Epistemology and Methodology of Comparative Law

Edited by

Mark Van Hoecke

Katholieke Universiteit Brussel

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Deep Level Comparative Law

MARK VAN HOECKE

IN THIS CHAPTER some of the main epistemological and methodological problems of comparative law will be discussed. This will mainly be done on the basis of a concrete example, notably my ongoing research on the interpretation of contracts in Europe, focusing on English, French and German law. From this analysis, conclusions will be drawn as to a methodology of comparative law at a deeper level than the usual one of rules and cases.

1. THE EPISTEMOLOGICAL PROBLEMS

What kind of knowledge do we need for carrying out comparative research? How, and to what extent, may we find it? What kind of new insights may follow from such a research? These are the basic epistemological questions of comparative law.

Worded more directly, we are faced with the question of what we are comparing, and what we should take into account when doing so. The answer to the first part (what are we comparing?) seems obvious: it is different legal systems, or parts of them, that we compare. But, what is a 'legal system'? What determines 'law'? In practice, such questions have hardly been raised in the history of comparative law, let alone answered. More theoretical insights into the phenomenon of law are largely, if not totally, lacking. To such an extent that it created quite a lot of confusion on what comparative law is about: Is it a discipline in its own right or just a methodology? Is it a description of foreign legal systems? Is it the search for the common core of all legal systems (within a certain region, such as the EU, or world-wide), looking for some kind of empirical 'natural law'?

Let us take the most modest of these alternatives: a discipline aiming at describing foreign legal systems. For the time being, we leave open the answer to the question whether this can suffice as such or whether this is only a first step, taken in view of finding interesting examples for improving

one's own legal system, or for finding out what we have in common across two or more legal systems, or for harmonising law, etc.

Describing the Law

Describing law is most familiar to legal scholars. After all, this is also what they mainly pursue outside any context of comparative research. So, we have to start with the question what is 'scholarly legal research' about within one and the same legal system? The short answer is: describing and systematising the law.[1] Describing means identifying valid legal sources and determining the content of the rules they contain. Systematising means the integration of all these sources and rules into one coherent whole, through interpretation and theory building. It is mainly the latter which guarantees the scholarly dimension of legal research. However, as a rule, collaborating to the systematisation of foreign law will be too ambitious for the comparatist, who will already be happy if he succeeds in correctly describing the foreign law. Generally speaking, such a description will not be based on autonomous analysis of all available sources either. It will mainly, if not exclusively, draw on scholarly writing of foreign colleagues who describe their own law. This is a useful work for offering relevant information to legal practitioners and others interested in that foreign law. However, if it would be pure descriptive information, it does not only entail problems as to the scholarly status of such work, but we could also question its practical relevance, in all cases where domestic legal scholars have made this information available in the same language. It does, for instance, not make much sense for a French scholar to publish a book or article, in French, which would purely describe Belgian administrative law, as there are sufficient publications available, written by Belgian lawyers, who, as a rule, are in a much better position to do so. But in most cases, one will rightly reply, (information on) foreign law is, with few exceptions, only available in a foreign language. Does this mean that comparative research would be nothing else but translation work? In practice, comparatists sometimes indeed limit themselves to translating selectively what others have written about their domestic law. This work is useful for those interested in that foreign law, but who do not master that foreign language (sufficiently), but, yet again, this is not scholarly work (however difficult it may be to translate adequately) and it does not create a 'discipline' nor a 'methodology' in its own right.

So, comparative law must be about more than just describing, and mostly translating, foreign law. Of course, the comparatist will reply, we

[1] See on this point more extensively: M Van Hoecke & M Warrington, 'Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law', *International and Comparative Law Quaterly*, 1998, 47 495–536, at 523–28.

'compare law'. This answer now raises another question: what are we *concretely* comparing?

Comparing Rules

Do we compare legal *rules*? A lot of comparative research has indeed focused on rules, but rules cannot be (fully) understood isolated from their legal and non-legal context.[2] Lawyers educated in a legal system have largely acquired this knowledge of the legal context through their legal education and their familiarity with the national, regional and local (non-legal) cultures, through their general education and their socialisation in the relevant communities. Unconsciously, but very effectively, this knowledge and sharing of values and world-views plays a role in the way law is looked at, interpreted and handled. Foreign lawyers largely lack this framework. This is an obvious problem for simply understanding the law of remote legal cultures, but also a more hidden problem for wrongly understanding apparently identical or comparable rules, which have, in practice, because of their context, a completely different scope.

This leads us to the next question: what is the *relevant context* for fully and correctly understanding (foreign) rules? To what extent do we have to consider the environing legal rules, procedural rules and court structures, the constitutional context, legal history, legal culture, the social and economic context, etc? Here, the comparative lawyer is lost. The relevance of each of those contexts is seldom explicitly raised, let alone discussed, in domestic research. According to the topic, different contexts may have diverging relevance. Occasionally some more theoretical legal research, including legal history, legal sociology and the like, may be available, but some overall theoretical framework is lacking.

[2] As has regularly been pointed out by some of the better comparatists. Eg: '…, for, as with all other legal concepts, a particular legal system's use of "contract" can be understood fully only within the wider conceptual, institutional and procedural framework of the system which it inhabits.' (S Whittaker, 'Unfair contract terms, public services and the construction of a European conception of contract', *Law Quarterly Review,* 2000, 116 95–120, at 95). 'Le droit comparé naît du travail de reconstitution des contextes.' (O Pfersmann, 'Le droit comparé comme interprétation et comme théorie du droit', *Revue Internationale de droit comparé* 2001, 275–88, at 285). 'It is also increasingly recognised today that the comparatist must be an observer of social reality and that comparative law has much to gain from an interdisciplinary approach.' (H Kötz, 'Comparative Law in Germany Today', *Revue internationale de droit comparé*, 1999, 753–68, at 756). However, due to a lack of methodology it is easier to make such general statements than to apply them in concrete research, as noted by Luke Nottage, L Nottage, *Convergence, Divergence, and the Middle Way in Unifying or Harmonising Private Law*, (EUI Working Paper LAW 2001/01, European University Institute, Florence) both as regards Kötz ('Unfortunately, Kötz has never adequately met this challenge', at p 20) and as regards Whittaker and Zimmermann's book on Good Faith ('Unfortunately, scant attention appears to have been paid to [that account be taken of any institutional, procedural or even cultural features that might be pertinent to a proper understanding of the approach involved] by the national reporters, none known for their expertise in procedural law—let alone legal sociology', at p 10).

One way out of this problem is to bring together lawyers from different countries and asking them to describe some element the promoters of the comparative research wish to compare. However, this does not always make all those involved in this research aware of hidden differences. Only through an intensive dialogue is it possible to retrieve all contextual differences and commonalities and to determine their relevance for the rules that are compared. When we would dispose of a sufficient number of outcomes of such empirical research, some theory of 'relevant context' could be worked out. Unfortunately, up to now, such empirical research is still almost completely lacking.

Comparing Cases

Another apparent way out, which became very popular in the last decade, is the move from 'rules' to 'cases'. If rules, because of their differing contexts, may mean different things when compared to what their wording may suggest, a way of finding out their exact scope is looking at their application in court decisions.

A first comment is that such a shift tends to offer a rather different picture of a legal system, as it does not describe the general rules of a legal system, but its pathology, namely the conflicts about the (application and interpretation of the) rules, or rather part of these conflicts, those which are not solved outside courts. Moreover, mostly only *published* judicial decisions are sufficiently accessible and can be taken into account. This raises the question to what extent court decisions offer a correct picture of a 'legal system'. The conclusion that legislation does not either is not a sufficient answer. Court practices may seem to be somewhat less 'law in the books' but they do not offer a full picture of the 'law in action': alternative dispute resolution, social or economic practices that never come to a court, will, by definition not appear from court decisions. Moreover, comparative analysis of cases seems to focus relatively more on 'hard cases' for which the solution is not beyond discussion in the legal system itself.[3] Also, comparison is often limited to supreme court or higher court decisions.[4] Here again, one may ask whether focusing on hard cases is an adequate way of showing

[3] This, for instance, is admitted by Simon Whittaker and Reinhard Zimmermann as to their research on *Good Faith in European Contract Law* (Cambridge University Press, 2000). In the concluding chapter to this book 'Coming to terms with good faith' they point to the fact that 'In all twenty of the thirty cases led either to the same result in all the systems or the same result in all the systems bar one or two' and they, rather enthusiastically, add 'This degree of harmony is particularly remarkable in view of the fact that many of the situations included in the study are recognisably "hard cases".' (p 653).

[4] With all its qualities this seems to be a major shortcoming of the comparative research on statutory interpretation conducted by Neil MacCormick and Bob Summers (DN MacCormick, & RS Summers, *Interpreting Statutes. A Comparative Study*, (Aldershot, Dartmouth, 1991)).

commonalities and differences *between legal systems*. They rather point to divergences *within* legal systems. Supreme courts, of course, have a strong authoritative power in their legal system, but they do not always reflect the legal reality of the lower courts. But let us, for the purpose of this paper, leave aside this possible sociological criticism, and accept this 'cases-approach' as having, in principle, a value in its own right, even if it would probably not suffice for fully comparing legal systems and if the actual choice of cases may be criticised to the extent that it would claim to offer a representative picture of the concerned legal field.

