

THE USE OF COMPARATIVE LAW IN THE LEGISLATIVE PROCESS

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I Introduction

It has always been a debated question whether comparative law is a “science” or a “method”, as well as what its use is, from both a theoretical as well as a practical point of view. I will not embark upon a study of the first question, but will focus on the second: its use. The theoretical use of comparative law has been discussed extensively in comparative legal literature.¹ Its practical use has been the subject of discussion at several comparative law congresses of the International Academy of Comparative law. This report deals – once more² – with the use of comparative law by the legislature.³ It is structured as follows. First some more general preliminary remarks will be made, then the Dutch legislative process will be outlined, followed by two examples: the new Dutch Civil Code and the new General Administrative Law Act. In the last section evaluating comments will conclude the report. It should be noted, however, that these comments about the actual value of comparative law in the legislative process are made from the viewpoint of an outside observer looking at the final outcome of this process.

II The use of comparative law

Comparative law can have many uses, both at a more theoretical as well as a more practical level. In my view its most important theoretical use is that it leads to a lasting critical reflection on the value of legal knowledge. There is simply not always a “best” solution to a particular problem. Not infrequently the most that can be said is that several options exist by which to

1. Cf. K. Zweigert and H. Kötz, *Einführung in die Rechtsvergleichung* (Tübingen, 1996), p. 12 ff.
2. During the XIth International Congress of Comparative Law, Caracas 1982, this topic was also discussed.
3. See also the Dutch national report for this Congress on “Systems mixing and in transition: Import and export of legal models.”, written by J.M. Smits.

solve a problem, of which one – in certain circumstances – might be better than another. In other words: legal knowledge is relative knowledge. From a more practical side this awareness of the relative value of legal concepts and the availability of choice can be extremely helpful for a judge who has to rule on e.g. a new problem where his own legal system does not offer clear guidance. In the same way it can be beneficial to drafters or other participants involved in the legislative process. Practice shows that in particular the drafting stage of legislation offers the possibility to look at other legal systems to see which solutions might be possible and if these solutions are workable.

When discussing the use of comparative law in the legislative process, it is quite intriguing to observe that the comparative legal method⁴ can function at both levels (i.e. theoretical and practical) simultaneously. It may inspire not only drafters or a drafting team in particular (and thus functions at a more theoretical, intellectual level), but it sometimes also leads to what Watson has called legal transplants: the adoption by a legal system of a legal model coming from a foreign system.⁵ This has happened in the past in e.g. Japan and Turkey. The practical influence of comparative law analysis can, of course, also be less dramatic and more subtle. This will be the case where the comparison between other (i.e. foreign) solutions and perhaps the drafter's own solution does not lead to the wholesale adoption of a foreign model, but to partial adoption or simply adjustment of the drafter's own views. It can also lead to the conclusion that the foreign solution should not be adopted.⁶ A serious problem for the observer of the legislative process in this respect is the “hidden” use of comparative law at both its theoretical and practical level. It frequently happens that comparative law analysis is in fact used, by e.g. civil servants or experts while drafting a bill, but that it is not communicated to others in the process.⁷

4. See Zweigert and Kötz, *loc.cit.*, p. 13 where they describe comparative law as “eine wissenschaftliche Methode der Jurisprudenz”.
5. A. Watson, *Legal transplants, An approach to comparative law* (second edition; Athens/London, 1993), p. 21 defines the subject of his book as “the moving of a rule or a system of law from one country to another, or from one people to another”.
6. Cf. J.H.M. van Erp, *The use of the comparative law method by the judiciary*, in: J.H.M. van Erp and E.H. Hondius (eds.), *Netherlands reports to the fourteenth international congress of comparative law, Athens 1994 (The Hague, 1995)*, p. 23 ff., p. 26; N.A. Florijn, *Rechtsvergelijking in het wetgevingsproces* (doctoral thesis, Tilburg University) (Zwolle, 1993), p. 213.
7. Cf. D.C. Fokkema, *De invloed van de rechtsvergelijking op de ontwikkeling van het nieuwe BW*, *Nederlands Juristenblad* 1983, p. 1223 ff., p. 1224; W. Duk, *Wetgeving en rechtsvergelijking, Preadvies voor de Nederlandse Vereniging voor Rechtsvergelijking*, no. 34, (Kluwer, 1984) p. 114 and p. 125 where he discusses the “diffuse” influence of

The Netherlands is currently going through a process of broad codification and re-codification. The prime example is the new Dutch Civil Code. But also the new General Administrative Law Act can be mentioned here. In both projects the legislative history shows several examples of the use of comparative law. This does not mean that comparative law has no (or a lesser) role to play when it comes to legislative activities that are not major (re)codification projects.⁸ Before examining the new Civil Code and the new General Administrative Law Act in some further detail it seems useful to outline, albeit in a very general and hence superficial way, the more formal side of the legislative process as such.

