The use of comparative law by the legislator in the Netherlands*

'Schlechte Rechtsvergleichung ist schlimmer als keine'

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A topic like the one taken for this report is very suitable to leave an author crossed-armed, staring at the empty space beneath the title. Even when restricted to private law, the field is so broad, that a fair amount of hesitation where to start seems justified. On the other hand, this gives an author a *freies Ermessen* in his treatment of the subject, as the odds of incurring a *culpa in eligendo* will not be very high. The words of *Kahn-Freund* come to mind: 'On the professor of comparative law the gods bestowed the most dangerous of all their gifts, the gift of freedom'. However, law still has something to do with order, and some structure in this essay might be helpful. This also gives the opportunity to deal with the intriguing questions posed by the general-reporter.
I intend to start with a general part, offering a frame-work for the treatment of the subject. Attention is given to the international discussion on the use of comparative law in law reform, which leads to the formulation of some starting points for our inquiry into law making in The Netherlands. At the same time an effort is made to obtain clarity on the different uses of comparative law, or should I say, the different forms of comparison of law, by the legislature.
The categories developed in the first chapter are being used in the second chapter, where illustrative examples of the use of comparative law in legislation are brought together. In the last chapter, finally, one finds an analysis of the subject, or rather an attempt in this direction, and further some critical remarks and conclusions. [38]

I. The framework

1. Comparative law and law reform

The use of comparative law as tool of law reform is treated by *Kahn-Freund* in his Chorley lecture, published in 1974 under the title 'On uses and misuses of comparative law'[1]. His bold description of the purposes pursued by those who use foreign law in law making, a process characterised as 'legal transplantations', was the start of an animated debate. *Kahn-Freund* distinguishes three purposes: first,

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* In: H.U. Jesserun d'Oliveira (red.), *Netherlands Reports to the XIth International Congress of Comparative Law*, Caracas 1982, IACL 1982, Deventer 1982, p. 37-67.

[1] O. Kahn-Freund, 37 *M.L.R.* 1 (1974).

the object of preparing the international unification of law; secondly the object of giving adequate legal effect to a social change shared by the foreign country with one's own country, and thirdly, the object of promoting at home a social change which the foreign law is designed either to express or to produce. The debate which followed was concentrated on the second and third categories, the first being of less interest and non-controversial. In the wording of *Marsh*, these categories can be phrased as reforms based on foreign law, which are intended to *reflect* a social change, respectively, to *effect* a social change[2].
Kahn-Freund is using the metaphore of 'transplantation' to stress the effects of this operation: like in the case of a surgical operation there is the risk of rejection by the home environment, which phenomenon is the main point of interest for the author. Through an analysis of some recent transplantations by the legislator in England and abroad (concerning divorce law and family law in general, law of procedure, and the law of labour relations), he comes to the formulation of preconditions for a successful transplantation. These have to do with the sociopolitical power structure in the recipient country. *Montesquieu*, could in his days only think of factors like the climate, and more generally geographical, social, economic and cultural elements, which could be prohibitive for the acceptation of foreign law, or in his own words, which would lead to 'un grand hazard'. *Kahn-Freund*, however, is pointing out the greatly diminishing importance of these factors, not fitting into the western world of today, and discerns on the other hand three important factors unknown to *Montesquieu*: the system of government, democratic or non-democratic, in other words the East-West split; the presidential type of government (USA) or the parliamentary type (Western-Europe) ; and finally, most important, the role of pressure-groups, 'organised interests in the making and maintenance of legal institutions'. These interests may be in the economic sense, like big business, trade unions, consumer organisations, etcetera, but also in the cultural sense, religious groups, and the like.
This last factor, the organisation of power, is often overlooked [39] in the process of legal transplanting, but the obstacles to transplanting may be formidable. The illustration given by *Kahn-Freund* is the English Industrial Relations Act of 1971, where, as he suggests, the American solution in structuring labour relations was not suited at all to be transplanted into the English situation.

This model presented by *Kahn-Freund* is, to my judgment, very useful, not for the sake of discussion only. It shows some similarity with *Hellner's* model for the purposes of the legislative process in general: first, the codification of existing law, customary or case-law; secondly, a juridical-technical reform; thirdly, a reform of policy[3]. Reference can also be made to the model for law reform used by *Merryman*, consisting of three kinds of law reform: 'tinkering', 'following', and

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[2] Norman S. Marsh, Comparative law and law reform, 41 *RabelsZ.*, 649 (1977), at p. 661 et seq., originally a paper for the Fourth European Conference of Law Faculties, *Council of Europe*, Strassbourg 1976.

[3] Jan Hellner, Rechtsreform durch Gesetsgebung im Bereich des Verbraucherschutzes, in: Festschrift *Zweigert*, 1981, 827, at 833. The first type he distinguishes, is the traditional type, the 'Übersetzung' of the 'herrschende Lehre' by codification. The second type, 'rechtstechnisch reformierende Gesetzgebung', deals with adaptation or extension of existing statutes, without the pursuit of new goals. In the last type however, the 'rechtspolitisch reformierende Gesetzgebung', new (political) goals are set, to change an unsatisfactory legal situation.

'leading'[4].
Returning to *Kahn-Freund's* model, in the debate which followed the model has been criticized, on the one hand, and has been elaborated on the other hand. The contribution of *Marsh* in this respect is very substantial. He indicates some factors derived from the praxis of law reform, which are missing in the model, that is, in the description of the socio-political power structure: the pressure of time as a practical limit to the use of comparative law, the particular needs of the reform project which do not always correspond with the legal situation elsewhere, the time limit for discussion in parliament. His only criticism of the model is, that it is hard to draw a line in practice between reforms merely reflecting social change and those which are trying to effect social change. The example *Marsh* is giving in this respect is the introduction of the *Ombudsman* in England in an Act of 1967. A strong opposition to *Kahn-Freund's* model is coming from the side of *Watson*[5]. His main argument is, that in 'legal borrowing' usually what is borrowed is not the legal rule, but the idea. Legal rules also operate on the level of ideas; the way a rule works in practice is often unknown to the transplantors anyway. More important is his objection against the influence of socio-political factors. The knowledge of the power structure in the donor country in his opinion is quite irrelevant, the home situation prevails[6]. Presumably this has to do with *Watson's* point of view that there is no natural, close relationship between law, institutions and rules on the one hand and the needs and desires and political economy of the ruling elite or of the members of the particular society on the other hand[7]. It seems that we have to do with a clash of ideas of the historian *Watson* and the lawyer-sociologist *Kahn-Freund*.
This last observation is taken from *Stein*, in his American contribution to the debate; his criticism of *Watson's* challenge to the *Kahn-Freund* model seems justi-

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[4] John Henry Merryman, *Comparative Law and Social Change*: On the Origins, Style, Decline & Revival of the Law and Development Movement, 25 *Am.J. of Comp.L.* 457, at 462 (1977). 'Tinkering' stands for accepting the existing system, keeping it operating, 'following' for adjusting the legal system to social change, 'leading' for the use of law to change society. Compare also J.H. Merryman, D.S. Clark and L.M. Friedman, *Law and Social Change in Mediterranean Europe and Latin America*, 1979, 2; Merryman, 17 *Stanford J. of Int. L.* 357, at 367 (1981). The topic of legislation and law reform is by no means a recent feature. Merryman, 1977, 462, refers to the Thibaut – Von Savigny debate about German codification in the early 19th century: codification seen as a way of achieving a number of important social objectives (Thibaut), contra codification as the finding and crystallizing of German law into statutory form (Savigny).

[5] Alan Watson, legal transplants and law reform, 92 *L.Q.R.*, 79 (1976); Comparative law and legal change, 37 *Cam.L.J.* 313 (1978). Compare also his Legal transplants, Edinbourgh 1974, 17; Society and legal change, Edinbourgh 1977. In his first mentioned article Watson points out that Montesquieu is closer to Kahn-Freund than the latter realizes; Montesquieu also stresses the importance of political factors and the knowledge of the foreign political context.

[6] 1976, 82.

[7] 1978, 315. Watson observes 'that private law in most countries of the Western world is in large measure out of step with the needs and desires of all classes of society and yet can continue unchanged for centuries'. His views on 'the transmission and longevity of rules' are based on a study of the reception of Roman law in the Western world and of the French, German and Swiss Codes in other parts of the world. For a criticism on the last part, see Stein, infra.

fied[8]. [40]
The interesting part of *Stein's* essay is his stressing of the importance of environmental factors besides the political factors, the latter ones which *Watson* was losing out of sight. Thus *Montesquieu* is put in the spotlights again. The author uses some convincing examples to illustrate the influence of psychological, cultural, and traditional elements in law reform based on comparative law, taken from the development of company law in Western Europe. Here too, it is hard to draw a line between environmental and political or power factors, as *Stein* concedes. Good examples given of the last factor are the 1966 French Law on Commercial Companies, borrowing German law, and, more recently, the 'European' Company Statute, where dissimilarities between donor and recipient countries in the attitudes of the business communities and in the status, ideology and power of the national labour unions have stalled the transplanting process[9]. The home environment in France, but in England as well, considered as *Fremdkörper* the German concept of the two-tier company-board system, consisting of a supervisory board and a management board, and the related concept of worker codetermination. The strong opposition here was clearly of a political nature; decisive factors were in *Stein's* observation: "the relative power and institutional arrangements of business and labour, of the management and the shareholders, of the bar, of the banks, and of the national and transnational bureaucracy"[10]. Nonetheless, 'environmental factors' also play a role, sometimes even a more decisive role, as *Stein* suggests: the opposition of lawyers (usually of the bar) is sometimes based "on their passionate attachment to national legal doctrine and traditions rather than on vested professional interests"[11].

