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THE CONVERGENCE OF LAWS: A TYPOLOGY OF IMPLEMENTATION MODELS & FACTORS

By
Antonios Emmanuel Platsas, LL.B., LL.M.

A Submission to
the University of Dublin of a
Dissertation Thesis
for the degree of Doctor of Philosophy, Ph.D.





Interim Head: Professor Hilary Delany
Head of Department: Professor William Binchy
Supervisor of Research: Dr. Neville Cox, Director of Post-Graduate Teaching and Learning

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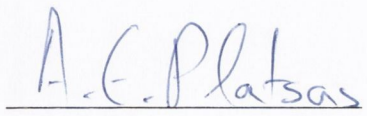
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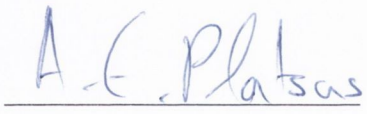
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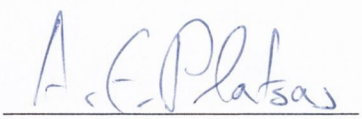
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SUMMARY & RESEARCH METHODOLOGY

SUMMARY: This thesis is divided into five parts and eight chapters. In the first part of the thesis one finds Chapters 1 and 2, which are purely introductory. In the second part one finds the models proposed, within Chapters 3 and 4. In the third part the proposed factors are to be found, within Chapters 5 and 6. In the fourth part of the thesis the academic input through interviews is to be found, in Chapter 7. In the final and fifth part, one finds the concluding Chapter 8. In particular:

Chapter 1 sets out the thesis, its objectives and its aims of this thesis and provides the chronology of analysis.

Chapter 2 sets out the parameters for the four models and factors of law implementation, which follow this chapter. It also incorporates the necessary background material which will acquaint the reader with the notion of law convergence and the surrounding material thereto, as well as other material in relation to the rest of the thesis.

Chapter 3 proposes the first model of implementation of convergent law, the 'general model of implementation'.

Chapter 4 proposes the second model of implementation of convergent law, the 'specific/restructuring of implementation'.

Chapter 5 proposes the third factor of implementation, the 'comparative law factor of implementation'.

Chapter 6 proposes the fourth and final factor of implementation of convergent law, the 'socio-legal factor of implementation'.

Chapter 7 examines qualitatively the answers of thirty-three academic law experts from Europe and the world on the question of convergence and other surrounding questions to this thesis.

Chapter 8 incorporates the conclusions of this thesis.

RESEARCH METHODOLOGY: As regards research methodology, one needs to firstly admit that ontology is the starting point of every thesis; ontology amounts to the reality upon which all theory is based; it is the world in which we live and feel. Second, as regards epistemology, one uses it to get a grasp of the world in which he lives, to acquire knowledge of this world. To do so, one requires methodology. The concrete methods used herein have been: i) the traditional legal method in research of reviewing the literature (such as published material) in the field, as well as legal texts, such as instruments of law and case law, which have been proposed as relevant in the analysis; this is the theoretical element of the research undertaken for this thesis, ii) the empirical research approach of observation and application of proposed models and factors, with regard to real and (to a lesser extent) hypothetical examples of implementation of convergent law and iii) the not-so-traditional empirical research (but only partially so and to a limited extent; in particular see Chapter 7 herein) approach with regard to interviewing academic law experts from all over Europe and other parts of the world. Sources of this thesis have, therefore, been laws and bibliography themselves; the empirical application of the models and factors proposed herein, based on observation of the reality, and the views of thirty-three law experts from law academia.

ACKNOWLEDGEMENTS

When an ancestor of the author was once asked about his teacher, Aristotle, he once famously replied 'honour your teachers more than your parents, for to your parents you owe your life, whilst to your teachers you owe your good life' ('I am indebted to my father for living, but to my teacher for living well' is the original quote). My greatest and warmest thanks go, therefore, to my supervisor, Dr. Neville Cox, who patiently and consistently 'tolerated' both my character and my sometimes optimistic ideas for the last four years. His guidance has been priceless. For this I am especially grateful to him. I wish him and his family the best for the future.

Particular thanks go to my parents for their support (financial and otherwise) in the nine years of my legal studies. 'Daddy cool', as the Boney M song goes – hopefully it will soon be me who supports you back!

I also wish to thank the Trinity Law School, for this has been my home for the last four years. In addition, I wish to thank the University of Dublin as a whole for providing me with a studentship in the first three years of my research. In particular, I acknowledge support from the Trinity Trust for the Trinity Award in the form of a studentship during these years of my research at Trinity College and support from both the Trinity Law School and the Graduate Studies Committee in supporting me financially for an interview trip and a conference presentation abroad. I acknowledge also financial support through the University from the European Student Assistance Fund for the first and last year of my studies at Trinity College.

Additionally, I wish to thank the following academics who have helped the preparation of my thesis either directly or indirectly (in alphabetical order):

- Professor John Bell for being interviewed by me.
- Professor William Binchy for supporting my cause in relation to a conference paper and for discussing twice the state of Irish human rights law vis-à-vis convergent law.
- Professor Joachim Michael Bonell for being interviewed by me.
- Professor Michael Bridge for being interviewed by me.
- Dr. Petra Butler for being interviewed by me.
- Professor Hugh Collins for being interviewed by me.
- Dr. Alberto Ricardo Dalla Via for being interviewed by me.
- Dr. Hilary Delany, Associate Professor of Law, Barrister-at-Law for supporting my cause in relation to a research trip for an interview.
- Professor Anna Maria De Vita for being interviewed by me.
- Professor Bruno de Witte for being interviewed by me.
- Dr. Oran Doyle, Lecturer in Law, Barrister-at-Law for proofreading parts of my thesis.
- Jabeur Fathally for being interviewed by me.
- Dr. Carmen Otero García-Castrillón for being interviewed by me.
- Professor Stephen Goldstein for being interviewed by me.
- Dr. Mehmet Helvacı for being interviewed by me.
- Dr. Angel José Rodrigo Hérnandez for being interviewed by me.
- Professor Margot Horspool for discussing my thesis with me at the British Institute of Comparative and International Law in the summer of 2005.
- Dr. Benjamin Karakostanoglou for being interviewed by me.

- Professor Jawahar Lal Kaul for being interviewed by me.
- Professor Richard S. Kay for being interviewed by me.
- Professor Konstantinos D. Kerameus for being interviewed by me.
- Professor Eckart Klein for being interviewed by me.
- Professor Hein Kötz for being interviewed by me and for his most useful advice on the *Affinitatis Formula.*
- Professor Assaf Likhovski for being interviewed by me.
- Professor María Elena Mansilla y Mejía for being interviewed by me.
- Professor Loukas Mistelis for consistently answering my e-mail queries in relation to the CISG and international trade law as a whole.
- Professor Olivier Moréteau for being interviewed by me.
- Professor John F. Murphy for being in interviewed by me.
- Dr. Eoin O'Dell, Lecturer in Law, Barrister-at-Law for being interviewed by me and for giving me the opportunity to present my work twice in the Dublin Legal Workshop in the academic years 2003/2004 and 2004/2005 respectively. I also wish to thank him for Kennedy v Law Society. He knows.
- Professor Tuomas Ojanen for being interviewed by me.
- Professor Esin Örücü for being interviewed by me.
- Professor Christa Roodt for being interviewed by me.
- Professor Cheryl Anne Saunders for being interviewed by me.
- Dr. Ruth Sefton-Green for being interviewed by me.
- Nick Squires for being interviewed by me.
- Professor Evhen Tsybulenko for providing me useful information on the recent law reforms of the civil laws of Estonia, Latvia and Lithuania.
- Professor Gardiol Johan van Niekerk for being interviewed by me.
- Professor Dário Moura Vicente for being interviewed by me.
- Professor Gerry Whyte for providing me with important guidance in relation to constitutional law vis-à-vis convergent law at an earlier stage in the preparation of my thesis.
- Professor Jiro Yamaguchi for being interviewed by me.

Finally, credit for the translations of the interview questionnaire and a heart-felt 'thank you' must go to the following: Julien André (French questionnaire), Zelal Aldemir (Turkish questionnaire), Pamela Bartolozzi (Italian questionnaire), Alfons Claver (Castilian and Catalan questionnaires), Rita de la Feria (Portuguese questionnaire), Doris Dietze & Michaela Hailbronner (German questionnaire), Katja Kuutio (Finnish questionnaire). I also wish to thank the Trinity Accommodation Office for their efforts to provide me on-campus accommodation for most of the last but truly crucial months of my thesis preparation. At this point it should be stated that there might be points in the text which may be open to improvement but the author must content himself that what he has done in this thesis he has done to the best of his ability. Perfection is, after all, not of this world.

I dedicate this thesis to the idea of law, my parents and the Divinity (though not necessarily in this particular order of preference).

Antonios Platsas
Trinity College, Dublin
30 September 2007

OUTLINE TABLE OF CONTENTS

1 INTRODUCTION 2

2 PARAMETERS & BACKGROUND MATERIAL 4

3 THE GENERAL MODEL OF IMPLEMENTATION OF CONVERGENT LAW 35

4 THE SPECIFIC/RESTRUCTURING MODEL OF IMPLEMENTATION OF CONVERGENT LAW 69

5 THE COMPARATIVE LAW FACTOR IN THE IMPLEMENTATION OF CONVERGENT LAW 131

6 THE SOCIO-LEGAL FACTOR IN THE IMPLEMENTATION OF CONVERGENT LAW 172

7 ACADEMIC INPUT THROUGH INTERVIEWS WITH EXPERTS 221

8 CONCLUSIONS 255

CONTENTS

Declaration ii

Summary and Research Methodology iii

Acknowledgements iv

Outline Table of Contents vi

Table of Statutes xi

Table of Cases xx

Index of Figures xxv

PART I: INTRODUCTION

1. **Introduction**
1.1. Introduction 2
1.1.1. Thesis, objectives and aim 2
1.1.2. Chronology of analysis 3

2. **Parameters & Background Material**
2.1. Introduction 4
2.2. Subject matter – Definition of Convergence 4
2.2.1. Unifying hypothesis for the thesis 8
2.2.1.1. Effectiveness 9
2.2.2. Proposed model, geographical scope and legal parameters 12
2.2.2.1. Potentially global model – European and international experience 13
2.2.3. Employment of certain features of the EU model of convergence and the US and Swiss models of internal alignment 13
2.3. Background material 15
2.3.1. Background information on convergence 15
2.3.1.1. Legal convergence is desirable – objections 18
2.3.1.2. Legal convergence is possible 22
2.3.1.3. Legal convergence is a political question 24
2.3.1.4. Convergent instruments of law 25
2.3.2.1. Correspondence principle 30
2.3.2.2. Propositional logic 31
2.4. Choice of methods – thesis relevance 34

PART II: MODELS

3. **The General Model of Implementation of Convergent Law-Implementation of Formal and Minor Changes**
3.1. Introduction 35
3.1.1. Definition of the General Model of Implementation 35
3.1.2. General application of the General Model of Implementation 36
3.1.3. Implementation benchmarks and reality 38
3.1.4. Succesful bridging between the legal systems: Says who? 39
3.2. Requisites and initial justification thereof 40
3.2.1. Existence of a codified text open to judicial or other scrutiny: positivism 41

3.2.2. A binding obligation to implement in theory 44
3.2.3. Adherence in practice to what has been agreed: *Pacta sunt servanda* 45
3.2.4. Respect to the letter or at least to the spirit of the convergent instrument to be implemented 48
3.2.5. Notice to sanctions 49
3.3. Application and mechanics 50
3.3.1. First exemplification: the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Application of the general model vis-à-vis an instrument concerned with Public International Law mattters) 52
3.3.2. Second exemplification: the United Nations Convention on Contracts for the International Sale of Goods 1980 (Application of the general model vis-à-vis an instrument concerned with Private International Law matters) 59
3.3.3. Third exemplification: the Council Directive (EC) 98/5 (Lawyers' home title Directive) and Council Regulation (EC) No 1/2003 (Implementation of rules of competition) (European law applications of the general model) 64
3.4. Conclusion 68

4. **The Specific/Restructuring Model of Implementation of Convergent Law-Implementation of Major and Substantive Changes**
4.1. Introduction 69
4.1.1. Definition of the Specific/Restructuring Model of Implementation 70
4.1.2. General application of the Specific/Restructuring Model of Implementation 71
4.1.3. How to actually discern of an *anacatataxis*? 73
4.1.4. Initial exemplification of *anacatataxes* via concrete examples 76
4.2. Requisites and initial justification thereof 77
4.2.1. Identification of an anacatataxis: assessing the system itself and the impact of the convergent instrument to it 78
4.2.2. In principle susceptibility of the legal system to the *anacatataxis* 81
4.2.3. The necessity for special arrangements 81
4.3. Application and mechanics 83
4.3.1. First exemplification of the restructuring model: Membership of the EU with particular reference to the membership of Ireland, the UK, Estonia and Bulgaria 85
4.3.2. Second exemplification: The direct incorporation of universal human rights treaties in a hypothetical Muslim *and* authoritative legal system 90
4.3.3. Third exemplification: A legal *anacatataxis* in Ireland and the UK with the incorporation of the general corpus of the European Convention on Human Rights 1950 98
4.3.4. A fourth illustration of the restructuring model in the UK and Ireland: implementation of Council Directive 93/13/EEC 110
4.3.5. A fifth illustration of a potential application of the restructuring model in the UK and Ireland: the incorporation of the general corpus of the Vienna Convention on Contracts for the International Sale of Goods 1980 117
4.4. Conclusion 128

PART III: FACTORS

(Preface to Factors) 129

5. **The Comparative Law Factor in the Implementation of Convergent Law-Implementation through the Claim of External Sources to the Legal System**
5.1. Introduction and Comparative Law in the dawn of the new century 131
5.1.1. Definition of the Comparative Factor of Implementation 133
5.1.2. General application of the Comparative Factor of Implementation 134
5.1.3. Indirect relevance of transplantation tactics to the factor 135
5.1.4. No deviatory patterns of convergence by the use of the factor 139
5.2. Requisites and initial justification thereof 139
5.2.1. The *Affinitatis Formula* 140
5.2.1.1. Directly and indirectly relevant systems 152

5.2.2. 'Litmus' of applicability 153
5.3. Application and mechanics 154
5.3.1. The Scylla of the language barrier in applying the method and the Charybdis of domesticating the latter 156
5.3.2. First exemplification: Application of the method in the potential case of introducing the notion of universal securities in the UK, France and Quebec 159
5.3.3. Second exemplification: The Irish experience-The Law Reform Commission's recommendations in the incorporation of international conventions and the use of the comparative factor of implementation 163
5.3.4. Third illustration: Application of the technique in the case of the 'laboratory state' 170
5.4. Conclusion 171

6. **The Socio-Legal Factor in the Implementation of Convergent Law-Implementation through the Claim of Internal/Domestic Sources to the Legal System**
6.1. Introduction 173
6.1.1. Definition of the Socio-Legal Factor of Implementation 173
6.1.2. General application of the Socio-Legal Factor of Implementation 174
6.1.3. How to discern of the need for the application of a socio-legal factor? 174
6.1.4. Occasions of justifiable insularity 176
6.1.5. The theoretical possibilities 177
6.1.6. Three hypotheses for the factor to apply 178
6.1.7. The hypotheses in perspective 179
6.1.7.1. Sociological considerations and convergent law 179
6.1.7.2. *Praesumptio similitudinis* arises but not always 182
6.1.7.3. A social contract between state and supra-state 184
6.1.8. The abstract character of the factor 185
6.2. Considerations and initial justification thereof 186
6.2.1. No excuse for abuses under the factor 186
6.2.2. Sustainablity of deviation or rejection 187
6.2.3. Apprehension of the factor to natiolist or political considerations 187
6.2.4. Upon rejection or adaptation the extra-national authority affirms 189
6.2.5. Margin of appreciation 189
6.3. Application and mechanics 191
6.3.1. First exemplification of the factor: Margin of appreciation *per* se under the ECHR 1950 191
6.3.2. Second exemplification of the factor: On intestines and convergent law 199
6.3.3. Third exemplification of the factor: The highways speed limit convergent law 206
6.3.4. Fourth illustration: The deviatory character of law adapting in the Japanese paradigm 209
6.3.5. Fifth illustration: Relativism and universalism vis-à-vis the socio-legal factor of implementation and the convergence theory with particular regard to the Universal Declaration of Human Rights 1948 213
6.4. Conclusion 220

PART IV: ACADEMIC INPUT THROUGH INTERVIEWS WITH EXPERTS

7. **Academic Input through Interviews with Experts**
7.1. Introduction 221
7.2. Thirty-three experts from all the corners of Europe and the world interviewed 221
7.2.1. Methodology: Interview format and qualitative/quantitative methodology 223
7.2.1.1. Interview format in general 223
7.2.1.2. Interview format in particular and aims 225
7.2.1.3. Justification of interview and interview format 226
7.2.1.4. Methodology in relation to the qualitative analysis of the interviews 230
7.2.1.5. On interpreting the interviews: Interpretivism and critical realism 232
7.2.2. Qualitative assessment 233
7.2.2.1. Question 1: Convergence in principle 234
7.2.2.2. Question 2: Convergence of your national legal system 242
7.2.2.3. Question 3: Which model from the ones proposed? 247

PART V: CONCLUSIONS

8. **Conclusions**
8.1. Conclusions of this thesis 255
8.1.1. General conclusions on the four models and factors 255
8.1.2. Particular conclusions 256
8.1.2.1. Conclusion No. 1: A full and effective pattern of implementation methodology - the limitations of a theoretical and idealistic thesis 256
8.1.2.2. Conclusion No. 2: The models and factors are mostly discretionary 257
8.1.2.3. Conclusion No. 3: The models and factors, as presented, are pure – Combination of models and factors preferable, if possible 257
8.1.2.4. Conclusion No. 4: The operation of one model does not exclude the parallel operation of another 258
8.1.2.5. Conclusion No. 5: The national legal system at the centre of the analysis 259
8.1.2.6. Conclusion No. 6: Modification of models and factors likely on a case by case basis 259

List of Sources 260

Appendix 1: Certificates of Academic Interviews 301
Appendix 2: Questionnaires (Original version in English followed by Castilian version, Catalan version, Finnish version, French version, German version, Greek version, Italian version, Portuguese version and Turkish version) 333
Appendix 3: Transcription of Academic Interviews 345
Appendix 4: Comparative Chart of the Models and Factors Proposed in this Thesis 359
Appendix 5: Published Material 362

Index 391

(Word Count: c. 75,000 words)

TABLE OF STATUTES

NATIONAL LEVEL

ARGENTINA

-Penal Code, Article 258 bis

-Statute on Ethics in the Exercise of Public Office (Law No. 25.188)

AUSTRALIA

-Criminal Code Act 1995, s. 70.1, s. 70.2 , s. 70.5

AUSTRIA

-BGBl. I 27/2000: Free Movement and Establishment of European Lawyers in Austria and Amendement to the Lawyers Regulation

-Constitution, Article 9 (2) (delegation of competences to international organisations)

-Penal Code, ss. 307, 308

BELGIUM

-Bribery Prevention Act of 10 February 1999

-Constitution, Article 25*bis* of the 1831 Belgian (Article 34 of the Consolidated Constitution)

-Criminal Code, Articles 246-252

-Law aimed at making legal practice and establishment in Belgium easier for lawyers from another Member State of the European Union

BRAZIL

-Law No. 10,467 of 11 June 2002

-Penal Code, Article 317

BULGARIA

-Law on the Amendment to the Penal Code

-Penal Code, Articles 93, 304 para. 2

CANADA

-Corruption of Foreign Public Officials Act 1998

-Criminal Code, R.S.C. 1985, c. C-46, para. 121 (1) (a)

-Cultural Property Import and Export Act 1977

(Quebec)

-Civil Code 1994, Articles 2666, 2715 et seq., 2755

CHILE

-Civil Code (1855)

-Criminal Code, Articles 250 *bis* A, 250 *bis* B

-Law No. 19,829

CYPRUS

-No 180(I) of 2002 Act amending the Lawyers Act

CZECH REPUBLIC

-Act No. 85/1996 Coll., on Advocacy, as amended by Act No. 210/1999 Coll., 120/2001 Coll., 6/2002 Coll. and 228/2002 Coll.