III The legislative process

It might be helpful, before discussing the two legislative projects mentioned, to offer a short prologue to the legislative process as such. N.A. Florijn

comparative law whenever the results of comparative law analysis are difficult to trace and for that reason are difficult to estimate regarding their extent and depth. See further J.M. van Dunné, *The use of comparative law by the legislator in the Netherlands*, in: *Netherlands Reports to the Eleventh International Congress of Comparative Law*, Caracas 1982 (Deventer, 1982), p. 37 ff., p. 43; J.M. Polak, *De rol van rechtsvergelijking bij de totstandkoming van wetten*, *Ars Aequi*, Vol. 43 (1994), p. 297 ff., p. 301; N.A. Florijn, *Rechtsvergelijking in het wetgevingsproces*, p. 138. This resembles closely the hidden use of comparative law which I found when studying the use of comparative law by the Dutch judiciary: J.H.M. van Erp, *The use of the comparative law method by the judiciary*, loc. cit., p. 31 ff.

8. See in this respect W. Duk, *ibid.*, p. 130/1 who – relying on his experience as a civil servant responsible for drafting legislation – concludes that the study of comparative law is very often seen as causing an undesired slowing down of the legislative process. For that reason comparative law is only occasionally used, with one major exception: private law. It is interesting to note that Duk, writing in 1984, is clearly hesitant as to the relevance of comparative law outside the area of private law (in particular the new Civil Code). This is remarkable in the light of the various non-private law statutes he discusses which have clearly been influenced by comparative law analysis. One of his themes is that criminal law, constitutional law and administrative law are less receptive to the results of comparative law research. This might still be true in the first two areas, but is no longer true when it comes to the third area. The new General Administrative Law Act shows certain influences – as will be discussed – of German law and German legal theory, albeit that the influence is hidden or – as Duk calls it – “diffuse”. Cf. further the earlier mentioned doctoral thesis by N.A. Florijn, *Rechtsvergelijking in het wetgevingsproces*. Based upon his (more methodological and theoretically inspired) doctoral thesis N.A. Florijn wrote a short practical guide to be used by civil servants involved in the drafting of legislation: *Leidraad voor zinvolle rechtsvergelijking* (published by the Ministry of Justice in the series: *Achtergrondstudies algemeen wetgevingsbeleid, Wetenschappelijk onderzoek*, Part 3) (The Hague, 1994). See also J.M. Polak in his earlier mentioned article.

distinguishes the following stages in the legislative process which are relevant for a study concerning the use of comparative law: (1) choice of subjects, (2) preparation of a draft at the departmental level (by civil servants and/or experts), (3) the discussion within the Council of Ministers and the advice by the Council of State (“Raad van State”), (5) the parliamentary debate and (6) the evaluation of – new – legislative measures.⁹ Comparative law is in particular used during the second stage and only occasionally during the other stages. Its impact can be manifold: it can be used for inspiration, a source of argumentation or as a mirror against which new legislation can be held to evaluate its functioning.¹⁰ According to Florijn, comparative law is seen by those participating in the legislative process not so much as a method by which to analyse Dutch law by confronting it with a foreign legal system, but as a way to reach a certain degree of international harmonisation as far as the law is concerned.¹¹

The examples of legislative projects in which comparative law has been used to a greater or lesser degree will show that the comparative analysis is used with some frequency, but that its thoroughness and its final influence on the actors in the legislative process vary enormously. It should always be remembered that legislation first of all is the product of a political process in which reasons other than purely (comparative) legal arguments play a preponderant role. Group interests or “national” interests might all work against accepting the results of comparative research as relevant or even decisive. It might e.g. be a “national” interest not to adopt a foreign model, in order to avoid the impression that a different legal system's solution might be considered an acceptance of economic or political superiority of the country from which that solution comes.¹² Or the other way around: that by promoting its “own” law, a country wishes to make a statement about its desire to influence others. In the Dutch legislative process these aspects do not, as far as I can see, play any role at all when it comes to accepting (or declining) the results of comparative research. What can be seen in the Netherlands, as in so many other countries, is that ultimately the debate about new legislation is directed more inwardly (i.e. a debate which is confined to the situation and prevailing views in the Netherlands), than outwards (i.e.