I would propose to leave the discussion on the use of comparative law in law reform at this stage, and postpone my own observations until we have looked into the Dutch legislative process. So much is clear, that there is a crucial borderline between the transplantation of foreign legal institutions or rules as a consolidation of a social change realized in the home country on the one side, and as an instrument of social change desired for the home country on the other side. In both cases, however, there may be opposition against the proposed operation, though this will be sooner the case in the latter situation. The problem with the phenomenon of social change seems to be, that at first it is being proclaimed by a (strong) minority in society, and when it gradually has been realized, it is being resisted by, again, a (strong) minority. There also is the problem of how to establish the exis-

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[8] Eric Stein, Uses, Misuses and Nouses of Comparative Law, 72 *Northw. U.L.R.*, 198 (1977).

[9] The French act took a preparation of 25 years, and despite the immense amount of preparatory work, indicated with impressive figures by the author, the resulting text of 1966 was a bleak version of the original draft. This draft met more than 400 amendments in the National Assembley and 548 in the Senate.

[10] p. 208. See for this subject also: Eric Stein, Harmonization of European Company Law - National Reform and Transnational Coordination, 1971.

[11] A striking - and well-known - example the author gives, is 'the lingering devotion on the part of some Italian and French lawyers to the theoretical concept of a company as a contract as distinguished from the modern concept of a company as a legal person' which seemed to have played a greater role than any policy differences in determining the parameters for the 'one-man' company or the circumstances under which a company may be declared null and void', at p. 208.

tence of a minority or majority in relation to a certain issue; usually it is not only a matter of numbers, but essentially of the power structure and of social and administrative stratification.

[41] At this moment the presentation of the issue will suffice, with the remark that the reason for refusing the transplantation of a foreign institution or rule is of equal interest as the reasons for acceptation of the transplant. We will return to this subject later. Another issue which came out of the debate, also deserving our attention, is the relation between the 'environmental factors' and the 'socio-political factors'. Again, some remarks on my part in advance. One should take into consideration, to my judgment, that the process of law making, here and elsewhere - in the courts and in the 'streets' - is not strictly a rational process, where pro and contra are being weighed on the scales of reason and logic. Drafts are prepared, made, discussed in legal periodicals, defended and accepted or rejected in parliament, by lawyers and other human beings. Therefore, not only human shortcomings should be reckoned with but also, which is more important, psychological factors such as prejudices in favor or against certain foreign legal systems or institutions -the 'transplant bias'. *Watson* is speaking of.

Besides these psychological factors, we may also think of extremely prosaic factors which come close to coincidence, like the command of a certain language, the acquaintance with a particular influential foreign lawyer, the attendence of a particular international conference, etcetera.[12]

A closer look at the socio-political factors also reveals some lacunae which I would like to indicate aforehand.

One can think of this category in the sense of policy-oriented strategies - labour relations offer an excellent illustration. But here we find also the personal element: the party affiliation or involvement with particular political issues of a certain minister of justice or of the civil servants engaged in the drafting process, members of law commissions. Every jurisdiction will have its own illuminating examples. Sometimes a legal idea is ripe for codification, but just waiting for the right person pushing it through treadmills of legislation, using his personal prestige and influence[13]. This is of course becoming more and more exceptional in modern times, the causes of which I leave to the reader's imagination.

The point I wanted to make though, is that one should not lose out of sight the 'bread and butter' politics, which also greatly influence the law making process on a comparative basis. It is not just the time factor playing a role in the game, as a neutral entity. There may be a hurry on the side of a minister in the view of the oncoming general elections, after which his position will be at stake. He may even try to 'buy votes' with the proposal of a specific draft, and the opposition may have the same objective. The enactment of the German *Allgemeine Geschäfts-*

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[12] An example: in the Preliminary Draft Book 6 New Civil Code (Obligations) references to Italian law are made frequently, contrary to later drafts. This was a result of the special interest of F.J. de Jong, one of the draftsmen, who had a command of Italian.

[13] An illuminating example is J.C. van Oven, who as a retired professor of law at the age of 74 was called upon as minister of justice, and through his personal efforts lead the 1957 act through parliament, granting women legal capacity, a reform which Van Oven had defended vigorously in the twenties. Due to a cabinet crisis he stayed longer than foreseen and took the opportunity to get also other pieces of important legislation through.

A recent example of a draftsman whose skill and prestige make the legislative process run smoothly, is H. Schadee, who drafted Book 8 New Civil Code, on Transport.

bedingungen Gesetz (Standard Terms Act) of 1976 is an amazing story of fighting for consumer-votes [42] by all parties in the legislative process[14]. Finally there is the situation that in regard of the political division of powers, a certain minister is not willing to stick his neck out with the proposed draft concerning a politically touchy issue. The personality of the minister may be as important in this respect as is the soundness of his evaluation of the political situation.
In short, policies which we are dealing with are not necessarily of the star-reaching type but, more often as it seems, down-to-earth policies of political survival or personal interest. Whether this is a general aspect of politics I am not qualified to consider;
A factor not yet mentioned in the debate over the last years is the economic factor which proves to be very influential at times. The field of risk-allocation in specific torts gives a variety of illustrations. The struggle most legal systems are going through, moving from fault-liability to no-fault-liability, with bottlenecks as the aspects of costs, insurance, and the allocation of liability to a group in society, is to a large extent similar to the situation on the socio-political battle-grounds. It deserves special attention though, even when disregarding the recession we are going through recently and its influence on legal solutions for liability questions. In this field the power-structure in society is of crucial importance, and with it the functioning of 'organised interests', insurance companies standing in the first ranks. So far for the framework on the use of comparative law in legal reform. However, before getting into the field-work, some other uses of comparative law in the legislative process have to be mentioned and furthermore, we have to go into the method of comparative law.

2. Other uses of comparative law by the legislator

In the last paragraph we investigated the more spectacular use of comparative law in the legislative process: as a tool for law reform. This, however, is by far not the only use or the most frequent use made of comparative law at legal departments. As indicated by several sources, we have in the first place a common use of comparative law at the pre-drafting stage[15]. The function of comparative law is here, with its *'Vorrat an Lösungen'*, ('stock of solutions', *Zittelman*), is to clear the ground, to find inspiration or stimulus to realize certain aims. The newer the legal institution or concept which asks for legislation and the less experience with its practice, the greater need for a comparative investigation: compare the introduction of the *Ombudsman*, or of products liability, or security transactions.

[43] This stage may be described as the looking for ideas, and the taking-over of ideas of foreign legal systems. Some authors speak of 'happy plagiarism'; perhaps *Watson* had this in mind when proposing his thesis that no legal rules are being borrowed, but legal ideas. Another use that can be distinguished is the use of foreign law as illustration for the proposed new domestic rule, to reach a greater clar-

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[14] Information obtained from E.H. Hondius. On the relation between special acts and the legal (code) system, compare Reinhard Damm, Verbraucherrechtliche Sondergesetzgebung und Privatrechtssystem, *JZ* (1978), 173.
[15] Compare for instance, Ole Lando, The Contribution of Comparative Law to Law Reform by International Organizations, 25 *Am.J. Comp.L.* 641, at 647 (1977) ('investigation stage'); Klaus A. Ziegert, Juristische und soziologische Empirie des Rechts, 45 *RabelsZ.* 51, at 70 (1981).

ity as far as the future application of the rule or institution is concerned, given the lack of imaginative examples in the own case law or practice. We may think for instance of the introduction, in cases of unjust enrichment, of an action of restitution (*ungerechtfertigte Bereichung*) or of the modification of contract based on changed circumstances (*imprévision*). A variation on this theme is the use of foreign law as window dressing, just to impress the reader (Compare Hungary, § 313; Egypt, § 212; Ethiopia, § 164), or more specifically, to sell a controversial rule. Especially in the last case these citations are not always free of an element of fashion or trend, and one wonders whether there is a symbolic function as well. Consumer law cannot go without Swedish law, for instance. A complicating factor here, is the iceberg-aspect of the drafting process. To a great extent the preparatory work, including comparative studies, is staying below the surface of the official documents forming a bill presented to parliament and the legal world at large. As will become clear from the following, this circumstance, a source for frustration for the civil servant and the legal scientist alike, is typical for our subject and contains the danger of making scholarly observations even more academic than they already are by nature. We will return to this aspect later.