DENMARK

-Act No. 228

-Act n° 231 of April 4th, 2000, with changes to the Civil Code

-Constitution, Article 20 (delegation of competence to international bodies)

-Regulation n° 276 of April 14th,2000, regarding the establishment of EU-lawyers in Denmark issued by the Justice Department

EQUADOR

-Civil Code (1860)

ESTONIA

-Bar Association Act

FINLAND

-Lawyers' Act, Paragraphs 5 b, 3, 8, 9

-Penal Code, ss. 13, 14 and 20

FRANCE

-Act No. 2000-595 of 30 June 2000

-Act No. 2004-130 of 11 February 2004 reforming the status of certain legal professions

-Civil Code

-Constitution 1958, Articles 55 (International law) and 88 (EU)

-Declaration of the Rights and Duties of Man and the Citizen 1795

-Declaration of the Rights of Man and of the Citizen of 1789

-Declaration of the Rights of Man and of the Citizen of the Year I of 1793

GERMANY

-Constitution 1949, Article 23

-European Lawyers Law of March 9th, 2000

GREECE

-Civil Code

-Code of Civil Procedure

-Constitution 1975, Articles 28-I, II and III

-Law 2251/1994

-Law 2656/1998

-Law 3043/2002

-Penal Code

-Presidential Decree n° 152/2000 of May 23rd, 2000

HUNGARY

-Criminal Code, ss. 258/B and 258/F

-Law No. XI of 2003 on the amendment of Law No. XI of 1998 on attorneys

ICELAND

-Act No.147/1998

-General Penal Code, Article 109

IRELAND

-Constitution 1937, Articles 12-14 (President), 15-27 (National Parliament), 28 (Government), 28A (Local Government), Articles 29.4, 29.5.1, 29.6, 34.4.5°, 40-44, 41

-Ethics in Public Office Act 1995

-European Communities Act 1972 (as amended), s. 2

-European Convention on Human Rights Act 2003, ss. 1 (1), 2 (1), 3 (1), 4, 5 (1)

-Human Rights Commission Act 2000 (as amended), s. 8 (c)

-Law Reform Commission Act 1975, ss. 3 (1), 4 (3) (b)

-Prevention of Corruption Acts of 1906, s. 1 and 1916 (1889-1916 Acts)

-Prevention of Corruption (Amendment) Act 2001

-Public Bodies Corrupt Practices Act 1889

-Sale of Goods Act 1893 (as amended), ss. 28, 35

-Sale of Goods and Supply of Services Act 1980, ss. 10, 11, 21, 22, 23, 24 & Schedule of the Act

-Solicitors (Amendment) Act, 2002

-Statutory Instrument 95, No. 27 of 1 February 1995 (European Communities (Unfair Terms in Consumer Contracts) Regulations, 1995.

-Statutory Instrument No. 307 of 2000 (European Communities (Unfair Terms in Consumer Contracts) (Amendment) Regulations, 2000)

-Statutory Instrument No. 732 of 2003

ITALY

-Constitution 1947, Article 11 (transfer of competence to international organisations)

-Criminal Code, Articles 321, 322, 322 bis para. 2

-Decree of February 2nd, 2001

-Law n° 526, Art. 19

JAPAN

-Penal Code, Article 8

-Unfair Competition Prevention Law, Article 10 bis (1)

KOREA, REPUBLIC OF

-Act on Preventing Bribery of Foreign Public Officials in International Business Transactions

LITHUANIA

-Law on supplementing articles 7 and 18 and adding a Chapter 10 to the Law on the Bar of 6 December 2001

LUXEMBOURG

-Act of 4 December 1967

-Code of Criminal Procedure

-Criminal Code

-Law of 15 January 2001

-Law of 13 November 2002

MALTA

-L.N.273 of 2002: Mutual Recognition of Qualifications of Legal Profession Regulations

MEXICO

-Federal Penal Code, Article 222 bis

NETHERLANDS

-Constitution 1983, Article 94 (compatibility of domestic provisions with international law)

-Extradition Act, Article 51a

-Law of July 13rd, 2002

-Penal Code, Articles 177a, 178a

NEW ZEALAND

-Crimes Act 1961, ss. 105 C, 105 D and 105 E

-Crimes (Bribery of Foreign Public Officials) Amendment Act 2001

NORWAY

-Penal Code, s. 128

POLAND

-Act of 5 July 2002 on the provision by foreign lawyers of legal assistance in the Republic of Poland

-Penal Code, Article 229

PORTUGAL

-Constitution, Article 8 (as amended)

-Decree Law no. 28/84 of 20 January, Article 41-A

-Law no. 13/2001 of 4 June

-Law 80/2001 of July 20th

-Regulation for the Registration of lawyers from other Member States of the European Union

SAUDI ARABIA

-Reservation to the Convention on the Elimination of All Forms of Discrimination Against Women, 7 September 2000

SLOVAKIA

-Act No. 586/2003 Coll. on Advocacy

-Criminal Code, section 161b , section 161c

-Law on Banks

SLOVENIA

-New Act amending the Attorney's Act published in the Official Gazette of the Republic of Slovenia, No. 24-1455/2001

-Penal Code, Articles 126, 268

SPAIN

-Constitution, Article 93 (transfer of powers to international organisations)

-Organic Act 3/2000 of the 11th of January

-Penal Code, Article 445 bis

-Royal Decree 936/2001 of August 3rd, 2001 published in the BOE 186/2001on August 4th, 2001

SWEDEN

-Code of judicial procedure, Chapter 8, paragraph 1 and followings

-Penal Code

SWITZERLAND

-Constitution, Article 46 (2)

-Criminal Code, Articles 322ter to 322octies

-Law on International Private Law

TURKEY

-Amendment to the Law regarding Prevention of Bribery of Foreign Public Officials in International Business Transactions No: 4782 of 2 January 2003

-Criminal Code (Law no: 765 dated 1 March 1926), Articles 4, 211 and 220

UNITED KINGDOM

-Anti-Terrorism, Crime and Security Act 2001, Part 12

-Bill of Rights (1689)

-Child Abduction Act 1984

-Crime (Sentences) Act 1997, s. 29 (as amended)

-Criminal Jurisdiction Act 1975

-Criminal Justice Act 1991, ss. 33 (2), 37 (4) (a) and 39 (Declared incompatible with Article 7 ECHR)

-European Communities Act 1972 (as amended), s. 2 (1)

-European Communities (Lawyer's Practice) Regulations 2000 (England/Wales), Part V, S.I. N° 1119

--European Communities (Lawyer's Practice) Regulations 2000 N° 121 (Scotland)

-Habeas Corpus Act (1679)

-Human Fertilisation and Embryology Act 1990, s. 28 (6) (b) (Declared incompatible with Art 8, and/or Art.8 with Art 14 ECHR)

-Human Rights Act 1998, ss. 2 (1), 3 (1), 4 (2), 6 (1), 19 (1)

-Immigration and Asylum Act 1999, Penalty Scheme contained in Part II (Amended by Nationality, Immigration and Asylum Act 2002, section 125, and Schedule 8)

-Income and Corporation Taxes Act 1988 Section 262 (The sections declared incompatible are no longer in force)

-Law Commissions Act 1965, s. 3 (1) (f)

-Law Society of Northern Ireland European Communities (Lawyer's practice) Regulations 2000 (Northern Ireland) SI 2000 N° 121

-Matrimonial Causes Act 1973, s. 11 (c) (Incompatible with Art 8, and Art 12 ECHR)

-Mental Health Act 1983, ss. 26 (1) and 29 (Incompatible with Article 8 ECHR), 73 (Amended by Mental Health Act (Remedial) Order 2001 (made 18/11/01, in force 26/11/01)), 74 (Absence of any power in s. 74 or any other statutory provision for the release of a prisoner in the circumstances of the applicant was declared incompatible with the Art. 5 (4) ECHR).

-Magna Carta (1215)

-Obscene Publications Act 1959 (as amended by the Obscene Publications Act 1964)

-Offences Against the Person Act 1861 (Amended by Criminal Justice (Northern Ireland) order 2002 (2003 No 1247 (N.I. 13), Article 19 and Schedule 1. Made 8 May 2003).

-Petition of Rights (1628)

-Prevention of Corruption Acts 1889 to 1916

-Protection of Trading Act 1980

-Unfair Contract Terms Act 1977

-Unfair Contract Terms in Consumer Regulations 1994, S.I. 1994/3159

-Unfair Contract Terms in Consumer Regulations 1999, S.I. 1999/2083

-Sale of Goods Act 1893, s. 14 (1) (now s.14 of the UK Sale of Goods Act 1979)

-Sale of Goods Act 1979 (as amended) in the, ss. 14 (2), 23, 24, 25 (1), 28, 35 (1) (b), 47 (2), 53 (3) and 61 (3)

UNITED STATES OF AMERICA

-Bill of Rights of the United States of America in 1791

-Constitution, Amendment X, Amendment XIV, Article I, § 1

-Convention on Cultural Property Implementation Act 1983

-Foreign Corrupt Practices Act

-Foreign Assistance Act 1961 (as amended) (22 USC 2151n) on sanctions for human rights violations, s. 116

-International Financial Institutions Act 1977 (22 USC 262d), s. 701

-Model Employment Termination Act (1991)

-Unanimous Declaration of the Thirteen States of America 1776

-Uniform Commercial Code 1952, Article 1-102 (2) (a), Article 1-102 (2) (c), Article 7 (Documents of Title), Article 9

(Georgia)

-Constitution of New Georgia 1777

(Massachussetts)

-Constitution of Massachusetts of 1780

(New York)

-Constitution of New York 1777

(Virginia)

-Virginian Declaration of Rights

REGIONAL LEVEL

COUNCIL OF EUROPE

-Council of Europe Convention on Laundering, Search, Seizure and Confiscation from the Proceeds of Crime 1990

-European Convention on Human Rights 1950, Articles 5 (4), 7, 8, 8 (2), 9 (2), 10, 10 (1), 10 (2), 11 (2), 12, 14, 15

-European Convention on the Abolition of Legalisation of Documents Executed by Diplomatic or Consular Officers 1968

-European Cultural Convention 1954

EUROPEAN UNION

-Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968

-Consolidated Treaty Establishing the European Community, Article 3, Article 5 (ex Article 3b), Article 10 (ex Article 5), Articles 81 and 82 (ex Articles 85 and 86), Article 230 (ex Article 173), Article 249 (ex Article 189), Article 254 (1) and (2) (ex Article 191 (1) and (2)), Articles 226 (ex Article 169), 227 (ex Article 170), 228 (1) (ex Article 171 (1)), 228 (2) (ex Article 171 (2))

-Constitution for Europe 2004, Article I-8.

-Convention Abolishing the Legalisation of Documents in the Member States of the European Communities 1987

-Convention on the Law Applicable to Contractual Obligations 1980

-Council Decision 98/745/EC of 17 December 1998 amending Commission Decision 97/534/EC on the prohibition of the use of material presenting risks as regards transmissible spongiform encephalopathies), p. 0113

-Council Decision 1999/881/EC of 14 December 1999 amending Commission Decision 97/534/EC on the prohibition of the use of material presenting risks as regards transmissible spongiform encephalopathies), p. 0078

-Council Directive 93/13/EEC of April 1993 on Unfair Contract Terms in Consumer Contracts, pp. 0029 – 0034, Article 1, para. 1, Article 1, para. 2, Article 3, para. 1, Article 4, para. 1, Article 7, para. 2.

-Council Directive 64/221/EEC of 25 February 1964, pp. 0850 – 0857.

-Council Directive 93/7/EEC of 15 March 1993, p. 74.

-Council Directive (EC) 98/5 of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained, Articles 1, 16.

-Council Regulation (EC) No 555/2000 of 13 March 2000 on the implementation of operations in the framework of the pre-accession strategy for the Republic of Cyprus and the Republic of Malta, p. 3.

-Council Regulation (EC) No 622/98 of 16 March 1998 on assistance to the applicant States in the framework of the pre-accession strategy, and in particular on the establishment of Accession Partnerships, p. 1.

-Council Regulation (EC) No 1266/1999 of 21 June 1999 on coordinating aid to the applicant countries in the framework of the pre-accession strategy and amending Regulation (EEC) No 3906/89, p. 8.

-Council Regulation 3911/92

-Council Regulation (EC) No 1/2003, OJ 2003 L1/1, in particular the Preamble and Articles 6, 16, 45

-Council Regulation No 17 of 6 February 1962

-Directive 64/221

-Directive 77/249/EEC

-Directive 89/48/EEC

-Directive 1999/44/EC (on various aspects of the sale of consumer goods and associated guarantees)

-EC Public Procurement Directives (Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts; Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors; Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts; Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts; Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts; European Parliament and Council Directive 97/52/EC of 13 October 1997 amending Directives 92/50/EEC, 93/36/EEC and 93/37/EEC concerning the coordination of procedures for the award of public service contracts, public supply contracts and public works contracts respectively; Directive 98/4/EC of the European Parliament and of the Council of 16 February 1998 amending Directive 93/38/EEC coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors; Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors; Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts.

-EEC Directive 85/374/EC on Product Liability.

-European Agreement with Bulgaria, Article 69.

-European Commission's Decision 97/534/EC of 30 July 1997 on the prohibition of the use of material presenting risks as regards transmissible spongiform encephalopathies, Articles 1 (b), 2.

-European Commission's Decision 2000/418/EC of 29 June 2000 regulating the use of material presenting risks as regards transmissible spongiform encephalopathies and amending Decision 94/474/EC (notified under document number C(2000) 1735) (Text with EEA relevance), Article 10.

-European Parliament and Council Directive 2004/38/EC of 29 April 2004.

-Protocols added by the Treaty of Amsterdam 1997.

INTER-AMERICAN

-Havana Convention on Treaties, Article 10

INTERNATIONAL LEVEL

COMMONWEALTH

-Scheme for the Protection of Cultural Heritage within the Commonwealth 1993

HAGUE CONFERENCE

-Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents 1961

-Hague Convention on Adoptions 1964

-Hague Convention on Civil Aspects of International Child Abduction and Some Related Matters 1980, Article 42

-Hague Convention on the Protection of Children and Co-operation in respect of Intercountry Adoption 1993

-Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters 1968

-Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954

INTER-ALLIED

-Declaration of London 1943

INTERNATIONAL ASSOCIATION OF ATHLETICS FEDERATIONS

-Competition Rules 2006-2007, Rule 125.2

ISLAM

-Koran, verse 2:228

LEAGUE OF NATIONS

-Covenant of the League of Nations 1919, the Preamble

ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT

-OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (DAFFE/IME/BR(97)20); in particular the Preamble and Articles 1 (1), 4 (1), 5, 9 (3), 13 (1)

UNITED NATIONS

-Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984

-Convention on Biodiversity 1992

-Convention on Contracts for the International Sale of Goods, April 11, 1980, S. Treaty Doc. No. 98-9 (1984), 1489 U.N.T.S. 3, *reprinted as United Nations: Conference on Contracts for the International Sale of Goods,* 19 I.L.M. 668 (1980), Articles 1, 6, 7 (1), 25, 26, 35 (2) (b), 37, 47 (1), 48, 50, 63 (1), 71 (1) (a) or (b), 72 (2), 82 (2), 91.

-Convention on the Elimination of all Forms of Discrimination Against Women 1979, Article 1

-Convention on the Elimination of All Forms of Racial Discrimination 1965

-Vienna Convention on the Law of the Treaties 1969/1980, Articles 11, 18, 24 (1), 26, 32, 60 (2) (a)

-Convention on the Rights of the Child 1989

-Covenant on Economic, Social and Cultural Rights 1966

-International Covenant for Civil and Political Rights 1966, Articles 6 (2), 6 (5)

-International Covenant on Economic, Social and Cultural Rights 1966

-UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Cultural Property 1970

-Universal Declaration of Human Rights 1948, General Assembly resolution 217 A (III) of 10 December 1948, Articles 2, 3, 5, 29 (2).

WORLD ANTI-DOPING AGENCY

-World Anti-Doping Code 2003

-Prohibited List 2006

TABLE OF CASES

NATIONAL LEVEL

BELGIUM

-Decision 27.5.1971 *Hof van Cassatie/Cour de Cassation* judgement in *Franco-Suisse Le Ski*

CYPRUS

-*Malachtou v Armefti* (1987) 1 Cyprus Law Reports 207, at 235

DENMARK

-*Supreme Court Judgement* of 6.4.1998

FRANCE

-*Cour de Cassation*, 14.7.1954, *Pasicrisie luxembourgeoise*, Vol. 16, 150

GERMANY

-Decision 9.4.1992 on the Maastricht Treaty on the European Union

-Decision Federal Constitutional Court of the 12.10.1993 on the law ratifying the Maastricht Treaty on the European Union [1994] 1 CMLR 57

IRELAND

-*Clayton Love v B & I* Transport (1970) 104 I.L.T.R. 157

-*de Rossa v Independent Newspapers Plc* [1999] 4 IR 432, at 450

-*Kelly v O'Neill* [1999] 4 IR 432

-*Kennedy v The Law Society & ors* [2005] IESC 23

-*Murphy v IRTC* [1997] 2 ILRM 467, at 476

UNITED KINGDOM

-*Arcos v Ronaasen* [1933] AC 470

-*Attorney General for Canada v Attorney General for Ontario* [1937] AC 326

-*Attorney-General for New Zealand v Ortiz* [1982] 1 QB 349, [1982] 3 WLR571 (CA), [1983] 2 WLR809 (HL)

-*Brown v Bateman* (1867) LR 2 CP 272

-*Cammell v Sewell* (1858) 157 ER 1371

-*Davy v Leeds Corporation* [1964] 3 All ER 390, [1964] 1 WLR 1218, 16 P&CR 244, 62 LGR 628, [1964] RVR 776, 128 JP 541

-*Fairchild v Glenhaven Funeral Serices Limited* [2002] 3 WLR 89 at 119

-*Gibson v East Riding of Yorkshire Council* (2000) *The Times*, 6 July.

-*Greatorex v Greatorex* [2000] 1 WLR 1976

-*Hong Kong Fir v Kawasaki Kisen Kaisha* [1962] 2 Q.B. 26 at 64, [1962] 1 All E.R. 474 at 484

-*Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1988] 1 All ER 348, at 353 (C.A.)

-*Nyali Ltd. V Attorney General* [1955] 1 All E.R. 646, at 653, [1956] 1 Q.B. 1, at 16-17

-*Preist v Last* [1903] 2 KB 148

-*Re Moore & Co v Landauer & Co* [1921] 2 KB 519

-*Re Valentine's Settlement* [1965] Ch. 831 (C.A.)

-*Re Wilson* [1954] Ch. 733, at 741

-*Reardon Smith Line v Hansen-Tangen* [1976] 1 W.L.R. 989, at p. 998

-*Reid v Metropolis Police Commissioner* [1973] 2 All ER 97

-*Thornton v Shoe Lane Parking Ltd* [1971] 2 QB 163

-*Total Gas Marketing Ltd v Arco British Ltd* [1988] 2 Lloyd's Rep 209

-*Universal Cargo Carriers Corporation v Citati* [1957] 2 QB 401

-*Walford* v. *Miles* [1992] 2 W.L.R. 174, at 181 (H.L.)

-*White v Jones* [1993] 3 All ER 481 at 501

-*Winkworth v Christie, Manson & Woods* Ltd [1980] 1 All ER 1121

UNITED STATES OF AMERICA

-*Lawrence v Texas* (2003) 539 U.S. 558, 586-605 and especially 589-592

-*New State Ice Co. v Liebmann* (1932) 285 U.S. 262, 311

REGIONAL LEVEL

COUNCIL OF EUROPE HUMAN RIGHTS PROTECTION MACHINERY

- *Airey v Ireland* (1979) 2 E.H.R.R. 305

-*Buchholz* judgment of 6 May 1981, Series A no. 42, para. 50

-*Capuano* judgment of 25 June 1987, Series A no. 119, para. 25)

-*Dudgeon* judgments of 22 October 1981, Series A no. 26, para. 56

-*Dudgeon v United Kingdom* 23 September 1981 (No. 45), 45 EHRR 149

-*Ettl and others* judgment of 23 April 1987, Series A no. 117, para. 40

-*France v UK*, Case 141/78 [1979] ECR 2923

-*Guincho* judgment of 10 July 1984, Series A no. 81, para. 32

-*Handyside v UK*, Series A, vol. 24, 7 December 1976, paras. 48, 49, 50, 54, 56, 57, 67; 58 International Law Reports, p. 150

-*Keegan v Ireland* 18 European Human Rights Reports [1994] 342

-*Le Compte I* judgment of 23 June 1981, Series A no. 43, para. 51

-*Loizidou v Turkey*, Series A, vol. 310, p. 20; 103 International Law Reports, p. 622

-*Minelli* judgment of 25 March 1983, Series A no. 62, paras. 34, 35

-*Modinos v Cyprus,* 22 April 1993 (No. 259), 16 EHRR 485

-*Müller and others* judgment of 24 Maz 1988, Series A no. 133, para. 36; 13 EHRR 212 (1991)

-*Murphy v Ireland* [2003] ECHR 352, 10 July 2003

-*Neumeister* judgment of 27 June 1968, Series A no. 8, pp. 42-43, para. 21

-*Norris v Ireland* 26 October 1988 (No. 142), 13 EHRR 186, para. 45.

