemporary increasing recourse to comparative law, there is no ongoing debate in France. The silence of French administrative scholarship on the topic contrasts sharply with the intensity of the debates across the Atlantic. The extreme position (refusal) is well illustrated by Justice Scalia's dissenting opinion in *Roper v Simmons* from 2005: “The Court thus ... purports to take guidance from the views of foreign courts and legislatures. Because I do not believe that the meaning of our Eighth Amendment, any more than the meaning of other provisions of our Constitution, should be determined by the subjective views of five Members of this Court and like-minded foreigners, I dissent.”⁶ Further, Scalia adds: “What these foreign sources “affirm,” rather than repudiate, is the Justices’ own notion of how the world ought to be, and their dictat that it shall be so henceforth in America. The Court’s parting attempt to downplay the significance of its extensive discussion of foreign law is unconvincing.” Following this decision, the Republicans tried, unsuccessfully, to pass a law to prevent the Supreme Court from interpreting the US Constitution using foreign interpretative aids.

What is this really all about? The position of the originalist Justice is a solution inspired by a kind of legal nationalism, the source of which is obviously not the need to protect the sovereignty of Congress. In reality, he is actually opposed to any development concerning the death penalty. But, having said that, one should not rule out from the outset how deeply shocking the use of comparative law can be *a priori* in a court decision – except in private international law (choice of law) cases. It is perhaps no coincidence that we are asking ourselves this question at a time when we are witnessing a hatred of democracy⁷ and an eclipse of legality⁸, one being of course linked to the other. The use of comparative law by judges (the Council of State has made extensive use of it for several years⁹) reflects a new relationship to the sources of law

⁵ J. RIVERO, « Le droit administratif en droit comparé : Rapport final », *RIDC* n° 4-1989, pp. 919-926.

⁶ *Roper v Simmons*, 543 U.S. 551, 668 (2005).

⁷ J. RANCIÈRE, *La haine de la démocratie*, Paris, la Fabrique éditions, 2005.

⁸ *The Eclipse of the Legality Principle in the European Union*, F. PENNING, F. M. LEONARD BESSELINK, S. PRECHAL, Kluwer Law International, 2010.

⁹ J.-M. SAUVÉ, « Le Conseil d’État et la comparaison des droits », *La comparaison en droit public, Hommage à Roland Drago*, Colloquium organized by the Institut français des sciences

revealing the significant development of judges' powers and the growing entanglement of legal systems; a phenomenon which calls for an increasing use of comparative law in Europe today, which Armin von Bogdandy has studied thoroughly¹⁰. However, all this said, we can only note that in European Union law, it has always been this way.

As a matter of fact, the Court of Justice has used comparative law at least since the *Algera* judgment of 1957, and precisely in an area that forms part of administrative law. But the position of the Court is different here, since it takes inspiration from the legal systems involved in its action, thus, it is not inspired by foreign legal systems, as was the intention of the Supreme Court in the case *Roper v Simmons*; in this sense, Justice Scalia does not object to the use of comparative law to compare the laws of US states. The Court of Justice draws inspiration from the laws of the Member States to identify certain principles, expressly prescribed by the Treaty requiring the Court, for extra-contractual liability, to "remedy, according to the general principles shared by the laws of the Member States, the damage caused by its institutions or by its agents in the performance of their duties"¹¹. Accordingly, within the ambit of fundamental rights, the Court stated in the judgments *Nold* of 1974 and *Hauer* of 1979 that it has an obligation to draw inspiration from the constitutional traditions common to the Member States"¹². The Court therefore undertakes this comparative approach as an obligation. It therefore performs, we might say, internal comparative law, which does not prevent it from being inspired by the European Convention of Human Rights, or other relevant international instruments. We will show that this is a traditional technique used by the CJEU. Looking at European administrative law in a restrictive sense, as the law of the administration of the European Union, excluding a complete analysis of the general principles of law that Jürgen

administratives and the Société de législation comparée, Conseil d'État, Feb. 14th 2014 (available at : <http://www.conseil-etat.fr/Actualites/Discours-Interventions/Le-Conseil-d'État-et-la-comparaison-des-droits>) ; B. STIRN, « Le droit administratif français, européen et global : bilan et perspectives », ELN Interviews ; *Vers un droit public européen*, coll. « Clefs », Montchrestien, 2015 ; O. DUTHEILLET de LAMOTHE, « Comparative law as an essential feature of French public law : the influence of the European Union and of the European Convention of Human Rights », in M. ADEMAS and D. FAIRGRIEVE (eds), *Courts and Comparative Law*, Oxford University Press ; F. LICHÈRE, « The Use of Comparative Law before the French Administrative Law Courts : or the triumph of castles over pyramids », *Courts and Comparative Law*, prev., p. 253 et s. ; A. BRETONNEAU, S. DAHAN, D. FAIRGRIEVE, « L'influence grandissante du droit comparé au Conseil d'État : vers une procédure juridictionnelle innovante ? », *RFDA* 2015. 855.

¹⁰A. von BOGDANDY, « European Law Beyond 'Ever Closer Union' - Repositioning the Concept, its Thrust and the ECJ's Comparative Methodology », *European Law Journal*, vol. 22, n° 4, July 2016, pp. 519-538.

¹¹ Par. 340, art. 2 of TFEU. For a fairly complete overview of the sources of the comparison: C. N. KAKOURIS, « Use of Comparative Method by the Court of Justice of the European Communities », 6 *Pace Int'lL. Rev.* 267 (1994).