Little has been said thusfar about the nonuse of comparative law by the legislator. Leaving aside factors as sheer ignorance, tradition[16], habit, incompetence, shortage of assistance and the like, it may be the case that the domestic situation calling for legislation is unique in its social or political setting, which makes comparison of law rather senseless. The problem of squatting for instance, cannot be detached from the local, Dutch, socio-economic context - in a neighbouring country like Belgium the phenomenon even is unknown, due to the nonexistence of a housing-shortage in that country. Then it may be the case that the home-made solution is the fruit of long debates and negotiations with specialists and interest-groups, which makes a comparative excursion also superfluous. Another reason for disinterest in foreign law may be that the solution sought for has to fit into a domestic legal system which is essentially different from the systems abroad in general, or from that of a specific country with a high-standing legal reputation in the field in question. Examples may be found in the Law of Property, of Civil Procedure, Family Law [44] and in the borderline territory with Administrative Law. The specific solution reached under foreign Law, attractive as it may be in itself, defies transplantation due to excessive costs of altering the surrounding system which is supporting it. Sometimes even a landslide will be caused in the sphere of the legal profession concerning work load and income, when a radical change would be effected by new legislation. This not always needs to be prohibitive, compare the new divorce procedure in England, enacted in 1977, cutting compulsory legal assistance in court - a topic under recent discussion in The Netherlands[17]. The fear to tread, and the inclination to rush will be competing drives in a legislator's mind. Again, we encountered the economic aspects of law reform. Finally we have the case that the own solution might be considered of exceptional value, which does

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[16] Compare for the American situation where law reform is seldom preceded by systematic, conscious comparative study: Stein o.c. 210; Edward M. Wise, Legal Tradition as a Limitation on Law Reform, 26 *Am.J. Comp.L.*, 1 (1978), at 14.

[17] Compare H.U. Jessurun d'Oliveira's lecture at the meeting of the Netherlands Comparative Law Association, January 1982, published in 57 *NJB* 309 (1982). The subject was also treated by Zander in his lecture at the 1981 conference of the Deutsche Gesellschaft für Rechtsvergleichung in Frankfurt.

not invite for code-shopping. It will be increasingly clear that we have entered the soft-ware department now, as one can only go by his own guess, which has little normative value as will be known. For understandable reasons it will not be very likely that the legislator will be very explicit on this point.

3. The method of comparative law

An essential part of the framework set up for the treatment of our subject is the method of comparative law. Again, my remarks on the state of the methodology in this field must be seen as an effort to supply rough standards for the evaluation of the activities of the legislator, nothing more. The abundant literature on this topic offers the obstinate reader a definite structure which, to my surprise, has not seen a fundamental change since the beginning of the century. If one compares the leading textbooks on comparative law, by *Zweigert* and *Kötz*, and by *Constantinesco* on the one hand, and the literature of the first decades of this century on the other hand there is a striking resemblance between the standpoints concerning the character of comparative law and its methodology. Let us take the famous Paris conference of 1900, seen by many authors as the cradle of the science of comparative law. The views expressed by the great French *Saleilles* in his report for the conference, elaborated in later publications, still form the essence of comparative law[18]. The central issues are: the method of the comparative process, the role of sociology of law, and the need for a supra-national system of law. The view of *Saleilles* on these issues is basically the *communis opinio doctorum* of our era: comparative law should be based on a functional approach, directed at law in action and not at black-letter rules; this approach should make use of sociology to get an insight of the functioning of legal rules and institutions; and finally, the comparatist [45] needs a supra-national system to get some structure in his observations. The functional method to begin with, was defended by *Saleilles* with statements like the following:

> On croit en effet avoir suffisamment constaté le droit étranger lorsqu'on connaît les textes qui résument. Or, d'abord le tout, les textes ne sont rien sans l'interprétation; et, au point de vue de la critique législative, l'interprétation elle-même n'est rien sans les résultats. Ce sont ces derniers, en définitive, qu'il importe de connaître.[19]

Function is the paradigm of contemporary comparative law. In the words of *Zweigert* and *Kötz*: 'Function is the start-point and basis of all comparative law'[20]. In the German literature the acceptance of the principle of functionality is attached to the names of *Kohler*, *Rabel* and *Radbruch*[21], in the American sphere the pioneers were *Pound*, *Rheinstein* and *Yntema*[22]. As to the role of sociology of law in

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[18] For Saleilles, his work and ideas, compare Léontin-Jean Constantinesco Rechtsvergleichung I, *Einführung in die Rechtsvergleichung*, 1971, 161, 234, (French translation 1972) and recently Klaus A. Ziegert, o.c., at 61. The views of Saleilles were shared by several other French authors of that period, like Lambert, Tarde, Deslandres.

[19] Citation by Ziegert, 61.

[20] Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law, I The Framework*, Amsterdam 1977, translated from the German by Tony Weir, 36.

[21] Ibid., 23; Constantinesco I, 143, 178. Compare also the essays collected in *Rechtsvergleichung*, K. Zweigert and H.J. Puttfarken, Eds., Darmstadt 1978.

[22] Compare Constantinesco II, *Die Rechtsvergleichende Methode*, 1972, 189, 263 (also in

comparison of law the state of discussion is characterised by the argument of some authors that comparative law is not just a sub-section of sociology of law[23]. For several reasons the weight given to sociology of law nowadays seems largely overdone. First there is the circumstance that this science, after almost a century, still is a young, promising science. The great expectations, also of comparatists, have not been fulfilled; according to *Constantinesco*[24] no considerable influence by sociology of law can be found in the legal science of France and Germany, and one may add The Netherlands. In the last mentioned country it is still not possible to find enough Dutch candidates for the chairs of sociology of law at the faculties of law; in West-Germany they are starting to abolish the chairs recently. Secondly, it should be possible to distinguish questions in comparative law where sociology of law could be very helpful, and questions where the assistance is of little use. An interesting proposal is made by *Gessner*[25]; in his view a scale can be drawn with on the extreme one end dogmatic legal problems, only to be formulated with the use of legal concepts. On the extreme other side one finds problems which can only be object of a social description as a legal setting fails. In between there are the social problems put into legal categories, usually the traditional categories; then we have also problems where the legal construction is only partially covering the problem in its social context, due to shortcomings of the legal model being out of tune with society, or to the novelty of the problem itself. This scale is in the form of a continuum; *Gessner's* argument is that only for problems on the half of the scale opposite to the dogmatic problems, that is, the more socially defined problems, the application of sociology [46] of law makes sense. In the sphere of the other, more dogmatically defined half, the comparatist may with a clear conscience use the traditional legal tools[26]. The proposal makes the impression of a wise self-constraint; furthermore one may call it a functional use of sociology of law.

The general acceptance of the functional method in comparative law, with the aid of sociology of law in certain fields, leads to the conclusion that the process of merely comparing legislative rules of different countries, or I may add, the comparison of cases, institutions and the like, taken by themselves, has little to do with

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French translation, 1974); Jerome Hall, Comparative Law as Basic Research, 4 *Hastings Int. Comp., L.R.*, 189 (1980). Rheinstein's collection of essays appeared also in a German translation, *Einführung in die Rechtsvergleichung*, 1974. For the functional method, compare further Michael Bogdan, Different Economic Systems and Comparative Law, *Comp. L. Yearbook* 1978, 89, at 93, and recently Efstathios K. Banakas, Some Thoughts on the Method of Comparative Law: The Concept of Law Revisited, 67 *Archiv f.R.u. Soz.phil.* 289 (1981).

[23] Constantinesco II, 265. For the role of sociology of law compare also Bogdan, o.c. 94; J. Carbonnier, l'Apport du droit comparé à la sociologie juridique, in: *Livre du centenaire de la Société de Législation Comparée*, Paris 1969, 75; H.A. Schwarz-Liebermann von Wahlendorf, *Droit Comparé, Théorie générale et Principes*, Paris 1978, 44, and for an impressive survey, Keebet von Benda-Beckmann, Einige Bemerkungen über die Beziehung zwischen Rechtssoziologie und Rechtsvergleichung, 78 *Zeitschr. f. Vergl. Rw.* 51 (1979).

[24] o.c. 263

[25] Volkmar Gessner, Soziologische Überlegungen zu einer Theorie der angewandten Rechtsvergleichung, 36 *RabelsZ.* 229 (1972).

[26] o.c. 240. Support for this point of view is given by Zweigert, Die Soziologische Dimension der Rechtsvergleichung, 38 *RabelsZ.* 299, at 312 (1974). In the same sense also Drobnig, compare Von Benda-Beckmann, o.c. 52.

the science of comparative law. In the image of *Saleilles*, statute law is only the skeletton of the law of a country, with flesh, blood and muscles of the living law lacking. For this reason some authors make a distinction between *Rechtsvergleichung* and *Auslandsrechtkunde*, comparative law and on the other hand the study of foreign law. This observation will gain importance when we will come to the investigation of the use of comparative law by the legislature: seeing the custom of only comparing statute texts one wonders whether there is any comparative law in the strict sense involved at all. But let us not run ahead.