-*Open Door and Dublin Well Woman v Ireland* (1993) 15 E.H.R.R.

-*Otto Preminger Institute* case, 20 September 1994, A 295-A (1995) 19 EHRR 34

-*The Sunday Times* judgment of 26 April 1979, Series A no. 30, paras. 47, 50, 59.

-*Weeks* judgment of 2 March 1987, Series A no. 114, paras. 40, 47, 50-53

EUROPEAN COURT OF FIRST INSTANCE & EUROPEAN COURT OF JUSTICE

-*Belgium v Spain*, Case C-388/95 [2000] ECR I-3121

-*Case C-183/00 González Sánchez* [2002] ECR I-3901

-'Cassis de Dijon' or 120/78 *Rewe-Zentrale AG v Bundesmonopolverwaltung für Branntwein* [1979] ECR 649, [1979] 3 CMLR 494

-*Commission v France Case C-52/00 ECR* [2002] Page I-3827

-*Commission v Greece*, Case C-387/97 [2000] ECR I-5047

-*Commission v Greece* [2002] *ECR* I-3879

-*Commission v Italy,* Case 39/72 [1973] ECR 101, para. 17.

-*Commission v Netherlands,* Case 96/81 [1982] ECR 1791

-*Consorzio del Prosciutto di Parma v Asda Food Stores Ltd* [1999] 1 CMLR 696; Eu LR 437

-*Costa v ENEL* [1964] CMLR 425

-*Internationale Handelgesellschaft* [1972] CMLR 255

-*Marleasing SA v La Comercial International de Alimentacion SA*, Case C-106/89, [1990] ECR I-4135

-*Océano Grupo Editorial v Rocio Murciano Quintero* [2000] ECR I-4491

-*Simmenthal* [1977] 2 CMLR 1

-*United Kingdom v Commission*, Case C-180/90 [1998] ECR I-2265, I-2298

-*Van Gend en Loos* [1963] CMLR 105

-*Von Colson v Land Nordrhein-Westphalen*, Case 14/83 [1984] ECR 1891

INTER-AMERICAN COURT OF HUMAN RIGHTS

-*Advisory Opinion OC-4/84 of January 19, 1984, Proposed Amendments to Naturalisation Provisions of the Constitution of Costa Rica*, Inter-Am. Ct. H.R., A 4 (1984)

INTERNATIONAL LEVEL

INTERNATIONAL TRIBUNAL ON THE LAW OF THE SEA

-*Russian Federation v. Australia* (The 'Volga Case'), Judgment of 23 December 2002, Separate Opinion of Judge Cot

INTERNATIONAL COURT OF JUSTICE

-*Legal Status of the South-Eastern Territory of Greenland case* (*Norway v Denmark*), Order 1932 PCIJ Series A No 8; Higgins, p. 83

-*New Zealand v France*), Interim Protection, Order of 22 June 1973, ICJ Report 1973, p. 135

-*Nuclear Tests cases* (*Australia v France*), Interim Protection, Order of 22 of June 1973, ICJ Report 1973, p. 99

FRENCH FORUM

-Scea *Gaec Des Beauches Bernard Bruno c. Societé teso Ten Elsen GmBH & CokG* (*Cour d' Appel de Grenoble* (Fr.)), No. 94/3859 UNILEX (Ch. Comm. 23 October 1996), CLOUT no. 205

U.S. FORUM

-*Delchi Carrier, SpA v Rotorex_Corporation*, No 88-CV-1078, 1994 WL 495787 (N.D.N.Y. Sept. 9, 1994); affirmed in part by 71 F.3d 1024 (2d Cir. 1995)

TABLE OF FIGURES

Figure 1: Division of Labour in Relation to the Models and Factors proposed p. 11

Figure 2: Convergent Instruments of Law p. 27

Figure 3: EU-25 Member State transposition deficit Chart, as at 1/6/2006 – 1620 directives p. 39

Figure 4: Diagrammatical Exposition of 'General Model of Implementation' p. 51

Figure 5: World Map of UN Convention on Contracts for the International Sale of Goods Contracting States p. 61

Figure 6: Diagrammatical Exposition of 'Specific/Restructuring Model of Implementation' p. 84

Figure 7: Diagrammatical Exposition of 'Comparative Law Factor in Implementation' p. 155

Figure 8: Katsuta's Diagrammatical Exposition of the Reception of Western Law in Japan p. 212

Figure 9: Analogical Diagrammatical Exposition of the Reception of Convergent Law under the 'Socio-Legal Factor in Implementation' based on Katsuta's Approach vis-à-vis the Reception of Western Laws in Japan p. 212

Figure 10: Informational Continuum vis-à-vis Research Approach followed in relation to Academic Experts interviewed p. 230

THE CONVERGENCE OF LAWS: A TYPOLOGY OF IMPLEMENTATION MODELS & FACTORS

PART I

Chapter 1

INTRODUCTION

1. INTRODUCTION

1.1. Introduction

This chapter will set up the thesis, its objectives and aim and will present the basic chronology of the analysis.

1.1.1. Thesis, objectives and aim

This is a thesis dealing with implementation of convergent law. It recognises a division between minor and major matters (changes) during such implementation but most importantly provides for particular models to the satisfaction of these matters i.e. a **'general model for minor and formal changes'** and a **'restructuring model for major and substantive changes'**. It is believed that such a division will result in more effective implementation of convergent law.

Satellitic and auxiliary to both of these models (especially where the implications are great), the implementer of convergent law will be required to have regard to two potentially competing factors, namely: (a) the possible relevance of **external legal sources** (classified in this thesis as the **'comparative law factor'**) as an assistance to effective implementation and (b) the possibility that because of **internal legal and socio-legal concerns** (referred to in this thesis as the **'socio-legal factor'**) it may be necessary

that the implementation of any given convergent law in that country may occur in restricted or limited fashion, or, in extreme cases, not at all. Thus the manner by which these secondary factors operate is also considered.

Consequently, the objectives of this thesis are an initial exposition and defence of the idea of legal convergence but then (most importantly) the proposition and defence of implementation tactics, which are suggested herein, for such a convergence to come about.[1] Depending on certain criteria and qualifiers, it will be shown that any particular mode or factor of implementation may be a theoretical possibility as regards potential implementation examples. Initially however, it is seen as of the essence that some background information is provided and that central concepts for this thesis such as convergence and convergent instruments of law are put into perspective. Finally, the general aim of this thesis is the proposition of a better, more effective, general framework for implementation of convergent law into national law. *Accordingly, this thesis is to act as a theoretical guide for the implementer of convergent law.*

1.1.2. Chronology of analysis

With regard to chronology, the thesis is divided into five parts and eight chapters. In this part, Part I (Chapters 1 and 2), the reader will find the introductory parts to this thesis (introduction *per* se, parameters and essential background information). In Parts II and III the core of the analysis is to be found. These parts provide the reader respectively with the proposed convergence models (Chapters 3 and 4) and convergence factors (Chapters 5 and 6), which are suggested by the author of this thesis. In Part IV, the reader will find an analysis of the ideas of academics, who have been interviewed for this thesis (Chapter 7). Finally, in Part V (Chapter 8), the conclusions of the thesis are found.

[1] See also below at 2.2.1. the hypothesis of this thesis for a further explanation.

Chapter 2

PARAMETERS
&
BACKGROUND MATERIAL

2. PARAMETERS & BACKGROUND MATERIAL

2.1. Introduction

This chapter will present the general parameters of the convergence model suggested for the models and factors proposed in this thesis to operate and will seek to familiarise the reader with the convergence thesis and certain surrounding material to the notion of convergence of laws, as well as other relevant material to the proposed models and factors.

2.2. Subject matter – Definition of Convergence

The first part of this chapter will concentrate on the subject matter and the parameters, that is, framework, of the proposed model of convergence to which the models and factors that are suggested herein apply.

This thesis deals with law convergence, such convergence from the legal point of view being the coming together[2] of different legal systems. With regard to the

[2] E.g. B.S. Markesinis, *The Clifford Chance Millennium Lectures: The Coming Together of the Common Law and the Civil Law*, Oxford: Hart Publishing, 2000 or M. van Hoecke, 'The Harmonisation of Private Law in Europe: Some Misunderstandings' in M. van Hoecke and F. Ost (eds.), *The Harmonisation of European Private Law*, Oxford/Portland, Oregon: Hart Publishing, 2000, p. 9. For more on convergence see 2.3.1. herein.

general convergence thesis, this can be epitomised by the following: for good reasons[3] and with particular circumspection[4], with or without reservations[5], national legal systems can and should gradually[6] converge into each other and into wider, extra-national, legal formations.[7]

The above proposed definition is to a certain degree self-explanatory. Hence, for the legal system which is in pursuit of convergence, there must be some sense when such an exercise is to be embarked upon. Moreover, it is common practice that legal systems do not have to converge holus-bolus to a given convergent instrument of law, i.e. they can reserve themselves from certain provisions of such an instrument. Finally, because convergence cannot be achieved at once, it would be most appropriate that such an exercise of legal convergence takes place in a gradual fashion. As to why systems *should* converge more (than less), this is dealt with further below.[8]

It should be noted that in addition to the more general approach/definition of convergence stated above, there is also a somewhat narrower 'European definition' of convergence. A definition as such for Europe would confine the term to the coming together of continental civil law with non-continental common law.[9] With regard to both a geographical as well as a legal scope, the European approach to convergence is indeed narrower than the more universalist approach forwarded above. It is geographically narrower in that it is confined to Europe and it is legally narrower in that it seeks to accommodate civilian legal systems with common legal systems only (rather than e.g. Muslim law systems with continental legal systems and/or common law systems etc). Yet the European definition, though narrower than the definition preferred herein, does not conflict with the more general approach of the universalist model. Again, as far as the harmonisation and approximation schemes are concerned, these two can be encompassed under our more general definition here in that the

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[3] See 2.3.1.1. and beginning of 7.2.2.1.
[4] U. Mattei, *Comparative Law and Economics*, Ann Arbor: University of Michigan Press, 1998, reprinted in 2004, pp. 17-19.
[5] *Infra*, fn. 45.
[6] B.S. Markesinis, *The Gradual Convergence,* Oxford: Clarendon Press, 1994.
[7] Note that this is not the 'European definition' of convergence but rather a more universalist definition thereof as perceived by the author (see further below in the main text for more).
[8] See 2.3.1.1.
[9] See e.g. recently S. Van Erp, 'Different Degrees of Convergence: A Comparison of Tort Law (Example: *Fairchild v. Glenhaven Funeral Services*) and Property Law', (October 2002) *Electronic Journal of Comparative Law*, Vol. 6.3, p.1; the article is accessible at http://www.ejcl.org/63/art63-4.doc

former can be seen as a synonym to the uniformist approach under international law convergence whereas the latter can be seen as a synonym to the programmatic approach under international law.[10]

Since it is convergent law which this thesis deals with, the models and factors proposed could be applicable either at an international or supranational and regional or global level but with the national legal system acting as the locomotive of their operation.[11] Some of these models and factors are directly relevant to comparative law[12], whilst others are not. The models and factors of convergence proposed herein are as follows:

- The **'general model of implementation'** (formal and minor changes)
- The **'specific/restructuring model of implementation'** (major and substantive changes)
- The **'comparative law factor of implementation'** (the claim of external *legal* sources)
- The '**socio-legal factor of implementation'** (the claim of internal *legal* sources)

With regard to the *models*, the following can be said to apply: Under the general model of implementation[13] the stress is on uniformity or approximation achieved through the implementation of formal and minor changes; thus, the national legislator should not generally fall out of the 'four corners' of the field of operation of a convergent instrument of law, which would have to be implemented. The typical example here would be the implementation of an international treaty. The restructuring/specific model of implementation[14] offers a more specific kind of analysis than the general model (hence 'specific') and it is a model of convergence which would have to be utilised when major changes come into play-when a whole

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[10] For more see the respective distinction provided in Chapter 3 of this thesis. Note that the approach of the model there reflects both European law and International law experience.

[11] See e.g. J. Basedow, 'The Effects of Globalisation on Private International Law' in J. Basedow and T. Kono (eds.), *Legal Aspects of Globalisation*, The Hague/London/Boston: Kluwer Law International, 2000, pp. 4-6.

[12] Cf. E. Örücü, 'Looking at Convergence through the Eyes of a Comparative Lawyer', (July 2005) *Electronic Journal of Comparative Law*, vol. 9.2 http://www.ejcl.org/92/art92-1.html

[13] See Chapter 3 herein.

[14] See Chapter 4 herein.

restructuring/*anacatataxis*[15] of a particular field of law occurs within the national legal system, arising again from a supranational law or international treaty which would have to be implemented into this system. This occurs by the operation of special arrangements. For instance, it will be shown *inter alia* that such restructuring with considerable arrangements has occurred in the implementation of the European Convention on Human Rights in the constitutional law of the UK with the enactment of the Human Rights Act 1998.

On the other hand, the following can be said in relation to the proposed *factors*: The comparative law factor of implementation [16] or the wholly syncretic/eclectic factor of legal implementation[17] is a factor of implementation of convergent law which suggests that the national legislator would ideally have to go through the arduous task of comparing the implementation of the convergent law in question in other *relevant*[18] jurisdictions (but not necessarily all), which are affected by such law. Finally, the socio-legal factor of implementation[19] is a factor of convergence under which the guiding principle would be that implementation of the relevant convergent instrument of law need not be wholly foreign and strange or abstract to the system which will incorporate it, for, if it is, then this system may be allowed certain deviations in the implementation of such law. This can be the case where, for instance, a country may be asked to alter its food-habits by avoiding the consumption of certain types of meat, when doing so would not only be disproportionate but also socio-legally disturbing.[20] In any case, it is not necessary that the two factors (comparative/socio-legal) are *per se* mutually exclusive.

At the end of this thesis, it will be suggested that this pattern of methodology is a full, ideal and adequate pattern of convergence. Each model or factor of this pattern presents a particular *modus operandi* for the national legislator, which would have to be followed in order to successfully implement convergent law. These are models and factors that the national legislator *can* follow or the extra-national

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[15] Greek for whole reshuffling or restructuring.
[16] See Chapter 5 herein.
[17] Wherever in the text the word 'implementation' is used, it has to be taken to mean legal, judicial and administrative implementation, i.e. implementation of convergent law into a national legal system, unless it is otherwise suggested. Cf. G. Falkner, O. Treib, M. Hartlapp and S. Leiber, *Complying With Europe: EU Harmonisation and Soft Law in the Member States*, Cambridge: Cambridge University Press, 2005, p. 6.
[18] See the *Affinitatis Formula* (5.2.1.) for more on this.
[19] See Chapter 6 herein.
[20] See example at 6.3.2.

legislator *may* suggest to the national legislator. It has to be noted, however, that the operation of one model or factor may not necessarily exclude the parallel operation of another.[21] On the contrary, a combination of two or more of the suggested models and factors may often arise,[22] depending in any case on the implementation problem that the national legislator would have to tackle and perhaps the willingness and the resources of a national legislature to employ more than one of the models and factors suggested herein.

2.2.1. Unifying hypothesis for the thesis

The first parameter of this thesis is its hypothesis. The hypothesis is made out of two parts, both of which are based on fact. The first part of the hypothesis suggests that, since as a matter of fact legal systems face minor and formal or major and substantive changes due to convergent law, the thesis follows suit and distinguishes between the two (general model and specific/restructuring model respectively). The second part of the hypothesis suggests that the well-known antithetical pattern[23] between comparative law on the one hand, drifting towards an external sources of law analysis and legal sociology on the other hand, drifting towards an internal sources of law analysis, implies that such factors are distinguishable and on the face of it are therefore dealt with in separate chapters herein (comparative law factor and socio-legal factor respectively). The hypothesis is a unifying one, as it denominates models and factors on the basis of implementation of convergent law.

Let us now call the models of this thesis the main patterns of our analysis and the factors the auxiliary ones thereof. Depending on what is asked from the implementing legislator, he may initially have to choose between the main models or indeed choose both of them, especially where he would target both formalities and substantive changes during implementation. Nevertheless, depending on how the legislator could proceed further, especially where the implications of the alignment due to convergent law are wide, he could deem it proper to proceed with an analysis

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[21] See 2.2.1.1. and Chapter 8 herein for more on this.
[22] Cf. K. Zweigert and H. Kötz, *An Introduction to Comparative Law*, 3rd Edition, 1998, Oxford: Oxford University Press, pp. 6-12; H. Collins, 'Methods and Aims of Comparative Contract Law', (1991) 11 *Oxford Journal of Legal Studies* 396, p. 398.
[23] See Preface to Part III of this thesis.

also based on auxiliary considerations, that is, with reference to external or internal sources of law or indeed by reference to both of these *in addition* to the main models analysis.

2.2.1.1. Effectiveness

Such a hypothesis would not be complete without reference to the purpose of the models and factors conferred herein. The purpose is to effect convergence, i.e. to effectively implement convergent law. Thus, in relation to the *question of effectiveness* of the models and factors provided in this analysis, this can occur in at least two different ways:

- By understanding the models and factors as devices serving specific functions **(functionalist approach)**
- By promoting Adam Smith's idea of a 'division of labour' [24] approach **(specialist approach)**

As regards the former, the following can be said: Effectiveness occurs as the general model comes to the satisfaction of minor changes by operation of convergent law, whereas the restructuring model comes to the effect of major changes by operation of such law, since it provides for certain special arrangements to the satisfaction of such changes. As stated above, with regard to the comparative factor, effectiveness occurs by reason of the fact that the system detects implementation material from *relevant* jurisdictions (as opposed to the detection of such material from an indefinite number of jurisdictions). Finally, effectiveness occurs under the socio-legal factor in that the factor strives for the accommodation of both convergent law and socio-legal features of the system in the implementation process where this, of course, is possible[25].

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[24] A. Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* [1776], Book 1, Ch. 1, para. 1 in R.H. Campbell, A.S. Skinner and W.B. Todd (eds.), *An Inquiry into the Nature and Causes of the Wealth of Nations*, Oxford: Clarendon Press, Inc., 1976, p. 13 (in the original text).

[25] Where this is not possible, the socio-legal factor acts as a call for renegotiating the instrument with the system, so that the established socio-legal features of the system are respected. See 6.1.1.

As regards the latter, Adam Smith's classical 'division of labour' theory is used. It is argued here that effectiveness occurs, in that this thesis provides for specialised labourers in bringing about the overall aim of implementing convergent law. It is Smith's theory that is chosen to support the unifying hypothesis of this thesis, by reason of the fact that this 'humble economic principle formerly relegated to mean or ignoble employments now finds itself connected with philosophical discussion of the highest order'[26].

Most importantly, as far as Adam Smith's ideas are concerned, he together with a number of other scholars (Plato, Xenophon, Petty, Mandeville and Hutcheson) who preceded him, have largely maintained that from the philosophical as well as economic point of view, it is more efficient to specialise efforts or resources in a given matter as opposed to having one thing addressing all different roles in this matter.[27] There must be specialisation and diversification for the achievement of the overall task.[28] However, as the division of labour theory argues and exactly as this thesis maintains, it is better from a certain point and afterwards to co-ordinate these 'specialised labourers' (the models and the factors) for the overall task: in our case the overall task being the convergence of laws or rather implementation of convergent law in a given legal system. Just as Petty's understanding was that Dutch shipyards are more effective in producing ships when they have specialist teams of workers performing separate tasks in the building of ships, so too the author of this thesis perceives the matter of implementation of convergent law as an overall project with specialist extensions. Closely following Smith's call for specialised and divided resources, it is these specialist extensions which make a convergent instrument properly effected.

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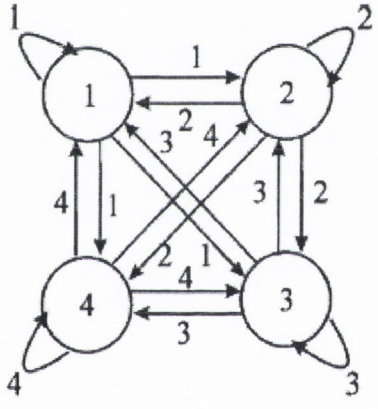
[26] M.L. Myers, 'Division of Labour as Principle of Social Cohesion', (1967) 33 *The Canadian Journal of Economics and Political Science* 432, p. 434.