¹²Case no. 4/73 and 44/79.

Schwarze¹³ has already studied thoroughly, establishing, for each, the contribution of comparative law, we will try to show how the CJEU has used comparative law from the outset to improve his techniques, to identify new principles, but that this use is in fact an instrumentalization of these sources, which should be subject to critical assessment.

We will begin by establishing the presence of comparative law in European administrative law. We will then analyse its application, to finally deliver a critical assessment of the role of comparative law in European administrative law.

¹³ J. SCHWARZE, *Droit administratif européen*, coll. « Droit administratif/Administrative Law », Bruylant, 2009.

I. THE PRESENCE OF COMPARATIVE LAW IN EUROPEAN ADMINISTRATIVE LAW

The CJEU has always invoked comparative law, and administrative law offered a perfect incubator for this, since the first major judgment in European administrative law is a judgment using comparative law. This presence goes way back, to the very origin of the European integration process. It can be traced in both jurisprudence, and doctrine.

A. - *Comparative law and the origins of European integration*

As Julie Bailleux clearly demonstrated, comparative law has from the outset been closely connected to emerging Community law¹⁴. At the Liberation, while law was disqualified as a means of bringing peoples together and promoting peace for the benefit of economics and political science, comparative law was quickly invoked. Comparative law is then understood as a social science and its purpose resonates with the imperative of the time: to enhance the mutual understanding of the peoples. Julie Bailleux clearly shows that comparative law was redefined at this very time to deepen this understanding between the peoples, the initial objective of the unification of laws, cherished in the 19th century, was therefore abandoned. It becomes indispensable “for the construction of a peaceful international order”¹⁵. Accordingly, René David asserts that comparative law is “the modern form of legal humanism”¹⁶. Comparative law was therefore on the rise after the war and was widely mobilized for the construction of the European Community. In 1957, the creation of the International Faculty of Comparative Law “led to a close and lasting collaboration between the members of the Legal Service [of the European institutions] and some of the most eminent representatives of a transnational community of jurists which was about to become institutionalized: comparative law specialists”¹⁷. The confluence of comparative law and Community law seems quite natural; while the former aims at the approximation of laws, the latter constitutes an indispensable tool for such an undertaking. Marc Ancel thus argues that “the Treaty of Rome on the

¹⁴ J. BAILLEUX, *Penser l'Europe par le droit, L'invention du droit communautaire en France*, coll. « Nouvelle Bibliothèque des thèses », Dalloz, 2014, chap. 1.

¹⁵ J. BAILLEUX, *Penser l'Europe par le droit, L'invention du droit communautaire en France*, *prev.*, p. 86.

¹⁶R. DAVID, 29 janvier 1947, « Raisons pour lesquelles il est souhaitable de voir créer dans le cadre de l'UNESCO une organisation pour l'étude du droit comparé », Archives of UNESCO, available on the institution's website, quoted by Julie BAILLEUX, in *Penser l'Europe par le droit, L'invention du droit communautaire en France*, *prev.*, p. 86.

¹⁷ *Ibidem*, p. 258.

European Communities, which presupposes or must bring about a harmonization of the legal, social and judicial institutions of the Member States (...) will increasingly require the systematic comparative study of these different institutions”¹⁸. The European executive therefore invested heavily in institutions such as the International Faculty of Comparative Law, the first annual session of which was dedicated to Community law¹⁹. Julie Bailleux describes the contribution of comparativists as follows: “The latter very quickly established comparative law studies as an essential resource for the construction of Community law as a symbolic and practical product. Firstly, they mobilized comparative law studies to fill the content of European rules resulting from the (daily) activity of the institutions of the ECSC, then of the EEC and Euratom. ECSC legislation in social matters, for example, was largely drawn up on the basis of studies which, in Michel Gaudet’s view, are the results of “comparative social legislation”, practised as of 1955 by a group of professors from the different countries of the European Community, brought together by the services of the High Authority”²⁰. There is therefore, at the institutional level, a specific Directorate dedicated to the approximation of laws which thus deals with comparative law.

This interest is not specific to the European executive bodies since Julie Bailleux quotes a letter from a judge of the European Court of Justice, Nicolas Catalano, who insists on the need to reflect on the approximation of the laws of the six member states²¹. Maurice Lagrange has theorized this method quite abundantly. For this lawyer, the alternative is the following: “either the legal order of the ECSC belongs to the international legal order of which it is only a manifestation; or, it constitutes an autonomous, balanced legal order, the rules of which are borrowed from the internal public law of the member states of the ECSC²²”. He then adds, and this is crucial for us, that the European Court of Justice must render judgements taking into account “the rules which were quite naturally borrowed from the common fundaments of the six member states.”²³,

¹⁸ M. ANCEL, « Cent ans de droit comparé en France », in *Livre centenaire de la Société de législation comparée : un siècle de droit comparé en France, 1869-1969*, quoted by Julie BAILLEUX,

Penser l’Europe par le droit, L’invention du droit communautaire en France, prev., p. 262.

¹⁹ J. BAILLEUX, *Penser l’Europe par le droit, L’invention du droit communautaire en France*, prev., p. 265.

²⁰ J. BAILLEUX, *Penser l’Europe par le droit, L’invention du droit communautaire en France*, prev., pp. 265-266.