Focusing on court decisions unquestionably has the advantage of showing how rules work in practice, how lawyers educated and working in that legal system look at the rules, interpret and handle them.

The 'Objectivity' of Facts

However, another epistemological problem has to be raised here. 'Case-comparatists' seem to approach (judicial) facts as neutral data that can be compared, without any restriction, across all legal systems. They do not seem to realise that 'facts' are socially, and in our context most notably legally, 'constructed'. The facts which create a 'crime', an 'accident', a 'contract' are not just external elements which as a 'natural law' would make it a 'crime', 'accident' or 'contract'. 'Facts' are looked at through legal glasses. Destroying a car may be considered a 'crime' if a thief has stolen this car for a hold-up and afterwards burned it to cover up his tracks, but it is an 'accident' if by a failure of the brakes a truck hits that car. It may even be a 'contract' if the owner brought his old car to a specialised company, which compresses used cars in order to reduce their volume. So these 'facts' appear to be created by property rights, intentions, etc. They are not just 'there'.

Sexual intercourse may be considered a positive fact and even a duty (marriage) or a negative situation and even a crime (rape). What in one country, or period of history, may be considered as the quite normal use of a right that results from marriage, may in another place or time be punished as 'rape' within a marriage. Offering sexual services in exchange of money may be called 'prostitution', but this will mostly not be called so when this is done in the frame of a marriage (even if the 'reality' may be the same).

Let's assume that you want to compare the 'administrative courts' in the countries of the European Union. What counts as 'administrative law' and what is to be considered a 'court', however, cannot be determined independently from the valid law of those legal systems. It involves conceptions of the public/private law divide, of the 'administration' and its task, of what makes a decision-taking body a 'court'. Comparing the same 'reality' will be difficult, as the diverging law of the compared legal systems made these

'realities' different. One could try to work out relevant criteria that are, at least partly, 'system-independent' and act as a common denominator, such as, for identifying 'courts': the independence of the 'court', the status of the 'judges' (professionals or not), the specialisation of the body (full-time court or only a (small) part of a broader task, which is non-judicial), the procedures to be followed, the (possibility of) appeal procedure(s), the integration into a larger court structure, access to the court, the degree of protection of the citizen, etc. Whatever one takes as criteria, it will be a choice that is not a pure description of 'facts' but is strongly determined by a (implicitly or explicitly) chosen theory and influenced by criteria already chosen by one or more of the legal systems one wants to investigate. This is not just so with law, in positive sciences too it is now generally accepted that an informative, scientific description of reality is only possible when embedded in, and guided by, theoretical constructs.[5] In law, 'facts' are, moreover, partly determined by the legal rules themselves and not only by the theoretical framework of legal science. Comparing the 'notary' function will, for that reason, be different when one limits oneself to continental EU countries having a rather similar profession of a 'notary public', in contradistinction with a comparison that also would take into account the Anglo-American law, where no comparable profession exists. Here, it are the rules of the respective legal systems which already have created different 'legal realities', independently (although often influenced by) the conceptual frameworks of legal science.

But, if 'facts' are already partly determined by the rules of the applicable legal system,[6] they cannot be considered to be a neutral basis for comparison.

Anyway, it will be difficult, if at all possible, to find cases from different countries with *identical* facts. To take some of the leading cases of the common law: on the continent there are no reported cases on a snail in a bottle of ginger causing a psychological shock to the consumer discovering it,[7] on

[5] 'The entire history of scientific endeavor appears to show that in our world comprehensive, simple and dependable principles for the explanation and prediction of observable phenomena cannot be obtained by merely summarising and inductively generalising observational findings. (…) Guided by his knowledge of observational data, the scientist has to invent a set of concepts—theoretical constructs, which lack immediate experimental significance, a system of hypotheses couched in terms of them, and an interpretation for the resulting theoretical network' Carl G Hempel, *Fundamentals of Concept Formation in Empirical Science* (Chicago, The University of Chicago Press, 1952), 2.

[6] Sometimes this has even explicitly been stated by legal practitioners, such as Master of the Rolls Jessel, in 1876: 'It is not the less a fact because that fact involves some knowledge or relation of law. There is hardly any fact which does not involve it. If you state that a man is in possession of an estate of £10,000 a year, the notion of possession is a legal notion, and involves knowledge of law; nor can any other fact in connection with property be stated which does not involve such knowledge of law' (*Eaglesfield v Marquis of Londonderry*, 4 Ch D, 1876, 693, at 703).

[7] House of Lords, *Donoghue v Stevenson*, 1932, All ER 1–31.

an advertisement for 'smoke balls' promising a reward to anyone who caught influenza after using the smoke ball inhalant as per directions for two weeks,[8] on somebody buying oats and afterwards complains that he received new ones, alleging that only old ones could be of any use to him,[9] let alone on 'Spice Girls' having signed an agreement to participate in filming a commercial for scooters, but hiding that one of the members had meanwhile decided to leave the group.[10]

Actually, lawyers are only interested in facts that are relevant to the law. So, for instance, the colour of the smoke balls or the day of the week on which the oats were bought is never mentioned, as it is irrelevant to law. Moreover, in order to make the case interesting for legal doctrine, these facts have to challenge the current rules, their scope, interpretation and relationship with other rules, in other words the doctrinal theories. For this reason, most cases related to the requirement of 'consideration' in English contract law, are completely irrelevant for comparing them with Continental legal systems, as none of them uses a concept which would come close to 'consideration'. As a result there cannot be comparable cases on the Continent. This means that, in order to compare cases, one firstly has to select them on the basis of previously conceived types or categories of facts that are relevant to all of the compared legal systems.

The 'practical' argument sometimes used in favour of comparative case studies is the conclusion 'that although the legal concepts and legal rules used in the compared legal systems may be rather different, the practical solutions are often by and large the same'.[11] This conclusion may be true in practice, but questions the scholarly relevance of such an approach even more. It is already interesting to note that comparatists tend to emphasise this 'positive' side of the analysed commonalities and differences. One may also focus on cases where the practical result is completely different, notwithstanding identical legislative rules. If this is so, then it means that legal rules do not, at least not decisively, determine judicial decisions and, hence, 'what the law is'. But, what then makes the law? The personal opinion of the judges? Legal tradition? The prevailing legal culture? The currently prevailing values and world-views in society? Anyway, nothing of all this is ever studied in comparative case research. How can we say that legal systems are different or comparable on the basis of decisions, if just one or three or five (or even somewhat more) judges happen to have delivered the only, or most recent, decision on these 'facts', or happen to have the authoritative power of a supreme court?

[8] Court of Appeal, *Carlill v Carbolic Smoke Ball*, *Law Reports* 1893, QB 256–75.
[9] *Smith v Hughes, 6,* 1871, QB 597.
[10] Court of Appeal, Chancery Division, *Spice Girls Ltd v Aprilia World Service*, (2000).
[11] See eg: K Zweigert, 'Des solutions identiques par des voies différentes. Quelques observations en matière de droit comparé', *Revue internationale de droit comparé* 1966, 5–18, at p 5.

Anyway, all this points to the necessity of having a better sight on what 'makes' the law, on what constitutes a legal system, so that we at least *know* which elements of the law and of its environment we have to study, when carrying out comparative research, and which respective weight should be given to each of them.

Epistemological Optimism and Epistemological Pessimism

Most of comparative research has shown a remarkable *naive epistemological optimism*, pursuing comparisons as if comparing legal systems would not entail specific epistemological problems, or as if the implementation of such studies could be isolated from these more theoretical problems that could be left to legal theorists. On the basis of the history of legal practice, legal science and legal theory there are, moreover, good reasons to believe that the practicioner (and scholar) of (positive) law does not need theory to be successful. What proved possible for domestic law, it is assumed, should be possible in comparative law too. As long as comparatists limit themselves to descriptive translations or summaries of foreign law, this even seems valid, at least if they drop any scholarly ambition to see 'comparative law' being recognised as a scientific discipline in its own right. But, once it comes to a real *comparison* of legal systems huge problems arise, be it for determining the real differences and commonalities, for identifying the 'better solutions' and/or for determining the possibilities and desirabilities for harmonising two or more legal systems.

On the other hand, as a reaction to these problems a *strong epistemological pessimism* has led to a simple denial of any possibility for comparing, let alone harmonising, legal systems. Law is seen as the product of a legal culture or legal '*mentalité*', which, also remarkably, always seems to coincide with the (entire) population living on the territory of a national legal system. Foreigners, in this reasoning never will be able to understand 'really' foreign law, because of cultural differences.[12] This is another easy way to escape the need for working out an adequate methodology for comparative law.