[27] This approach does not occur only in economics but in other disciplines as well e.g. in biology and in computer science engineering. See, for instance, L.M. Wahl, 'Evolving the Division of Labour: Generalists, Specialists and Task Allocation', (2002) 219 *Journal of Theoretical Biology* 371; J. Rettner, 'Multi-core to the masses', Parallel Architectures and Compilation Techniques, 2005. PACT 2005. 14th International Conference on 17-21 Sept. 2005; O. Takahashi, 'The Circuits and Physical Design of the Synergistic Processor Element of a CELL Processor' *IEEE Symposium on VLSI Circuits, Digest of Technical Papers*, v 2005, *2005 Symposium on VLSI Circuits - Digest of Technical Papers*, 2005, pp. 20-23; D.C. Pham *et al.*, 'Overview of the Architecture, Circuit Design, and Physical Implementation of a First-generation Cell Processor', (January, 2006) 41:1 *IEEE Journal of Solid-State Circuits* 179.

[28] W. Cheng and X. Yang, 'Inframarginal Analysis of Division of Labor: A Survey', (2004) 55 *Journal of Economic Behavior & Organization* 137, p. 143.

To put it otherwise, a stratagem from economics is used in this thesis to assert effectiveness; a metaphor. To comprehend our metaphor, we first have to take into account that, in broad classical economics, theory argues that to achieve the overarching aim of anything, you normally have to fragment the resources available for such an aim (division of labour).[29] Accordingly, we may well consider the models and factors advanced herein as our 'specialised labourers', their overarching task being 'effective convergence'. Thus, the following division of labour has to be taken to be true under our metaphor:

1. First 'Labourer': The General Model
2. Second 'Labourer': The Specific Model
3. Third 'Labourer': The Comparative Law Factor
4. Fourth 'Labourer': The Socio-Legal Factor



Item 1

In other words, one separates between four faculties of knowledge in implementation matters (the faculty of minor matters or generalities and formalities; the faculty of major matters or specificities and substantive matters; the faculty of legal externalities and the faculty of legal internalities). Theoretically, these 'faculties' or 'labourers' can all be used in conjunction with one another (see figure 1 above)[30]. In any case, one cannot overemphasise that to specialise resources for the over-arching scope lies at the heart of Adam Smith's 'division of labour'. Close to this tradition, this thesis,

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[29] T. Negishi, 'Adam Smith's Division of Labor and Structural Changes', (2000) 11 *Structural Change and Economic Dynamics* 5, p. 6.

[30] The figure is taken from W. Cheng and X. Yang, *op. cit.*, fn. 28, p. 148.

therefore, asks in a sense from the national legal systems to specialise resources for the general and over-arching purpose of effective implementation of convergent law. In this respect, the models and factors, which the author confers, present us with specialised possibilities. Thus,

> '[Consider] [t]he *solution to a difficult game* (e.g. solving a Rubik's cube or playing chess). An effective solution is a long sequence of moves, each of which is chosen out of a set of possibilities [...]'[31]

Finally, it should be noted that our four 'labourers' do not have to be used exactly as they are prescribed herein, for they are perceived as flexible labourers (the models and factors are modifiable and open to adjustment), just as Smith once argued that the division of labour helps us to see the dexterity[32] of the labourers improve over time *inter alia*.

2.2.2. Proposed model, geographical scope and legal parameters

As far as the proposed model of analysis is concerned, the suggestion is for a supranational/intergovernmental and/or an international authority as the main or prototype legislative authority, even though one cannot exclude the theoretical possibility that two or more legal systems may directly converge without the interference of such an international authority. The aim of the model is either the approximation or the uniformity of different legal systems. The model also makes allowance for certain considerable deviations[33] to occur. Furthermore, the proposed model would most probably be one of federal structure, even though any other option of a confederative model may not be disregarded as long as there is a higher supranational or international authority of at least directive legal competencies. The authority in this model, therefore, issues prototype convergent instruments that the

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[31] L. Marengo & G. Dosi, 'Division of Labor, Organizational Coordination and Market Mechanisms in Collective Problem-solving', (2005) 58 *Journal of Economic Behavior & Organization* 303, p. 309.
[32] E.G. West, 'Adam Smith's Two Views on the Division of Labour', (February, 1964) 31:121 *Economica*, New Series 23.
[33] Such deviations may occur, when a socio-legal pattern of implementation is followed, wherein the society itself, as in the form of a legal system, provides the basis for a different way of implementation of a convergent law from another legal system. For this, see Chapter 6 herein.

corresponding, but nationally sovereign member states, to this authority have to implement. These systems are sovereign, for it is they that wish to converge in the first place e.g. by acceding to a supranational superstructure.

2.2.2.1. Potentially global model – European and international experience

Furthermore, the model of convergence proposed could theoretically be global. On the other hand, the fact that a global model of analysis is suggested does not mean that a regional model of analysis cannot be applicable. Obviously, the concerns raised under a regional model and a global model are not exactly the same; yet nothing in the prescribed implementation models and factors in this thesis dictates contrary to either of these models of analysis. Hence, as this thesis is by definition 'an alliance of globalism and regionalism'[34], both regional and global law offer useful examples in relation to law convergence. Second, as convergence can be either global or regional, one has to admit that both international as well as European law is used herein. Thus, most of international law and most of European law are directly relevant to this thesis. Of course, one does not need to explain why international law is relevant to a convergence thesis. Also, even though this thesis takes the more legalist approach of analysis, it should be made clear that except for the above two well-known and established approaches (through international legal instruments on the one hand and through economic integration on the other hand), at other times there is *de facto* convergence e.g. in the area of commercial law, including for example the incorporation of 'universal' contractual and tortious provisions in commercial contracts.

2.2.3. Employment of certain features of the European models of convergence and the US and Swiss models of internal alignment

However, as regards referral to other existing models of legal alignment (whether regional or national), the analysis requires at least some partial employment

[34] P.L.C. Torremans, *Legal Convergence in the Enlarged Europe of the New Millenium*, 2000, The Hague/Boston/London: Kluwer Law International, p. 28.

of the European experience of convergence *inter alia*; there are good reasons for this: firstly, with particular regard to the EU model, this model is very attractive from the comparatist's point of view, since, after the collapse of the USSR, it is the only continuous supranational lawmaking union of states in the world[35]; secondly, Europe includes a very diverse spectrum of different legal cultures with common but also very different features; third, the EU remains to this day the most ambitious legal structure[36] of direct legal convergence between sovereign member states; fourth, it provides us with very interesting convergent mechanisms, such as the EU directive and the EU regulation[37] and fifth, Europe is the *only* continent in the world with a 'true' binary[38] convergence mechanism (EU and Council of Europe)[39]. *In other words, where usage of European material is made this is done not because the material is European but because there is merit*[40] *in using such material; Europe is to date by far the most effective*[41] *example of direct legal convergence machineries with special judicial arms to this effect (Court in Strasbourg and Court in Luxembourg).*

On the other hand, the US model and the Swiss model of internal alignment (of the states to the federation in the former case and of the cantons to the confederation in the latter case) provide some very interesting analogical features for the analysis. Of course, there are political differences between the European structures and these models, since, for instance, the USA is a federal nation, whereas the EU and the Council of Europe constitute a partially supranational and partially

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[35] Cf. H.P. Glenn, 'North America as a Medieval Legal Construction' in M. Bussani and U. Mattei (eds.), *The Common Core of European Private Law*, The Hague/London/New York: Kluwer Law International, 2003, pp. 51, 59 and T.C. Hartley, *European Union Law in a Global Context: Text, Cases and Materials*, Cambridge: Cambridge University Press, 2004, p. 5.

[36] T.C. Hartley, *op. cit.*, fn. 35, p. 3.

[37] European law provides us with a clear-cut distinction between regulative and directive law, an approach which even though occurs in international law and miscellaneous regional law, occurs only generally. For more see 3.2.4.

[38] M. Delmas-Marty, *Towards a Truly Common Law*, Cambridge: Cambridge University Press, 2002, pp. 168, 171.

[39] K. Lenaerts and P. Van Nuffel (ed. R. Bray), *Constitutional Law of the European Union*, London: Thomson/Sweet & Maxwell, 2nd Edition, 2005, pp. 23-26 (Council of Europe integration path), 41-65 (EU integration path).

[40] *Supra*, fn. 35 and fn. 36. Also, see certain critical remarks of scholars in relation to the American human rights protection system vis-à-vis European experience. E.g. A.H. Robertson and J.G. Merrills, *Human Rights in the World*, Manchester/New York: Manchester University Press, 4th Edition, 1996, p. 156, where they state that 'It follows that a member of the Inter-American Commission on Human Rights would be impressed by the functioning of the European system [...]'. Also, with regard to the Inter-American Court on Human Rights it should be noted that individual citizens of a member state of the Organisation of American States *cannot* take cases directly to the Court, as is the case under the European human rights system.

[41] On this see e.g. 3.1.3. Also consider the fact that the European Court of Human Rights *is* by far the most influential extra-national human rights court in the world with a jurisdiction over 45 member states and a population of 800 million citizens.

intergovernmental association of states.[42] But as in European law, federal American law in its areas of competence seeks to override state law, whilst confederative Swiss law seeks to align canton law; furthermore, these systems provide certain legal features that are not readily found in the European models of convergence. For instance, in Europe there are no such instruments as federal acts, model acts or uniform laws.[43] Also, one cannot find in the EU the sensitive touch of the Swiss confederative legislator to respect the sociological patterns of his implementers and 'partners in law', the cantons, as in Article 46 of the Swiss Constitution.[44] The EU and the US have hitherto failed – perhaps to their embarrassment – to show any such sensitivity to their member states (except if an opt-out is dealt with)[45] and federal states respectively by an express provision such as the one found in Article 46 of the Swiss Constitution.

2.3. Background material

Discussion will now turn to some necessary background material in relation to this thesis. In turn, the notions of convergence as well as the theme of legal alignment techniques (convergent instruments of law) will be analysed. Also, a discussion on the logical basis of the proposed models and factors of this thesis will be found at the end of this chapter in addition to a discussion amongst others in relation to the correspondence of the models and factors to real and hypothetical examples of implementation.

2.3.1. Background information on convergence

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[42] P. Craig, and G. De Búrca, *EU Law: Text, Cases and Materials*, 3rd Edition, 2003, Oxford: Oxford University Press, pp. 3-4.

[43] See also R. Hyland, 'The American Experience: Restatements, the UCC, Uniform Laws, and Transnational Coordination' in A. Hartkamp, M. Hesselink, E. Hondius, C. Joustra, E. du Perron & M. Veldman (eds.), *Towards a European Civil Code*, New York: Kluwer Law International, 3rd Edition, 2004, p. 53ff.

[44] In particular, Article 46 (2) of the Swiss Constitution on the implementation of Swiss federal laws by the cantons reads as follows: *The Federation leaves the Cantons as much organizational scope as possible and takes into account the peculiarities of Cantons.* Cf. Chapter 6 of this thesis.

[45] See generally J.P. Gardner (ed.), *Human Rights as General Norms and a State's Right to Opt Out*, London: British Institute of International and Comparative Law, 1997. Cf. L. Lijnzaad, *Reservations to UN-human Rights Treaties*, Dordrecht/Boston/London: Martinus Nijhoff, 1995.

In addition, however, to the model of analysis suggested herein and the short definition of the convergence thesis above, one also has to elaborate further on the environment in which such a model can mature. For this, further clarification of the term 'convergence' is seen as crucial. But let us take things from the start. **Convergence**, literally, is defined as a movement directed toward or terminating in the same point.[46] This point is called point of convergence but legally convergence must be *both* a continuous process and a result to be achieved. On the other hand, it is always questionable whether legal convergence requires political convergence or a meeting of minds between the various nations in pursuit of convergence. The short answer on this is in the affirmative. Thus, political Europe, for instance, with its internal disagreements and objections is now politically structured as the European Union; in America NAFTA[47] is in effect a political consensus of convergence, at least in the area of trading rules amongst the nations of USA, Canada and Mexico. So is ASEAN[48], an organisation of economic cooperation and political convergence in South East Asia, though only to an embryonic extent at present.

[Legal] convergence, in particular, came to be known as a term amongst the circles of comparative law academicians probably after the works of Professor Markesinis on this topic. That is not to say, of course, that the idea of convergence did not pre-exist; on the contrary, the idea of convergence is lost in the passage of

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[46] 'That which "converges" is that which purports to reach the same point': P. Legrand, 'Public Law, Europeanisation, and Convergence: Can Comparatists Contribute?' in P. Beaumont, C. Lyons and N. Walker (eds.), *Convergence and Divergence in European Public Law*, Oxford/Portland, Oregon: Hart Publishing, 2002, p. 226.

[47] North American Free Trade Area. The North American Free Trade Agreement, which comprises Canada, Mexico and the US of A is -as its name suggests- a free trade area, but unlike the EU it provides only for free movement of goods and services. No actual provision is made in the agreement itself in relation to free movement of capital and persons as in the case of the EU. Additional objectives of NAFTA within this free trade area are: the promotion of conditions of fair competition; the increase of investment opportunities; the effective protection and enforcement of intellectual property rights and a creation of a framework for further cooperation to enhance the benefits of the Agreement.

[48] Association of South East Asian Nations. The Association of South East Asian Nations has a population of more than five hundred million (500) people and is one of the three (3) main political and economic players in the Pacific region along with China and Japan. The ASEAN Declaration states that the aims and purposes of the Association are: (i) to accelerate the economic growth, social progress and cultural development in the region through joint endeavours in the spirit of equality and partnership in order to strengthen the foundation for a prosperous and peaceful community of Southeast Asian nations, and (ii) to promote regional peace and stability through abiding respect for justice and the rule of law in the relationship among countries in the region and adherence to the principles of the United Nations Charter. In 1995, the ASEAN Heads of States and Government re-affirmed that 'Cooperative peace and shared prosperity shall be the fundamental goals of ASEAN'.

time.[49] In any case Markesinis, in an influential work of his, and a number of other leading academics in Europe[50] suggested that convergence occurs already through a variety of ways,[51] which include:

- Academic work in universities;
- Judges and Practitioners;
- International Conventions;
- EC Directives[52] and
- The Case Law of the European Court of Justice in Luxembourg.

One would be able to claim further that legal convergence is the approximation of laws at a primary stage (or at least so it should be) and through such approximation the attempt to create more uniform international legal standards, as is the case particularly with international conventions or treaties at a secondary stage. [53]

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[49] The philosophical underpinning of convergence *per se* is found in the works of Plato and in particular in his theory of 'One-Over-Many'. See e.g. *Rep.* 596a: *'We are in the habit of positing a single Form for each plurality of things to which we give the same name'* or *Phaedo* 100c-d, where we also see One-Over-Many reasoning at work: '*... if there is anything beautiful besides Beauty itself, it is beautiful for no other reason than that it shares in that Beauty. ... nothing else makes it beautiful other than the presence of, or the sharing in, or however you may describe its relationship to that Beauty we mentioned, for I will not insist on the precise nature of the relationship, but that all things are made beautiful by Beauty*' and P. Legrand, 'The Same and the Different' in P. Legrand and R. Munday (eds.), *Comparative Legal Studies: Traditions and Transitions*, Cambridge: Cambridge University Press, 2003, p. 299. Traditionally, however, it is Cicero who first discussed the idea of a universal, natural law, which would apply in time and space without frontiers, the only limits of which can be set by the divine. See Cicero, *De Republica*, III, xxii, 33. In more recent times, one of the fathers of modern comparative law, Edouard Lambert, has been also a great supporter of the idea of convergence, even though he would speak of 'uniform and international laws' rather than convergence *per se*. See E. Lambert, 'Sources du droit compare ou supranational: législation uniforme et jurisprudence comparative', in *Recueil d'études sur les sources du droit en l'honneuer de François Gény, vol. III*, Paris, Sirey, 1934, p. 502. However, the classical work on cultural convergence and therefore the forerunner of Markesinis' legal convergence is that of Clark Kerr, *Industrialism and Industrial Man*, Cambridge, Massachusetts: Harvard University Press, 1960. In this work he argues *inter alia* that the global convergence of cultures is the outcome of industrialisation processes.

[50] B.S. Markesinis, *The Gradual Convergence,* Oxford: Clarendon Press, 1994.

[51] *Ibid.*, p. 21. See also B. de Witte, 'The Convergence Debate', (1996) 3 *Maastricht Journal of European and Comparative Law* 105.

[52] It is quite peculiar that Professor Markesinis refers to EC directives only, as opposed to EC directives and regulations, regulations also being a *prima facie* instrument of legal harmonisation/convergence. Perhaps this is so as regulations are expected to directly apply throughout the EU states, whilst directives have to be implemented in a discretionary manner, though the policies therein have to be achieved. Alternatively Professor Markesinis may have used the word 'directives' where he meant directives and regulations.

[53] Thus, one of the most fundamental taxonomies of convergence is between an approximating model and a uniformist model thereof. Another distinction is that between an absolute/total model and a relative/partial model of convergence (opt in-opt out model). A third distinction is that between esoteric level convergence, that is, convergence that touches upon the domestic rules of the system e.g.

Obviously, systems can converge with uniform instruments, only that having to implement such instruments may cause considerable friction within the legal system, since even approximating mechanisms such as directives cause friction in practice.[54] All in all, legal convergence may occur through international treaties as well, whereas practice has shown that it is better achieved perhaps, both through directives and regulations in the case of Europe, though these two legal instruments may sometimes still be inadequate for the legal systems to truly converge.[55] In addition to this, Markesinis also suggests[56] that in the UK, for instance, it is attitudes and phobias which constitute the greatest factor that separates the country from continental Europe, rather than legal problems, solutions and even methodology. This may also be true for many of the rest of the EU member states.

2.3.1.1. Legal convergence is desirable – objections

Gott grüss Euch Brüder
Sämtliche Oner und Aner
Ich bin Weltbewohner

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when an EU regulation applies against an old domestic rule of a legal system and changes it and exoteric convergence, that is, convergence that signifies alignment of principle between legal systems, e.g. the various human rights treaties. The latter example becomes problematic, however, when such international instruments lead to modifications of domestic human rights law. Cappelletti, distinguishes the models of convergence by theory; his analysis concludes on seven (7) models: i) Return to Ius Commune theory, ii) Legal evolution theory, iii) Natural law theory, iv) Law as superstructure theory, iv) International transactions theory, v) International integration theory, vi) Simplicity and certainty theory. See J.H. Merryman, 'On the Convergence (and Divergence) of the Civil Law and the Common Law', in J.H. Merryman (ed.), *The Loneliness of the Comparative Lawyer and Other Essays in Foreign and Comparative Law*, The Hague/London/Boston: Kluwer International, 1999, p. 17ff. This was reprinted from M. Cappelletti (ed.), *New Perspectives for a Common Law of Europe*, Sijtoff, Leyden, 1978, p. 195. Finally, Nottage argues that convergence can be divided between a 'Rules-Plus' kind of convergence (or convergence on rules and the law in the books) and a 'Law in Context' kind of convergence (or convergence on law in action). See L. Nottage, 'Comment on Civil Law and Common Law: Two Different Paths leading to the Same Goal', (2001) 32 *Victoria University of Wellington Law Review* 843, p. 847.

[54] On this, see the scepticism of Gunther Teubner in relation to the implementation of a non-uniformist instrument of law, which should not normally cause particular friction on its implementation: Council Directive 93/13/EEC of 5 April 1993 (*OJ l95, 21 April 1993, 29*). Apparently it did. A directive as such should not have caused friction into the body of British contract law, since it should allow the British to choose the means of its implementation. See G. Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences', (1998) 61:1 *Modern Law Review* 11.

[55] See below on Legrand's ideas.

[56] B.S. Markesinis, *The Gradual Convergence,* Oxford, Clarendon Press, 1994, p. 1.

Bin Weimaraner.[57]

Except, of course, for the words of Goethe, who calls upon us not only to desire to be nationals of a state but also citizens of the world,[58] one must state why convergence is a desirable phenomenon in more concrete terms. Generally, legal convergence for all its disadvantages, which will be dealt with more extensively below – such as onerous political involvement in the lawmaking of convergent instruments or manipulation of smaller nation states in such lawmaking or implementation problems – must be desirable. There are many[59] and good reasons for this:

- First of all, there is considerable philosophical underpinning, as in the theory of the 'postulation of universals' (the Platonic One)[60].
- Second, in our world one has it, especially after the years of Enlightenment (as in Hegelian Idealism[61]), that there is *unity of thought* in the human race and by extension *unity of legal thought,* especially as a matter of legal results (as opposed to the legal means to reach such results).[62] Besides, it should be remembered that '[t]here is no such thing as "German" physics or "British" microbiology or

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[57] [I greet you, brothers-Partisans of various 'isms' and 'slogans'-As for me I'm a world citizen-As well as Weimarian!]. Goethe, Zahme Xenien v, in *Sämtliche Werke*, Berliner Ausgabe, Bournal, 2: Teil, Poetiische Werke, 687. Trans. by A. Lenhoff as quoted in Markesinis, *supra*, fn. 56, p. 1.