²¹ Letter from Nicolas Catalano to Pierre Wigny dated 9 November 1959, Archives of the Jean Monnet Foundation, Gaudet collection, Correspondances, quoted by Julie BAILLEUX, p. 266.

²² J. BAILLEUX, *Penser l’Europe par le droit, L’invention du droit communautaire en France*, prev., p. 266. She quotes here a sentence by Maurice Lagrange taken from the following article: « L’ordre juridique

de la CECA », *RDP* 1958, p. 843.

²³ M. LAGRANGE, « La Cour de justice de la Communauté européenne du charbon et de l’acier », *RDP* 1954, p. 434, quoted by J. BAILLEUX, *Penser l’Europe par le droit, L’invention du*

He thus rejects international law as a source, prioritizing the internal law of the Member States, as the sole source of Community law²⁴. The European Court of Justice, he says, “performs comparative law”²⁵. Here is how Maurice Lagrange describes this method: “If the court is autonomous and must proclaim what the law of the Treaty is, it is easy to imagine that the source of this law can only be drawn from the common legal base of the six States”²⁶. It is therefore necessary to discover their “common denominator” after a comparative law analysis in order to discover “these general principles of law, which give, in reality, although through different paths of thought, the same solution to identical problems”.²⁷

We will see this idea in action in case-law and doctrine.

B. - *The comparative method at the heart of case-law and doctrine in European administrative law*

We will study a few cases here, to analyse the way in which case-law and possibly the opinions of the Advocates General use comparative law. Then, we will also illustrate the use of comparison in an original doctrinal proposal, that of the ReNUAL group, which has drawn up a draft European code of administrative procedure.

1. The comparative method in the case-law of the Court of Justice

Many areas of European administrative law have been influenced by comparative law, as Jürgen Schwarze has amply demonstrated in his handbook²⁸. Case law has borrowed extensively from national administrative laws; from Germany, for example, the review of proportionality or legitimate expectations.

This point will be illustrated based on the *Algèra* judgment, which offers the advantage of showing the influence of the thinking of Maurice Lagrange. This judgment was rendered on July 12, 1957²⁹, based on his opinion. The case concerned the legality of the withdrawal of an administrative act establishing a right (in this case the appointment of a civil servant in public employment). The Court recognises that the regulation of this question is based on administrative law traditions of the Member States, and the Treaty is silent on this point. The

droit communautaire en France, prev., p. 266.

²⁴ M. LAGRANGE, «L'ordre juridique de la CECA», *RDJ* 1958, p. 843, quoted by J. BAILLEUX, *Penser l'Europe par le droit, L'invention du droit communautaire en France*, prev., p. 266.

²⁵ *Ibidem*, p. 856.

²⁶ M. LAGRANGE, « Une réalité européenne. La cour de justice de la CECA », *Cahiers chrétiens de la fonction publique*, April 1955, p. 20, quoted by J. BAILLEUX, *Penser l'Europe par le droit, L'invention du droit communautaire en France*, prev., p. 267, note 165.

²⁷ *Ibidem*.

²⁸ J. SCHWARZE, *Droit administratif européen*, 2nd ed., Bruylant, 2009.

²⁹ Case no. 7/56 and 7/57, *Rec.* p. 81.

Court then carried out a comparative administrative law study to identify the rules common to the Member States in this field: “As to the possibility of withdrawing such acts, this is a problem of administrative law, well known in the case-law and doctrine of all the countries of the Community, but for the solution of which the treaty does not provide any rules. The Court, to avoid a denial of justice, is therefore obliged to resolve the case by drawing inspiration from the rules recognized by the legislations, the doctrine and the case-law of the member states”. The Court’s analysis leads to the conclusion that, in the six Member States of the Community, the revocability of an illegal administrative act is always possible, within a reasonable time. This conclusion is in accordance with the views of Advocate General Lagrange, who begins by stating that “Indeed, it is a principle that, when individual decisions comply with the law, they cannot be withdrawn: persons who are the addressees of those decisions derive from them an individual right and they are entitled to require that it should be respected.” Where does the Advocate General get this principle from? He confines himself to explaining the following: “This solution, which meets the need to ensure the stability of legal relationships and which, in the realm of unilateral public law relationships, corresponds, to the effects of a contract in multilateral relationships, is common to the principles of the law of all six member countries”. We can therefore infer that the comparative analysis preceded the drawing up of the opinion, but the Advocate General does not go into more details. On the other hand, the question of the withdrawal of illegal individual decisions is subject to extensive elaboration. The AG first analyses French administrative case-law to show that the withdrawal of such decisions was, at the time, possible when these decisions were illegal; but within the time limit to bring judicial review. Recourse to the French example is questionable in this case, since in the absence of a relevant time limit for review in Europe at the time (this was only introduced by the ruling of the Court on 21 February 1957), the applicants concluded that the acts in question could not be revoked. The Advocate General is therefore faced with a dilemma which leads him to continue his analysis by turning to other legal systems: he notes that France is the only country in which the withdrawal of the illegal act is limited by the time limits applicable for judicial review. In Germany, the inviolability of the acquired rights of civil servants is a fundamental principle of constitutional civil service law in that country, except in certain cases, including cases of illegality. Should we therefore take inspiration from the French solution?

The Advocate General therefore notes:

“It will be for the Court to decide whether, when the general time-limit laid down for the application of Article 58 is applicable (it is so now), it intends to lay down case-law modelled on the French case-law which will protect the vested rights of officials. For the time being, all that I would be inclined to accept for my part is the idea of a 'reasonable period of time’”. He also notes that this concept of

reasonable time is in accordance with German law, as set out in a manual cited by the Advocate General.