9. N.A. Florijn, *Rechtsvergelijking in het wetgevingsproces*, p. 109 ff.

10. N.A. Florijn, *Leidraad voor zinvolle rechtsvergelijking*, p. 10.

11. N.A. Florijn, *Rechtsvergelijking in het wetgevingsproces*, p. 118.

12. In my experience this explains the sometimes limited influence of law reform projects and the help offered by foreign experts in Eastern Europe, Russia and Asia. Cf. J.H.M. van Erp, *Der Einfluß des neuen niederländischen Bürgerlijk Wetboek außerhalb der Niederlande*, *Jahresheft der Internationalen Juristenvereinigung Osnabrück* 1995/96, p. 37 ff. (Osnabrück, 1996).

taking foreign solutions into account). And the sole explanation for this is simply that this has been the attitude for a very long time, which appears very difficult to change. Somehow it seems to be an immense step to change from being self-contained to being receptive to a legal system which is outside the control of the national political process. A step which is, as history shows, taken more easily in situations where it is in a country's interest to adopt an already existing model. Examples are the countries which took over a foreign code as part of their desire to establish themselves as a modern independent nation with its own legal system (e.g. the Netherlands in 1838) and – to some degree – countries like Russia, the Eastern European and Asian states which had to make a legal u-turn in order to adapt their legal systems so as to accommodate a radical change in their economic structure.¹³

IV Some examples

*A Civil and commercial law: the new Dutch Civil Code*¹⁴

Hartkamp,¹⁵ who during the final stage of the enactment of important parts of the new Civil Code was very much involved in that process because of his position within the Ministry of Justice, mentions that the Explanation accompanying Title 6.3 (torts) has 220 footnotes, of which 120 have references to legislation, case-law or literature in 15 countries.¹⁶ He continues by saying that all in all the laws of 40 countries were referred to, in particular German, Swiss, Italian and French law, but also English law.¹⁷ This was, first of all, the result of the influence of one of the greatest Dutch legal scholars of this century: E.M.M. Meijers who in 1947 had been

13. To give but one illustration of the radical and speedy changes needed: in a planned economy entrepreneurial activities are a crime, whereas a market economy cannot exist without commercial activity.
14. See D.C. Fokkema, *De invloed van de rechtsvergelijking op de ontwikkeling van het nieuwe BW*, loc. cit. and the earlier mentioned national report by Van Dunné, p. 48 ff., where he also discusses the use of comparative law in the enactment process of the new Civil Code.
15. A.S. Hartkamp, *Aard en opzet van het nieuwe vermogensrecht*, Monografieën Nieuw BW A1 (Deventer, 1990), p. 17 ff.
16. Cf. the *travaux préparatoires*, to be found in: C.J. van Zeben and J.W. du Pon, *Boek 6, Algemeen Gedeelte van het Verbintenissenrecht* (Deventer, 1981), p. 595 ff.
17. Hartkamp, *Aard en opzet*, p. 17/8.

appointed as the sole drafter of the new code.¹⁸ Hartkamp quotes Bregstein as having said: “Meijers had read everything and remembered everything. (...) His knowledge of foreign systems of law was limitless.”¹⁹ After Meijer's death in 1954 this aspect of his work was continued by his successors as general drafters.

It is clear that when studying the *travaux préparatoires* one cannot but be impressed by the various references to foreign law. E.O.H.P. Florijn, however, in a recent study²⁰ pointed out that many citations are rather formal in nature, that is to say are no more than references to code articles without any further comments about the broader structure and functioning of the foreign system.²¹ In reply the following two comments should be made. First of all, the comparative remarks by Meijers are in my view the outward result of an inner thought process which was initiated and supported by an extensive study of foreign law. Secondly, there are numerous instances where references to foreign case-law and literature can be found.