Anyway, with all its shortcomings, comparative research seems to have attained results, which are clearly beyond pure description. All over Europe (but also outside of it) scholars and other lawyers are involved in comparative research projects, in harmonisation initiatives and even in the drafting of 'European codes'. Civil officers from various countries prepare European directives, which should as much as possible fit with the legal concepts and

[12] See most of the publications of Pierre Legrand and most notably: 'European Legal Systems Are Not Converging', *International and Comparative Law Quarterly*, 1996, 45 52; *Fragments on Law-as-Culture*, (Deventer, Kluwer, 1999).

structures of the member States, at least to the extent that it should be practically possible to implement them into domestic law. Judges in European and other international courts (and the advocates, *référendaires*, etc) have to face divergences in legal cultures and need to bridge them in one way or another, on a daily basis. Law students attending programmes abroad, through schemes such as Erasmus/Socrates or otherwise, also have to integrate the new 'foreign' information into their domestic legal knowledge and culture. 'European' textbooks and casebooks are published and used in legal education and legal practice. Reality seems to support the optimistic view.

How to solve this paradox? Whilst one scholar is professing that there never will be a European Civil Code, others agree on a draft of it and receive growing institutional recognition from parliaments and governments.

Maybe they both have a biased view of reality.

Strong epistemological *pessimism* has a perfectionist view on 'understanding'. If you do not fully understand something, you do not understand anything. In practice this means that almost nobody can understand almost anything. A rather frustrating conclusion, especially for those who's professional life is centred around teaching and publishing. As an almost inevitable consequence, knowledge and culture are perceived as static entities, which cannot change under the influence of other persons or cultures. They are closed to the external world. Each culture or 'system' has its own 'code', and converts all external information into its own language. There is no common language. Real communication, in this view, is impossible. This conclusion, however, is clearly refuted by our common sense observation of reality[13] and the knowledge offered by world history.

Naive epistemological *optimism* thinks that comparative law can very well do without any method, or that 'comparing' is just a natural activity: you look and listen, and automatically you 'see' the divergences and commonalities; you compare different legal solutions and automatically you 'see' the 'better solution'.[14] The implicit, unconsciously followed, methodology,

[13] Many comparative analyses show the, sometimes important, influence European law has on domestic law, and how it is, in this way, creating changes in national legal cultures and effectuating a slow, but ever increasing convergence. See, eg, among the abundant literature: J Ziller, 'La dialectique du contentieux européen: le cas de recours contre les actes normatifs', in: *Les droits individuels et le juge en Europe. Mélanges en l'honneur de Michel Fromont*, (Strasbourg, Presses Universitaires de Strasbourg, 2001), 443–64, most notably at 455–59.

[14] Otto Pfersmann has rightly criticised the naive epistemological and ontological assumptions underlying such a view: 'Elle lie implicitement une thèse épistémologique (un cognitivisme juridique: l'expert des règles positives sait ce que sont les règles idéales) à une thèse ontologique (ce savoir produit des règles). Elle constitue une variante du sophisme naturaliste induisant l'habituel fantasme du juriste de se croire producteur de règles idéales dans la mesure où il est expert de règles positives.' (O Pfersmann, 'Le droit comparé comme interprétation et comme théorie du droit', *Revue Internationale de droit comparé* 2001, 275–88, at 279).

the ideological and other assumptions, and their influence on the description and interpretation of the foreign law and on the choice of the 'better solution' thus remain completely out of view. For instance, as rightly noted by Jonathan Hill, 'the approach adopted by "better solution" comparatists fails to consider a more fundamental question, namely whether the function which the rule or institution serves is a worthwile one.'[15] In other words, something comes out of comparative research, but we do not know whether it are the right things, neither at the descriptive level (what is the foreign law and how does it differ or not from our law?) nor at the normative level (which is the best rule or legal solution?).

2. THE METHODOLOGICAL PROBLEMS

The methodological problems of comparative law can best be analysed by using a concrete example. For this purpose, I will focus on a comparison between England, France and Germany as to the interpretation of contracts.

2.1. Terminology

Words do not only generally differ from one language to another, even within the same language words may have diverging denotations according to the country, the region, the professional group, etc. An example in English is the diverging connotation the word 'lawyer' has in the USA when compared to the UK. The Italian saying '*traduttore traditore*' is even more valid in law. How to translate concepts such a 'trust', 'barrister' or 'solicitor' into any continental language? 'Easement' comes close to 'servitude', but is not the same. 'Hypothèque' cannot simply be translated into 'mortgage'.[16] Attorney (USA), barrister, solicitor (England), advocate (Scotland) are all English words, which, in different places, denote comparable, but not identical realities of lawyers defending clients in court. Translating them as '*avocat*' or '*Rechtsanwalt*' suggests a different reality than what is covered by the original word. This means that, for technical concepts, such as 'trust', '*acquis communautaire*', '*Bundesverwaltungsgerichtshof*' translation is undesirable, if not just impossible. It also means that, in order to understand technical words in legal language, one needs an insight into the rules governing the concept and the actual reality it covers, which may be rather broad (as is the case with the three examples given).

[15] J Hill, 'Comparative Law, Law Reform and Legal Theory', *Oxford Journal of Legal Studies*, 1989, 101–15, at 104.
[16] The official translation of the *Code civil du Québec* has solved this problem by creating a new English word: 'hypothec'.

So, the comparatist has first to find out to what extent the words used in the compared legal systems bear the same meaning. Apparently identical words may have a different meaning and apparently different words may have the same meaning.[17] The table hereafter compares the words used in France, England and Germany for 'interpretation', 'contract', and 'methods of interpretation'. Although it is sometimes tried to see a difference between 'interpretation' and 'construction', these two words may be considered to be perfectly synonymous,[18] just as *Auslegung* and *Interpretation* in German, and *contrat* and *convention* in French.

France	England	Deutschland	Comparison
INTERPRÉTATION	INTERPRETATION CONSTRUCTION	*AUSLEGUNG Interpretation*	all words basically refer to the same intellectual activity
CONTRAT CONVENTION	CONTRACT	*VERTRAG*	all words basically refer to the same reality
L'interprétation des conventions	The Construction of Contracts	*Die Auslegung von Verträge*	notwithstanding different terminology, the denoted reality is the same
Méthodes d'interprétation	Canons of construction	*Auslegungs-methoden*	the methods may slightly diverge, but the conception is the same

Summarising, we may conclude that apparently different words in the different languages cover the same reality, so that, here, the comparatist is not confronted with linguistic obstacles. However, it is not because the denoted reality is (roughly) the same in the three languages, that the underlying conceptions, behind these words, as used in the respective countries and legal cultures, are really identical, as we will see further on.

2.2. The Structure of (Law and of) Textbooks

When looking for relevant information in the compared field, one will, as a rule, start with textbooks. Rapidly one may discover that the structure of the law, and of the textbooks describing the law, is not identical in all countries, if not substantially, different. This leads us to the question: to

[17] Some good examples of 'false friends' and 'false enemies' in German, Austrian and French public law are given by Otto Pfersmann (above n 14, at p 283–4).
[18] See also in this sense: K Lewison, *The Interpretation of Contract*, (London, Sweet & Maxwell, 1989), p 1, fn 2, criticising a distinction made by J Isaacs in *Life Insurance Co of Australia v Phillips*, *CLR* 36, 1925 p 60.

what extent is there, in each of the compared countries, books or chapters on 'contract law' and subdivisions on 'interpretation'?

Here, the comparison is more confusing for the comparatist.

In France, most of (general) contract law is to be found in the *Code civil (Cc)*, in which there is a chapter on '*Droit des obligations*', with a subheading '*Les contrats*'. Here, in the subdivision '*Les effets du contrat*' a section V *'De l'interprétation des contrats*' contains 9 articles (Art 1156–64 Cc) on the interpretation of contracts.[19]

In Germany, the *Bürgerliches Gesetzbuch* follows at first sight a similar structure: contract law (*Vertragsrecht*) (with one article on interpretation, §157) as a subdivision of the law of obligations (*Schuldrecht*). However, there happens to be a more general chapter, in the first book of the BGB, the '*Allgemeiner Teil*', with a chapter on 'legal acts' ('*Rechtsgeschäfte*'), in which not only important principles are laid down concerning general contract law, but in which there is also an important article (§133) for the interpretation of contracts, under the heading 'the declaration of will' (*Willenserklärung*).

In England, there are no statutory rules on the interpretation of contracts in general. These principles have been laid down by court decisions in the course of history and are to be looked for in legal textbooks on 'The Law of Obligations', 'Contract Law' and, if one is lucky, 'The Interpretation of Contracts'.[20] In English textbooks the interpretation of contracts is not discussed in a separate chapter. Some textbooks even lack any heading referring to 'interpretation' or 'construction',[21] but mostly it will appear as a smaller subheading in different chapters, the main one being the chapter on 'implied terms'.

We should add that, following a European directive, all EU legal systems have now a specific, and identical, legislative provision on the interpretation of *consumer contracts*. It is obvious that the way in which each of the legal systems will handle this provision and integrate it with more general principles of contract interpretation may both bring to light more hidden divergences and/or show a degree of convergence, also beyond consumer law, under the influence of this common, European, rule.

Until now we seem to be faced only with the practical problem of where to find the relevant data for our comparison, but the mentioned divergences have more important consequences as to the perspective from which the

[19] It is interesting to note that the drafters of the *Code civil* (in 1804) linked the interpretation of contracts not to their coming into being and validity, but to their implementation. However, no important conclusion can probably be drawn from this fact that would be relevant for our comparison.