What has been said thusfar will obtain some more depth when we give some attention to the models developed for the process of comparison. We will also be able then to comment on the third issue mentioned, the proposal of a supranational system of rules and concepts. Here again, we find a remarkable similarity in the structure of ideas in this century. As will be known, all good things come in three. Therefore, all models of some importance consist of three stages or categories or phases. Even more strikingly, there is a consistance in the content of every separate stage. In the following survey the model of *Saleilles*, developed in 1900, is compared with the recent models of *Zweigert/Kötz* and of *Constantinesco*. The three stages are, in the terminology of *Saleilles*, 1. 'constatation', 2. 'comparaison' and 3. 'adaptation'. In the first stage the materials are being collected concerning the law of the countries under investigation. This is seen as an objective, descriptive process aimed at the gathering of basic material to give the comparatist access to foreign legal systems. *Zweigert* and *Kötz* and *Constantinesco* are on the same line. After this preliminary step the comparison proper takes place: the second stage. In this stage the differences and similarities of comparable legal figures are being studied, not by way of a simple juxtaposition. In the formulation of *Zweigert* and *Kötz*:… 'the solutions we find in the different jurisdictions must be cut loose from their conceptual context and stripped of their national doctrinal overtones so that they may be seen purely in the light of their function, as an attempt to satisfy a particular legal need. It means also that we must look to function in order [47] to determine the proper ambit of the solution under comparison…'[27]. In the vision of *Constantinesco* in this analytical stage there is the need for a common comparative scheme to investigate a legal figure stripped to its elements, and rearrange common elements according to specific characteristics. Consideration is also given to the relations with the legal system in question and to the metalegal '*Umwelt*'[28].

This all serves a preparation for the third and final stage: the critical evaluation and possible 'adaptation' in the domestic legal system, the legal transplantation we discussed earlier. As we have seen *Saleilles* stresses the focus on the real results in the practice of legal rules. His approach is also policy-oriented: comparative law serves as an instrument for the development of the law and even law reform. In his view this is the task of the legislator and the judiciary as well[29]. For this purpose the comparatist should develop types of legal institutions, extracted from the different legal systems as the legislator's ideal form: *'le type idéal tout relatif'*. This 'droit commun international' however, is in his view based on the functioning of legal rules, on the results in the solving of social problems. In later publications *Saleilles* also speaks of *'droit commun de l'humanité civilisée'* and

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[27] o.c., 37.
[28] o.c. II, 147, 280.
[29] o.c. I, 168.

shows some natural law influences in his thinking[30]. Compared to the modern view there is much in common. According to *Zweigert* and *Kötz* in the third stage one needs the building of a system of structural concepts which should be achieved inductively during the comparison of different legal systems. 'A system of comparative law will thus seem to be rather of a loose structure. The component concepts cast a wider net than those of national systems: this is because the functional approach of comparative law concentrates on the real live problem which often lurks unseen behind the concepts of the national systems'[31]. Only thus comparative studies can rise above the level of 'national comparative law' and reach the level of truly 'international comparative law' which could form the basis for a universal legal science. The authors also stress the need for critical evaluation.

This last aspect is also an important element in *Constantinesco's* vision of the third stage, which he calls the synthetic stage. On basis of the analytic scheme used in the second stage the aim of investigation now is by comparing elements in the social functioning to find the basic causes for difference and similarity. This calls for an universalistic approach[32]. In contrast with *Zweigert* and *Kötz* however, he sees no use in the development of universal concepts or types, not even in the restricted sense in *Sandrock's* approach[33]. In this context *Constantinesco* nor *Zweigert* and *Kötz* are giving much attention to the subject of comparative law as an instrument of law reform. Only the first author has some remarks on *Rechtspolitik* and what he calls the [48] orientation and control function of comparative law. He observes that in the case of legal-technical reforms a broad comparison of foreign legal systems is useful, which is not the case when the legal institution at stake has ideological, political, national or social characteristics. The foreign solution in the last field may be superior but will as a rule not be suited to fit into the domestic legal order. Political motives outweigh legal motives in this field anyway[34].

II. Comparative law and the legislative process

Before starting our survey of the use of comparative law in the practice of statute drafting I would like to make some preliminary remarks. Like there is a theoretical framework for our topic, there is a practical framework as well. Reference to this framework was made earlier, when we discussed the influence of political and personal factors, the time-factor, and the like. We have to return to this matter first, in order to see the role of comparative law in its proper perspective. What came out of the interviews I held with staff members of the legislation department of the Ministry of Justice is that, seen in whole context of the legislative process, the legal construction plays a very modest role, and so does the aid of comparison of law. As a rule the preparation of a draft is policy-oriented: what kind of a regulation do people want? Then comes the consulting stage on a national and interna-

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[30] o.c. II, 357, where besides Saleilles also Lambert and other authors accepting 'La structure conceptuelle de la science de droit comparé' are being treated by Constantinesco.

[31] o.c., 38. Reference is made in this context to the work of Drobnig, and the approach of Sandrock is rejected, at p. 40.

[32] o.c. II, 280, 294, 323, compare also 371.

[33] o.c. II, 361.

[34] o.c. II, 371.

tional basis; all kinds of organizations and pressure groups have their say and after an exchange of several drafts a compromise is reached. The results of this stage are binding for the next stage, that of the legal construction. Then there is little room left for experiments, alternatives, and the niceties of comparative law in general.

This model will often hold true: on the other hand, a common model can be construed also with a use of comparative law at the second, consulting stage. A pressure group or interest group is usually looking for examples to back up her position which one often can find in other countries. I will give some illustrations shortly. An other aspect I want to mention which is distorting the comparative scene, is the abundance of international treaties, conventions and the like, which usually are based on a comparative study and which only ask for implantation of certain rules by the national legislator. The prefab character of this all sounds attractive, at the presumption that the preparatory work done is of high quality, but a great disadvantage is the time-claim which is laid on the domestic legislation department. Little time thus is left for comparative research in preparing other, self-initiated drafts[35].

The influence of harmonization of the law being a typical aspect of the legislative process of the Western world, less [49] typical is the codification-project taking place in The Netherlands in the last decades. The New Civil Code is on its way; started in 1947, partially in force since 1970, the complete enactment is planned for 1984. The work on the new code definitely gave an impulse to comparative law. One may doubt however, whether the enormous energy needed for this gigantic project has not been spent at the cost of the quality of the substantive law in its revised form, the form and content of the new legal rules. The speeding up of the procedure in recent years in a 'point of no return'-mood, does not seem to be a guarantee for quality either. In the following I will only incidentally refer to the New Civil Code, as this is the topic of an other reporter. The point I wanted to make in this context, is the time-consuming aspect of the re-codification procedure comparable with the harmonization movement. To my judgment this is not in the interest of law reform based on fundamental comparative research.

As observed above, the evaluation of the use of comparative law in the practice of legislation is being hampered by the iceberg-aspect. As I was told it is almost a standard procedure that in preparing a draft the first step taken is a comparative survey in regard of the subject by way of orientation. It depends on the subject and on circumstantial factors whether a more substantial use of comparative law will follow. This part of the process and the motivation for the decision making stays below surface.

We now come to the survey of the legislation in private law of the last years. It will be by no means an exhaustive treatment, I tried to select illuminating examples of pieces of legislation to support the discussion in the preceding chapter. The arrangement of the materials, reports, drafts, bills and laws, created a problem. I

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[35] Compare the complaint in the Comment on the Draft Data Protection Act, 1981, Memorie van Toelichting p. 4, stating that the time-consuming international consulting went at the cost of the preparation of the Act. Compare in general on the overburdening of the national legislature: Jan Kophöller, *Internationales Einheitsrecht. Allgemeine Lehren*, 1975, 23; Hein Kötz, Gemeineuropäisches Zivilrecht, in: *Festschrift Zweigert*, 1981, 481, at 483. See for a critical review of harmonization also Paul Heinrich Neuhaus and Jan Kophöller, Rechtsvereinheitlichung – Rechtsverbesserung? 45. *RabelsZ.* 1981, 73 at 78.

decided to take one category apart, namely drafts influenced by economic factors, and treat the rest on the basis of the intensity of the use of comparative law. I hope that the outlines of the field will become clear and an overall picture can be obtained, revealing tendencies and the legal climate in general.

1. Economic factors

It is not uncommon that a change in the national private law will have repercussions in the field of international trade. Thus the market position can be at stake, due to a change in the legal situation. Much of the harmonization endeavour in Europe and elsewhere is based on this very thought and is therefore directed at ironing out legal differences between states. On a smaller, national basis one sometimes sees the same phenomenon and here too, comparative law is used as an instrument.