18. In his “De herziening van ons Burgerlijk Wetboek” (‘The revision of our Civil Code’) (Weekblad voor Privaatrecht, Notaris-ambt en Registratie 1948, no. 4041/2, re-published in: Verzamelde Privaatrechtelijke Opstellen (‘Collected Essays’) Vol. I (Leyden, 1954), p. 146 ff.) Meijers remarked at p. 150 (my translation, JvE):
 “The element which slows us down while trying to develop the law in a proper way is (...) only partially to be found in statutory law; for the same part it can be found in ourselves. For during my preparatory work I have realized more and more how limited the power of a human person to think is and how also the human person who imagines himself in what he does and thinks to be completely free from routine and tradition, is dependent upon what has been handed down to him.
 Both they who want to direct themselves to fairness as those who have themselves been directed by precedents or by statutory law, will experience this, when they compare their own view with those of other countries and other times. We badly need a deepening of our legal knowledge by comparative law.”
19. Hartkamp, Aard en opzet, p. 17. M.H. Bregstein, Meijers en de poging tot hercodificatie in Nederland (Lecture, Faculty of Law, Ghent, Belgium), Rechtskundig Weekblad, 20th Volume nr. 2, 23 September 1956, re-published in: Verzameld Werk I (Zwolle 1960), p. 61 ff., p. 70. (My translation, JvE.)
20. E.O.H.P. Florijn, Ontstaan en ontwikkeling van het nieuwe Burgerlijk Wetboek (Maastricht, 1995), p. 231 ff.
21. On p. 232 E.O.H.P. Florijn also states: “Exemplary for the somewhat laconic approach is further that the comparability was hardly recognised as a problem. The choice of legal systems was in any case remarkably broad. Of real importance was the comparison with the law of Germany, Switzerland, France, Belgium, Italy, Austria, England and the Scandinavian countries. Most influential were the Swiss and German systems; witness the frequent references to those countries. The application of some codes was limited or absent, such as the Hungarian draft and the Russian and Chinese codifications.” (My translation, JvE.)

In the following paragraphs I will briefly look at three topics where the clear influence of English law can be seen and one topic where German influence is prevalent.²² The first three topics concern undue influence, anticipatory breach and mistake. The last topic concerns unreasonably burdensome clauses in general conditions.

1 The common law influence: undue influence, anticipatory breach and error

In order to demonstrate that the use of comparative law was not limited to a comparison with legal systems rooted in the codified Roman law tradition I will first devote some attention to traces of the common law influence. These can be found in e.g. articles²³ 3:44,²⁴ 6:80²⁵ and 6:228²⁶ of the

22. Of course more examples could be mentioned. See e.g. the influence of foreign law on the draft bill introducing amendments to the sales articles and a recodification of works contracts in Book 7: Kamerstuk (“Parliamentary Document”) 23095, Aanpassing van titel 7.1 (Koop en ruil) van het nieuwe Burgerlijk Wetboek met bepalingen inzake de koop van onroerende zaken alsmede vaststelling en invoering van titel 7.12 (Aaneming van werk). This bill contains, among other things, provisions on the possibility of public notification of the contract of sale of an immovable before the registration of such a contract. N.B.: the latter is required for transfer of title. Such a notification is comparable to the German “Vormerkung”.
23. An English and a French translation of the new Netherlands Civil Code (patrimonial law) can be found in: P.P.C. Haanappel and E. Mackaay, *Nieuw Nederlands Burgerlijk Wetboek, Het vermogensrecht* (Deventer/Boston, 1990).
24. “1. A juridical act may be annulled when it has been entered into as a result of threat, fraud or abuse of circumstances.
(...)
4. A person who knows or should know that another is being induced to execute a juridical act as a result of special circumstances – such as state of necessity, dependency, wantonness, abnormal mental condition or inexperience – and who promotes the creation of that juridical act, although what he knows or ought to know should prevent him therefrom, commits an abuse of circumstances.
5. If a declaration has been made as a result of threat, fraud or abuse of circumstances on the part of a person who is not party to the juridical act, this defect cannot be invoked against a party to the juridical act who had no reason to assume its existence.”
Art. 3:44 was art. 3.2.10 in the draft version of the C.C. See for the *travaux préparatoires* (with references to English law sources): C.J. van Zeben and J.W. du Pon, *Parlementaire Geschiedenis van het nieuwe Burgerlijk Wetboek, Boek 3, Vermogensrecht in het algemeen* (Deventer, 1981), p. 210 ff.
25. “1. The consequences of non-performance take effect even before the claim is exigible:
 - a. if it is certain that performance without failure will be impossible;
 - b. if the creditor must conclude from a communication by the debtor that the latter will fail in the performance; or
 - c. if the creditor has good reasons to fear that the debtor will fail in the performance and the debtor does not comply with a written warning indicating those reasons and

new Civil Code on abuse of circumstances (influenced by the English doctrine of 'undue influence'), effects of non-performance before the exigibility of a claim (cf. 'anticipatory breach') and error (cf. 'misrepresentation') respectively. In this report I do not intend to offer a thorough comparative law study of these articles, their history and the foreign legal solutions which were used during the legislative process. I merely intend to draw attention to the sources mentioned in the *travaux préparatoires* and some (in-depth) studies for further reflection.²⁷

requesting the debtor to confirm that he is willing to perform his obligations within a reasonable period specified in that warning.