[20] Only one book of this kind seems to have been published in England: K Lewison, *The Interpretation of Contract*, (London, Sweet & Maxwell, 1989). The author is not an academic but a barrister.

[21] Eg GH Treitel, *The Law of Contract*, 8th ed, (London, Sweet & Maxwell/Stevens & Sons, 1991).

problems are analysed and perceived in each of the legal systems: an autonomous body of contract interpretation in French law; a combination of two bodies, contract and legal act, in German law, and a fragmented set of diverging rules and principles, generally with a more limited scope, in English law. We will see hereafter how these differences in the environing structure of the law also affect the practical results.

2.3. The Problems Perceived as Important Discussion Points in Each Legal System

Difference in rules and structures is not the only divergence, which appears from the reading of textbooks. It is interesting to see to what extent the *problems discussed* may be completely different.

Here, we may notice to what extent the structure of the law, procedural law and elements of legal culture may determine the 'legal problems'. In a way, legal systems create their own problems.

In French textbooks we may find a large chapter on *interprétation des contrats* but it will mainly, if not exclusively, focus on the (limited) part of it controlled by the *Cour de cassation*. As this court has considered the interpretation of contracts to be a matter of 'fact', not of law, lower judges may freely decide, without direct control of the highest courts. Nevertheless there are limits. This French court worked out a theory of '*dénaturation de l'acte*', which assumes that texts may have a 'clear meaning' on their own, so that any 'diverging' interpretation would be incompatible with the 'real meaning' of this text. If judges depart from this 'obvious meaning' the *Cour de cassation* will quash the decision. Textbooks tend to concentrate on this problem rather than on the interpretation methods and reasoning used by lower courts outside the realm of an alleged '*dénaturation de l'acte*'. As no other legal system seems to have a comparable approach, because of a different procedure (no 'cassation' but full reconsidering of the case) or of different theories (no '*dénaturation*' theory in any of the other *Code Napoléon*-countries).[22]

In Germany one will find, as one could expect, (very) large chapters in (extremely) voluminous books, extensively discussing all aspects of the field, but mainly concentrating on the relationship between the seemingly opposed, or at least diverging, interpretation rules of §133 (declaration of will) and of §157 (contract). Other broadly discussed distinctions are those between 'Ob' (if) and 'Wie' (how): Is there a declaration of will? (Ob?) and, if so, which content does it have, how is it to be interpreted (Wie?), and between declarations of will that need a 'receiver' (eg a contract) and those which do not (eg a will) (*empfangsbedürftige Willenserklärung* and

[22] Another typically French problem is the question whether the interpretative rules, laid down in the *Code civil* are compulsory or just guidelines for the judge.

nicht-empfangsbedürftige Willenserklärung). None of these problems ever occurred to the mind of a French or an English lawyer.[23]

In England, interpretation of contracts does not seem to be a subject in its own right. In some publications on contract law it is hardly mentioned, and if so, it is in the context of another topic: implied terms, misrepresentation, fraud, duress, consideration, and so on. Anyway, no attention is paid to some general theory of interpretation of contracts. Problems are, for instance, linked to the question 'was there consideration?'. For the comparative lawyer this is not a very promising road to take, as no continental legal system ever thought of 'consideration' as a condition for the existence or validity of a contract.[24]

To this it should be added that the borderline between 'contracts' and 'torts' is not the same in the three legal systems. What would count as liability in tort in England may well be considered to be a matter of contractual liability in France, if there is any trace of a contractual relationship (eg an accident with public transport). In contradistinction with the continental legal systems, supply of energy (electricity, gas) is, in England, considered to be a statutory duty, not a contract. However, in the light of what has been noticed above these differences seem to be of minor importance, at least in this context.

2.4. Underlying Conceptions

The previous chapter may have made clear that we need to tackle the comparative problems in a different way. So let us have a look at a deeper level, at the underlying conceptions and theories. Do lawyers in France, Germany and England have the same notion in mind when they use concepts such as 'interpretation' or 'contract'? Again, rather diverging views come to light.

A. Interpretation

In France, interpretation is basically focusing on *the will of the contracting parties*, on what they had in mind when concluding a contract. This vision is, very explicitly, supported by Article 1156 of the *Code civil*: '*On doit dans les conventions rechercher quelle a été la commune intention des parties contractantes, plutôt que de s'arrêter au sens littéral des termes*.' This, clearly is a 'subjective approach' to interpretation.

[23] Another typically German discussion is about the *Wegfall der Geschäftsgrundlage*: what should happen when the reasons for concluding the contract are lost, because of a substantial change of circumstances? However, the underlying problem is discussed in other jurisdictions too. In France it is known as (*théorie de*) *l'imprévision*, in England it is partly covered by 'frustration'.

[24] Another typically English approach is the emphasis on the *proof* of terms, and most notably of 'implied terms'.

In England, interpretation primarily focuses on the meaning *'as it appears from the text of the contract'*.[25] What people exactly had in mind when drafting the contract is difficult to find out afterwards, if not impossible. The 'normal meaning' of the text, here, seems to offer, at least apparently, the most reliable basis for judicial interpretation of contracts. This may be called the 'objective approach'.

German lawyers take an intermediate position between the French subjective approach and the English objective approach. They do not focus primarily on the contracting parties thoughts, nor on some 'objective meaning' of the wording of the contract, but on *the meaning a reasonable outsider would assume to be meant*. This is a somewhat 'objectivated' subjective approach: if one has wrongly expressed his thoughts in a way an outsider would have noticed that this could not reasonably be meant, the 'real', psychological, will has to take priority over the expressed will. It is also a 'subjectivated' objective approach in that it does not interpret the text in isolation of its authors and the context in which the contract was concluded.

B. Contract

The conceptions of 'contract' are very similar in France and in Germany, where contract is defined as 'an agreement between two or more parties, that creates legal obligations, or, put more broadly, legal consequences (*Rechtsfolgen*)'. In order to identify the existence of a contract, in both countries the *consent* between the parties suffices.

If some slight difference between the French and the German definitions of 'contract' may be noticed, it is linked to the more abstract German approach, that focuses on 'legal act' and 'legal consequences', whereas the French word it more concretely in terms of 'contract' and 'legal obligations'.

The conception of 'contract' in England, on the other hand, is rather different.

Firstly, rather than emphasising the *agreement*, the 'meeting of the minds' of the contracting parties, as continental lawyers do, English lawyers tend to focus on individual *promises* accepted by the other party.[26] Rather than two persons 'doing something together', there is an, almost accidental, exchange of unilateral promises, accepted by the other party. Here, 'contract' is defined as 'a promise or a set of promises, which the law will enforce'.[27]

[25] Kim Lewinson's book on *The Interpretation of Contracts* starts with the following sentence, under the heading 'The Object of Interpretation': 'The construction of a written contract involves the ascertainment of the words used by the parties and the determination, subject to any rule of law, of the legal effect of those words' (p 1).
[26] House of Lords, *Christopher Hill Ltd v Ashington Piggeries Ltd*, 1972, AC, 441–514, at p 502 (per Lord Diplock).
[27] Pollock, *Principles of Contract*, 13th ed, 1950, 1; AG Guest, (ed), CHITTY *on Contracts. General Principles*, 26th ed, 1989, vol 1, §1.

Moreover, an agreement, or rather 'acceptance of a promise', does not suffice, there must be an (economic) advantage for each of the parties, called '*consideration*'. Equivalence of these advantages is not required, but there must be 'something'.[28] 'Gratuitous contracts' are possible in continental legal systems,[29] but not in English law.[30] Because of this economic view on 'contract', family agreements will not easily be accepted to be 'contracts', as 'natural love' is not a sufficient 'consideration'.

For English lawyers it is not the intention to create legal *consequences* that is essential to a contract, but the intention to create *legal relations*, as opposed to social and family relations. Again this tends to narrow the scope of contract law, as there is a presumption that no legal relations were intended when agreements, or promises, are made in such social or family contexts.[31]

France	**England**	**Deutschland**
INTERPRÉTATION	INTERPRETATION	AUSLEGUNG
LA VOLONTÉ des parties contractantes (the will of the contracting parties)	The meaning as it appears from the TEXT of the contract	*Normative Auslegung*: the meaning a reasonable outsider would assume to be meant
Subjective approach	Objective approach	Intermediate position
CONTRAT *Accord entre deux personnes qui crée des obligations* (agreement between two persons, creating obligations)	**CONTRACT** Offer & acceptance Promise	**VERTRAG** *Abkommen zwischen zwei Personen mit beabsichtigten Rechtsfolgen* (agreement between two persons, with aimed legal consequences)
Consent suffices	Requirements: -Consideration: *quid pro quo* -Intention to create legal *relations*	Consent suffices

Summarising, we have to conclude that also at the level of underlying conceptions and theories there are important divergences about such fundamental concepts as 'interpretation' and 'contract'. How then can we find some common basis for comparison, which would transcend the purely 'national' perspective on 'foreign law' and offer a methodology for 'comparative law' as a discipline in its own right?