In light of the silence of the Treaties, it is the French and German administrative laws that allow the Advocate General and the court to identify the applicable rule. Why does he omit to elaborate on the situation in the legal systems of the other Member States? The use of comparative law thus serves to identify a rule, even if the analysis is not all that thorough.

We can continue this analysis, based on two other judgments which seem particularly emblematic of the approach of the Court in its use of comparative law. These are the 1974 *Nold*³⁰ and the 1979 *Hauer*³¹ decisions. In the *Nold* judgement, a company challenged a Commission decision on the grounds that it violated its fundamental rights, in this case its right to property, by compromising the profitability of its business. At the time, the Treaty was silent on the matter of fundamental rights. The Court starts by declaring that fundamental rights form an integral part of the general principles of law, the observance of which it ensures. But it then adds in safeguarding these rights it “is bound to draw inspiration from constitutional traditions common to the Member States, and it cannot therefore uphold measures which are incompatible with fundamental rights recognized and protected by the Constitutions of those States”. It adds furthermore that it can also find inspiration in the international instruments for the protection of human rights of which Member States are signatories. It is thus in the light of these principles that the violation of the right to property by an administrative act must be assessed. It develops its control in a way that is indeed not foreign to the classic review of the violation of a fundamental right. We find the same line of reasoning in the *Hauer* judgment of 1979.

EU law thus has a particular affinity to comparative law. There is now an increasing use of this method, which can be explained by the culture of the Court, which has the ideal resources to do this work. The composition of the Court makes it a perfect place to carry out comparative analyses, each judge arriving in Luxembourg bringing their own legal tradition. This is the reason why the opinions of the Advocates General very often contain elaborations on comparative law. Pierre Pescatore mentions in this regard the model developed in the opinion of AG Lagrange in the *Assider* judgment of February 11, 1955 on the concept of misuse of power.

Jürgen Schwarze unpacks various influences of national administrative law on European administrative law. From the outset, French administrative law has played an influential role in the development of European administrative law, and in particular in the development of judicial review: the cases in which review may be brought are directly inspired by this tradition. German administrative law then played a leading role in the development of the proportionality test and the

³⁰ Case no. 4-73 of May 14th 1974.

³¹ Case no. 44/79 of December 13th 1979.

protection of legitimate expectations. We cannot fail to note that the German inspiration for the proportionality test is a topos of comparative law and deserves further nuancing: the proportionality test has in fact existed in administrative law in France for a long time, in particular in the context of the review of police measures (since the Benjamin case of 19 May 1933), yet it is also true that the German technique, with the three-tier test, is much more elaborate. It is also striking that procedural rights, in particular the right to be heard, are recognized by the Court just one year after the United Kingdom joins the Community. Jürgen Schwarze quotes here the opinion of Advocate General Warner in the *Transocean Marine Paint Association* case³². In this case, the Advocate General conducted a detailed analysis of English law, in which this principle of natural justice has existed for a long time. He even refers to the landmark case *Ridge v Baldwin* of 1964 of the House of Lords.

The importance of comparative law is not only apparent in case-law. It is also clearly discernible from the doctrine.

2. Comparative law and the development of the European Code of Administrative Procedure

Comparative law is indeed of vital importance in the legislative activity of the Commission, as well as in certain areas of academic work. For example, the draft European Code of Administrative Procedure, initiated by European academics, is strongly inspired by the comparison of laws.

Herwig C.H. Hofmann and Jens-Peter Schneider explain that they used comparative law to develop the code in two ways: on the one hand, they compared existing rules of procedure in European Union law in the major areas of European policy-making; on the other hand, they carried out a comparative analysis of the administrative procedural principles of each Member State³³. The comparison did not only focus on the procedural laws of the Member States, since the American example has strongly inspired the drafters in at least one area: the development of acts of general application. Herwig Hofmann and Jens-Peter Schneider explain that national experiences could not be used by the drafting team, because, generally, the procedural codes or laws of EU Member States did not provide for a specific legal regime for these acts. Therefore, the ReNUAL team drew inspiration from American law. It is worth noting that following the American model,³⁴ the drafters provided for a high degree of transparency, participation and evaluation of draft regulatory acts. The drafters thus carried out

³² CJEC, October 23rd 1974, *Transocean Marine Paint Association vs Commission of the European Communities*, n° 17-74.

³³ H. C. H. HOFMANN, J.-P. SCHNEIDER, «Administrative law reform in the European Union: The ReNUAL Project and its basis in comparative legal studies », S. ROSE-ACKERMAN, P. LINDSETH, *Comparative Administrative Law*, Edward Elgar, forthcoming.