2. The original moment of exigibility remains valid for the obligation to pay damages for delay and for the purpose of imputation to the debtor of the obligation becoming impossible to perform during his default."

Art. 6:80 was art. 6.1.8.5 in the draft version of the C.C. See for the *travaux préparatoires* (with references to English law sources): C.J. van Zeben and J.W. du Pon, *Parlementaire Geschiedenis van het nieuwe Burgerlijk Wetboek, Boek 6, Algemeen gedeelte van het verbintenissenrecht* (Deventer, 1981), p. 277.

26. "1. A contract which has been entered into under the influence of error and which would not have been entered into had there been a correct assessment of the facts, can be annulled:

- a. if the error is imputable to information given by the other party, unless the other party could assume that the contract would have been entered into even without this information;
- b. if the other party, in view of what he knew or ought to know regarding the error, should have informed the party in error;
- c. if the other party in entering into the contract has based himself on the same incorrect assumption as the party in error, unless the other party, even if there had been a correct assessment of the facts, would not have had to understand that the party in error would therefore be prevented from entering into the contract.

2. The annulment cannot be based on an error as to an exclusively future fact or an error for which, given the nature of the contract, common opinion or the circumstances of the case, the party in error should remain accountable."

Art. 6:228 was 6.5.2.11 in its draft version. See for the *travaux préparatoires* (with references to English law sources): C.J. van Zeben and J.W. du Pon, *Parlementaire Geschiedenis van het nieuwe Burgerlijk Wetboek, Boek 6, Algemeen gedeelte van het verbintenissenrecht*, p. 902. Cf. also Van Zeben and Du Pon, *ibid.*, p. 911 for a rejection of the English doctrine of 'common mistake' within the framework of art. 6: 229 (draft art. 6.5.2.12).

27. See for anticipatory breach M.H. Wissink, Artikel 6.1.8.5 NBW: anticipatory breach, in: A.G. Castermans et al. (eds.), *BW-krant jaarboek 1988* (Leiden, 1988), p. 141 ff. and for error M.M. van Rossum, Dwaling, in het bijzonder bij koop van onroerend goed (Deventer, 1991).

2 Continental law and common law influence: unreasonably burdensome clauses in general conditions

Consumer protection is one of the leading themes in the new Civil Code. Its prime example is the protection of consumers against unreasonably burdensome clauses in general conditions. In the Explanatory Memorandum a paragraph is devoted to comparative law.²⁸ It concerns mainly references regarding foreign legislation. At the end of this paragraph the following, intriguing, statement can be found: “This memorandum is not the place to discuss the contents of those statutes (...). It goes without saying that they have influenced the present draft in many respects. For the rest comparative law fulfilled its usual function: it is a valuable source of inspiration, but rarely offers ready-made solutions.”²⁹ Nevertheless it will be clear to any (Dutch or foreign) observer that the provisions of what became articles 6:231 ff. are to a very large degree modelled according to the German *Gesetz zur Regelung des Rechts der allgemeinen Geschäftsbedingungen* (the so-called “AGB Gesetz”).³⁰

B Administrative law: General Administrative Law Act

A major codification project alongside the Civil Code has been (and still is) the codification of Dutch administrative law. This has been done in the General Administrative Law Act.³¹ The project has been subdivided into “tranches” (parts). The first tranche³² dealt with introductory provisions (definitions and scope), dealings between individuals and administrative authorities,³³ general and special provisions on orders³⁴ (these include

28. W.H.M. Reeshuis and E.E. Slob, *Parlementaire Geschiedenis van het nieuwe Burgerlijk Wetboek, Invoering Boeken 3, 5 en 6, Boek 6 Algemeen gedeelte van het verbintenissenrecht* (Deventer, 1990), p. 1454/5.

29. W.H.M. Reeshuis and E.E. Slob, *Parlementaire Geschiedenis van het nieuwe Burgerlijk Wetboek, Invoering Boeken 3, 5 en 6, Boek 6 Algemeen gedeelte van het verbintenissenrecht*, p. 1455. (My translation, JvE.)