[50] A first example is the reform of the Pilotage Act 1957. The report of the commission preparing the reform was published in 1981 and contains a considerable amount of comparative work[36]. One of the issues was the liability of the pilot and as consequence of his status as civil servant, the state liability. The commission is stressing the need for a regulation which is in accordance with the situation in neighbouring countries and which takes the insurance aspects into account[37]. An interesting remark was made by the municipality of Rotterdam, pleading for the acceptance of the legal solution found in surrounding countries in view of competitive position of the port of Rotterdam. Laying a greater liability on the pilot or the state could lead to a raise of pilotage fees, and thus make a stay in Rotterdam less attractive.

Another example of the need of keeping up with international developments, be it for less specific reasons, is the Securities Transactions Act 1977 *(Wet Giraal Effectenverkeer)*. The international trade in securities in The Netherlands is an estimated 9% of the total trade in this sector. Many Western countries already had introduced a securities transactions system; for several reasons there was a feeling that the Dutch law could not stay behind, among others the need for connecting with foreign transactions systems in the international trade. In the report of the drafting commission attention is given to these systems in the countries of Western-Europe, and incidentally, the United States, Japan and Canada. There is a preference for French, Belgian and German law[38]. Only in exceptional cases reference is made to the experience in other countries with the new system, in a casual manner. The most radical change made in Dutch law through this reform is the acceptance of the institution of joint-ownership for this purpose, defended in the past by several authors, but thusfar rejected by the *Hoge Raad* (Supreme Court). The comparative basis given in the report for the introduction of this legal con-

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[36] Final Report of the Commission for the reform of the Pilotage Act 1957 (Loodswet), Ministry for the Maintenance of Ways and Waterways, sept. 1981. Reference is made to the law in Belgium, W.-Germany, France, England, Canada, USA, Japan, including the work of Law Commissions in this field. No citations are given in the report, however.

[37] p. 76, 88. The commission is advising further study by qualified experts as preparation for a draft. The 1957 Act contains exemptions clauses for civil liability of the pilot (with cases of gross or international negligence excepted) and for state liability, the last being severely criticised by the group of 'users', p. 74.

[38] Rapport van de commissie giraal effectenverkeer, 1974. The commission started the work in 1970, the draft appeared in 1976 and passed parliament in 1977.

struction is not very impressive[39]. In the 'evaluation' of the commission, qualified as a legal evaluation, it is pointed out that the central theme is the creation of a strong position of the security-owner. At the same time, a stronger argument seems to be of economic nature: the acceptance of the system applied by neighbouring countries which takes out thresholds in the international trade (p. 18). Section 6 of the German *Depotgesetz* stood model for the joint-ownership construction (also followed by legislation in Austria and Switzerland), which is also generally accepted by French and Belgian authors. In the following the material is put into categories on the basis of the amount of comparative law used in the legislative process, varying from zero to a substantial part. [51]

2. No or little comparative law used in drafting

An example of drafting without the use of comparative law is the new Land Registry Act *(Kadasterwet)* which will be presented to the parliament very soon. The motives for this restriction are apparently the unique character of the Dutch system for the transfer of immovables. Like the German system it operates with a land register, opposed to the conveyancing system in Anglo-American law, but the reliance on the register according to Dutch law is relative: it is a so-called 'negative system', whereas German law has a 'positive system'[40].
Another field where almost no comparative law can be found is the legislation concerning leases. This is probably due to the political issues involved, and the typical Dutch setting, with its great housing shortage. This observation also holds true for the solutions sought by the legislator for the squatting phenomenon[41].
In the Door-to-door Sales Act 1973 *(Colportagewet)* the role of comparative law has been very restricted. In the presentation of the draft and in the report on which it was based almost no reference to foreign law was made, let alone a comparison of law. The parliamentory Standing Committee on Justice brought in the comparative aspects: especially in regard of the introduced 'cooling off period' questions were asked about the regulations in other countries and the experience had with the new construction[42]. In response brief information is given by the ministers responsible for the draft, mainly in an illustrative manner: some remarks on the Belgian and Austrian system, and simply a mentioning of countries with a cooling off period accepted in the legislation for this type of sales (Canada, England, Sweden, Luxemburg, USA, Switzerland, and in preparation, Germany and France), with an indication of the length of the period. The answer to the more important question regarding the effects of foreign regulations using the cooling off period, the reply is evasive. An efficient comparison of the draft with foreign regulations is impossible, it is said; the difference in legal systems and commercial customs

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[39] p. 16 et seq. Compare for this subject F.H.J. Mijnssen, 53 *De NV* 1975, 199, at 200, where also Dutch law is discussed as it was before the proposed Draft, a matter one is missing in the report.

[40] Compare for the choice made in the New Civil Code the discussion in the House of Commons, *Parlementaire Geschiedenis NBW, Boek* 3, 107.

[41] Unoccupation Act 1981 (Leegstandswet).

[42] Voorlopig Verslag, *Tweede Kamer* 1971, 11106 nr. 6, p. 7. The cooling off period proposed was one of 6 days. General information was asked about periods in other countries and specific information on the experience in Belgium and Austria. The advisory commission preparing the draft, a SER-commission (Social-Economic Council) had taken a position against the cooling off period.

prevents the drawing of conclusions of value for the legislation in the Dutch situation[43]. A further argument is the lacking of a registration of cases where the contract was repudiated during the cooling off period, in the countries mentioned. No literature has been cited, nor any effort made to put any flesh to the bones of the black-letter rules. It appears highly improbable that no information whatsoever concerning the functioning of all these regulations could be obtained from consumer organisations, institutes, experts, and the like. It is not clear whether the parliament was convinced by this information; the period was extended from 6 to 8 days, and leaving aside many other objections the policy followed was that some legislation seemed to be better than none.

[52] Another act drafted with little or no use made of comparative law is the Protective Trust for Older Adults Act 1981 (*Wet Onderbewindstelling ter bescherming van meerderjarigen*). The basis for this act were reports brought out for the Netherlands Jurists Association in 1974, by *C.J. van Zeben* (professor of law) and *W. Heuff* (notary-public). In the annual meetings of this *Nederlandse Juristen Vereniging* a standing issue is the need for legislation concerning subjects discussed. The positive reaction of the assembly resulted in the present act. In the draft presented and the comments from the minister almost no signs of comparative law can be found. This was also the case with the NJV-reports mentioned: apart from some cursory remarks, *Van Zeben* only briefly refers to the French 1968 act *'portant la réforme du droit des incapables majeurs',* adapting the Code Civil, and to an American 'Report of the national protective services project for older adults'[44]. This time the Committee on Justice of the House of Commons proves less inquisitive: only one suggestion in this respect is made, by the socialist delegation *(PvdA),* to change section 953 *BW* along the line of section 1125-1 of the French *CC,* concerning gifts by deed or will. This suggestion, also made in 1974, was taken over by the minister, as a bye-product of the present act. It is puzzling why with the passing this piece of legislation no need was felt for an extensive comparison with solutions found in other legal systems and, more important, for a survey of the experience with the new institution which is by no means without hazards.

The draft for a Postbank Act (1977) seems to be an example of a legislative effort where the political aspects are a hindrance for an efficient use of comparative law. The motives for activity by the legislator are reasons of efficiency on the one hand, and reasons of policy on the other hand. At stake is the fusion of the *Rijkspostspaarbank* and the *Postcheque- en Girodienst* as a reaction to increasing competition from the side of the banks. Then we also have the consumer interests and anti-trust aspects. Due to concentration in the banking world of the 114 banks of 1963, 18 remained in 1975, of which only 6 are of importance, of which the 2 biggest take 65% of the balance total of the general banks. Thus the creation of a 'Postbank' could promote a healthy competition in banking affairs. Although the development described and endeavours to cope with it by the legislature are a common feature in the Western world, little use of comparative law is made by the draftors. In the comments a remark is made that the solutions found in neighbouring countries are in the same direction the present draft is following, and in an

[43] Memorie van Antwoord, 1972, 11106 nr. 7, p. 11.

[44] *Handelingen NJV* 1974, I p. 61 note 2; passim, e.g. 52, 63. In Van Zeben's proposal for legislation connection is sought with the New Civil Code, especially the regulation of 'bewind' (trust) in general. This became also the approach of the draft.

appendix a brief survey is given of the banking situation in the European Common Market - countries, Sweden and Finland[45]. No citations though, and no information about the legal constructions and their functioning. At the moment the future [53] of the draft is uncertain.
The law of civil procedure is another arid territory for comparative law. In the course of the introduction of the New Civil Code changes had to be made in the Code of Civil Procedure. A special topic was the role of the bailiff and the law of seizures. In the 1981 draft references to foreign legal systems are rare, and usually by way of illustration[46]. The influence of the consultations with professional groups, like the Association of Bailiffs, seems to have been stronger than that of comparison of law[47]. The position of the bailiff in the civil procedure according to the draft has gained considerable importance. One novelty is the introduction of the *deurwaarders-kort geding* (bailiff-injunction procedure) in the field of execution.
Started as an adaptation of the Code of Civil Procedure, what remained in the end was a complete reform of the law of seizures. The minor role of comparison of law is a striking feature.