[58] Socrates too used to say, when asked, that he is 'not an Athenian or a Greek but a citizen of the world' (translation from ancient text by the author of this thesis). See Plutarch, *De Exilio* ('On Banishment'), *Thesaurus Linguae Graecae,* {0007.110}, p. 600, section F, lines 9-10.

[59] See L. Mistelis, 'Is Harmonisation a Necessary Evil? The Future of Harmonisation and New Sources of International Trade Law' in I. Fletcher, L. Mistelis and M. Cremona (eds.), *Foundations and Perspectives of International Trade* Law, Sweet & Maxwell, 2001, pp. 4-27 and in particular pp. 20-22.

[60] *Supra*, fn. 49.

[61] Hegel's account of idealism can be seen as the idea that the being is ultimately comprehensible as an all-inclusive whole. See e.g. R.B. Pippin, *Hegel's Idealism: The Satisfactions of Self-consciousness*, Cambridge: Cambridge University Press, 1989.

[62] The *locus classicus* on this is the work of K. Zweigert. See K. Zweigert, '*Des solutions identiques par des voies différentes (Quelques observations en matière de droit comparé)*', (1966) 18: 1 *Revue internationale de droit comparé* 5. For extracts in English see K. Zweigert, *'Different Paths to Identical Solutions: Some Comments on Comparative* Law' in V. Gessner, A. Hoeland and C. Varga, (eds.), *European Legal Cultures*, Aldershot: Dartrmouth Publishing Company Limited, 1996, pp. 160-164. Also B.S. Markesinis, *op. cit.*, fn. 56, p. 1. 'On the truth of this premise and the promise it holds for comparative lawyers' see more recently B.S. Markesinis, *Comparative Law in the Courtroom and Classroom: The Story of the Last Thirty-Five Years*, Oxford/Portland, Oregon: Hart Publishing, 2004, p. 36 where it is argued that 'the most "basic issues" pop up in all systems and are not excluded by the different histories or other peculiarities of each of them, making mutual borrowing possible'.

"Canadian" geology'.[63] The obvious question then which would have to be answered is, if knowledge and science as a whole are unconfused, indivisible and inseparable, [64] why should there be separate national laws in non-culturally specific areas[65] of law (as opposed to single convergent laws)?

- Third, because already in the Common law world and the Civilian law world there is unity from within.[66]
- Fourth, because convergence lifts legal barriers, creating or rather promoting an environment of globalisation[67];
- Fifth, supranational and international instruments are doing what their name suggests, that is, they provide solutions for supranational and international legal problems respectively; thus, convergent rules serve convergent purposes;[68]

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[63] K. Zweigert and H. Kötz, *op. cit.*, fn. 22, p. 15. The thesis of the unity of science comes in agreement with the modern Vienna Circle of philosophy. For writings on the unity of science see e.g. L. von Bertalanffy, 'An Outline of General System Theory', (1950) 1:2 *British Journal or the Philosophy of* Science 134, pp. 134-165; P. Oppenheim and H. Putnam, 'Unity of Science as a Working Hypothesis', (1958) 2 *Minnesota Studies in the Philosophy of Science*, pp. 3-36 as reprinted in R. Boyd, P. Gasper and J.D. Trout, *The Philosophy of Science,* Cambridge, Mass./London: MIT Press, 1991, pp. 405-427. Cf. J. Fodor, 'Disunity of Science as Working Hypothesis' in (1974) 28 *Synthese* 77, reprinted as 'Special Sciences' in Boyd, et al., *op. cit.*, pp. 429-441 and more recently, J. Fodor, 'Special Sciences: Still Autonomous After All These Years?, (1997) 11 *Philosophical Perspectives* 149-163.

[64] On this see Plato's theory of the forms. The characteristics and functions of the forms according to Plato are: i) unchangeable (*Phaedo*, 78c10-d9), eternal (*Phaedo*, 79d2), intelligible, not perceptible (*Phaedo*, 79a1-5), divine (*Phaedo*, 80a3, b1), incorporeal (passim), causes of being ('The one over the many') (*Phaedo*, 100c), are unqualifiedly what their instances are only with qualification (*Phaedo* 75b).

[65] For deviations during implementation of convergent law with regard to culturally specific areas of law based on legal-sociology see generally Chapter 6 of this thesis.

[66] Even Legrand admits this. See P. Legrand, 'European Legal Systems are Not Converging', (1996) 45 *International and Comparative Law Quarterly* 52, p. 78 where he clearly implied this by the following: 'the Civilian lawyer will never understand the Common law experience and the Common lawyer will never understand the Civilian law experience'. Legrand, thus, understands that there is unity from *within* the common law world and the civilian law world.

[67] On a definition of globalisation see the classic work of A. Giddens, *The Consequences of Modernity*, Cambridge: Polity in association with Blackwell, 1990, p. 64. On the promotion of globalisation through convergent law see John A. Spanogle, Jr., in 'American Attorneys' Use of International And Comparative Legal Analysis in Everyday Legal Practice' (1993) *Wake Forest Law Review* 1. Spanogle argues that globalisation of the markets requires globalisation of the [legal] rules too. See also an article from the author of this thesis in relation to the role of comparative law as the ideal method for reaching convergence amongst the financial systems of this world in the environment of globalisation; A. Platsas, 'Comparative law as the ideal means of convergence of the national financial systems in the world of globalisation', (December 2002) *Coventry Law Journal*, Volume 7, Issue No.2, 53. The article is appended at the end of this thesis. See Appendix 5.

[68] As in Aristotle's 'rules serve purposes' structure by way of analogy. See Aristotle, *Nichomachean Ethics,* V, x.

- Sixth, national laws become more sophisticated through the adoption of convergent/globalised standards;
- Seventh, 'neutral law' is produced, that is, law which is more or less compatible with all the relevant legal systems affected;[69]
- Eighth, proliferation of variable national laws is avoided by the existence of a single law and finally the need to resort to conflict of laws rules is dispensed;
- Ninth, legal systems become stronger when acting in unity, that is, in a system of convergence, for convergence is like that metaphor of the strong rope consisting of fibres; a rope, which 'does not get its strength from any fibre [any convergent legal system for the purposes of our analysis], which runs through from one end to the other, but from the fact that there is a number of fibres overlapping';[70] and
- Tenth, 'the desire for convergence of legal systems merely expresses a yearning for simplicity. It responds to popular discontent with complexity and seeks to impose order where there is untidy diversity...it is little more than an expression of frustration at the fact that the world is complicated, disorderly and uncertain.'[71]

Nonetheless, convergence is not free from defect.[72] As aforesaid, such problems as political interference during the negotiation of convergent instruments and manipulation of smaller states during negotiations may occur; other obvious disadvantages are: first, the fact that convergence may act as what Legrand calls the 'Procrustean bed of sameness' for legal systems[73]; second, convergence may result in a legal-cultural fusionism[74]; third, convergence on a 'top-down' basis[75] (as opposed to

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[69] Moens and Biffot refer 'to a tendency of the world's legal families to embrace a common intellectual framework for the consideration and resolution of problems'. See G.A. Moens and R. Biffot, 'Convergence of the Legal Systems in the 21st Century' in G.A. Moens and R. Biffot (eds.), *The Convergence of Legal Systems in the 21st Century: An Australian Approach*, Brisbane: Copyright Publishing, 2002, p. 5.

[70] For this excellent philosophical metaphor see R. Rhees, *Preliminary Studies for the 'Philosophical Investigations'*, 2nd Edition, Oxford: Blackwell, 1964, p. 87.

[71] Merryman, *supra*, fn. 53, p. 27.

[72] See also 7.2.2.1. and C. Lyons, 'Perspectives on Convergence Within the Theatre of European Integration' in P. Beaumont, C. Lyons and N. Walker (eds.), *op. cit.*, fn. 46, pp. 83-88 for a general discussion on the arguments against convergence.

[73] P. Legrand, 'The Same and the Different' in P. Legrand and R. Munday (eds.), *op. cit.*, fn. 49, p. 302. Cf. 7.2.2.1.

[74] *Ibid.*, p. 303. Cf. 7.2.2.1

a 'bottom-up' convergence) may not be democratically legitimised[76] and fourth, convergence projects may often neglect from their analysis established national practices and traditions[77].

In view of the above, one should not pursue utopias when it comes to convergence. When Legrand wrote[78] that the European systems are not converging, he was probably looking for a legal utopia, whilst he did not take into account one thing and perhaps he never thought that it is human beings that make convergence come true. For this reason alone one – unlike Legrand – should expect and accept the inevitably true, that is, that convergence occurs at a rather primary and basic level. He argued, however, that the rules pertaining to convergence are ephemeral, contingent and unreliable guides as to how legal systems operate and how their respective lawyers think. According to him a civilian lawyer will never understand the English legal experience like a common law lawyer and vice versa. But neither would the former matter, since no harmonisation is guaranteed *ad infinitum* application, nor would it matter whether or not a civilian would nowadays understand the common law system experience, since convergence of laws is still in the making. Moreover, it is the civilian and the common lawyer of the near future who would have to feel that convergence is taking place. Therefore, convergence is a state of law that can achieve realistic legal results, despite the fact that its impact is yet to be effectively seen by the average common law lawyer or the average civilian lawyer. Furthermore, nobody has ever claimed that convergence is an absolute term. On the contrary, it would seem that convergence can only be a relative state of law where the national legal systems are in a constant process of coming together. As mentioned above, convergence thus is both a point of legal consensus but also a process to reach this point. To say, however, that legal systems are not converging misses the point and the point is that the systems at least in Europe and to a lesser degree around the world are converging, be it only in certain areas.

2.3.1.2. Legal convergence is possible

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[75] Cf. 7.2.2.1.
[76] C. Harlow, 'Voices of Difference in a Plural Community' in P. Beaumont, C. Lyons and N. Walker (eds.), *op. cit.*, fn. 46, pp. 203-205.
[77] *Supra*, fn. 75.
[78] P. Legrand, *op. cit.*, fn. 66.

Additionally, legal convergence is on the move. Academic opinion suggests that harmonisation 'occurs almost everywhere with bewildering speed and that [the comparatist's] difficulty is to ensure that knowledge [on convergence] is up to date'.[79] Thus, the primary reason that convergence is possible is because it already happens[80] and is tested in practice.[81] Second, convergence is possible, because it has reoccurred in human history. In short, when one queries the possibility of convergence of laws, the answer should be: If ancient Rome had stretched its laws from the Middle East to the Strait of Gibraltar, that is to all the (then) known world, be it by the power of sword, then the question is *how* can convergence of laws reoccur by peaceful means, not whether it will. Many different cultures existed then too but ultimately all these cultures had to be subjugated under Roman law. Therefore, our analysis must not be too pedantic in relation to legal culturalism, as, for instance, Legrand's is.[82] Finally, another thing that makes convergence more possible is the fact that there is a general tendency of the nations (mainly driven by the ideas of supranationalism[83] and internationalism[84]) to come together legally. One should take for example the relatively recent call of the European Commission to the European Council and the European Parliament for the approximation of European contract law[85] or the abundance of international treaties in pursuit of convergence. Thus, convergent law is very likely to reoccur time and again, as it did and does. Hence, the question is not whether convergence occurred, occurs or will occur but whether one can keep up with the pace of convergence projects in Europe and the world; so paramount is the convergence movement in our times.

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[79] R. Munday, 'Accounting for an Encounter' in P. Legrand and R. Munday (eds.), *op. cit.*, fn. 49, p. 26.

[80] R. Zimmermann, *Roman Law, Contemporary Law, European Law: The Civilian Tradition Today*, Oxford/Portland: Hart Publishing, 2001, p. 129. Zimmermann refers to the example of offer and acceptance in South African contract law, which is 'an anglicized version of an essentially civilian doctrine' (quoting D. Hutchison, 'Contract Formation' in R. Zimmermann and D. Visser (eds.), *Southern Cross: Civil Law and Common Law in South Africa*, 1996, p. 173).

[81] A.E. Platsas, Book Review (*Comparative Legal Studies: Traditions and Transitions* as edited by P. Legrand and R. Munday), (2005) 54 *International and Comparative Law Quarterly* 1044, p. 1045.

[82] P. Legrand, 'European Legal Systems Are Not Converging' (1996) 45 *International and Comparative Law Quarterly* 52; cf. A. Watson, 'Legal Transplants and European Private Law' *Electronic Journal of Comparative Law*, Vol. 4.4, December 2000, p. 8; the article is accessible at http://www.ejcl.org/44/art44-2.doc . Watson suggests to us that a European Civil Code is very much possible and that 'conformity of interpretation will be a problem, but one must not exaggerate'.

[83] D. Dinan, *The Encyclopedia of the European Union*, London: Macmillan Press Ltd, 2000, p. 441.

[84] C. Holbraad, *Internationalism and Nationalism in European Political Thought*, 2003, New York/Basingstoke: Palgrave MacMillan, p. 1.

[85] COM (2001) 398 final, *Official Journal of the European Union*, c 255/1 of 13 September 2000.

2.3.1.3. Legal convergence is a political question too

Moreover, given the at-many-instances wide-ranging effect[86] of convergent law instruments into a legal system, one has to note that convergence as a whole is mobilised through politics. Thus, to approximate, if not unify, systems to the point of convergence, one *has* to be assisted in one sense by willing political leaderships.[87] It would be a figment for one to believe that the models and factors of implementation suggested in the analysis could simply be applied on the basis of mere legal interference. For laws and thus national implementing laws to come to life, something more than good implementing committees or a supranational watchdog (be it a Court or the Commission in Europe) must be needed. It is believed that this 'something more' is found only in those democratic nations which have a true political conscience, whilst their adherence to the Rule of Law exists in parallel.

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[86] The effect of convergent laws is nowadays well-felt in the constitutional laws of legal systems in many instances. For more see Chapter 4 of this thesis. See also e.g. Articles 55 (International law) and 88 (EU) of the French Constitution 1958 as reinforced by the decision of 9.4.1992 on the Maastricht Treaty on the European Union; Article 23 of the German Constitution 1949 as reinforced by the decision of the Federal Constitutional Court of the 12.10.1993 [1994] 1 CMLR 57 on the law ratifying the Maastricht Treaty on the European Union; Articles 28-I, II and III of the Greek Constitution 1975; Article 29.4 of the Irish Constitution 1937, in the UK Communities Act 1972. For Belgium see Article 25*bis* of the 1831 Constitution (Article 34 of the Consolidated Constitution) in conjunction with 27.5.1971*Hof van Cassatie/Cour de Cassation* judgement in *Franco-Suisse Le Ski*; for Italy see Article 11 (transfer of competence to international organisations) of the 1947 Constitution in conjunction with *GranitalJudgement* No. 170/84 of 8.6.1984; for Luxembourg see *Cour de Cassation*, 14.7.1954, *Pasicrisie luxembourgeoise*, Vol. 16, 150; for the Netherlands see Article 94 (compatibility of domestic provisions with international law) of the 1983 Constitution; for Denmark see Article 20 (delegation of competence to international bodies) in conjunction with the *Supreme Court Judgement* of 6.4.1998; for Spain see Article 93 of the Constitution (transfer of powers to international organisations); for Austria see Article 9(2) (delegation of competences to international organisations); for Cyprus see *Malachtou v Armefti* (1987) 1 *Cyprus Law Reports* 207, at 235 etc For more see K. Lenaerts and P. Van Nuffel (ed. R. Bray), *op. cit.*, fn. 39, pp. 678-700. Such recognition, however, came from the ECJ long before official recognition in the national constitutions of EU states.[86] This effect of convergent into domestic legal systems has also been asserted by extra-national justice. See *Van Gend en Loos* [1963] CMLR 105; *Costa v ENEL* [1964] CMLR 425; *Internationale Handelgesellschaft* [1972] CMLR 255; *Simmenthal* [1977] 2 CMLR 1. An interesting analysis in relation to *Van Gend en Loos* is provided by Fennelly J. See N. Fennelly, 'The Dangerous Idea of Europe? *Van Gend En Loos* (1963)' in E. O'Dell (ed.), *Leading Cases of the Twentieth Century*, Dublin: Round Hall Sweet Maxwell, 2000, pp. 220-236.

[87] 'The objectives of internationalisation are determined above all by political choice.' See recently M. Delmas-Marty, 'Comparative Law and the Internationalisation of Law in Europe' in M. van Hoecke (ed.), *Epistemology and Methodology of Comparative Law*, Oxford/Portland, Oregon: Hart Publishing, 2004, p. 248.

2.3.1.4. Convergent instruments of law

A *sine qua non* to an analysis on implementation of convergent law is useful to briefly explain the most widely used alignment techniques (item 2). This is true, as the character of the actual convergent instrument of law may interfere with the way such an instrument is actually transposed.

Starting with the **EU regulation** one can claim that this is perhaps the most dynamic regulatory tool that the European Union uses to address a problem or to commence a new policy in an area of law. Even though a regulation, as is the case with a directive, is a secondary kind of legislation in the EU, it is the most effective, for it is the expression of the rather vague primary EU legislation such as the Treaty of Rome for instance and the EU treaties in general. Under Article 249 (formerly Article 189) of the EC Treaty (as amended) a regulation shall:

'have general application. It shall be binding in its entirety and directly applicable in all Member States'.

By 'direct applicability' it is meant that the member states have no discretion to deviate from the regulation or postpone implementation thereof. The EU regulation is, therefore, self-executing.[88]

The **EU directive**, on the other hand, is at best a peculiar creature of law. Thus, a directive is binding in its objective(s), whilst allowing to the member state(s) some leeway in its transfer to national law and the manner in which a member state implements and achieves the goals set by the Council and Commission. There are 4 stages for a directive to be implemented: the first stage is that of communication of the directive to the member state(s); the second stage is the transposition of the directive into national law by the relevant legislative measures by the member state(s); the third stage is that of the very application of the directives, that is the administration of the directives into a concrete case, which normally occurs by the application of the national measures transposing the directive and the fourth stage is that of enforcement, which normally occurs either primarily through additional

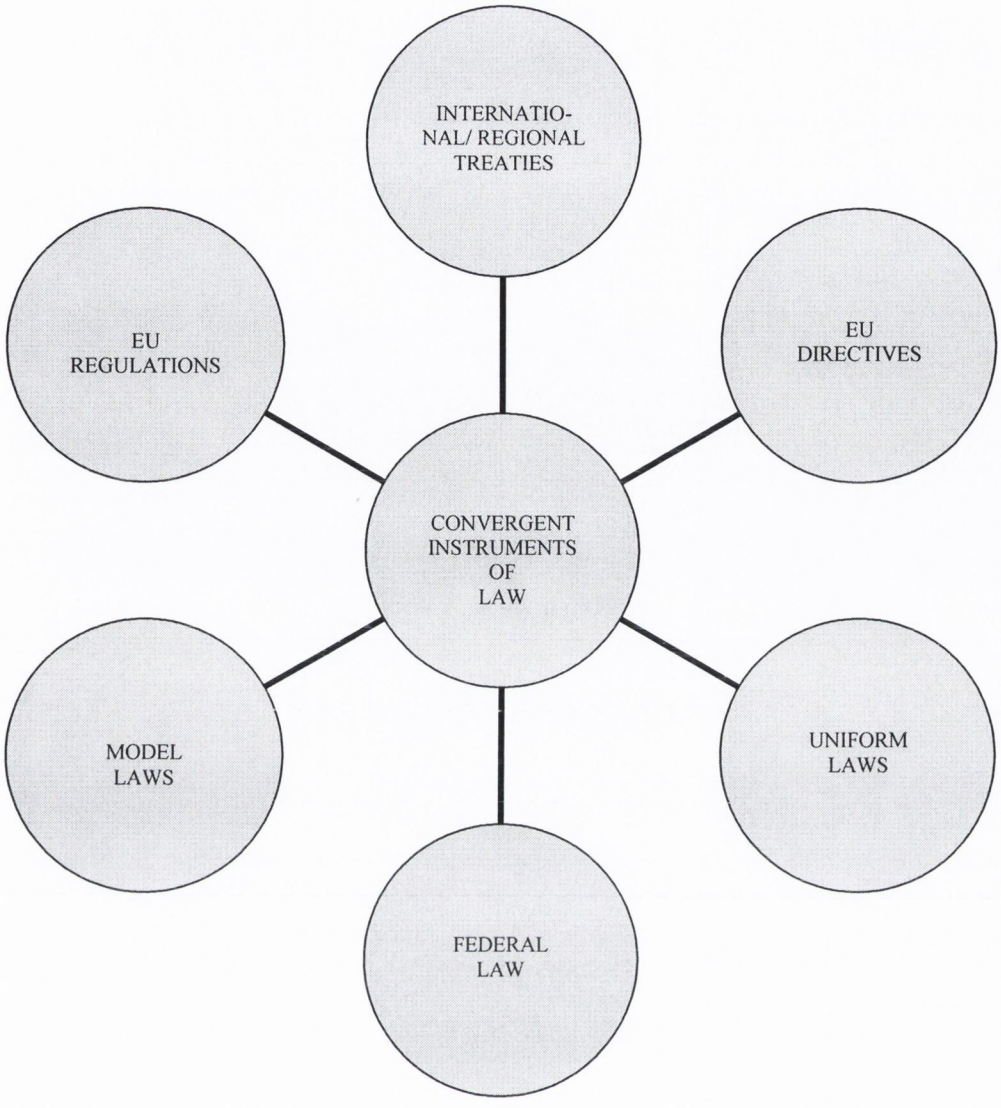
[88] See *Consorzio del Prosciutto di Parma v Asda Food Stores Ltd* [1999] 1 CMLR 696; Eu LR 437, in which case the English Court of Appeal ruled, *inter alia,* that a regulation did not have direct effect, aince it was not sufficiently clear and precise and itself indicated that it was not intended to have direct effect.

administrative measures or secondarily by the enforcement through the judiciary. Finally, one has to stress that unlike EU regulations which entail clearly the notion of direct effect, depending of course on their wording, clarity and whether or not member state action is required as a prerequisite to their implementation or whether the implementation deadline has passed, the EU directive – since it requires additional legislative and administrative measures almost invariably on behalf of the member state – it does not automatically entail such direct effect. The very nature of the directives is clearly responsible for this, that is, directives tend to be imprecise, vague and rather insufficiently defined due to their framework nature.[89]

Moreover, the EU directive is problematic, when it comes to its implementation. Here is why:[90]

> 'Person A sends person B to buy something for dinner. A could simply say: "Buy something for dinner". On the other hand, A could also say: "Buy some pasta, sauce and wine" or "Buy tagliatelle, pesto and Chianti". A could also send B to the Italian shop on the corner for the tagliatelle and pesto and to the wine merchant on the other corner for the Chianti etc. Finally, it may happen that B has nothing to do other than to get there. And even in this respect it is conceivable that A says: "Take the car". In other words, one situation may involve a distinction between the result on the one hand and the means to realise it on the other, while in another situation both these facets become the result'.