30. See for a comparative study R.H.C. Jongeneel, *De Wet algemene voorwaarden en het AGB-Gesetz*, published in the series *Consument en recht*, no. 9 (Deventer, 1991).

31. An English translation can be found at the following internet site (maintained by the Netherlands Ministry of Justice):

http://www.minjust.nl/a_beleid/thema/awb/teksten/awbeng/inhopeng.htm.

32. The first tranche entered into force on 1 January, 1994.

33. See as an example Section 2:4:

“1. An administrative authority shall perform its duties without prejudice.

2. An administrative authority shall ensure that persons belonging to it or working for it do not influence the decisions if they have a personal interest in the order to be made.”

decisions³⁵ by administrative authorities in individual cases) and special provisions on objections and administrative appeals. The second tranche³⁶ contains provisions on the implementation of binding decisions of authorities of the European Communities, further provisions on – among other things – orders and special provisions in appeals to a court. The third tranche entered into force on 1 January, 1998.³⁷ This part of the Act has provisions on subsidies, self-binding policy rules set by administrative authorities, enforcement (which includes the administrative “*astreinte*”), representation of administrative authorities and general rules on approval and annulment of orders. A fourth and a fifth tranche are under consideration and are still at the drafting stage.³⁸

The *travaux préparatoires* of the first two tranches make explicit reference to comparative law analysis. This can be found in the *Memorie van Toelichting* ('Explanatory Memorandum') by the Ministers of Justice and Home Affairs which accompanies the first tranche and the Explanatory Memorandum which accompanies the second tranche. In the first mentioned document Chapter VIII discusses “comparable foreign legislation”,³⁹ whereas the last mentioned document has a paragraph entitled “some

34. The definition of an order is given in section 1:3:
“1. Order means a written ruling of an administrative authority constituting a juristic act under public law. (...)”
35. Section 1:3 defines “decisions” as follows:
“(...)”
2. Decision means an order which is not of a general nature, including refusal of an application for such an order.
“(...)”
36. This tranche also entered into force on 1 January, 1994.
37. Cf. the information given at the earlier mentioned WWW site maintained by the Ministry of Justice:
http://www.minjust.nl/a_beleid/thema/awb/hoef/hoef.htm
38. See for an overview of future enactments:
http://www.minjust.nl/a_beleid/thema/awb/hoef/hoef.htm
and for the text of the letter written by the Ministers of Justice and Home Affairs to the Second Chamber of Parliament, in which they indicate the various subjects to be regulated in the fourth and following tranches:
http://www.minjust.nl/a_beleid/thema/awb/teksten/download/overige.htm
39. The *travaux préparatoires* were published in: E.J. Daalder/G.R.J. de Groot, *Parlementaire geschiedenis van de Algemene wet bestuursrecht, Eerste tranche (wet van 4 juni 1992, Stb. 315)* (Alphen a/d Rijn, 1993). Chapter VIII of the Explanatory Memorandum can be found on p. 93 ff.

comparative remarks”.⁴⁰ The comparable foreign legislation considers – as might be expected from the title – foreign statutes, with only one footnote for further reference. The footnote mentions a French book (from 1975; it should be noted that the Explanatory Memorandum dates from 1989) on the codification of administrative procedure and two books written by Dutch authors. One book discusses the administrative law of the countries of the European Communities (published in 1986), the other examines general principles of proper administration and foreign equivalents (published in 1987). Also the “some comparative remarks” refer almost exclusively to statutory foreign law, except for some references to German literature.

A further, albeit very slight, influence of comparative law can be found in the “evaluation” of the practical effects of the General Administrative Law Act. According to section 9:1 the Ministers of Justice and Home Affairs are obliged to submit to Parliament an evaluation of how the Act is being implemented.⁴¹ In its first report⁴² the committee which was responsible for the evaluation devoted a paragraph to the “juridification” of the relationship between citizens and public authorities. By “juridification” the committee means that the relationship between citizens and public authorities is increasingly laid down in legal rules, that citizens show a growing readiness to litigate, that judges are more and more inclined to rule on decisions of public authorities and are no longer willing to abstain from doing so on the basis of not wishing to interrupt the administrative decision-making process. The committee acknowledges that certainly a tendency exists that the volume of annual legislation is increasing and that litigation also is growing. In its view the General Administrative Law Act is not, however, one of the causes of juridification, but a reflection of what can be seen “in all Western countries”. The committee further mentions that Germany has more judges and advocates per head of the population than the Netherlands and that administrative litigation in the Netherlands on average does not take

40. See E.J. Daalder/G.R.J. de Groot/J.M.E. van Breugel, *Parlementaire geschiedenis van de Algemene wet bestuursrecht, Tweede tranche* (Stb. 1993, 581, 650, 671, 690) (Alphen a/d Rijn, 1994), p. 178 ff.