³⁴ *Ibidem*. See ReNUAL Model Rules on EU Administrative Procedure, 2014, article II-4.

an in-depth analysis of American law on this subject in an attempt to identify the difficulties of applying the participatory procedure in the United States: “As to the American rules for drawing up acts of general application, these provide for an information and participation procedure. Following a thorough analysis of American scholarship on the subject, the editors of the working group entrusted with Book II concluded that the risk of “ossification” (that is, the difficulty experienced by US agencies to implement new rules due to complex procedural requirements and the obligation to state reasons imposed by the procedure for drawing up acts of general application), was less due to this procedure as such, than to the rules of standing before the American courts. Consequently, because of the considerable differences between the litigation rules applicable in the United States and in Europe, the drawbacks of the participatory procedure appeared to be less relevant for Europe”³⁵. In this case, we may witness real comparative law analysis with the aim of transplanting the American model. The American participatory model is indeed highly criticized for its cumbersome nature, preventing agencies from updating the regulations. The editors found that this risk was not present in Europe due to the particulars of the judicial review procedure, meanwhile, the participatory procedure promised great benefits. It should be noted that in France there is no general rule requiring the participation of stakeholders in the preparation of administrative acts of general application (despite relative progress made by the Code of relations between the public and the administration which provides for such a procedure but at the discretion of the administration)³⁶ nor is there such a requirement in effect in Germany³⁷, Italy³⁸ or Spain³⁹. The codification work therefore meant looking to America for the purposes of ensuring a significant degree of transparency in the development of administrative policies at the European level.

Comparative law is therefore a major source of inspiration in the creation of European administrative law, both at the level of jurisprudence as well as of

³⁵ C. H. HOFMANN, J.-P. SCHNEIDER, « Administrative law reform in the European Union: The ReNEUAL Project and its basis in comparative legal studies », *prev.*

³⁶See Title III on involving the public in decisions taken by the administration: “When the administration decides, apart from cases governed by legislative or regulatory provisions, to involve the public in the design of a reform or in the development of a project or an act, it makes the terms and conditions of this procedure public, makes the relevant information available to the persons concerned, ensures them a reasonable period of time to participate in it and ensures that the results or the envisaged follow-up are, at the appropriate time, made public” (art. L. 131-1).

³⁷A. JACQUEMET-GAUCHÉ, U. STELKENS, «La participation à l’élaboration des règlements administratifs en Allemagne », in *Droit comparé de la procédure administrative*, J.-B. AUBY and T. PERROUD (dir.), p. 261.

³⁸G. della CANANEA, « Administrative Rulemaking in Italy: Theories and Practice », in *Droit comparé de la procédure administrative*, J.-B. AUBY and T. PERROUD (dir.), p. 247.

³⁹C. VELASCO, « La participation à l’élaboration des règlements administratifs : le cas espagnol », in *Droit comparé de la procédure administrative*, J.-B. AUBY and T. PERROUD (dir.), p. 289.

legislation. The fate of the future European code of administrative procedure is undecided, but we can clearly see to what extent comparative law can be useful in creating new procedures.

It is now worth looking at how the court uses comparative law methods in European administrative law.

THE IMPLEMENTATION OF COMPARATIVE LAW IN EUROPEAN ADMINISTRATIVE LAW

Does the court apply a particular method? We will see that it is altogether quite unsophisticated. We will also see that comparative law is used by the Court within the context of its teleological method; it is an instrument for finding the principle of law or rule which best serves to achieve the objectives of the treaty. More fundamentally, is comparative law not just a discourse to legitimize jurisprudence, the spirit of which is to base judicial law-making on the law of the Member States and thereby promote a higher acceptance of its judge-made solution? We will first look at the methods used by the Court in comparative law before demonstrating that comparative law forms a part of a teleological reasoning.

A. - Analysis of the methods used

Is there a method that could lead to the conclusion that comparative law is used in a scientific and neutral way? The Court used both quantitative and qualitative methods. I prefer this distinction to that used by Pierre Pescatore, who distinguishes between an analytical method and a synthetic method, the first consisting of bringing together the status quo in the laws of the Member States on a given issue and the second serving to identify a common principle, because it does not quite seem to reflect the reasoning of the judges⁴⁰.

1. The quantitative method

In liability cases, the Court of Justice used a quantitative method in the *FIAMM* and *Fedon* judgments⁴¹ to rule out the existence of a general principle of law in strict liability cases in the absence of unlawful behaviour by the Community. The difference of opinion on the existence of this principle between the Commission, joined by the Court, and Advocate General Maduro highlights the importance of the quantitative factor. We will first analyse the Court's reasoning and then the result, which is based on the comparative law analysis provided by the Commission. Then we will look at how Advocate General Maduro sought to justify his position.

The reasoning of the Court for rejecting such a principle is based on the observation that only seven Member States have this principle in place and apply it only in specific cases so that, under these circumstances, the principle cannot be considered a principle common to the legal orders of the Member States of the Union, in the sense of Article 288(2) (now Article 340(2) of the TFEU)⁴². Now to the comparative law analysis provided by the Commission: “examination of the 25 legal orders of the Member States indicates that, in contrast to cases such as expropriation in the public interest or compensation paid by the State for damage caused by dangerous activity on its part or on account of a specific relationship between it and the victim, which are irrelevant here, any obligation to pay compensation as a result of a lawful State act reflecting a broad discretion, on

⁴⁰ P. PESCATORE, « Le recours, dans la jurisprudence de la Cour de justice des Communautés Européennes, à des normes déduites de la comparaison du droit des États membres », *RIDC* n° 2-1980, p. 352 ff. We find this distinction in the following work: J. F. DELILE, *L'invocabilité des accords internationaux devant la CJUE et le Conseil d'Etat français*, Bruylant, 2016, p. 574.