3. A substantial use of comparative law in drafting

It is hard to draw a line between the last category and the present one, some of the legislative products discussed below would also fit into the foregoing category. The Misleading Advertising Act 1980 *(Wet Misleidende Reclame)* is based on a 1975 draft which contained hardly any references to foreign law. A broad statement mentioning the law in Belgium, Western-Germany, England, France and Sweden, and a reference to the resolution of the Council of Europe and the International Code of Advertising Practice is all that can be found[48]. The committee on Justice of the House of Commons was highly disappointed by the draft, and pointed out that the legislation in other countries is of superior quality. The Committee asked for information concerning these regulations in the countries of Western-Europe, and especially about the experience with the Belgian solution to misleading advertising by the introduction of a group action.
In the answer of the ministers a survey is given of the legislation in this field in Western-Germany, England, France, Austria, Sweden and Switzerland. No information is given on the practice in Belgium of collective action, with the motivation that the activities of consumer organisations of different countries are not comparable. Moreover, it is deemed of more importance to wait for experience with the present act[49]. One of the important changes made in the draft is the rever-

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[45] *Tweede Kamer,* 1977, 14632 nr. 3, 14; 50, 51; Compare also nr. 7 (1981). The draft was issued by the minister of Finance and the secretary of state for the Maintenance of Ways and Waterways.

[46] Introductory Act Books 3-6 New Civil Code, first part, containing the change of the Code of Civil Procedure, the Code of Judicial Organisation and the Bankruptcy Act, *Tweede Kamer* 1981, 16593, nr. 3. Compare p. 10, costs of litigation, Belgian and German law; p. 6, execution, Belgian and French law, p. 111, seizure, French, Belgian and German law; p. 142, bankruptcy, German law. Only sections of codes are referred to.

[47] Compare M. Teekens, 91, *De Gerechtsdeurwaarder,* 53. (1981). For a survey of the reform of the law of seizures, H. stein, 61 *Advocatenblad* 1981, 85; 106.

[48] *Tweede Kamer* 1975, 13611, nr. 3, 4, 9; nr. 4, 17.

[49] nr. 6, 16; nr. 8, 2. The point of Interest to the Commission was the role of the Govern-

sal of the burden of proof in the advantage of the consumer. Without further objections the bill was passed. Here we have another example the initiative for comparison of law coming from the parliament as support for law reform. The level of comparative law presented by the drafters however, [54] is not impressive at all, but proved nonetheless acceptable to the Commission of Justice in the end.

The 1981 Draft Data Protection Act is based on work done by a state-commission (1976) and resolutions of the Council of Europe OESO, *(OECD)* and EC. In the draft itself reference to foreign law is scarce, recent data acts in Western-Germany, France and Sweden are mentioned, the last one being cited several times[50]. Finally there is the 1981 Treaty of the Council of Europe which has been incorporated in the draft. This setting makes the draft a typical product of the harmonization movement. An interesting aspect though, is that the drafters have joined the general criticism against the report of the state-commission, namely the lack of information about the functioning of data registration systems in other countries (p. 3) In regard of the institution of a registration office it is said that research will be undertaken about the practice in Sweden, Western-Germany and France, to get an insight in the personal and material consequences of such an institution. Thus also a basis can be found for the financial aspects (p. 24) In the drafting tradition, this is a completely new sound. Is this the influence of the new, progressive minister of Home Affairs and secretary of state of Justice?, one wonders. In 1979 a report was presented to the House of Commons containing a study of the need for a section in the constitution dealing with the protection of the human body. This study was undertaken at the request of the House several years before. The comparison of law involved is of a general character; most attention is given to German literature and case-law concerning the comparable section 2 of the constitution in a short exposé.

In an appendix one finds a brief survey of the regulations in European constitutions and in international documents[51]. The government is opposing the introduction of a specific basic right of protection of the human body in the constitution, with arguments found in the system of the constitution and the suffiency of the section on the protection of the personal way of life, which would include that of the human body. The ministers could not convince the House and an amendment to insert a section on the protection of the human body was accepted unanimously[52]. A remarkable procedure, as the same amendment was defeated years before, in a session leading to the promised study by the government. It seems that this study, shaky as it is, only worked in favor of the amendment. The many examples of foreign legislation apparently spoke a clear language.

Traffic accident liability is the subject of a study-group formed by the minister of Justice in 1973. The reports came out in 1978 (personal injury) and 1980 (damages) and are based on an intensive use of comparative law. Attached to the reports are preliminary drafts: for personal injury one based on no-fault liability and

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ment in the Belgian legislation. Compare also nr. 9, 3, where the ministers are requested to reconsider this issue.

[50] Regels ter bescherming van de persoonlijke levenssfeer in verband met persoonsregistraties (Wet op de persoonsregistraties). *Tweede Kamer* 1981, 17207 nr. 3, 4; 6; 27; 48.

[51] *Tweede Kamer* 1979, 15463 Nota over de vraag of een bepaling over het recht op onaantastbaarheid van het menselijk lichaam in de Grondwet zou moeten worden opgenomen, nr. 2, 4; 21.

[52] *Handelingen Tweede Kamer* 1979, 5678. The amendment was from Kappeyne van de Copello c.s.

an alternative one based on a traffic [55] compensation system; for material damages the draft is based on the so-called barema-system, known in Belgium and France, which is essentially a fault-system[53]. A sharp criticism is formulated by an expert in this field, *Bloembergen,* who may be considered the Dutch *Tunc.* Besides objections against the content of the reports and the drafts, he also criticizes the quality of the comparison of law involved. As he points out, the study-group has insufficiently studied the abundant literature, legislation and case-law on this subject. The description of the no-fault systems in the USA are partially out of date and no endeavour has been made to obtain information on the functioning of these systems[54]. *Bloembergen's* general complaints about the functioning of the commission have to do with its composition, as being one-sided (civil servants and representatives of the insurance world), and with the poor staff assistance provided. Representatives of other interest groups are missing and so is the know-how of economists, social scientists, social security lawyers. Looking at the legislative activities at large, his criticism seems to be of general importance.

Of the last group of drafts I would like to discuss all drafts have to do with the New Civil Code. Usually they form an integrated part of the code in preparation, but are sent to parliament as a separate bill, to be enacted aforehand for reasons of policy, as a so-called 'front-train'. This policy is based on different motives. Sometimes international treaties or conventions ask for national legislation in a short term, but as a rule there is an urgent need felt for legislation in a specific area of the law, which cannot wait for the completion of the code, planned for the mid-eighties. There is also the motive of promoting the New Civil Code idea, a project which proved more time and energy consuming than ever expected, by presenting some tangible results of all labour. The way it turned out in practice, most subjects taken for a front-train bill were found to be more complicated than initially expected, others were highly controversial. Illustrations of this development will be given below.

The Draft Contract of Road Transportation Act *(Wet Overeenkomst Wegvervoer)* was presented to parliament in 1979 simultaneously with the identical Draft Book 8 New Civil Code, 2nd Part[55]. An increasing need for modernizing the 1950 General Transportation Conditions (modified in 1972) was felt among consumers and transportation companies alike, which explains the introduction of this front train[56]. Domestic law is brought closer to the regulations of the CMR Convention, ratified by The Netherlands in 1960. Comparison of law therefore, is scarce in the draft. Reference is made, and no more, of the Swedish Domestic Road Transportation Act of 1975[57]. This act was not mentioned in the 1976 draft of Book 8, which

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[53] Studiegroep Verkeersaansprakelijkheid over de Vergoeding van schade door dood en letsel; the reports are discussed at length by A.R. Bloembergen, 53. *NJB,* 693; (1978) 1980, 925.

[54] *NJB* 1980, 928. Bloembergen is supporting his standpoint and his criticism of the reports with an impressive use of comparative law. He also cites studies on the functioning of no-fault systems in several jurisdictions.
Compare also his remarks in 56 *NJB* 1981, 910, on the legislative procedure.

[55] *Tweede Kamer* 1979, 15963 and 15966.

[56] Compare 15963 nr. 3, 1 and also R. Cleton, 30 *Ars Aequi* 1981, 247. The proposed act corresponds with titel 13 of Book 8 CC.

[57] 15963, nr. 3, 5, in the sense that the Swedish act is not identical to the CMR Convention, as is the Dutch draft. Reference is made only to the article by Petersson and Wetter in *Lloyd's MCLQ* 1978, 567.

leaves the impression that no comparison with the recent [56] Swedish law has been made, at least not overtly. There seems to be no reason, however, to refrain from such a comparative study in 1979, although it may jeopardize the identical status of both 1979 drafts.