41. Section 9:1 reads as follows:

“1. Within three years of the entry into effect of this Act and thereafter every five years Our Ministers of Justice and Home Affairs shall submit a report to Parliament on the way in which the Act is being implemented.

2. Subsection 1 shall not apply to the provisions governing appeal to an administrative court.”

42. *Toepassing en effecten van de Algemene wet bestuursrecht 1994 – 1996, Verslag van de commissie evaluatie Algemene wet bestuursrecht* (The Hague, 18 December 1996), to be found at: http://www.minjust.nl/a_beleid/thema/awb/teksten/download/overige.htm

as much time as in Germany.⁴³ For these two reasons juridification is considered to be less of a problem in the Netherlands than in Germany. No footnotes or further explanation are offered. Given the summary (almost apodictic) nature of these remarks, I can only say that in my view arguments such as those used here are a far cry from comparative law arguments. They resemble far more purely political arguments.

The General Administrative Law Act also shows a quite interesting example of the “hidden” use of comparative law. One of the leading notions of the Act is the so-called “mutual legal relationship” (“*wederkerige rechtsbetrekking*”), which exists between public authorities and citizens. Remarkably enough, this leading idea is nowhere to be found in the text of the statute, but only in the *travaux préparatoires*. The first time this notion is unfolded can be found in the Explanatory Memorandum of the bill introducing the first tranche of the project.⁴⁴ The relationship between public authorities and citizens is considered to be a legal relationship between – according to their nature – different parties. On the one side are public authorities which represent the general interest, on the other side citizens who will defend their private interests. This legal relationship is mutual as both public authorities and citizens should respect each other's interests.⁴⁵ The Explanatory Memorandum concerning the second tranche tentatively states that in the near future the development towards a “mutual legal relationship” might also have its consequences in the area of administrative procedural law. Then the lawfulness of a decision *ex tunc* will no longer be the subject under focus, but rather the legal relationship *ex nunc*.⁴⁶

Where did this idea of a “mutual legal relationship” – as remarked earlier: nowhere to be found in the text of the statute and introduced in the *travaux préparatoires* without any references to literature or other sources – come from? It is not too bold to presume that, at least in part, it was an idea which emanated from the then Minister of Justice Hirsch Ballin. Before Hirsch Ballin became the Minister of Justice he was a Professor of constitutional law⁴⁷ and in his scholarly writings he had expressed a great deal of sympathy for the thoughts of N. Achterberg, a German constitutional law

43. Committee report paragraph 4.6, p. 35/6.

44. Daalder/De Groot, *Parlementaire geschiedenis*, Eerste tranche, p. 39 ff.

45. Daalder/De Groot, *Parlementaire geschiedenis*, Eerste tranche, p. 39.

46. Daalder/De Groot/Van Breugel, *Parlementaire geschiedenis*, Tweede tranche, p. 174. I abstain from giving any comments as to what this latter remark implies, as this is not really clear from the Explanatory Memorandum and hence would require further analysis of recent developments in Dutch administrative law which I cannot offer in this report.

47. Hirsch Ballin has now returned to the academic community; he is also a Member of the Upper Chamber of Parliament.

scholar. Achterberg had defended the view that the legal order should be seen as an order of legal relationships.⁴⁸ Questions as to what was meant by “legal relationship”, its “mutual” nature and in particular the possible consequences of this approach to rights and duties between public authorities and citizens have provoked fierce methodological debate.⁴⁹

Irrespective of who has the better arguments in this debate on “mutual legal relationships” as a comparativist I must regret that relevant German academic writings were not even mentioned in a footnote in the *travaux préparatoires*. It could, of course, be argued that not mentioning the origins of the theoretical concepts underlying a new codifying statute makes it possible to debate and interpret the statute independently of those origins. The guiding thought in the latter approach is to dissociate the theoretical (academic) discourse from the practical application of the statute, thus making room for free interpretation. Although I acknowledge the attractive side of that approach, I cannot share its pragmatic view. Where, as in this case, foreign law has most likely inspired a fundamental and (perhaps) far-reaching choice, all arguments and sources of inspiration should have come to light: laying one’s hand on the card-table in order to have an open and constructive debate.⁵⁰