[28] 'Consideration is usually said to be something which represents either some benefit to the person making a promise (the promisor) or some detriment to the person to whom the promise is made (the promisee), or both.' (C Elliott, & F Quinn, *Contract Law*, 3rd ed, (Harlow, Longman, 2001), 57.

[29] Where a 'gift' is typically seen as a contract, that has to be accepted by the beneficiary in order to be 'valid' (Art 894 *Code civil: 'La donation entre vifs est un acte par lequel le donateur se dépouille actuellement et irrévocablement de la chose donnée, en faveur du donataire qui l'accepte.'*).

[30] With the exception of a promise made under a formal covenant, for which no consideration is required (Law of Property (Miscellaneous Provisions) Act 1989).

[31] AG Guest, (ed), *Chitty on Contracts. General Principles*, 27th ed, 1994, vol 1, p 156, §2–110.

3. DEEP LEVEL COMPARATIVE METHODOLOGY

At the surface, the interpretation of contracts seems to be a very difficult topic for comparing the law of England, France and Germany. There is no common basis available for comparison and almost everything seems to be different: the legal and doctrinal structure in which the topic is located, the problems discussed in legal doctrine, and the underlying conceptions of the two most basic concepts for this field: 'interpretation' and 'contract'.

However, when we look at a deeper level, most notably the history and development of underlying theories and conceptions, we get a rather different picture.

Let us take the opposition between 'subjective' and 'objective' interpretation, in relation to which France is considered to be close to the 'subjective' end of the line, England close to the opposite end, and Germany somewhere in the middle.

3.1. Subjective Interpretation: The Will Theory

Undoubtedly, the 'will theory', that emphasises the will of the contracting parties to determine the content and scope of the contract, has dominated legal thinking in France during most of the nineteenth and twentieth centuries.

When we have a closer look at history, however, we may notice that it is not unfamiliar to German and English legal cultures either.

In Germany the subjective approach to contract interpretation has dominated in the second half of the nineteenth century. Especially von Savigny defended this subjective approach. To him, the (psychological) will was the only relevant element for interpreting a contract, or any other legal act, whereas the text, or any other form of declaration of the will, was only a sign through which the will could be discovered.[32] This resulted in a choice for the will theory in the first draft of the *Bürgerliches Gesetzbuch*, in 1887. Under the influence of von Jhering, who argued in favour of a 'reasonable trust', of what one could reasonably assume to have been meant, rather than the real will of the other party, the second draft of the *BGB*, of 1895, came closer to this more objective theory, which was eventually laid down in the final version of the *BGB* of 1896. However, the code still shows the opposition between both theories. The *Willenstheorie* is clearly to be found in §133:

> When interpreting a declaration of will one has to search for the real will and not to stop at the literal sense of the saying,[33]

[32] FC von Savigny, *System des heutigen römischen Rechts*, vol 3, Berlin 1840, eg at p 257–60 and 307–08. It is interesting to note that most of this volume is discussing the 'declaration of will' (pp 98–307).

[33] 'Bei der Auslegung einer Willenserklärung ist der wirkliche Wille zu erforschen und nicht an dem buchstäblichen Sinne des Ausdrucks zu haften.'

which repeats, almost literally, the wording of Art 1156 of the French *Code civil*. The objective counterbalance (*Erklärungstheorie*) is to be found in §157:

> Contracts have to be interpreted in such a way as is required by good faith and reasonableness in the context of the social practices and normative expectations.[34]

In England the subjective approach obtained a central position in nineteenth century,[35] under the influence of the writings of Pothier. As noted by David Ibbetson, the will theory had a measure of intellectual coherence that the traditional Common Law wholly lacked.[36] In practice, however, the rule that it was the intention of the parties that determined whether or not a term was a condition, was watered down to a rule that it was open to the parties to depart from the ordinary interpretation, provided that their intention to do so was clearly expressed.[37] Nevertheless, at the surface level the will theory prevailed.

3.2. Objective Interpretation: The 'Objective' Meaning of the Text

In England, as a rule, the intention of the contracting parties must be ascertained from the document itself. The task of the courts is to construe the contractual term without any preconception as to what the parties intended.[38] Words are to be understood in their plain and literal meaning, unless it appears from the document itself that another meaning was intended.

Although, in practice, exceptions to this rather strict approach may be found (eg when such meaning would involve an absurdity), it assumes that, in almost all cases, written contracts have a meaning on their own, independently of any context, be it the previous negotiations, the subsequent way of implementation of the agreement, or any other relevant external

[34] 'Verträge sind so auszulegen, wie Treu und Glauben mit Rücksicht auf die Verkehrssitte es erfordern.'

[35] Already in the Middle Ages a kind of will theory was largely applied to 'informal contracts' ('covenants' and 'contracts'): 'Covenant meant "agreement", a "coming-together"; it was based on "the assent of the parties"; "Contract" too … a lways connoted an agreement rather than a unilateral promise; it could be said to be derived from "the will of each party as proved by their mutual words";' (DJ Ibbetson, *A Historical Introduction to the Law of Obligations*, (Oxford, Oxford University Press, 1999), 73 In 'formal contracts', on the other hand, Common Law courts were not concerned to look behind the document (above, 83–7).

[36] *Ibid,* p 221.

[37] Above n 35 p 224.

[38] J Beatson, *Anson's Law of Contract*, 27th ed, (Oxford, Oxford University Press, 1998), 157; K Lewison, *The Interpretation of Contract*, (London, Sweet & Maxwell, 1989), 7–10 with several relevant quotations from Law Lords.

facts or situations. This approach is well worded by Master of the Rolls Cozens-Hardy, in 1911:

> If there is one principle more clearly established than another in English law it is surely this: It is for the court to construe a written document. It is irrelevant and improper to ask what the parties, prior to the execution of the instrument, intended or understood. What is the meaning of the language that they have used therein? That is the problem, and the only problem[39]

In practice, notwithstanding appearances to the contrary, a similar approach may be found in French law.

An analysis of legal history shows an undisputed attachment to the will theory, at least from the sixteenth century onwards,[40] including by the most authoritative scholars such as Domat and Pothier. It is only by the end of 18th century that a more objective approach, limiting the predominance of intention over text, became more popular among French lawyers.[41] However, the scholars and politicians involved in the drafting of the *Code Napoléon,* and the discussions on it, clearly followed the will theory, as also appears from the wording of the final texts on the interpretation of contracts in the 1804 Code.

After the enactment of the *Code civil* something strange happened. Courts,[42] supported by most of the legal scholars,[43] massively applied the objective approach to interpretation notwithstanding the opposite wording of Article 1156, the long tradition of the will theory and the obvious choice of the drafters of the code to follow the subjective approach. The most plausible explanation for this unexpected change seems to be the fear for judicial arbitrariness,[44] which is closely linked to the period following the French revolution. One of the main aims of this revolution was to replace the aristocratic, law making judges of the *Ancien Régime* by servile bourgeois judges who would strictly follow the statutory law as laid down by the democratically legitimated parliament. Fear of a return to the previous *gouvernement des juges* created an atmosphere in which theories could flourish, which apparently seem to bind judges to the wording of the text, be it statutory or contractual. As a result the French *Cour de cassation* came

[39] Cozens-Hardy MR in: Court of Appeal, *Lovell & Christmas Ltd v Wall* 104 1911 LT, 85.
[40] But with one exception, Cujas, who, in 16th century defended the maxim *interpretatio cessat in claris*, but was not followed by other scholars (Edouard De Callataÿ, *Etudes sur l'interprétation des conventions*, (Brussels/Paris, Bruylant/LGDJ, 1947), 21–3).
[41] E De Callataÿ, see above fn 40, 32.
[42] See above fn 40 E De Callataÿ, 85–6 and 97–103.
[43] E De Callataÿ, see above fn 40, 68–78.
[44] 'On n'a jamais rien à se reprocher en s'attachant au sens propre et naturel des mots; on court toujours le risque de se tromper lorsqu'on s'écarte sur des conjectures. Tout rentre alors dans un arbitraire effrayant.' (Toullier, *Droit civil français*, book III, vol III, n° 305 ff, quoted by E De Callatay, n 40, 70).

to prohibit the interpretation of contracts when the wording is considered to be 'clear'.[45] However, as early as 1808 the Court decided that the interpretation of contracts is a matter of fact finding, which has to be left to the lower courts and cannot be checked as such by the court of cassation.[46] Apparently it would have sufficed for lower judges to present a meaning as 'clear', even if it was based rather on the proven intention of the parties than on the average sense of the words. Hence, in order to be able to check the hidden interpretations by lower courts, that would not be in conformity with the 'normal' meaning of the wording of the contract, the *Cour de cassation* had to introduce an additional, be it rather artificial, theory on the 'denaturation of clear texts', which then would be seen as a matter of not (correctly) applying the code and not as a matter of factual judgement. It is interesting to note that the article which is considered to be violated in such cases is not Art 1156 (on interpretation) but Art 1134, which says that contracts are binding for the contracting parties as if they were a statute.[47]

In other countries, such as Belgium, that were ruled, and even up to now still are, by the same dispositions, neither the theory on, and prohibition of, interpretation of 'clear texts', nor a theory on the 'denaturation' of such texts has been followed. The first theory has been criticised because it is scientifically untenable: there are simply no texts that could be 'clear' on their own, isolated from their context.[48] The 'denaturation' theory has, also rightly, been criticised as an open concept that allows the French *Cour de cassation* to control the factual judgement of a lower court whenever it does not like the result, without any statutory rule being violated by that court.[49] The approach of the French *Cour de cassation* is also highly incoherent and paradoxical, as it is, in its own logic, based on a 'denaturation' of the obvious 'clear meaning' of Art 1156 of the civil code.