⁴¹ Case no. C-120/06, to the opinion of Advocate General Maduro. See: J. F. DELILE, *L'invocabilité des accords internationaux devant la CJUE et le Conseil d'Etat français*, coll. « Droit de l'Union européenne », Bruylant, 2016, p. 574 ; A. ARCURI, S. POLI, « What Price for the Community Enforcement of WTO Law? », *EU I Working Papers Law* 2010/01. See also A. BARAV, « « Injustice normative » et fondement de la responsabilité extracontractuelle de la Communauté économique européenne », in *L'application judiciaire du droit de l'Union européenne : Recueil d'études*, Bruylant, 2015.

⁴² A. ARCURI, S. POLI, « What Price for the Community Enforcement of WTO Law? », prev., pp. 19-20.

account for example of considerations of solidarity or fairness, is unknown to the law of a large number of Member States. While liability of such a type can be found, in exceptional circumstances, in the legal orders of certain other Member States, it is, as a general rule, limited solely to administrative acts, with the notable exception of French law which alone clearly accepts this type of liability in the case of legislative activity, provided that the damage is unusual, special, serious and direct, that the legislature is not pursuing the common good and that the legislature has not ruled out compensation as a matter of principle. Furthermore, the principle specific to French law cannot be transferred to the Community legal order. While the basis of that principle is the fact that, in France, judicial review by the Conseil d'État (Council of State) of the constitutionality of laws is precluded, Community law provides for review of the legality of measures of the legislature by reference to the Treaty and fundamental principles and for the possibility of the liability of the Community to be put in issue if those higher-ranking norms are infringed.”⁴³

Advocate General Maduro did not share this view. He tries to override the quantitative argument, since in fact there are only two States in Europe with a principle of strict liability in the absence of an unlawful act, when the act causing harm is a legislative act. The question raised by Maduro is therefore legitimate: “should the second paragraph of Article 288 EC be interpreted as excluding a solution in matters of extra-contractual liability of public authorities in Community law unless it is shared by all Member States?”⁴⁴. The risk of such an approach is to retain only “the lowest common denominator,” according to Maduro. Advocate General Roemer in the *Zuckerfabrik* judgment of December 2nd 1971 “rejected the application of the ‘rule of the lowest limit’ that would result if it were decided to adopt only rules existing in all the Member States”⁴⁵. He emphasized that there was no need to seek “the concordance of the legal orders of all the Member States” or even “of a majority”.⁴⁶

⁴³ Case no. C-120/06, §151-152.

⁴⁴ Item 55.

⁴⁵ Opinion by AB Maduro in case C-120/06, note 59 which cites AG Roemer’s opinion in the case *Zuckerfabrik Schöppenstedt v Council*, December 2nd 1971, n° 5/71, *Rec.* p. 975, in particular p. 991.

⁴⁶ Opinion in case *Werhahn Hansamühle e.a. v. Council and Commission*, n° 63/72 to 69/72, November 13th 1973, *Rec.* p. 1253, in particular p. 1258, quoted by Maduro in note 59.

For Maduro, therefore, it is necessary to overcome the quantitative method when using comparative law in order to find the “legal solution (...) which will be the most appropriate for the context and the needs of the Community legal order”.

The Court’s approach is questionable because, as Pierre Pescatore put it, “the comparative approach is sometimes used to introduce legal concepts of a single Member State into Community law”.⁴⁷ Koen Lenaerts has also reflected on the fluctuation of the quantitative method in jurisprudence.⁴⁸ Sometimes, the convergence of Member State laws makes it possible to find a solution, but the Court clearly doesn’t refrain from transposing purely and simply a technique inspired by one single legal system, such as transplanting the proportionality test or the principle of legitimate expectations from Germany. The quantitative criterion cannot therefore be an authoritative criterion since it has never been consistently used throughout the history of European Union law.

The use of the quantitative method is not uncommon in European administrative law. Yet it is questionable. Another method can also be used, which I will refer to as the qualitative method. This approach was explained by Advocate General Roemer.

2. *The qualitative method*

Advocate General Roemer, in a 1973 case concerning the definition of the principles governing the Community’s extra-contractual liability, made explicit reference to a concept developed by the great comparatist Zweigert⁴⁹: the balanced study of comparative law. He explains his approach as follows: “Rather what is indicated—as always when judicial decisions are arrived at by references to general principles—a process of assessment in which above all the particular objectives of the Treaty and the peculiarities of the Community structure must be taken into account (and in which perhaps it is appropriate that the guideline be the best elaborated national rules)”⁵⁰. He adds in another case that “What is important in ascertaining the law under Article 215, second paragraph, [on the extra-contractual liability of the Community], is not the unanimity of the legal systems of all Member States, nor a kind of vote ending in a majority finding; no,

⁴⁷ P. PESCATORE, « Le recours, dans la jurisprudence de la Cour de justice des Communautés Européennes, à des normes déduites de la comparaison du droit des États membres », *RIDC* n° 2-1980, pp. 353-354.

⁴⁸ K. LENAERTS, « Le droit comparé dans le travail du juge communautaire », in *L’utilisation de la méthode comparative en droit européen*, F. van der MENSBRUGGHE (dir.), Presses universitaires de Namur, 2003, p. 111 ff.

⁴⁹ Author of the famous introduction to comparative law: K. ZWIEGERT, H. KÖTZ, *An introduction to comparative law*, Oxford, Clarendon Press, 3rd ed., 1998.

⁵⁰ Opinion in case 5/71, *Aktien-Zuckerfabrik Schöppenstedt v. Council of the European Communities*, Rec., XVII, p. 991.

it is rather a matter of looking at what eminent legal writers (e.g., Zweigert) have called evaluative comparative law. In this connexion what may be highly relevant is to ascertain which legal system emerges as the most carefully considered”⁵¹.