48. N. Achterberg, *Die Rechtsordnung als Rechtsverhältnisordnung, Grundlegung der Rechtsverhältnistheorie* (Berlin, 1982), p. 31 who defines legal relationship (“Rechtsbeziehung”) as “die rechtsnormgestaltete Beziehung zwischen zwei oder mehreren Subjekten” (a relationship between two or more persons shaped by legal norms). See for a discussion of Achterberg’s writings e.g. E.M.H. Hirsch Ballin, *Onafhankelijke Rechtsvorming, Staatsrechtelijke aantekeningen over de plaats en functie van de Hoge Raad in de Nederlandse rechtsorde*, in: *De plaats van de Hoge Raad in het huidige staatsbestel* (commemorative collection of essays on the occasion of 150 years of the Hoge Raad (Supreme Court of the Netherlands) (Zwolle, 1988), re-published in his selected works: *Rechtsstaat & Beleid* (Zwolle, 1991), p. 291 ff.
49. Cf. *pro* the idea of a “mutual legal relationship” R.M. van Male, *Onvoltooid recht* (inaugural lecture) (Zwolle, 1993), *contra* A.Q.C. Tak, *De overheid in het burgerlijk recht* (The Hague, 1997), p. 50 ff., where he also summarizes the debate; see also – for criticisms from a comparative viewpoint – J.M.H.F. Teunissen, *De ‘wederkerige rechtsbetrekking’ als strategisch concept voor nivellerende rechtswetenschap?*, in: E.C.H.J. van der Linden and A.Q.C. Tak, *Eenzijdig of wederkerig, Beschouwingen over de wederkerige rechtsbetrekking als basisconcept in het bestuursrecht* (Deventer, 1995), p. 277.
50. At this point I should mention that in my doctoral thesis entitled *Contract als rechtsbetrekking, Een rechtsvergelijkende studie* (Contract as a form of legal relationship, A comparative study) (Zwolle, 1990) I defended the view that in private law the “legal relationship” should be the focus of attention, not the dichotomy: contract vs. tort. From this “legal relationship” (private law) duties ensue, which can be – from a classical viewpoint – contractual, quasi-contractual, delictual or quasi-delictual in nature. Concluding that two (or more) parties have a contract is in my view saying in other

V Conclusion

Van Dunné at the end of his Dutch national report on this same subject concluded some 15 years ago:⁵¹

“As to the quantity of comparative law research used in the legislative process in civil law, the conclusion must be that it is disappointingly small. (...) The foreign law taken in comparison in ministerial drafts is almost without exception ‘black-letter law’, the comparison is one of code texts.”

This conclusion, at least to some degree, still holds true. As the use of comparative law frequently occurs in the preparatory stage of a draft and might be based on personal knowledge or contacts, it is difficult for an outside observer to fully appraise this use. What is written in the *travaux préparatoires* often shows a fairly superficial use of comparative law and it is clear – as was also the conclusion of Van Dunné – that the political aspects of the legislative process are decisive as to what influence – if any – comparative law analysis might have. This is exemplified in the *travaux préparatoires* of the, still pending, draft bill on the sale of immovables and works contracts. In the “Memorandum of Reply”⁵² the Minister of Justice writes that the choice of a particular statutory solution at the end of the day remains a policy choice. And this is even true when the foreign solution that is taken as an example comes from a legal system which is very comparable with the Dutch legal system. Obviously the closeness or comparability of systems is a factor of relevance, but nothing more. It can still nevertheless be said that those involved in the Dutch legislature are growingly conscious of the benefits that the study of foreign law and the comparative law method have to offer, a consciousness which in my view can only increase in a time of closer economic cooperation within Europe and of, more generally, overall globalization with resulting worldwide interdependent markets.

words that between them a more specific legal relationship exists, resulting in specific duties: obligations. The views which I expressed in the area of private law are sometimes referred to by both proponents and opponents of the “mutual legal relationship” approach in the General Administrative Law Act. In this report I do not intend to concern myself with the merits of the public law debate, but only the debate as such.

51. National report, p. 58/9.

52. Kamerstuk 23095, no. 3, Memorie van Antwoord, p. 2/3.