[45] Eg: 'Attendu que si, aux termes de l'Article 1156 du Code civil, on doit, dans les conventions, rechercher quelle a été la commune intention des parties contractantes plutôt que de s'arrêter au sens littéral des termes, cette règle n'est faite que pour le cas où le sens des clauses du contrat est douteux et exige une interprétation; mais que permettre au juge de substituer la prétendue intention des parties à un texte qui ne présente ni obscurité, ni ambiguïte, ce serait manifestement l'investir du droit d'altérer ou même de dénaturer la convention.' (Cass.civ., 10 November 1891, *Sirey* 1891, I, 529; *Dalloz Périodique* 1892, I, 406).

[46] Cass.civ. 2 February 1808, *Sirey*, chron., 1808, I, 183.

[47] See eg: Cass.civ 7 March 1922, *Sirey* 1922, I, 366; *Dalloz Périodique* 1925, I, 143.

[48] See on this, more generally: M Van Hoecke, *Norm, Kontext und Entscheidung. Die Interpretationsfreiheit des Richters*, (Leuven Acco, 1987); M Van de Kerchove, 'La doctrine du sens clair des textes et la jurisprudence de la Cour de cassation', in: M Van de Kerchove, (ed) *L'interprétation en droit*, (Brussels, Publications des Facultés Universitaires Saint-Louis, 1978), 13–50.

[49] 'Ce mot *dénaturation* est un mot élastique à la faveur duquel deviennent possibles toutes les extensions du contrôle de la décision que le juge du fond a rendue en fait. On peut craindre que l'institution en perde son caractère et que la cour de cassation devienne un troisième degré de juridiction.' (*procureur-général* at the Belgian court of cassation Paul Leclercq, in an opinion published in *Pasicrisie* 1933, I, 10).

The position of this court has remained unchanged up to the present, but part of the lower courts and of legal doctrine, nowadays, tend to take a more flexible position.

So, surprisingly enough, both the English and French (highest) courts have, during most of the nineteenth and twentieth centuries, applied an objective approach behind a facade of a subjective approach.

3.3. The Intermediate Theory: Legitimate Expectations

The obvious tension between the subjective and objective interpretation in France and England has as a consequence that none of these approaches has ever been applied in its pure form in any of these countries, at least not over the last two centuries.

In Germany, where the tension is to be found in the *Bürgerliches Gesetzbuch* itself, a more realistic theory has developed. A balance has been found between pure subjective elements that are difficult to find out and to prove, on the one hand, and objective elements, on the other. These 'objective' elements, however, are not some untenable theory of 'objective' meaning, but an 'objectivated' approach to the scope of the contract in the light of social standards of good faith and other social norms and practices. When interpreting a contract, German lawyers will not focus on the real intention of the parties, but rather approach it from an external point of view. They will do this both descriptively and normatively. When, descriptively, determining the meaning of the text of the contract, they will ask what an outsider, who would have been present when the contract was made, would reasonably have assumed to have been meant by the parties. Normatively, this meaning will be orientated towards, or corrected by, good faith (*Treu und Glauben*) and social practices and norms (*Verkehrssitten*). Interpretation, thus, is not just a matter of describing what is meant by the wording of the contract, but also a *normative Auslegung*, which is guided by what *legitimately could be expected* by the contracting parties.

Tendencies towards this kind of approach are present in the other countries too, most clearly in England. In fact, the idea that a contract has to be understood in the sense a reasonable man would expect the contract to mean, including some idea of good faith and balance between the parties, is today to a large extent applied everywhere (openly or more hidden).

Today, in England, it is asserted that the court must seek 'the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract'.[50]

[50] (HL), *Investors Compensation Scheme Ltd v West Bromwich Building Society*, 1998, *1* WLR (HL) 896.

This fits perfectly with the descriptive part of the German approach to interpretation. It is interesting to note how the importance of the context is now emphasised, and even more explicitly so by Lord Hoffmann in another decision:

> The meaning of words, as they would appear in a dictionary, and the effect of their syntactical arrangement, as it would appear in a grammar, is part of the material which we use to understand a speaker's utterance. But it is only a part; another part is our knowledge of the background against which the utterance was made.[51]

The normative part of the German approach is now also present in English law, at least in consumer law, by the introduction of the good faith principle and the statutory duty for the judge to interpret consumer contracts in favour of the consumer. Undeniably this will, be it slowly, also affect the way English judges approach the interpretation of contracts in general.

But this normative element is not just some foreign body that would have been imposed on the common law by a European directive.

In his historical overview of the English law of obligations, David Ibbetson points to several developments, that took place in the period between 1970 and 2000, which lead to a more normative approach to interpretation. There is an increased use of standard form contracts, for which it is assumed that parties mostly do not have had any relevant intention at all.[52] In such cases relevant elements have to be found to 'construe' an appropriate meaning. Here, good faith and contractual fairness can play a decisive role. This is supported, of course by the introduction of the good faith principle in consumer law, but also by an increasing legislative regulation in general, by the judicial acceptance of unjust enrichment as a theory in common law, by a greater willingness of judges to lay down rules of law,[53] and by the public law dimension of private law.[54]

The idea of some fair balance[55] between the parties developed during that period, in two stages.

From the 1970s, taking advantage of another party's weakness was not any longer acceptable.[56]

From the 1990s, principles of substantive fairness have been introduced in English contract law,[57] including estoppels that have the same scope as

[51] (HL), *Mannai Investment Co Ltd v Eagle Star Life Assurance Co*, 1997, AC (HL) 749.
[52] D Ibbetson, see above fn 36, 246–7.
[53] See above fn 36, 249.
[54] See above fn 36, 251.
[55] Also Lewison notes, under the heading 'Manipulative interpretation': 'The court will sometimes manipulate the construction of the contract in order to achieve a fair result on the facts of the particular case. This approach is rarely overtly recognised, …' (above n 15, 18).
[56] D Ibbetson, see above fn 36, 251.
[57] See above fn 36, 251 and 258.

continental principles such as the prohibition of abuse of rights. Duties of disclosure of information (misrepresentation) or prohibition of undue influence (duress) likewise aim at putting the contracting parties on equal footing.[58]

The pressure on English law to accept a general principle of good faith is strong. Not only has it already been introduced in the area of consumer contracts, which conceptually is a limited field but practically of very high importance, moreover there is a strong case for considering it to be a general principle of law in several other Commonwealth countries, such as Canada, Australia and New Zealand.[59] The fact that such a principle is also generally accepted on the Continent puts the UK in a position of increasing, be it not very splendid, isolation.

Also in France, it is increasingly recognised that some normative input is needed in contract interpretation, in addition to the intention of the parties:

> Le contrat (…) se caractérise en tant que catgorie juridique par son élément subjectif essentiel: l'accord des volontés, et par ses finalités objectives: l'utile et le juste. De la finalité d'utilité se déduisent les principes subordonnés de sécurité juridique et de coopération. De la finalité de justice se déduit la recherche de l'égalité des prestations par le respect d'une procédure contractuelle effectivement correcte et équitable.[60]

It is recognised that the 'meaning' given to contractual terms is often an imposed meaning rather than the reconstruction of a real common intention held by both parties. Rather than assuming some (non-existent) will, it seems better to construct it on the basis of objective social standards, such as good faith, social practices, the purpose of the contract, general principles of law,[61] or simply 'equity'[62] or 'justice'.[63] They constiture the 'objective' approach, which co-exists, in France too, with the, more traditional, subjective approach. Ghestin notes:

> Certes la Cour de cassation s'obstine souvent à se retrancher derrière la volonté des contractants, encore que l'on constate une évolution de la

[58] See above fn 36, 252–3.
[59] See the evidence given in: AF Mason, 'Contract, Good Faith and Equitable Standards in Fair Dealing', *Law Quarterly Review*, 2000, 116 66–94.
[60] J Ghestin, C Jamin, & M Billiau, *Traité de droit civil. Les effets du contrat*, 3rd ed, (Paris: LGDJ, 2001), 9, with further reference to: J Ghestin, 'La notion de contrat au regard de la diversité de ses éléments variables' *Rapport de synthèse aux Journées Nationales H. Capitant*, (Nantes: LGDJ 2001), 223 ff, esp at 255–6.
[61] Cass. civ. 10 December 1985, *Bull. civ.*, I, n° 339, p 305; *D.S.* 1987, 449.
[62] '… une étude plus attentive permet d'apercevoir que, sous des précautions de style, *l'équité guide souvent le juge* dès qu'il n'est plus tenu par une volonté clairement exprimée. Prenant prétexte de déceler l'intention des parties à travers des clauses ambiguës ou dans le silence du contrat, il prête aux contractants des intentions équitables.' (F Chabas, *Mazeaud Leçons de droit civil*, tome II, vol 1 *Obligations. Théorie générale*, 8th ed, (Paris, Montchrestien, 1991), 321, n° 351).
[63] J Ghestin, above n 60 *(Traité)*, 18.