What does the mean? What is the CJEU method? This is said to be the great comparatist Zweigert’s method, referred to as *wertende Rechtsvergleichung* in German (in English: *evaluative comparative law*). It is a knowledgeable method of evaluation with the aim, of creating new law, of selecting the legal rule most appropriate to the context: “Methodically, it is not a functional comparison of legal provisions; it is therefore not a question of analysing the objectives of a provision in a given context. Rather, it is a method of careful selection and elaboration of certain rules on the basis of a prior assessment. The standard used to select the rule includes the setting of a goal which may be to safeguard the highest level of protection, especially in the area of fundamental rights, and the compatibility of the new rule with the objectives and structures of the law of the Union. This method therefore does not consist of a simple transfer of a national rule to the European Union, but of the development of common European standards”⁵². As TP van Reenen puts it, evaluative comparative law is in fact a method of applied comparative law. It is about using comparative law in order to identify the different rules applied in each Member State to a given legal situation and to assess each of these rules in the light of the Community’s needs and to retain only the most relevant rule.

Koen Lenaerts explains furthermore that the comparative method is actually associated with the teleological method: “First, the comparative method provides a range of different possible options for interpretation. Then, the Court chooses the one which is best for achieving the objectives pursued by the Union”⁵³. But,

⁵¹ *Opinion in joint cases 63 to 69/72, Wilhelm Werhahn Hansamühle e.a. v. Council of the European Communities, Rec.*, 1973, p. 1258. See J. KOKOTT, C. SOBOTTA, « The Charter of Fundamental Rights of the European Union after Lisbon », *EUI Working Paper*, AEL 2010/6, Academy of European Law, p. 2.

⁵² P. DANN, « Thoughts on a Methodology of European Constitutional Law », *The Unity of the European Constitution*, Michal RYNKOWSKI, Philipp DANN, eds., Berlin, 2006, p. 52. The method is also explained this way « ‘Evaluative comparison’ differs from analytical comparison in that, although it identifies differences between the legal orders under comparison, it attempts to level these differences by receiving or re-evaluating the foreign solutions in the own, domestic system. In this regard Eörsi’s view that the socialist legislator may adopt the solutions of non-socialist legal systems after they have been ‘stripped of their bourgeois elements’, is worth mentioning (G. EÖRSI, «Comparative analysis of socialist and capitalist law», 1964 *Coexistence*, n° 141, 143-145). This kind of comparison implies the involvement of value judgment in addition to the purely cognitive process of analytical comparison. ‘Applied comparative law’ is therefore, as a rule, evaluative comparative law » (TP van REENEN, « Major theoretical problems of modern comparative legal methodology: the comparability of positive legal phenomena », *The Comparative and International Law Journal of Southern Africa*, vol. 28, No. 3 (November 1995), pp. 407-421, esp. pp. 413-414.

⁵³ K. LENAERTS, « La Cour de justice de l’Union européenne et la méthode comparative », *Proceedings of the International Days of the SLC, Le droit comparé au XXI^e siècle*, Paris, Société de législation comparée, 2016.

as I have shown, comparative law often only provides an argument and is not decisive.

As we can see, despite the development of a few theories, which the judge or the advocate general never explain, the comparative method is often instrumentalized. Franz C. Mayer and others, are therefore correct in arguing that the Court's comparative work in its judgments is not sufficiently transparent, clear, and developed⁵⁴. It is more about practicing comparative law in order to achieve the objectives of the Community.

B. - *The instrumentalization of the comparative method*

The comparative method is used both by the Advocates General and the Court. As Pierre Pescatore clearly pointed out, there is no objective criteria that would allow us to predict the result of the comparison⁵⁵. Comparative law must make it possible to find the solution which best meets the objectives of the Union. It is about finding the solution best suited to the judge's goals, which is why the comparative study is inserted within the framework of the teleological reasoning of the Court⁵⁶ and this is the reason why comparative law can even be used as "contrast agent", as Pierre Pescatore had pointed out, in the event that the existence of differences between the laws of the Member States could lead the Court to deviate from these rights in order to find the most satisfactory solution.⁵⁷

More fundamentally, one will need to find the solution which represents the least conflict with the interests of Member States. In this regard, it fulfils a diplomatic function. The use of comparative law must enable the optimal articulation of European and national legal orders. Comparative law therefore contributes to "ensuring the primacy, effectiveness and uniformity of application" of Union law⁵⁸. In light of the scepticism of the German Federal Constitutional Court (in the Solange decision) with regard to the degree of protection of

⁵⁴F. C. MAYER, « Constitutional Comparativism in action. The example of general principles of EU law and how they are made-a German perspective », I-CON (2013), vol. 11, n° 4, 1003-1020, p. 1008 ; L. WILDHABER, « The Role of Comparative Law in the Case-Law of the European Court of Human Rights », in Festschrift Röss, Internationale Gemeinschaft und Menschenrechte: Festschrift für Georg Röss zum 70. Geburtstag am 21. Januar 2005, p. 1101.

⁵⁵P. PESCATORE, « Le recours, dans la jurisprudence de la Cour de justice des Communautés Européennes, à des normes déduites de la comparaison du droit des États membres », *RIDC* n° 2-1980, p. 353 ff. See also F. C. MAYER, « Constitutional Comparativism in action. The example of general principles of EU law and how they are made-a German perspective », I-CON (2013), vol. 11, n° 4, 1003-1020, p. 1007.