[89] For this see *Gibson v East Riding of Yorkshire Council* (2000) *The Times*, 6 July.
[90] S. Prechal, *Directives in European Community Law: A Study of Directives and Their Enforcement in National Courts,* Oxford: Clarendon Press, 1995, pp. 16-17.



Item 2

Federal laws in the US (and in other countries) are the highest form of domestic law except for the US constitution, which is perceived as supreme even against a federal law, in case the latter is deemed 'unconstitutional' by the Supreme Court. It is the US congress that issues and enacts federal statutes under Article I, § 1 of the Constitution of the Unites States. Amendment X of the US Constitution, however, suggests that powers not delegated to the federation by the Constitution, nor prohibited by it to the states are reserved to the states or to the people. A federal statute becomes part of the American legal order automatically as soon as the President signs it. In case he vetoes it, a federal statute becomes law only if consent of two thirds in both chambers of the Congress is the case. An analogy could be

drawn between US federal statutes and EU regulations. The parallels are obvious: they both apply throughout the Union in Europe and throughout the States in America; they are both self-executing by and large and neither regulations nor federal statutes provide any discretion to their addressees. In effect, the US federal laws are a form of internal convergence, that is, convergence of American states to each other and vis-à-vis the federation.

Model laws, in international law and in the US, are prototypical laws. A model Act may never become law at all. For instance, the Model Employment Termination Act (1991) was completed by the uniform law commissioners but it never became law of any American state. An individual too may draft a model Act and of course there are other organisations that may propose model legislation. A typical example of model law in international law are the UNIDROIT Principles of International Commercial Contracts. It need be stressed that the organisations[91] issuing model laws have no legislative competence *per se*. All they do is propose.

Uniform laws, on the other hand, are prototypical laws that seek to align the differences that occur from state to state in various areas of law. To take an example, the American Law Institute in conjunction with the National Conference proposed the Uniform Commercial Code 1952,[92] which *inter alia* sought to 'make uniform the law among the various jurisdictions'.[93] Moreover, the simplification, clarification and modernisation[94] of the existing laws is another aim of uniform laws. Uniform laws are particularly successful in their implementation throughout the American legal system. For example, the UCC has been so successful, that it was adopted wholly by 49 states, the District of Columbia and partially by the state of Louisiana.

International treaties or other international instruments of non-treaty form normally[95] form the last great category of convergent law. Taxonomically, they

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[91] Model laws in international law are produced by such organisations as UNIDROIT, whereas model acts in the USA are issued by one of the following: the American Law Institute, the National Conference of Commissioners on Uniform State Laws, the American Bar Association and the Council of State Governments Committee on Suggested State Legislation.

[92] The Uniform Commercial Code is an ongoing model law. The American Law Institute still redrafts it. Its most current meeting took place in February 2003. This concerned Article 7 (Documents of Title) of Uniform Commercial Code. Hereinafter UCC 1952.

[93] As in § 1-102 (2) (c) UCC 1952 (as amended).

[94] As in § 1-102 (2) (a) UCC 1952 (as amended) for instance, which sought to 'to simplify, clarify and modernize the law governing commercial transactions'.

[95] Note that the fact that an international treaty is an international treaty does not automatically make it a 'convergent instrument of law', the typical example here being a peace treaty which despite the fact that it is an international instrument of law, this does not normally affect the inner legal workings of the contracting state; therefore, such an international treaty is not a convergent instrument of law.

are either bilateral, such as bilateral investment agreements between two trading countries, or multilateral, such as 'universally' accepted instruments such as the UN Universal Declaration of Human Rights 1948.[96] Of course, the fact that the Universal Declaration is a 'soft-law' instrument does not reduce its significance or impact vis-a-vis convergence law theory, in that even though the instrument is of declaratory nature, it is widely regarded as indicative of international customary law. Beyond such instruments, an international treaty *per se* is defined 'as a written agreement, governed by international law, concluded between two or more states, or other subjects of international law, possessed of treaty making capacity.'[97] A further division which occurs in the case of international treaties is the division between instruments of public international law and private international law; the former deals with the legal rules that apply between sovereign states, whilst the latter deals with the rights and the duties of citizens of different sovereign states towards one another. Finally, a good example of a public international law treaty is the UN Charter 1945, whilst a good example of a private international law is the UN Convention on Contracts for the International Sale of Goods 1980. Depending on the country that has to implement an international treaty, a monist process or a dualist process is followed. **Monism** is that doctrine of international law ratification, whereby national and international law form a single whole, or part of the same conceptual structure, in which international law takes precedence. France, Greece and the Netherlands are only a few examples of the legal systems that follow the monist pattern. In these countries, once the obligations of international law are assumed, they take precedence over national law. **Dualism** on the other, clearly segregates national from international law and vice-versa; in order for international law to enter into national law and apply within a national legal system some domestic legislative action must be enacted by its national parliament.[98] To this school of thought belong countries such as Ireland[99], the UK[100] and the US. It is noted, however, that the previous

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[96] See e.g. J.C.M. Willens, 'The Children's Law of Nations in the Trias Pedagogica' in J.C.M. Willens (ed.), *Developmental and Autonomy Rights of Children: Empowering Children, Caregivers and Communities*, Antwerp/Oxford/New York: Intersentia, 2002, pp. 71-72 (para. 2.2.: The Children's Law of Nations binds all states, both rich and poor).

[97] L.B. Curzon, *Dictionary of Law,* Harlow: Longman, 6th Edition, 2002, p. 426.

[98] H. Barnett, *Constitutional & Administrative Law*, 3rd Edition, 2000, London, Cavendish Publishing, pp. 342-343.

[99] Articles 29.5.1 and 29.6 of the Constitution of Ireland of 1937.

[100] Lord Atkin in *Attorney General for Canada v Attorney General for Ontario* [1937] AC 326 has laid the principle in connection to British Law: 'Within the British Empire, there is a well established rule

classifications of systems occurs at a general level and that certainly there are other classifications in this respect e.g. in many systems (for instance, as in the US) except for the generally dualist approach which is followed, there is also a distinction between self-executing and non self-executing instruments of international law.[101]

2.3.2.1. Correspondence principle

With particular regard to model building (in the main part of the thesis), a perfectly legitimate exercise in Academia as a whole,[102] the first thing to be said is that a model, any model, is to gain its 'credibility from its *correspondence* with one's perception of reality'[103]. Theoretically, this does not have to be an objective reality (as Professor Samuel seems to imply), if such thing exists of course. Nor such correspondence has to be a strictly objective exercise. This is why the systematics of the implementation models and of the factors analysed herein are largely subjective in essence, except of course for the fact that this is *a* typology of implementation models and factors (as opposed to *the* typology of such models and factors), as the second part of the thesis title reminds us by the use of the indefinite article 'a' (as opposed to the definite article 'the').

However, as 'law is *par excellence* the thing that wants a reason'[104], one should justify the models and factors which he confers. Professor Samuel seems to be of the same mind on this, thus except for his 'correspondence principle', he goes on to argue that there are *mutatis mutandis* objectifying factors for one's models:

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that the making of a Treaty is an executive act, while the performance of its obligations, if they entail alteration of the existing, requires legislative action. The stipulations of a Treaty do not, by virtue of the Treaty alone, have the force of law. If the government of the day decides to incur the obligations of a Treaty which involves alteration of law they have to run the risk of obtaining the assent of Parliament to the necessary statute or statutes'.

[101] This distinction was also detected by Professor Hérnandez, one of the interviewees. See 7.2.2.3. herein.

[102] See e.g. the 'Architecture of Theories' in J. Buchler (ed.), *The Philosophy of Peirce: Selected Writings*, London: Routledge, reprinted in 2000 (originally published in 1940), pp. 315-323.

[103] G. Samuel, 'Epistemology and Comparative Law: Contributions from the Sciences and Social Sciences' in Mark Van Hoecke (ed), *Epistemology and Methodology of Comparative Law*, Oxford and Portland Oregon: Hart Publishing, 2004, p. 44. But cf. G. Samuel, *Epistemology and Method in Law*, Aldershot: Dartmouth, 2003, p. 120.

[104] J. Buchler (ed.), *op. cit.*, fn. 102, p. 318. Cf. also the well-known maxim: *Ratio legis est anima legis.*

> Thus a model which plots the movement of comets and predicts when and where they will be at any given moment is likely to be treated seriously if the predictions can be independently verified *by observation* (the author's emphasis). However a model can also gain its validity from its own internal *coherence*. [...] A third method of verification is *consensus*. A model or indeed theory will gain its force and credibility if members of a specified community are agreed amongst themselves that it is valid'.[105]

The models and the factors revisited (and in turn their requisites and qualifiers) in this thesis being subjective in nature, one presents these by observation[106]. So too, observation is perfectly verifiable when examples are real (as in most cases are) and they in turn reflect 'one's perception of reality', that is the author's. Even in the minority of exemplifications, wherein the author provides hypothetical examples, it is well arguable that observation is achieved, for otherwise one would not be permitted to confer hypothetical examples whatsoever, an otherwise repugnant and absurd approach in legal theory. As far as the internal coherence of the models and factors analysed is concerned the author is of the belief that the models are not self-conflicting or conflicting to each other, notwithstanding the fact that the models and factors perceived can be used interchangeably, they are modifiable and in any case open to adaptation, them being subjective in essence.

2.3.2.2. Propositional logic

Together with the fact that the models and factors proposed herein are seen as discretionary and modifiable, the models of the thesis and the factors presented, normally operate under propositional logic (thus, if *a*, then *b*)[107].[108] A typical example

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[105] G. Samuel, 'Epistemology and Comparative Law: Contributions from the Sciences and Social Sciences' in Mark Van Hoecke (ed), *op. cit.*, fn. 103, p. 44. In the same work, see also Samuel's analysis on the virtuality of models, his distinction between virtual and actual facts and the 'French candidate in the Paris constituency' metaphor at pp. 45-46 and 74.

[106] Cf. J. Buchler (ed.), *op. cit.*, fn. 102, p. 150.

[107] E.g. H. Pospesel, *Introduction to Logic: Propositional Logic*, Englewood Cliffs, New Jersey: Prentice-Hall, 1974; G. Samuel, *Epistemology and Method in Law*, Aldershot: Dartmouth, 2003, p. 106. See also the 'connective logic' of Chrysippus of Soli whereby 'With words like 'and', 'or' and 'if...then', different statements can be joined together and the truth of the whole will depend exclusively on the truth of the parts'. (Example: Either Muhammad will go to the mountain or the mountain will go to Muhammad. Muhammad did not go to the mountain, therefore the mountain went

here would be the choice between 'uniformist' and 'directive/instructive' convergent law under the 'general model' of our analysis. Theoretically, since all convergent law is either of a largely uniformist aspiration or of a largely instructive aspiration,[109] the non-occurrence of either a uniformist (*a1*) or an instructive (*a2*) convergent law would render our model (*b*) obsolete (thus, if not *a1 or a2*, then not *b*)[110].

With regard to the mode of reasoning in the main part of the thesis, the models and the factors herein normally operate under some of the classical approaches of reasoning. Reasoning operates under three modes: Deduction, induction and abduction.[111] Deduction is inference in which the conclusion is of no greater generality than the premises (reasoning from general to specific)[112]; induction is the process of reasoning in which the premises of an argument support the conclusion, but do not ensure it, the conclusion being of greater generality than the premises (reasoning from specific to general)[113]; abduction (aka retroduction) is the process of reasoning to the best explanations by the identification of a pattern in a phenomenon and the suggestion of a hypothesis[114]. There is normally an adaptation of a hypothesis to a given set of facts.[115]

The models and factors of this thesis, it is *proposed*, operate under deduction and abduction. The author submits that the general model[116] adheres to deductive

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to Muhammad) and the later but more refined 'propositional calculus' under Frege in D. Cryan, S. Shatil and B. Mayblin, *Introducing Logic*, Royston: Icon Books, 2004, pp. 8, 19.

[108] Note that the analysis on the socio-legal factor follows a slightly different pattern of analysis to the rest of the models and factors in the sense that its analysis of a more descriptive nature (as opposed to strictly adhering to propositional logic).

[109] E.g. M. Delmas-Marty, 'Comparative Law and the Internationalisation of Law in Europe' in Mark Van Hoecke (ed.), *Epistemology and Methodology of Comparative Law*, Oxford and Portland Oregon: Hart Publishing, 2004, p. 252.

[110] This is also known as the 'arrow out' rule in propositional logic ('*The Arrow Out Rule*: From a conditional and a statement identical to its antecedent derive a statement identical to its consequent'). See H. Pospesel, *op. cit.*, fn. 107, pp. 13-19.

[111] E.g. A.W. Burks (ed.), *Collected Papers of Charles Sanders Peirce* (Vol. 7: Science and Philosophy), Bristol: Thoemmes Press, 1998, p. 61.

[112] A typical example of deductive reasoning is the following: All men are mortal. – Socrates is a man. – Therefore Socrates is mortal.

[113] A typical example of inductive reasoning would be: This raven is black. – That raven is black. – Therefore, all ravens are black.

[114] A typical example of abductive/retroductive reasoning is: The grass is wet – But if it rained, wet grass is observed as a matter of course – Therefore, there is a reason to suspect that it rained. Alternatively, the surprising fact, C, is observed – But if A were true, C would be a matter of course – Therefore, there is a reason to suspect that A is true. See Buchler (ed.), *op. cit.*, fn. 102, p. 151.

[115] A.W. Burks (ed.), *op. cit.*, fn. 111, p. 67.

[116] E.g. 'All implementations of convergent instruments of law fall on first instance within the general model. – This is an implementation of a convergent instrument of law. – Therefore, the implementation of this convergent instrument of law falls on first instance within the general model'. (Deduction)

reasoning, as the analysis on the sociological factor [117] does. As far as the restructuring model[118] and the analysis on the comparative law factor[119] are concerned it could be said that these operate under abduction by the operation of minor hypotheses therein, the hypothesis with regard to the restructuring model being the implementation of major changes convergent law brings about special arrangements[120], whilst the hypothesis with regard to the comparative law factor (as revisited) being that there is practicality and convenience [121] in comparing implementation in related legal systems.

Yet, to place the abductive parts of this thesis into induction would have to be a mistake. This could on first instance be the case but in all probability should not be the case. The reasons for this are: first, it is not the intent of the author to present inductive models when he intends to do so under abduction; second, the qualitative conferment of limited examples in the abductive parts of the thesis would serve abduction better than induction, because induction requires a wide range of examples, arguably wider than the examples conferred herein in the restructuring model and the comparative law factor of this thesis (law of large numbers). Thus, simply because one observes four black ravens, this does not equate to all ravens being black; especially when we know that one can e.g. find white ravens in Japan.[122] Third, simply because the author observes a limited number of cases does not mean that all future cases of legal restructuring due to convergent law or where comparative law is used during the implementation of such law, should fall within the restructuring model and the comparative law factor by reason of the fact that something is simply observed in a given set of facts in a particular time, i.e. just because something is

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[117] E.g. 'All implementations of convergent instruments of law interfering with internal sources of law could *mutatis mutandis* fall within the socio-legal factor. – This is an implementation of a convergent instrument of law which interferes with internal sources of law. – Therefore, the implementation of this convergent instrument of law could fall on first instance within the socio-legal factor'. (Deduction)

[118] E.g. 'The model generally applies as per exemplifications. – But if there were special arrangements in the implementation of major changes convergent law (hypothesis), then the model would be a matter of course. – Therefore, there is a reason to suspect that the hypothesis is true. (Abduction)

[119] E.g. 'The factor (as revisited) generally applies as per exemplifications. – But if there were practicality and convenience in comparing implementation of convergent law in related legal systems (hypothesis), then the factor (as revisited) would be a matter of course. – Therefore, there is a reason to suspect that the hypothesis is true. (Abduction)

[120] See 4.2.3.

[121] See 5.2.1.

[122] D. Cryan, S. Shatil and B. Mayblin, *op. cit.*, fn. 107, p. 116.

observed in the past does not mean that this should be valid in the future (*post hoc ergo propter hoc* fallacy).[123]

2.4. Choice of methods - thesis relevance

Finally, the choice of any one model or a factor or a combination thereof such as are proposed in this thesis is dependent on four elements: i) The practicality of the chosen method(s) in relation to a particular implementation problem on a case-by-case basis, ii) the legal system *per se*, which may choose any, if not all, of the patterns suggested herein, iii) the political will of the legal system in relation to choosing a pattern and iv) the impact that the particular implementation problem may bring into the legal system itself.

An additional qualifier for the analysis is that it is mainly concerned with the legislative and judicial implementation element of convergent laws. The executive/administrative implementation will also be addressed but to a significantly lesser degree. The administrative implementation of such laws is seen as a largely political question and since this thesis is not concerned with any such arguments, any considerations on the executive implementation element are seen as deviatory considerations from the legal point of view.

[123] A.W. Burks (ed.), *op. cit.*, fn. 111, p. 67: 'But it is Abduction, not Induction, and proves nothing but the ingenuity with which the hypothesis has been adapted to the facts of the case. To take this for Induction, as great proportion of students do, is one of the greatest errors of reasoning that can be made. It is the *post hoc ergo propter hoc* fallacy, if so understood'.

PART II

Chapter 3

THE GENERAL MODEL OF IMPLEMENTATION OF CONVERGENT LAW

3. THE GENERAL MODEL OF IMPLEMENTATION OF CONVERGENT LAW–IMPLEMENTATION OF FORMAL AND MINOR CHANGES

3.1. Introduction

In this chapter, the author's perceived general model of implementation of convergent law will be analysed. The chapter will seek to systematise the model as a matter of general application in the implementation of convergent instruments of law. Additionally, it will be shown that the implementation techniques of European, public international law and private international law are at the core of this model. Finally, the model will be put into perspective and the argument will then revolve around the key notions for applying this. The model suggested in this chapter is defined, conditioned and exemplified.