> jurisprudence vers un abandon partiel de cette référence pour justifier certaines solutions.[64]

This development has directly been influenced by German law, as it was Raymond Saleilles, who later on became very influential in France, who proposed, at the very beginning of the twentieth century, a more objective, socially oriented approach that was directly based on §157 *BGB*.[65]

It has been worked out in the jurisprudence of the French courts in the course of the twentieth century, in the form of theories that aimed at broadening the scope of contractual obligations, independently of the actual intentions of the parties: the distinction between '*obligations de moyen*' and '*obligations de résultat*', assuming stronger duties for some categories of contracting parties (eg a tour operator), that are liable if no result has been obtained, even without proven fault;[66] security *obligations* with public transport,[67] play grounds, medical services, schools, etc; *duties of information* for the professional, such as a banker,[68] vis-à-vis the consumer; a *prohibition of competition*, eg, for an agent, with his principal.[69]

In England, one would call these (generalised) *'implied terms'*, which, paradoxically comes closer to the fiction of applying the will theory, than the French approach in this respect does.

Hence, it is no surprise that Article 2:102 of the *Principles of European Contract Law* reads:

> The intention of a party to be legally bound by contract is to be determined from the party's statements or conduct as they were reasonably understood by the other party.

Obviously, also the scholars involved in the drafting of these principles, could agree on a 'legitimate expectation' view, discarding both the 'subjective' *will theory* and the 'objective' *obvious meaning of the text theory*.

[64] Above n 18, 60.
[65] R Saleilles, *De la déclaration de volonté. Contribution à l'étude de l'acte juridique dans le Code civil allemand*, Pichon 1901, 228, n° 86.
[66] This theory was proposed by René Demogue in 1925 (*Traité des obligations*, vol 5, s 1237, vol 6, s 599) and soon generally accepted by courts and legal doctrine in France and in several other countries (eg Belgium), but it was not taken over in the *Principles of European Private Law*.
[67] Cass. civ. 21 November 1911, *D.P.* 1913, I, 249 was the first case imposing such a security obligation.
[68] Cass. com. 18 May 1993, *Bull. civ* 1993, IV, n 188, p 134.
[69] Cass. civ. 16 March 1993, *Bull. civ*, 1993, IV, n 109, p 75.

These principles also emphasise the role of the context, including social norms of good faith and fair dealing, for interpreting the contract.[70]

3.4. Competing Theories in Each Legal Culture

Summarising this analysis of underlying theories guiding the interpretation of contracts in France, Germany and England, we notice that in fact, the *same competing theories and conceptions* are largely to be found in each of those legal systems. These, more fundamental theories are not typically linked to a country as such, but to a period in history. More precisely, they have, in the course of history, almost constantly been competing, but the predominance of one theory over the other one did not follow the same chronology in the different countries.

Here, we have only been discussing the opposition between the 'subjective' and 'objective' approaches to interpretation. Other questions that are of direct relevance for the interpretation of contracts, where competing theories are to be found in probably every European country, include:

- The role of (contract) law in society: economic (framework for individual liberty and the working of the market) and/or moral (correction of inequalities and injustices);
- The role of the judge in contract law: active or passive?
- A theory of meaning: is a 'meaning' given (in the text) or construed (by the reader)?
- A conception of contract:
  - an agreement for the 'market' or for regulating inter-human relations?
  - (purely) private law or (partly) public law?
  - an individualist gamble or a co-operative endeavour with fair partnership?

In practice, it is the (accidental) majority in the highest courts and/or in legal doctrine that determines 'the' law of the country. They mostly take

[70] 'In interpreting the contract, regard shall be had, in particular, to:

(a) the circumstances in which it was concluded, including the preliminary negotiations;
(b) the conduct of the parties, even subsequent to the conclusion of the contract;
(c) the nature and purpose of the contract;
(d) the interpretation which has already been given to similar clauses by the parties and the practices they have established between themselves;
(e) the meaning commonly given to terms and expressions in the branch of activity concerned and the interpretation similar clauses may already have received;
(f) usages; and
(g) good faith and fair dealing.' (Art 5:102 PECL).

some intermediate position on the scale between two opposite theories in their pure (and extreme) form. Sometimes there is a clash among higher judges (eg: The English Court of Appeal under Lord Denning as opposed to the House of Lords,[71] or currently the *IX. Senat des Bundesgerichtshofes* in Germany, as opposed to the *XI. Senat*, or the 1st *chambre* of the French Cour de cassation, as opposed to the 3rd one), sometimes there are diverging opinions between lower courts (that tend to be more 'practical') and higher courts (that tend to pay more attention to the doctrinal dimension), or between judges and legal scholars, but most often the oppositions run across each of these professional groups, as they are linked to more general ideological divergences in society.

Doctrinal theories play a crucial role for making a desirable result fit with the prevailing law,[72] but they often also block such results. Sometimes the highest courts persevere in applying old theories, which are not any longer followed by lower courts, large parts of legal doctrine and legal practice. Sometimes the facade of the old theory is kept, but in practice the opposite is done.

The Europeanisation of private law will slowly, but thoroughly, influence theory building in the various jurisdictions. In the field analysed in this paper it is the directive on consumer contracts that has introduced, in all EU countries, the rule that 'Consumer contracts are interpreted in favour of the consumer'.[73] Questions that will be raised include, for instance: Is this a compulsory rule or just a guideline for the judge?[74] Does it only apply when the text is unclear or ambiguous or also with 'clear' texts? May it go as far so as to exclude 'consideration'? If the answer to such questions will be difficult to fit in the prevailing general theories on interpretation, these theories will be questioned, and probably adapted.

[71] See eg the criticism by Lord Diplock on Lord Dennings decision in: House of Lords, *Gibson v Manchester City Council*, 1979 ALL ER, 1, 972–81, at 974.

[72] How inventive lawyers may be in this respect, at least if they really want some specific result, transpires from an analysis of case law in Germany and England on cohabitants standing as a surety for bank loans: see M Van Hoecke, & M Warrington, 'Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law', 47 *International Comparitive Law Quarterly*, 1998, 495–536, at 516–519.

[73] Directive of 5 April 1993 (93/13/EEC) *OJ* 1993 L 290, p 9. Art 5: 'In case of contracts where all or certain terms offered to the consumer are in writing, these terms must always be drafted in plain, intelligible language. Where there is doubt about the meaning of a term, the interpretation most favourable to the consumer shall prevail'.

In France: 'Les clauses des contrats proposés par les professionnels aux consommateurs ou aux non professionnels … s'interprètent en cas de doute dans le sens le plus favorable au consommateur et au non-professionnel.' (Art L 133–2 Code de la consommation, loi du 19 mai 1998).

In the United Kingdom: '… If there is doubt about the meaning of a written term, the interpretation most favourable to the consumer shall prevail.' (Art 6 Unfair Terms in Consumer Contracts Regulations 1994).

[74] According to the French court of cassation, the interpretation rules of Articles 1156 to 1164 of the civil code are not binding for the judge (Cass. civ., 6 March 1979, *Bull. civ.* I, n° 81; Cass. civ., 19 December 1995, *Bull. civ.*, I, n° 466).

4. SOME METHODOLOGICAL CONCLUSIONS

From the analysed topic it transpires that comparative law research may only be carried out meaningfully if it also includes the deeper level of underlying theories and conceptions.

These theories and conceptions have the advantage of not being as such determined by positive law, although the legal system in which the lawyer works will influence the way in which they will be worked out in legal doctrine. This makes this level the most appropriate basis for comparing legal systems, without being biased by one's own legal structures, rules, concepts and language.

Such an approach should be adequate in all fields of comparative law. Family law, for instance, has been largely neglected in comparative (European harmonisation) studies, because it is considered too strongly linked to (national) culture and tradition. However, in Europe, over the last few decades, we have seen strikingly comparable developments and changes as to the sociological reality (from large families and then nuclear families to 'incomplete' families; disconnection from marriage and parenthood; more generalised living together outside of marriage; increasing divorces, etc) and as to the conceptions of marriage and family relationships (including an increasing acceptance of homosexuality as being on an equal footing with heterosexuality, with developments towards same-sex marriages). At this level of integrating new sociological and ideological developments in the law, comparative research may be very fruitful, also within the context of developing a common European private law. State law may be strongly linked to national history and local politics, but it is always comparable at the level of conceptions of democracy, division of power, human rights, centralisation viz. decentralisation, the position of minorities, etc. Social security law may be very technical, but there is always an underlying view on solidarity, insurance, redistribution of wealth and, more generally, a conception of a 'good life' or at least the minimal conditions for it. Of course, in comparative law, these underlying conceptions and theories should not be studied as such but in their relationship and interaction with positive law and the way this law is handled and interpreted by the legal profession.

How to Carry Out Deep Level Comparative Research?