⁵⁶C. N. KAKOURIS, « Use of Comparative Method by the Court of Justice of the European Communities », 6 *Pace Int'l L. Rev.* 267 (1994), esp. p. 273.

⁵⁷P. PESCATORE, « Le recours, dans la jurisprudence de la Cour de justice des Communautés Européennes, à des normes déduites de la comparaison du droit des États membres », *prev.*, p. 354.

⁵⁸K. LENAERTS, « The European Court of Justice and the Comparative Law Method », *European Review of Private Law*, vol. 25, Issue 2 (2017), pp. 297-312, esp. p. 49.

fundamental rights granted by the Court of Justice, we can better understand the need to justify CJEU decisions with reference to the constitutional traditions of the Member States. Comparative law is therefore at the centre of the discourse legitimizing the creative activity of the Court.

However, the case-law of the Court, and in particular the opinions of the Advocates General, are not completely free from a certain bad faith regarding the use of comparative law, and sometimes from a certain condescension towards certain legal systems, because the use of comparative law is sometimes imbued with the idea of progress. Certain judgments on the extra-contractual liability of the Community are very interesting in this respect. These are the judgments *Zuckerfabrik* of 1971⁵⁹ and *Werhahn* of 1973⁶⁰, both rendered on the basis of the Opinion delivered by Advocate General Roemer. We have seen that in this field, according to the Treaty, the Court settles this question by recourse to comparative law.

Roemer notes that in France, Belgium, Italy and the Federal Republic of Germany the State's liability for the illegality of a normative act is possible, even if differences exist between these States regarding the scope of damages that can be compensated. As demonstrated above, the Advocate General sets himself as a guideline that, for the interpretation of this Article of the Treaty, the approach shouldn't be to retain only rules which exist in all the Member States, since this would have the effect of transposing into Union law only those rules which constitute the "lowest common denominator". He thus dismisses the principle of the lowest common denominator. It is clear, that in his choice of comparative law the Advocate General is guided by a legal policy inspired by the idea of progress, of hierarchy. This is what he calls "proceeding in a critical manner" taking into account the objectives of the Treaty. He thus rejects the rule of the lowest common denominator in favour of a critical approach, which he says is inspired by a reference point: adopting "the most judiciously elaborated national regulation". Of course, these standards are extremely subjective. But how does he proceed in the particular case? He begins by noting the particular nature of the Community and, in this case, its democratic deficit due to insufficient parliamentary control. He then details the general economy of the Treaty and of Union law, all of which stand in favour of the Community's liability for the illegality of a normative act, a principle that is by far not shared by all Member States.

However, in the second *Werhahn* judgment of 1973, the same Advocate General must respond to a criticism formulated by the parties concerning the relevance of his comparative law analysis. The plaintiffs criticize him for having said in his opinion that the principle of state liability under the different national

⁵⁹ CJEC, December 2nd 1971, *Aktien-Zuckerfabrik Schöppenstedt v Council of the European Communities*, n° C-5/71.

⁶⁰ CJEC, November 13th 1973, *Werhahn Hansamuehle e.a. v Council*, n° 63 to 69-72.

laws was “widespread”. The Advocate General then clarified that he only meant to say that it was recognized “in a number of states”. He plays with words by adding that “the idea of ‘broad application’ should therefore only be understood in a geographical sense. Neither the findings, nor the judgment lost sight of the fact that liability for legislative injustice is an unusual situation which only plays a very small role in practice.” In other words, Advocate General Roemer considerably watered down his comparative law analysis in the *Zuckerfabrik* opinion to arrive at the solution he wanted and his denials in the *Werhahn* opinion are likely to only have convinced him alone. But what is even more interesting about this second opinion is the question which the Advocate General asks next: should the inclusion of three new Member States in the Community change anything in respect of the rule laid down in the *Zuckerfabrik* judgment? He asks the question as follows: “Yet one can already wonder with reason whether it is really necessary to take account of the legal orders of the new Member States for the interpretation of Article 215, paragraph 2” of the Treaty on the extra-contractual liability of the Community. The analysis is narrower, but not devoid of bad faith. After having shown that the principle is not accepted in the new Member States, he confirms that he has not “however discovered decisive reasons against maintaining the current case-law”. It is thus not necessary to seek a concordance, but to carry out this “evaluative study of comparative law” described above, with the purpose of deciding which legal system offers the ‘best’ rule. In this light, he notes that the laws of the new Member States show “progress in the area of state liability”. Next, AG Roemer assumes the role of a prophet: “So we can rightly say that the three legal orders which show a largely negative attitude on the point of interest to us at the moment will continue to come closer, in this important field of legal protection, to the orders of the more progressive legal systems, if you will, of the other Member States”. Here we are witnessing an implicit classification of states, reactionary states and progressive states and the Court of Justice is meant to show the way forward.

These findings highlight a fairly clear competition between administrative law traditions for primacy, a competition in which the Court of Justice is the arbiter. Comparative law is therefore not simply an argument, to use Fabrice Melleray’s⁶¹ expression, but instrumentalised by the various institutions and the Member States in the competition between the different traditions of European administrative laws to help a certain model of public action succeed.

⁶¹ F. MELLERAY (dir.), *L’argument de droit comparé en droit administratif français*, Bruylant, 2008