3.1.1. Definition of the General Model of Implementation

The general model of implementation of convergent law[1] is that model of alignment of a national or sub-national[2] legal system, to a convergent instrument or

[1] [Hereinafter the general model of implementation]

[2] Even though the general model mainly addresses the convergence of national legal systems to each other and the convergence of the national legal systems to supranational and or international forms of law, sub-national legal systems of a federation, such as the American states in the USA or a confederation such as the cantons in the Swiss Confederation, cannot be precluded from the application

order of law (be it at a supranational, intergovernmental, federal, regional or international level), **according to which the national or sub-national legislator and/or respective judges and/or administration of a legal system must meet the legislative, judicial and administrative implementation requirements respectively of the convergent instrument of law in question. The model aims at fulfilling the *formal requirements of and general changes* brought about by such instruments. It, thus, aims to bring about mere alignment between a given national legal system and a convergent instrument of law.** This can either be done when the national legal system (and its enforcing mechanisms) should implement both the letter and spirit of the convergent instrument in question or just the spirit of it. It will be argued that in the former case, the national legislator and its enforcing mechanisms find themselves having no discretion to deviate from the spirit and letter of such an instrument, whereas in the latter case, the national legislator and its enforcing mechanisms find themselves having some minimal technical discretion to deviate significantly, at least from the letter of such an instrument of law. According to this method, failure on the part of the national legislator to implement in a sufficient manner, either the spirit and letter or simply the spirit of a convergent instrument of law, brings about the operation of sanctions against him.[3]

3.1.2. Initial application of the General Model of Implementation

As aforesaid, the general model aims to bridge laws and if bridges are the superstars of architectural engineering, then the general model must be construed as being the superstar of legal convergence engineering.[4] This is the case, because, as mentioned in the introduction of this chapter, the general model is perhaps the most widely used method of convergence; it is the mode of convergence that almost all the

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of the model, as is the case with the other models and factors herein. In such a case the sub-nations (US states, Swiss cantons or German *Länder*) have to be taken to act as the national legal systems; only that in this case, the question of convergence would address the convergence of the sub-national legal systems to each other and their convergence to the federal or confederative system of law.

[3] For the mechanics of this method, see 3.3 herein.

[4] Cf. B.S. Markesinis, *Foreign Law and Comparative Methodology: A Subject and a Thesis*, Oxford: Hart Publishing, 1997, p. 194: 'The comparatist's enduring mission is to act as a communicator and as a tireless builder of cross-cultural bridges'. Also see more recently, 'Bridge building between systems and even cultures is a complex and noble task': B.S. Markesinis, *Comparative Law in the Courtroom and Classroom: The Story of the Last Thirty-Five Years*, Oxford/Portland, Oregon: Hart Publishing, 2004, p. xi.

legal systems use in one way or another. However, the general model – as it is presented herein – is an amalgam of legal techniques: the legal technique that international law experience provides us with on the one hand and the European law experience on the other. The fact that the method is amalgamated through the practices of international law or European law does not mean that the model cannot be applied in a more international or regional fashion. This, of course, depends on the situation in which the general model is used.

The model is by-and-large divided into two subcategories when it comes to variants: i) the **uniformist sub-model**[5] of bridging of laws e.g. as in the case of EU Regulations or uniformist treaties and ii) the **instructive/directive sub-model**[6] of bridging of laws e.g. as in the case of EU directives or instructive international treaties. In effect, if a convergent instrument of law asks for total adherence to its word and spirit, then the uniformist model is operative to the exclusion of the directive model. If, on the other hand, a convergent instrument of law asks for adherence only to its spirit, then the directive model is applicable to the exclusion of the uniformist model. Finally, as its name suggests, the uniformist model seeks unity of law, whilst the directive model seeks approximation of law.[7]

At this point it should be remembered that not all treaties are necessarily convergent instruments of law,[8] whilst most EU Regulations and directives must be and almost invariably all federal and confederative statutes in a federation or a confederation are convergent.

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[5] Typical examples of international uniform instruments of law are the Brussels and Lugano Conventions. See J. Newton, *The Uniform Interpretation of the Brussels and Lugano Conventions*, Oxford/Portland, Oregon: Hart Publishing, 2002. An interesting discussion on uniformity is also provided by Eisenberg. See M.A. Eisenberg, 'The Unification of Law' in M. Bussani and U. Mattei (eds.), *The Common Core of European Private Law*, The Hague/London/New York: Kluwer Law International, 2003, p. 36ff. International sports law provides interesting examples in relation to uniform law by way of the World Anti-Doping Code 2003 and the ensuing Prohibited List (of Substances and Methods) 2006. See N. Cox & A. Schuster, *Sport and the Law*, Dublin: First Law, 2004, pp. 87, 107, 152.

[6] It should be noted that the directive sub-model is not another expression of the sociological factor of implementation of convergent law found in Chapter 6, even if the directive model gives some discretion (especially of a technical nature) to the national legislator and judge. See chapter 6 for more on this.

[7] See e.g. G.A. Zaphiriou, 'Unification and Harmonization of Law Relating to Global and Regional Trading', (1993-1994) 14 *Northern Illinois University Law Review* 407ff.

[8] This depends on the context, the general aim and the particular objectives of a treaty. For instance, a bilateral investment treaty is not a convergent instrument of law; however, a bilateral investment treaty which brings about domestic changes of law to both the systems concerned for the better functioning of investment may be deemed to be a convergent instrument of law. On the other hand, one must bear in mind that a convergent instrument of law may not necessarily touch upon the internal workings of the systems concerned. For instance, convergence of principle between different legal systems is primarily achieved with human rights treaties etc. See chapter 2 of this thesis.

3.1.3. Implementation benchmarks and reality

As regards the theoretical benchmark of the general model, such a benchmark should be particularly high. Reality, however, is not as happy as theory. Of course it is a positive state of affairs, when one considers the most successful application of convergent law, EU law, but even in this case the situation is not ideal. Nevertheless, it is submitted that this is not the fault of the general model but rather the fault of *how* such a model is not respected by the various legal systems. One should take the example of the recent 'EU scoreboard'[9] (item 3) which suggests that Luxembourg, Greece and Italy have 62 directives overdue each, whilst Portugal has currently 60 directives overdue. Of course, there are member states which have a good record, such as Denmark, Cyprus, Hungary and Lithuania - their implementation records are on time; at least most of the time. However, the fact that 1.9% of all EU internal market directives are yet to be implemented does not provide an excuse for the current situation, since in reality the internal market directives are according to the Commission responsible for bringing '€ 877 billion in extra prosperity since the EU's internal frontiers were effectively removed in 1993.'[10] However, the ambitious target set by the Commission in 1999[11] for a general deficit of implementation not exceeding 1.5% of all EU legislation and 100% of all EU Directives two years past their implementation is deemed unrealistic to this day. This is particularly true for two reasons: i) many of the old 15 EU Member States, even though they were supposedly more integrated than the current 25 EU Member States, did not manage to reach these targets and ii) the Commission itself has stated that even though its targets are high, reality has dictated contrary to its ambitious targets.

EU-25 Member State transposition deficit, as at 1/6/2006 – 1620 directives

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[9] IP/06/1008 (Brussels, 18th July 2006). Accessible at http://europa.eu/rapid/pressReleasesAction.do?reference=IP/06/1008&format=HTML&aged=0&language=EN&guiLanguage=fr

[10] IP/04/33 (Brussels, 12th January 2004). Accessible at http://www.europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/04/33|0|RAPID&lg=EN

[11] *The Strategy for Europe's Internal Market: Communication from the Commission to the European Parliament and the Council* (24th November 1999), p. 14.

Member State	DK	CY	HU	LT	SI	UK	EE	AT	PL	SK	SE	NL	FI	LV	ES	DE	FR	BE	IE	MT	CZ	PT	EL	IT	LU
Transposition Deficit (%)	0.5	1.0	1.1	1.2	1.2	1.3	1.4	1.4	1.4	1.4	1.4	1.5	1.5	1.5	1.7	1.8	1.9	2.0	2.0	2.2	3.0	3.7	3.8	3.8	3.8
Number of Directives	8	17	18	19	20	21	23	23	23	23	23	24	24	25	28	29	31	32	32	35	48	60	62	62	62

Item 3

In an ideal implementation scenario, where EU regulation as a whole is of high quality, another € 50 billion[12] would be added to the figure of € 877 billion which the Commission has already calculated. This alone should be a good reason for the stronger application of the general model in the EU, both as a matter of national adherence to EU law and as a matter of generation of high quality law by the EU.

3.1.4. Successful bridging of law between the systems: Says who?

It is clear in our analysis that the nation state is a very important element for the model (as well as for any other model or factor herein) to operate. It is always questionable as to what body should scrutinise the implementation record of a converging legal system. Again, reality suggests to us that in the case of human rights it is the various human rights committees; in the case of the UN Convention on Contracts for the International Sale of Goods the various national courts interpreting the Convention and in the case of the EU primarily the Commission and at a latter stage the Court of First Instance and the European Court of Justice.

There is one important addition, however, that this thesis would have to make to the above in relation to implementation. The suggestion made is that these bodies should connect the implementation of convergent law with the possible *direct* conferral of any financial benefits to the national legal systems except, of course, in cases such as that of the UN Convention on Contracts for the International Sale of Goods, where national courts effect and scrutinise national implementation. Thus, only systems which implement successfully should be the recipients of financial aid or investment by the other legal systems in a convergence pattern.

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[12] IP/03/40 (Brussels, 14th January 2003). Accessible at http://www.europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/03/40|0|RAPID&lg=EN&display=

3.2. Requisites, possibilities and initial justification thereof

The model, as perceived herein, is subjective[13] (as all other models and factors herein) and operates under a number of criteria or possibilities (considerations) which may operate as criteria on a case by case-by-case basis i.e. where these possibilities occur, they should be taken to act as variable criteria; the central[14] considerations are:

- Existence of a codified text open to judicial or other scrutiny,
- A binding obligation on the national legal system to implement in theory,
- Adherence to what has been agreed in practice,
- Respect to both the letter and spirit of the convergent instrument of law (or at least to the latter of the two) - if drafting discretion is allowed, this can normally be related to deviations from the text of the convergent instrument of law only,
- Notice to some kind of sanction against the legal system which fails to implement correctly or on time.

The initial justification with regard to the above requisites/possibilities emanates from the experience in international law and European law. As already maintained in the introduction to this chapter, the model aims at systematising a model of general implementation with regard to minor and formal changes in a given legal system. Thus, given the above criteria or possibilities, one would be able to argue that they are all (in one way or another) children of international law and European law, i.e. they are the result of international and European law experience. The application of the model and its criteria advanced in this chapter are based on propositional logic (if *a*, then *b*). These criteria or variables are explained and justified below in detail.

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[13] See 2.3.2.1. herein.

[14] Depending on one's perception on the matter, there can also be other considerations acting as 'criteria' e.g. the consideration of derogations, the time factor etc. Such considerations were incorporated in earlier drafts of this thesis but were finally omitted for the sake of conciseness.

A last point to be noted is that some of the proposed considerations may seem obvious or even reminiscent of common practice to the reader. Of course, such thought may arise by reason of the fact that a general model of implementation is almost invariably a rather *mechanistic/formalistic* exercise, notwithstanding the fact that it has already been proposed in the introductory part[15] of this thesis that the proposed general model is of deductive nature.

3.2.1. Existence of a codified text open to judicial or other scrutiny: positivism

The first broad requirement of the general model is that the convergent instrument of law is found within a written text in a codified form, open to some kind of scrutiny after its promulgation and enforcement, because it is an inherent characteristic of the world's modern legal systems that legal texts are open to examination and scrutiny. With regard to the written character of the convergent instrument under our model, the analogy here with contract law is obvious: though oral agreements between two or more parties (in our case between two or more states) can be enforced, the complexity of our modern world and the difficulties in evidence of proving such an agreement would make us believe that a written agreement (and hence a codified instrument of convergent law) is normally more easily enforced, if not exclusively enforced in implementation practice. In effect, such a codification requirement would not only be more preferable to the majority of national legal systems[16] but it would also provide the national legal systems with certain legal provisions, avoiding the vagueness of oral agreements. As is pointed out in the bibliography, the trend for written and codified convergent instruments[17] became significantly stronger between the 1960s and the 1980s,[18] whilst it is recognised nowadays that a written instrument – at least in the majority of cases – should not create problems of interpretation.[19]

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[15] See 2.3.2.2.
[16] A. Cassese, *International Law*, 2001, Oxford: Oxford University Press, p. 136.
[17] See for instance the Treaty of Rome 1957/1958, the four Conventions on the Law of the Sea in 1958 which were superseded by the 1982 Convention of the Law of Sea, the Vienna Convention etc.
[18] *Supra*, fn. 16, p. 136.
[19] V.D. Degan, *Sources of International Law*, 1997, The Hague/London: Martinus Nijhoff Publishers, p. 356.

Furthermore, in relation to the preference of the general model to the written and codified approach, the analysis would be incomplete without referring to the distinction which international commercial law has brought into the area. According to the theory of *Lex Mercatoria*, one must perceive international trade law as either a self-generating set of customs, practices and usages (autonomist approach) or a transnational state of affairs which operates under uniform international laws and tends to affect the domestic legal systems, when the latter implement the former (positivist approach).[20]

The autonomist view was mainly supported before the development of the nation state in Europe; Europe had at the time a 'law merchant', the old *lex mercatoria*; this, according to Schmithoff, was 'a body of truly international customary rules governing the cosmopolitan community of international merchants.'[21] However, from about 1600 to about 1640, when the King's Bench and the Courts of Common Pleas in England replaced the merchant courts law and as states became more nation-conscious after the Peace of Westphalia in 1648, international law in general and that of commerce in particular became a positivist legal phenomenon. The nations, rather than traders themselves, would agree on common principles for international commerce. International law became the predominantly private toy of the nation-state.[22] In the 20th century, the main proponent of this idea has been Clive M. Schmitthoff,[23] who advocated for a new law merchant, a new era of law, where law would be agreed on an international codified basis and would, therefore, apply on a global basis. The general model maintains that the positivist approach is preferable to the autonomist view, since in our times it is the nation state which has to agree with

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[20] The distinction between an autonomist and a positivist approach follows the pattern of Jarrod Wiener's analysis. See J. Wiener, *Globalisation and the Harmonisation of Law*, 1999, London: Pinter, p. 161.

[21] C.M. Schmitthoff, 'International business law: a new law merchant', *Current Law and Social Problems*, volume 129, 1961; this was reprinted in Chia-Jui Ceng (ed.) as *Clive M. Schimtthoff's Select Essays on International Trade*, London: Martinus Nijhoff Publishers, 1988, pp. 20-37, p. 20. See also Schmithoff, 'The Unification of the law of international trade', *Journal of Business Law*, 1968, pp. 105-119 as this was reprinted in Chia-Jui Ceng, *ibid.*, pp. 105-119.

[22] So strong were the forces in favour of positivism for the adoption of international law on the part of nation-states that due to the sovereignty of the latter, there has been 'a radical rejection of all remnants of natural law during the 19th century' and these were 'not subject to any superior rule, and hence to any kind of natural law commanding' them 'how to behave in regard to its equals', that is, other states. See V.D. Degan, *op. cit.*, fn. 19, p. 31.

[23] C.M. Schmitthoff, 'International business law: a new law merchant' as reprinted in Chia-Jui Ceng, *op. cit.*, fn. 21, pp. 34-36 and C.M. Schmitthoff, 'The Unification of international trade', *The Unification of the Law of International Trade*, Handelshögskolans Skrifter 1964-1965, Gothenburg School of Economics and Business Administration Publication, 1964, pp. 5-28 as reprinted in Chia-Jui Ceng, *op. cit.*, fn. 21, pp. 170-187.

a number of other states of different legal traditions and cultures. Most importantly, harmonisation under the general model becomes easier to attain, if the nation states agree to a single legal text which is universally applicable, for, as stated above, such codified texts tend to offer to us a significant degree of precision.[24] As Wiener argues, 'the new Lex Mercatoria is given [not only] expression [but also] coercive force, *because* it is [further] codified in national laws.'[25]

Additionally, it must be noted that according to the general model convergent law must be scrutinised.[26] This is due to the very important role it plays, both in the workings of the global community as a whole as well as in the workings of national legal systems in particular. The method does not promote a strict pattern of judicial scrutiny only, although judicial scrutiny is preferable for the obvious expertise that one can find in courts which are to question convergent law and its application. Judicially, convergent law in Europe may be put to the test by both national courts and the supranational European Court of Justice as well as the European Court of Human Rights.[27] Furthermore, the United Nations Convention on Contracts for the International Sale of Goods 1980 is judicially scrutinised by national courts as regards its application within the domestic legal system concerned.[28] Finally, the most universally accepted convergent instruments of law, the UN human rights treaties, are also scrutinised in a judicial manner, as the UN Convention on Contracts for the International Sale of Goods or the European instruments of convergence are;

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[24] See V.D. Degan, *op. cit.*, fn. 19, p. 32 on the value of precision of positive law in international law and the origins of codification in international law in national codification projects.

[25] J. Wiener, *Globalisation and the Harmonisation of Law*, 1999, London: Pinter, p. 165; cf. L. Henkin, 'International Law: Politics, Values and Functions', in *216 Collected Courses of the Hague Law Academy of International Law (Vol. IV, 1989)*, p. 215, noting that the United Nations Charter is a 'positivist' instrument, whereas emanating from it are the most important human rights instruments.

[26] For particular examples showing the application of the general model on the part of the judiciary or the scrutiny of convergent law from other extra-judicial bodies, see further below at 3.3. herein.

[27] E.g. *Commission v Greece*, Case C-387/97 [2000] ECR I-5047, on the failure on behalf of Greece to properly process and dispose toxic wastes. In relation to the European Convention on Human Rights, see e.g. *Loizidou v Turkey*, Series A, vol. 310, p. 20; 103 International Law Reports, p. 622, on the extension of compliance with the European Convention on Human Rights to areas which are not signatories to the Convention but are controlled by a member of the Convention and *Handyside v UK*, Series A, vol. 24, 1981; 58 International Law Reports, p. 150, on the wide margin of appreciation with respect to issues of morality and the correct application of Article 10 of the European Convention on Human Rights on the part of the signatory to the Convention.

[28] See e.g. Scea *Gaec Des Beauches Bernard Bruno c. Societé teso Ten Elsen GmBH & CokG* (*Cour d' Appel de Grenoble* (Fr.)), No. 94/3859 UNILEX (Ch. Comm. 23 October 1996), CLOUT no. 205 on the compatibility of French law with the application of the UNIDROIT principles in the interpretation of the UN Convention on Contracts for the International Sale of Goods and *Delchi Carrier, SpA v Rotorex Corporation*, No 88-CV-1078, 1994 WL 495787 (N.D.N.Y. Sept. 9, 1994); affirmed in part by 71 F.3d 1024 (2d Cir. 1995) on the gap-filling effect of the above Convention in a question relating to certain matters of Articles 74-78 of it.

however, since international human rights conventions tend to be 'programmatic' conventions,[29] it is United Nations monitoring[30] which guarantees in a way a minimum level of compliance with international law.

3.2.2. A binding obligation to implement in theory

Our second broad consideration/variable for the implementer of convergent law to consider is whether or not the implementation exercise in question would deal with a binding or non-binding obligation to implement, the rationale for this being that this would ideally allow him to prioritise domestic legislative work vis-à-vis implementation work or binding implementation work vis-à-vis non-binding implementation work.

Consequently, even though the general model does not exclude soft-law instruments from its remit, it is normally hard-law which is accompanied by an obligation to be implemented which will suffice.[31] That is not to say that soft-law

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[29] H.J. Steiner and P. Alston, *International Human Rights in Context: Law, Politics, Morals*, 2nd Edition, 2000, Oxford: Oxford University Press, p. 275.

[30] Monitoring can be achieved through recommendations by the UN General Assembly under Article 13 UN Charter. Additionally, the committees which are directly responsible for the implementation of the human rights conventions are: i) the Human Rights Committee, ii) the Committee on the Rights of the Child, iii) the Committee on the Elimination of Racial Discrimination, iv) the Committee Against Torture, v) the Committee on Economic, Social and Cultural Rights and vi) the Committee on the Elimination of Discrimination Against Women. On the above committees see E. Schwelb, 'The International Measures of Implementation of the International Covenant on Civil and Political Rights and of the Optional Protocol', 12 *Texas International Law Review*, 1977, p. 141; D.D. Fischer, 'Reporting under the Convention on Civil and Political Rights: The First Five Years of the Human Rights Committee', 76 *American Journal of International Law*, 1982, p. 142; F. Jhabvala, 'The Practice of the Covenant's Human Rights Committee, 1976-1982: Review of State Party Reports', 6 *Human Rights Quarterly*, 1984, p. 81, P.R. Ghandi, 'The Human Rights Committee and the Right to Communication', 57 *British Year Book of International Law*, 1986, p. 201 and also G. Lansdown, 'The Reporting Procedures under the Convention on the Rights of the Child' in P. Alston and J. Crawford, *The Future of UN Human Rights Treaty Monitoring*, 2000, Cambridge: Cambridge University Press. On criticisms in relation to the current UN monitoring situation lawyers, see H.J. Steiner and P. Alston, *op. cit.*, fn. 29, p. 276. Note, also, that this proliferation of committees with the concurrent lack of resources (see e.g. M.N. Shaw, *International Law*, 5th Edition, 2003, Cambridge: Cambridge University Press, p. 310) and an unfortunate overlap (see e.g. E. Tistounet, 'The Problem of Overlapping among Different Treaty Bodies' in P. Alston and J. Crawford, *The Future of UN Human Rights Treaty Monitoring*, 2000, Cambridge: Cambridge University Press) as well as the inability of the international community to directly impose human rights law on violating states suggests a rather unfortunate situation in respect of implementation of such law.