Historical analyses, sociological studies and critical writings, which do not approach the matter from a pure descriptive, positivist point of view, may be a useful starting point for finding relevant material. Depending on the subject this may include other areas, such as political science for constitutional law.

Once the underlying theories and conceptions have been identified that are considered relevant for the matter, the researcher will have to check them on the basis of sufficiently representative material.

This includes legal doctrine and court decisions.

One should be aware of the fact that theories in legal doctrine sometimes live a life of their own and do not reflect any 'legal reality'.

Analysis of court decisions should certainly not be limited to the supreme court or the higher courts, as they may sometimes offer a picture that is not at all representative for the judiciary as a whole. In constitutional law the situation is different. Here, only the constitutional court or, if there is no such court, the highest courts will normally offer useful material.

It is anyway desirable, if not necessary, that some independent research of case law and other legal sources in the compared jurisdiction is carried out in view of its relevance for testing the hypotheses.

If the comparison is about (proposals of) new legislation, which are based on important changes in the predominant world-view in society (eg, euthanasia, same-sex marriage) views expressed in the media and in parliamentary or other debates should be taken into account.

5. WHAT ABOUT HARMONISATION?

Harmonisation may be difficult because of differences as regards:

a) concepts which play an important role in one legal system and are absent in the other (eg: consideration, *cause*);
b) the structure of the field or its environment (eg: a different borderline between contracts and tort);
c) procedural elements (kinds of actions available; lack of uniformity because the *Cour de cassation* leaves interpretation basically to *les juges de fond*);
d) different dominating views and conceptions; and
e) different rules.

(a) Harmonising diverging concepts requires a thorough analysis of the history of the concepts, of the discussions about them and of their practical relevance.

Sometimes scholars have found it necessary to emphasise that 'consideration' has nothing to do with '*causa*'.[75] However, these concepts have several elements in common, be it mainly their superfluous character.

[75] Eg: R David, & D Pugsley, *Les Contrats en Droit Anglais*, 2nd ed, (Paris, LGDJ, 1985), 96, n° 129.

The concept of 'consideration', creating the condition that there must be an advantage for the promiser to engage into a contract, developed in England in the middle of the sixteenth century out of the previously existing *quid pro quo* requirement. Interestingly enough, at those times, it was also called '*causa*'. However, at the opposite of the continental conception of *causa*, it limited the reasons to enter a contract to *pecuniary* reasons, excluding eg 'natural love' in marriage and family relations.

The continental concept of *causa*, inherited from Roman law, also entails a condition for concluding a valid contract, namely a *reason* for entering the contract, an (expected) *advantage* that follows from this contract.

The concept of *causa* is somewhat broader than the concept of *consideration*, but their *function* is identical, as even the House of Lords had the opportunity to confirm in a Scottish case in 1923.[76]

However, historically, this function has probably more to do with the *evidence*[77] of the existence of a contract than with any real requirement for its *validity*. In times when few could read and write, contracts were mostly concluded orally. Proof of the existence of the contract and of its exact terms entailed more problems than where a signed document is available. If there was no advantage whatsoever for one of the parties it could readily be assumed that it was very unlikely that there had been any contract at all. This is underpinned by the fact that, in the common law, as a rule, no 'consideration' is required when the contract is contained in a deed.[78]

The concept of *causa* has, on the Continent, divided legal scholars in *causalistes* and *anti-causalistes*. In fact the concept could be dropped without any inconvenience, as has extensively been underpinned by the anti-causalists. As far as it is relevant, it can easily be covered by the requirement of '*objet*'. Indeed, apart from a reason for entering the contract, civil (Roman) law requires also an 'object'. In practice, this object is also the 'reason' for entering the contract: the reason for buying a house is precisely that one wants this house, the reason for selling it is that one wants the money. The discussion has been complicated because the concept of *causa* has also been linked to conditions of legitimacy of the contract such as morality and public order, but these conditions can easily be worded independently, without linking them to another concept, such as *causa*.

As noted by Ibbetson, throughout the nineteenth and twentieth centuries the concept of 'consideration' was, in England, progressively marginalised

[76] House of Lords, *Cantiere v Clyde Shipbuilding and Engineering Co Ltd*, *Scottish Cases*, 1923, (HL), 105. For an analysis of this case, in which the failure of '*causa*' was equated with failure of 'consideration', see: R Evans-Jones, 'Roman Law in Scotland and England and the Development of One Law for Britain', *115 Law Quarterly Review*, 1999, 605–30, at 607–10.
[77] Consideration has developed within the procedural context of the 'action of assumpsit'. The technicalities of this procedure also partly explain the coming into being of the requirement of 'consideration'.
[78] AG Guest, (ed), *Chitty on Contracts. General Principles*, 27th ed, vol 1, 1994, p 26, §I–034; see also p 166, §3–001.

by courts by ingenious interpretation.[79] The doctrine of consideration was especially creating problems when changes were made to an existing contract without a direct pecuniary advantage for one of the parties, or when the 'consideration' consisted of past events. A reform proposal by the Law Revision Committee in 1937 largely limited the scope of consideration for possibly invalidating a contract.[80] Recent cases seem to go into that direction too.[81] Patrick Atiyah proposed to replace the concept of consideration by one of legitimate expectation: the reasonable reliance on a promise.

All this proves that also the concept of 'consideration' could easily be dropped.

If this is the case, then harmonisation will not be only about choosing the 'better concept' and the 'better rule', but also about rethinking more fundamentally the use and function of every concept and rule. Harmonisation, then, is not some imperialistic conquest of weaker legal systems by stronger ones, but *rethinking and developing together some new European private law*.

This is shown by the *Principles of European Contract Law*, in which indeed both 'consideration' and '*causa*' have been dropped, as the only conditions for a contract to exist are that

(a) 'the parties intend to be legally bound', and
(b) 'they reach a sufficient agreement without any further requirement.' (PECL, Art 2:101(1))

(b) Sometimes the structure of the field concerned will have to be adapted, if one aims at harmonisation. Here, external evidence will have to be given for proposing the 'better solution'. This may be efficacy (economic analysis of law) or one solution better supporting a generally recognised interest (eg consumer protection in contracts, the protection of the victim in torts).

Anyway, when arguing in favour of a 'better solution', in this context or more generally in any form of harmonisation, one has to make explicit the kinds of reasons that would make it a better solution. If such solutions are technical, it is a matter for discussion and decision within legal doctrine, if they imply important political or moral choices, it would rather be a choice to be made at the political level.

[79] DJ Ibbetson, *A Historical Introduction to the Law of Obligations*, (Oxford, Oxford University Press, 1999), 236–41. See also: R David, & D Pugsley, *Les Contrats en Droit Anglais*, 2nd ed, (Paris, LGDJ, 1985), 106–7.
[80] C Elliott, & F Quinn, *Contract Law*, 3rd ed, (Harlow, Longman, 2001), 79–80.
[81] *Williams v Roffey Bros & Nicholls (Contractors) Ltd*, 1990 All ER, 1, 512; QB, 1991, 1, 19. In this decision factual benefit to the promisor is regarded as sufficient in one situation, even in the absence of a legal benefit to him or of a legal detriment to the promisee (AG Guest, (ed), *Chitty on Contracts. General Principles*, 27th ed, vol 1, 1994, p168, §3–006).

(c) Diverging procedures and court structures cannot be changed but very slowly. Probably the only means for circumventing this obstacle will be the creation of a new, supra-national court which may guarantee uniform interpretation in the field (as is currently done by the two European courts within the ambit of their competence).

(d) Different (nationally) dominating views and conceptions may lead to one view, which is generally accepted in all jurisdictions, as a result of a large discussion within a European legal doctrine.[82]

Some conceptions can be declined and theories eliminated, because they are simply wrong, such as the idea that there would be texts that are 'clear' as such, independently from any context and the '*dénaturation de l'acte clair*' theory in France, which is based on it.

Some theories may be imported into other jurisdictions, because they fit better with current needs and conceptions, such as the German theory of legitimate expectations.

Some views are simply part of diverging opinions in our societies and cannot be 'harmonised': they are part of an ongoing debate, both scholarly and political, in which, for the time being, one view may be more popular than competing ones, but could be a minority view in the future. These theories will go on to compete, but with a much broader (European) basis and audience, which, as a rule, should improve both the quality of the arguments used in the discussions, and the quality of the theories, because of a higher number of participants in the scholarly debate and a broader empirical basis for testing these theories.

(e) Rules are probably the easiest to harmonise. However, it does not help very much to harmonise legal rules if important differences subsist on the other points. There are abundant examples of identical rules in two or more countries, which in practice appear to have a different scope and sometimes lead to opposite results. In the field of the interpretation of contracts, there is a notable difference between the French and the Belgian *Cour de cassation*, as in Belgium there is no '*théorie de l'acte clair*' or concept of '*dénaturation de l'acte*', although both countries still largely, if not fully, share the Code Napoléon structure, concepts and rules as to the law of obligations.

[82] On both the need for, and the advantages of such a European legal doctrine, see: M Van Hoecke & F Ost, 'Legal Doctrine in Crisis: Towards a European Legal Science' *Legal Studies* 1998, 18 197–215.