The reform of the law of succession is characterized by emotional and political issues and the need for information by comparison of law is amazingly small. In 1969 Book 4 of the New Civil Code was accepted by parliament; the draft dating from 1954 received a substantial opposition from the side of the notaries public. In 1969 the minister promised the introduction of a front train draft covering the issues which were of the greatest political and social interest: the position of illegitimate children and that of the remaining spouse. Reconsideration of the regulation in question and intensive consultation with representatives of the association of notaries public also intended, partially to satisfy the opposition to the law reform. Especially the last subject proved very controversial: the 1974 draft was rejected by the Committee on Justice of the House. This draft was not based on comparative research, the proposed construction, known as 'the longest-living-all' seemed unique in the legal world. As some members of the Committee stated, the deprivation of the children of their position as heir-at-law is a legal novelty. Citing the President of the *Hoge Raad* (Supreme Court) they remark that most European, American and Asean countries place children first in the parential inheritance[58]. Other members question the consequences in relation to the legal systems in surrounding countries (p. 12). General remarks made are, the draft being too theoretical in approach and too little focused on societal developments and on the legal practice (p. 7, 11). The Committee also asked for the legal-philosophical and sociological foundation of the new construction. In response to the last request the minister conducted an inquiry under the population regarding this question, the results of which were published in a letter presenting the main lines of a modified draft to the Committee[59]. The foreign law referred to in this document consists of two sentences and one footnote, describing the general international development and mentioning a Belgian draft[60].

In 1981 the minister gave up the idea of a front train and re-incorporated the subject in the Draft Introductory Act Book 4 NCC[61], presented to parliament October 1981. As a result of the consultations with practicioners and the House of Commons the construction concerning the remaining spouse had been modified into a special usufruct. Judging from the comments that appeared thusfar, like the one by *Van Mourik,* the drafters are still kicking up a lot of dust. Considering all technical questions raised by the draft the acceptance of the bill probably will take some

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For a discussion of the draft Book 8, see K.F. Haak, 108 *WPNR* 513, 529 (1977).

[58] *Tweede Kamer* 1974, 12863 nr. 4, 6. Compare for the history of the draft also M.J.A. Van Mourik, 57 *NJB* 1 (1982).

[59] 12 863, nr. 5 (1978). Statistical information is given also. In the new proposal the position of the remaining spouse is in the form of a special usufruct, also known in a Belgian draft. The Association of Notaries Public also held an inquiry under their members in 1974.

[60] At p. 9. In the Belgian draft the usufructuary's authority to act is depending on permission of the judge, contrary to the Dutch draft.

[61] 17141, appearing as part 3 of the Introductory Acts Books 3-6 NCC. Compare for a survey of the reform in inheritance law according to Book 4: Commissie Erfrecht, 112 *WPNR* 5590-93, (1981); Van Mourik, o.c. The regulation of the position of illegitimate children has been presented earlier, under nr. 16585, as a consequence of the Marckx-case of the European Court (1979).

time.

[57] Standard form contracts have been a field of interest of the legislator for a considerable time. In the 1961 preliminary draft Book 6 NCC two sections dealt with unfair contract terms. In 1975 the government announced a front-train draft for this subject and asked advice from the SER, the Social Economic Council, which Commission for Consumer Matters (CCA) presented a report in 1978. In the meantime a combination was sought with the preliminary draft on consumer sales, which appeared in 1978. Here again the idea of putting up a front train vanished after confrontation with the reality of the drafting process. The final draft on the present subject was presented to parliament in 1981 as a part of Book 6 NCC[62]. The consultations of interest groups took place through the work of this CCA-commission where consumer organisations and the business world were represented. Due to the conflicting interests a description the work of the commission as 'a battle of forms' is not unrealistic. The final report, after half a dozen drafts, was clearly a compromise. Very influential were the Swedish consumer acts and the German *AGB-Gesetz*, from which ideas about a 'black list' and a 'grey list' were borrowed. It took three years before the legal department of the ministry of Justice completed a draft, which is an indication of the political implications of the draft.

In the draft the use of comparative law is very moderate indeed. A brief survey of less than half a page is given where consumer legislation from Western-Germany, Austria, France, England, and the Council of Europe is only mentioned, with reference for the contents to the literature[63]. With it goes a general remark that the present draft has been influenced by these acts in many respects, but that, as a rule, they are a valuable source of inspiration but seldom offer ready-made solutions. Very few citations of foreign regulations are given, in a cursory manner, and furthermore some general observations.[64] The reason for this unimpressive use of comparative law could be, in my opinion, that the political choices made outweigh the importance of comparative study. Nonetheless, for a proper evaluation of the proposed legislation and an insight in its functioning the instrument of comparative law is indispensable. In 1981 another front-train draft was brought on a regular schedule, the Consumer Sales Act already mentioned. The preliminary draft of 1978 was incorporated in Book 7 NCC on Sales[65], which was published in 1972 as a preliminary draft. This book is to a great extent based on a 1970 Benelux Convention on Sale and Exchange and the ULIS *(LUVI)* regulations. The legislative developments concerning consumer sales have much in common with those in the field of standard forms, which just have been described. Here the conflict of interests was even stronger though, and no compromise between representatives of consumer organisations and of business organisations could be reached in the

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[62] *Tueede Kamer* 1981, 16983, Introductory Act Books 3-6 New Civil Code, 2nd Part, Standard Forms (Algemene Voorwaarden).

[63] Nr. 3, 13; general reference is made to the Israelean, and Swedish acts, a Luxembourg and a Belgian draft and the Italian CC.

[64] Compare p. 12, 28, 30, 66. A preliminary draft on this subject remained unpublished but has been discussed with interest-groups and experts. This pre-draft contains more references to foreign law than the final draft. The AGB-Gesetz is cited most and further one finds European legislation mentioned cursorily. No reference is made to Swedish law; a staff member of the department however, spent some time in Sweden to study consumer law there, as I was informed.

[65] Draft of an Act Establishing and Introducing Title 7.1 (Sale and Exchange) of the New Civil Code, *Tueede Kamer* 1981, 16979.

CCA-commission of the SER. The last [58] group opposed the legislation of consumer sales; the advise came out in 1980.
In the 1981 draft of Book 7, containing the regulation of consumer sales, the use of comparative law, again, is very restricted[66]. At several places references are made to the CCA-advise, e.g. in defending the compulsory character of some crucial sections, a central issue in the opposition from the representatives of business organisations, being the minority in the CCA-commission[67]. In the report of this commission support for a compulsory regulation is found in consumer acts from England, Sweden, USA and Denmark.

III. Contours of the use of comparative law by the Dutch legislator. Conclusions.

For an insight in the use of comparative law in the legislative process the materials of the previous chapter are very instructive, at least for the present author. Although a profound analysis would be justified, at this stage of the report I can only give some brief observations, as an aid for the interested reader to draw his own conclusions. A general impression is that the discussion in Chapter I on uses, nouses and misuses of comparative law finds ample illustration in the materials gathered. The way economic factors are of influence (e.g. Pilotage Act), the influence of political factors (e.g. Postbank Act) or of the uniqueness of the domestic solution for the legal need (e.g. the bill on the law of succession) and its consequences for the use of comparison of law, came out clearly. The role of interest or pressure groups varying from consumers to bailiffs, also came to the fore. The influence of treaties and conventions was considerable too, and with it the negative aspects of the international harmonization circuit: parliament is left out, they concur often with national legislation, they come in high sequence, their text is frequently complicated, their basis usually compromises, which are leading to rigidity. In this sense recently, *Neuhaus* and *Kropholler*[68]. In practice it gives the ministry responsible for a bill on a subject dealt with in a treaty or convention an excuse for refraining from a motivation for legislation and from comparative research.
One of the outcomes of the present study and a surprise to this author, is the active role of the House of Commons, especially the Standing Committee on Justice, in the use of comparative law. As we have seen, in many cases the Committee took the initiative for (additional) comparative research, which the ministry carried out consequently (compare e.g. the bills on Misleading Advertising, Door-to-door Sales, Law of Succession).
As to the quantity of comparative law research used in the legislative process in civil law, the conclusion must be that [59] it is disappointingly small. But the more important question, in scientific work too, is the one concerning quality. We now come to an evaluation of the method of comparative law applied by the legislator and his purposes for using this instrument, the subject of Chapter I. It seems appropriate at this place to cite a thought-provoking statement of *Kahn-Freund*. At the end of his 1974 article we met earlier in this report, he gives a summing up of

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[66] nr. 3, e.g. 12, 16.
[67] 14, 6.
[68] o.c., 78. Compare also Kötz, o.c. 483: Lando, o.c. 651. Compare also, on the compromise character of the ULIS (LUVI) convention, the draft Consumer Sales Act, o.c. 3.

his treatise of the comparative method:

> "All I have wanted to suggest is that its use requires a knowledge not only of the foreign law, but also of its social, and above all its political, context. The use of comparative law for practical purposes becomes an abuse only if it is informed by a legalistic spirit which ignores this context of the law"[69].

To my judgment, most civil law legislation passed in The Netherlands would fit into this last category of *Kahn-Freund*. The foreign law taken in comparison in ministerial drafts is almost without exception 'black-letter law', the comparison is one of code-texts. A happy exception is the bill on Data Protection and also the initiative of the House in the case of the bill on Law of Succession should be mentioned. In general the functioning of rules of foreign law and legal institutions seems to be of no interest to the draftsmen. Thus, the functional method of comparative law which finds its starting-point at the Paris conference in 1900 and became the leading doctrine after some decennia and is firmly rooted now, in the practice of legislative drafting seems to be of academic value only. The comparative law study in the preparation of drafts, in this observer's impression, as a rule is not going beyond the first of the three stages discussed above, the stage of 'constatation' (*Saleillea*). An indication for this is the statement made by several draftsmen about the function of foreign law at the start, the period of orientation, as a source of inspiration. The conclusion may be that according to the international scientific standards we have to do with *'Auslandsrechtkunde'* and not with 'Comparative Law'. In this context the influence of international legal harmonization on national legislation is also of importance. As *Lando* states, uniform laws are often drafted at conferences were academics predominate, who seem to have a professional preference for codified law[70]. His observations regarding the 1964 ULIS (*LUVI*) law is, in my opinion, of general importance.

> "The basis was a careful analysis of how the sales laws of the world's leading commercial countries were framed. The influence of the existing sales statutes, many of which were of venerable age, was considerable. [60]
> No systematic effort was made to base the draft laws on the experiences of the business communities. We have now, since 1972, seen how numerous enterprises in the countries which have adopted the Uniform Laws have taken advantage of their option to contract out of the Uniform Laws".

Of course there is much which can be said in defense of the hard-working drafting departments at the ministries, as a matter of fact many arguments for the actual process in drafting have been discussed yet, like the time-pressure, under-staffing, political aims, et cetera. An argument not yet brought forward which also can be heard at the ministry of Justice, is that the draftors find little support for comparative study in Dutch literature. This observation seems correct, comparative law as a branch of legal science is still in its infancy in The Netherlands[71]. But it was by

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[69] o.c., 27.

[70] o.c. 651. In contrast to the 'professorial' way the Hague Uniform Laws were drafted Lando points at the empirical way of drafting in the case of the American Uniform Commercial Code, using extensive studies in the field of business life in the various commercial centers of the US.

[71] For a survey, compare E.H. Hondius, Teaching and research in comparative law in the

no means my intention to be an inquisitor, this report must be seen as an investigation by an interested consumer of legislation.

However, legislation is a matter to be taken seriously. It effects by its nature many people and in practice it proves hard to change and therefore it may effect generations to come. Consequently, demands relating to the quality of legislative products are justified, and excuses should be dealt with healthy suspicion if the products are of poor quality or if the treatment in parliament is ill-prepared. Bad laws make hard cases, one case being the effects of dead-letter rules, or the loss of confidence in the abilities of the legislator.

Parliament should get real information about the expected functioning of proposed regulations and not just a survey of countries where the same rules were sent through the House. Only thus the members of parliament are in the opportunity to weigh pro and contra of the law presented on a more realistic basis, namely in its effects in society. Their role should not be restricted to the scrutiny of texts which have been gone already through many hands (even foreign hands) before. For matters of a more dogmatic nature the scale developed by *Gessner*[72] indicates a traditional use of foreign law which is an attractive suggestion.

Of course, the field of study in a functional approach is not without difficulty, and one should also be realistic in the demands formulated[73]. But the current level of study is clearly insufficient in this respect. There is no reason for leaving foreign comparative studies unnoticed (compare e.g. the Traffic Accident Liability Reports). It also seems a too readily made excuse for the omission of comparison of law to point at the 'environmental differences' of countries (compare e.g. the Door-to-Door Sales Bill and the [61] Misleading Advertising Bill). If one is to characterize the 'style' of civil law drafting in the Netherlands the description would be traditional and rather conservative. The cause is basically the composition of commissions, study-groups et cetera preparing drafts, in which no economists, statisticians, sociologists and others take part. We met the criticism of *Bloembergen* in regard of the law of traffic accident liability, in the same direction is a general observation by *Lando*[74]. In the words of *Lord Wilberforce*, law reform is a too serious matter to be entrusted to the lawyers. Or, as put by *Farrar*: 'For too long law reform has been carried out on the basis of *a priori* assertions or intuitive assessments of social facts and social consequences by lawyers'[75]. The point I want to stress is that the drafters cannot refrain from motivating their pro-

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Netherlands, 24 *Neth. Int. L. Rev.* 560 (1977) At the moment not every faculty of law has a full chair in (civil) Comparative Law; two chairs are presently occupied by foreign scholars.

[72] See supra.

[73] For a sympathetic but rather utopian proposal for multi-disciplinary methodology and research, compare A. Esin Örücü, Symbiosis between Comparative Law and Theory of Law - Limitations of legal Methodology, Inaugural lecture Erasmus University Rotterdam 1982, *Meded. Juridisch Instituut nr. 16*, 1982.

[74] o.c., 651.

[75] J.H. Farrar, *Law Reform and the Law Commission*, London 1974, 78. For a general criticism in this sense in regard of the New Civil Code, see my article in 52 *NJB* 342, at 345 (1977).

For a stimulating example of broadening the process of consultation, compare the practice of the Australian Law Reform Commission which goes much further than the publication of working Papers like the English Law Commission does. Compare Michael Zander, *The Law-Making Process*, London 1980, 301.

posal for law reform (or any regulation) in the light of its prospective functioning. Comparative law, the *'Kritikweckend'* science in the word of *Zittelman*, is an indispensable instrument here.

Finally a few words on the much debated question on the use of comparative law as 'tinkering', 'following' or 'leading', which we came across in Chapter I. The remark by *Marsh* about the difficulty in practice to draw a line between reflecting and effecting social change by law reform with the aid of comparative law is, looking at the results of our study, justified. Especially where the reform proposed is controversial it is hard to say whether the legislator is following a social change or leading. Compare the introduction of the black list in consumer law, import from Germany and Sweden. The qualification of the role of the legislator is also hindered by the lack of information and motivation in the drafts. An improvement would unquestionably be the accessibility of all *travaux préparatoires*, as is the case in Sweden[76]. In the Netherlands too, we have a *'Gesetzgebung durch Vorarbeiten'*[77]. If for instance social research is used the results should also be open to scientific evaluation.

Coming to a conclusion, I would suggest that reform of the legislative process as far as the use of comparative law is concerned, is even more important than law reform in itself. It is only realistic not to increase the workload of the hard-pressed civil servants at the drafting departments of the ministries. Realization of the proposed reform can only be obtained with the use of other means. I would like to make a few suggestions.
A most obvious solution would be the extension of the staff of these drafting departments. At the Ministry of Justice this section consists of some 30 lawyers, of which 7 are occupied with the New Civil Code and 16 with the other civil legislation[78].
[62] This is not a popular thought though, in a time of economy, and moreover this is a political issue. A cheaper solution and perhaps easier to realize, is the search for cooperation in comparative research at the universities. The basis could be contract-research, whether or not on a commercial basis, or the hiring or borrowing of assistants, accepting students[79] as research assistants, and the like. There are no Max Planck-Institutes in The Netherlands, so no ready-made structures are available[80]. It should be worth while the effort. In Sweden judges are

[76] Compare Hellner, o.c. 647; William Dale, *Legislative Drafting: A New Approach*, London 1977, 101. This is based on the Swedish Administrative Publicity Act. Under the Dutch Act (Wet Openbaarheid Bestuur) the publicity of these materials in principle is excluded, in view of policy questions.
[77] An example of the publishing of preparatory work is the report by J.R.A. Verwoerd, *On the Reform of the Judicial Organization in Belgium*, 1978, a literature study done at the request of the State Commission for Reform of the Judicial Organization.
[78] In the Dutch system most ministries have their own drafting department; for a survey compare J.M. Polak, Preadvies NJV 1979, *Hand. NJV 1*, 1979, 20. For the English system, using one central department, the Office of Parliamentary Counsel, serving all ministries, compare Zander, o.c. 1; Dale o.c. 331 (with also a description of the French, German and Swedish systems).
[79] In the consumer legislation a draft on consumer sales was prepared by Tilburg students which was discussed in the bill.
[80] The Inter-Universitary Asser Institute is dealing with international law, private interna-

working during some time in their career at the Ministry of Justice to assist in drafting. Another solution, perhaps besides the previous one, would be the staffing of the Standing Committee on Justice of the House of Commons (and of the Senate too, perhaps), along the same lines drawn above. The Committee deserves it, considering her role in the process and moreover some independence in relation to the ministry in question seems to be of importance. The practice in regard of the New Civil Code where the Committee obtained a special secretary for assistance is not a happy example. This secretary is furnished by the department to further a smooth procedure, which in practice means that he functions as *'bouche de la loi'*, a loi *in statu nascendi*. Here too, clear structures are not yet available but there is room for inventive action. What could be a more striking thought when dealing with comparative law?

tional law and European law. Compare also Hondius' survey, o.c., 568.