[31] Notwithstanding the fact that even hard law such as international human rights treaties may have limited effect in domestic law. Consider the words of Kenneth Roth: 'It is sadly academic to ask whether international human rights law should trump US law'; this is an approach of 'fear and arrogance', as he argues in 'The Charade of US ratification of International Human Rights Treaties' 1 *Chicago Journal of International Law* 347 (2000).

instruments are excluded. However, the reason for this preference for hard-law is that there are already difficulties of reaching convergence[32] or legal bridging, as things are; when a state or a national legal system has to implement a convergent legal instrument. Simply put, with soft law instruments convergence would either be a very slow process or not even occur.[33] Yet the convergence theorist cannot simply omit from his general analysis that such instruments may in certain circumstances achieve more than the traditional (but perhaps more demanding) approach under hard-law instruments.[34]

As regards the binding obligation requirement *per se*, what has to be said is that from the moment a state expresses its consent to a treaty or more generally to a convergent instrument of law, then that state is bound by such an instrument.[35] It is not especially important how this actually comes about, since there is a variety of ways for a national legal system to be bound by a convergent instrument of law.[36] Additionally, a crucial point as regards any such binding obligation on the parties to a convergent instrument of law is that this – as Lord McNair put it – 'rest[s] upon contract. What binds a party to carry out his promise is the efficacy from his consent...'[37] A final point to be made in relation to the obligation on the part of the national legal system to implement bridging law is that the states in pursuit of convergence must not frustrate the 'object and purpose' *prior* to the enactment of such instrument of law. This is also provided in Article 18 of the Vienna Convention on the Law of the Treaties 1969/1980.

3.2.3. Adherence in practice to what has been agreed: *Pacta sunt servanda*

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[32] *Supra*, 3.1.3. on this.

[33] For a critique on this see e.g. K. Krabbers, 'The Undesirability of Soft Law', (1998) 67 *Nordic Journal of International Law*, p. 381.

[34] See e.g. C. Crawford Lichtenstein, 'Hard Law v. Soft Law: Unnecessary Dichotomy?', (2001) *The International Lawyer*, pp. 1434-1435. On the application of soft-law in international private law matters see M.J. Bonell, 'Soft Law and Party Autonomy: The Case of the UNIDROIT Principles', (2005) 51 *Loyola Law Review*, p. 229. On the genealogies of soft-law see e.g. A. Di Robilant, 'Genealogies of Soft Law', (2006) 54 *American Journal of Comparative Law*, p. 499.

[35] H.J. Steiner, D.F. Vagts, H.H. Koh, *Transnational Legal Problems: Materials and Text*, 4th Edition, 1994, Westbury, N.Y.: Foundation Press Inc., p. 273.

[36] See Article 11 of the Vienna Convention on the Law of the Treaties 1969/1980.

[37] See also the definition of Lord McNair's definition of 'treaties' in his *The Law of Treaties*, Oxford: Clarendon, 1961, p. 486.

Obvious as the presumption may be that legal systems have to honour the instruments with which they have to theoretically comply, practical observance of convergent instruments of law lies at the heart of the general model, for otherwise no legal bridging could ever be achieved under this model. Furthermore, a national legal system affirms its adherence to a convergent instrument of law as a matter of good faith application of it rather than by any other means.[38] In fact, this general proposition, which is also one of the oldest principles of international law,[39] must be the single most important element for convergence to come about under the general model. The principle has been affirmed time and again in almost all instruments of convergence and instruments of international law as a whole.[40] One should refer, for instance, to the provision of Article 26 of the Vienna Convention on the Law of the Treaties 1969/1980 which clearly stipulates that:

'*Every treaty in force is binding upon the parties to it and* ***must be performed*** *by them in good faith.*'

With regard to this provision it must be stressed that the International Law Commission has always stressed that 'the principle of good faith is a legal principle which forms an integral part of the rule *pacta sunt servanda*'.[41] This good faith element applies not only to the execution of convergent instruments of law but also to their interpretation.

Additionally, EU law sees the *pacta sunt servanda* doctrine as a *sine qua non* in relation to the harmonisation of the laws of its Member States. Thus, Article 10 (ex Article 5) of the Consolidated Version of the Treaty Establishing the European Community commences as follows:

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[38] See generally I. Brownlie, *Principles of Public International Law,* 5th Edition, 1998, Oxford: Clarendon Press, p. 616.

[39] Shaw suggests that this is arguably the oldest principle of international law, whilst in another point he argues that this is a 'pre-existing and indispensable norm'; see M.N. Shaw, *op. cit.*, fn. 30, pp. 812 and 871 respectively.

[40] See e.g. the preamble of the Covenant of the League of Nations 1919, Article 10 of the Havana Convention on Treaties, the preamble and Article 2 (2) of the UN Charter 1945 etc.

[41] *Yearbook of the International Law Commission*, (1966-II), p. 211. It must be added that the importance of good faith and the *pacta sunt servanda* principle are also given recognition in the Preamble of the Vienna Convention on the Law of the Treaties by suggesting *inter alia*: '*Noting* that the principles of free consent and of good faith and the *pacta sunt servanda* rule are universally recognized...'

*'Member States **shall take all appropriate measures**, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community.'*

So strong is the principle in European law that the ECJ has ruled its application extends to national court interpretation of EC directives.[42] In Europe it is the principle of supremacy which governs (in the main) the competencies of the EU and thus governs the agenda of the *pacta sunt servanda* rule in the application of EU law. In short, the principle of supremacy or otherwise known as principle of primacy does what its name suggests: it places extra-national European law at a higher level than that of the national level but *only* where this is provided for in a relevant treaty text (principle of conferral)[43] and *only* where the European Union will have exclusive competence, whereas in areas of shared competence between the extra-national and the national, the European Union will have competence 'only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by Member States'[44] (principle of subsidiarity). The *locus classicus* of the principle's recognition is the well-known decision of the European Court of Justice in *Van Gend en Loos*[45].[46] Moreover, the ECJ was quick to point out in *Commission v Netherlands*[47] that the breach on the part of the Netherlands was not [so much] a failure to comply with the duty to provide information' but rather, a 'failure to fulfil the obligation to implement the directive.' In this case, the Commission initiated proceedings against the Netherlands, alleging that the state failed to properly implement certain directives on the pollution of bathing water. Not only that, but the *pacta sunt servanda* was

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[42] Case 14/83, *Von Colson v Land Nordrhein-Westphalen* [1984] ECR 1891 and Case C-106/89, *Marleasing SA v La Comercial International de Alimentacion SA* [1990] ECR I-4135. See more recently *Océano Grupo Editorial v Rocio Murciano Quintero* [2000] ECR I-4491. For more on these cases and their effect, see T.C. Hartley, *The Foundations of European Community Law: An Introduction to the Constitutional and Administrative Law of the European Community*, 5th Edition, 2003, Oxford University Press, pp. 211-220.

[43] Articles 3 and 5, Consolidated Version of the Treaty Establishing the European Community.

[44] Article 5 of the Consolidated Version of the Treaty Establishing the European Community.

[45] Case 26/62, *NV. Algemene Transporten Expeditie Onderneming van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1, [ECR] CMLR 105.

[46] For indicative case-law on the supremacy of EU law over national law, see: *Van Gend en Loos* [1963] CMLR 105, *Costa v ENEL* [1964] CMLR 425 and *Internationalle Handelgesellschaft* [1972] 2 CMLR 255. Note that such case-law came to be recognised in national constitutional law. See *supra* 2.4.

[47] Case 96/81, *Commission v Netherlands* [1982] ECR 1791. As noted in the man text, the case involved the failure of the Netherlands to implement certain bathing water directives and a failure to provide information on the Netherlands' compliance to these directives to the Commission.

expanded here. So, for instance, the Commission also pointed out that under the directive it was the obligation on the part of the Dutch government not only to comply with all the directives in question but also to inform on its compliance with these, something that did not occur in at least one case. The legal consequence here was that since this was the case, the Commission was ready to presume that the Netherlands did not actually transpose the directive in question for having failed to inform amongst others.

This approach of the ECJ suggests that the failure of the Dutch must have been at first instance one of principle. The ECJ – one would be able to suggest – effectively pointed to the 'sacrosanct' operation of then Article 5 (now Article 10) of the Consolidated Version of the Treaty Establishing the European Community, which is not a general proposition of the Europeans in pursuit of convergence but rather, a directly binding principle *(pacta sunt servanda)* on the Member States to uphold EU law and therefore a principle which asks for their commitment with respect to convergence of various European laws.

3.2.4. Respect to the letter or at least to the spirit of the convergent instrument to be implemented

Moreover, not only has a legal system to generally comply with a convergent instrument of law but it has also to particularly question the exact mode of incorporation, so that implementation is faithful, at least in the level of abstraction. In effect, the national implementer has either to opt for the **uniformist sub-model** of implementation or a **directive/instructive sub-model** of implementation. However, international law (unlike European law), one of the two main representatives of legal convergence, offers no magic application formula which one should follow on the matter of implementing a convergent instrument of law. Nor does it offer any binding interpreting formula as Anzillotti has already emphasised in 1912.[48]

Consequently, unless prescribed by the very nature of the convergent instrument of law in question, the choice between a uniformist approach or an instructive approach is arguably a question of whether the implementer is to

[48] Anzillotti, *Corso*, I, pp. 71-76.

implement both the letter and spirit of convergent instrument of law (normally a uniformist approach) or merely the spirit of convergent law (normally a directive/instructive approach). As Craig and De Búrca argue, in [a uniformist model of legal bridging as in EU regulations] 'every 't' must be crossed, and every 'i' must be dotted...since Member States must not tamper with them'.[49] Therefore, in such a case the discretion for the national legislator and judge is zero.

The reader is reminded at this point that the discretion offered by the general model is significantly different to the margin of appreciation offered by the application of the European Court of Human Rights which, for instance, allows national courts to take into account sociological considerations in relation to questions of morality.[50] This will be dealt with extensively in chapter 6 of this thesis.

3.2.5. Notice to sanctions

Finally, because it can be argued that the implementation of convergent law is *inter alia* a question of prestige for a given legal system in the arena of international law, the system must pay tribute to the effect of sanctions, if any. The general model would be a useless model of implementation, if it did not have 'teeth'; this despite the fact that legal systems are supposed to honour their implementation obligations as a matter of good faith.[51] Its teeth are the sanctions which it purports against the trespasser of its proper application. In this respect the implementer should be reminded that he is to honour the obligations arising from a convergent instrument of law. Accordingly, it is expected that the more severe the sanctions that the variable of the general model comes with, the more faithful the application of convergent law on the part of the national legal system in question and vice versa. Sanctions can be either legal[52] or extra-legal[53] in nature. These can be delivered by a national court

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[49] P. Craig and G. De Búrca, *EU Law: Text, Cases and Materials*, 3rd Edition, 2003, Oxford University Press, p. 115.

[50] See e.g. *Handyside v UK*, Series A, vol. 24, 7 December 1976. See chapter 6 herein for a full analysis on the socio-legal factor of implementing convergent law.

[51] Cf. 3.2.3.

[52] On sanctions in international law, see A. Cassese, *op. cit.*, fn. 16, p. 241. On the general underlying basis for the initiation of procedures for sanctions in European law, see Article 254 (1) and (2) (ex Article 191 (1) and (2)) of the Consolidated Version of the Treaty Establishing the European Community. On sanctions *per se*, see Article 228 (1) (ex Article 171 (1)) of the Treaty Establishing the European Community. The procedure is further elaborated in Article 228 (2) (ex Article 171 (2)),

against the national legal system itself, a regional court[54] or an international court or tribunal.[55] Initiators of actions for sanctions can normally be other legal systems,[56] a supervising body of implementation[57] or natural persons.[58]

3.3. Application and mechanics

The analysis will now turn to how the model works in practice. The model, though modifiable (as all other models and factors of this thesis), normally operates under the considerations that have been explained and justified above (see also item 4 which follows for a brief diagrammatical exposition of the model).

In turn, in the analysis which follows, the application of the general model will deal with its *correspondence* to a public international law instrument (OECD Convention on Combating Bribery), a private international law instrument (United Nations Convention on Contracts for the International Sale of Goods) and two European law instruments (a directive and a regulation).

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whereby the Commission acts as the enforcer of a prior ECJ judgement as delivered under the general provision of Article 226 (ex Article 169) by issuing a reasoned opinion to the Member State. If the Member State fails to comply, then the Commission is entitled to bring the case before the ECJ by specifying a lump sum or penalty payment to be paid by this Member State. In effect, this is a penalty imposed by the ECJ against a state that has failed to observe a prior ECJ judgement on the same matter (second judgement sanctioning). See Craig and De Búrca, p. 402f. On sanctions initiated under national law see e.g. s. 116 US Foreign Assistance Act 1961 (as amended) (22 USC 2151n) on sanctions for human rights violations or Section 701 of the US International Financial Institutions Act 1977 (22 USC 262d) on human rights and US assistance policies with international financial institutions.

[53] J. Austin, *The Province of Jurisprudence Determined* (Ed. H.L.A. Hart), London, 1954, pp. 134-142.

[54] *Supra*, fn. 27.

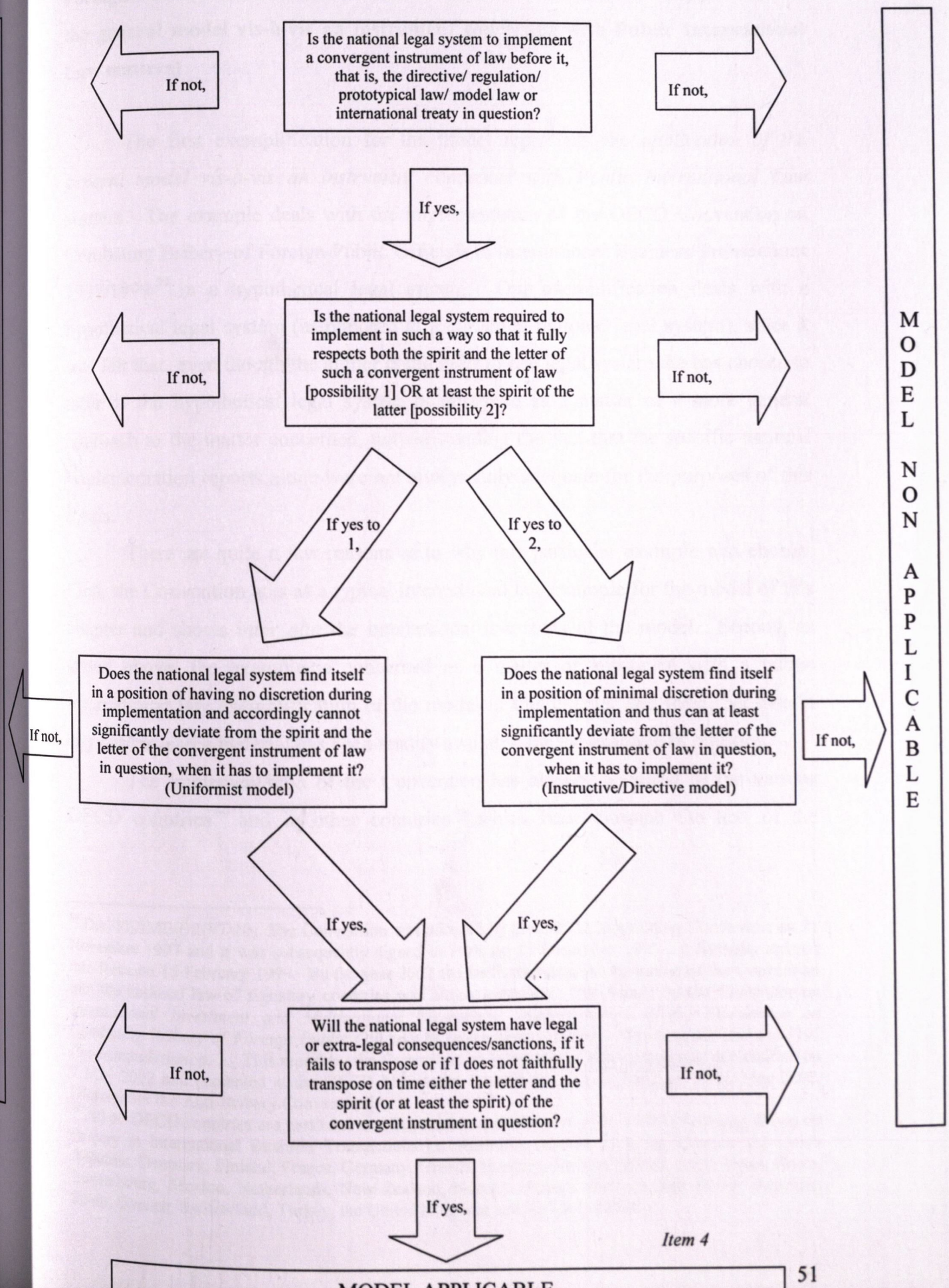
[55] The International Court of Justice does not *per se* uphold convergent instruments of law such as human rights treaties. However, it has done so, where the interim measures to protect human rights cannot be extended further than to protect the main claim sought by the party. This was established in the *Legal Status of the South-Eastern Territory of Greenland case* (*Norway v Denmark*), Order 1932 PCIJ Series A No 8; Higgins, p. 83; the principle reiterated in the *Nuclear Tests cases* (*Australia v France*), Interim Protection, Order of 22 of June 1973, ICJ Report 1973, p. 99 and also (*New Zealand v France*), Interim Protection, Order of 22 June 1973, ICJ Report 1973, p. 135.

[56] Rare as this may be, particularly in the EU model of convergence for instance, it has occurred in the past. An action of one state against another is pursuant to Article 227 (ex Article 170) of the Consolidated Version of the Treaty Establishing the European Community. See e.g. Case 141/78, *France v UK* [1979] ECR 2923, where France successfully brought an action against the UK over a fishing dispute and more recently Case C-388/95, *Belgium v Spain* [2000] ECR I-3121, where Belgium failed to convince the ECJ that the Spanish position on rules concerning rules of origin for Rioja wine was wrong.

[57] E.g. the UN Human Rights Committee as regards international human rights law or the European Commission as regards EU law. *Supra*, at 3.1.4.

[58] The classical case on this in Europe is of course Case 26/62, *Van Gend en Loos* [1963] ECR 1, 13. The case affirmed that EU law is also to be the matter of enforcement by individuals in addition to the public law supervision of EU law.

GENERAL MODEL OF IMPLEMENTATION



Item 4

3.3.1. First exemplification: the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Application of the general model vis-à-vis an instrument concerned with Public International Law matters)

The first exemplification for the model represents the *application of the general model vis-à-vis an instrument concerned with Public International Law matters*. The example deals with the implementation of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions 1997/1999[59] in a hypothetical legal system. Our exemplification deals with a hypothetical legal system (as opposed to a particular national legal system), since it was felt that, even though the author could refer to one legal system, he has chosen to refer to the hypothetical legal system *in abstracto* as a matter of a more general approach to the matter concerned, notwithstanding the fact that the specific national implementation reports alone were not always fully adequate for the purposes of this thesis.

There are quite a few reasons as to why this particular example was chosen. First, the Convention acts as a typical international law example for the model of this chapter and shows *inter alia* the international law roots of the model. Second, as stated above, the example is concerned as a matter of substance with a public international law exemplification of the model in this chapter and third, because in any case research material has been readily available for the example in question.

The implementation of the Convention has already occurred in the various OECD countries[60] and in other countries[61] which have adopted the text of the

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[59] DAFFE/IME/BR(97)20. The Convention was adopted by the OECD Negotiating Conference on 21 November 1997 and it was subsequently signed in Paris on 17 December 1997. It formally entered into force on 15 February 1999. By the year 2002 the ratification and incorporation of the Convention into the national law of signatory countries was almost complete. See *Report by the Committee on International Investment and Multinational Enterprises: Implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation*, p. 3. This report by the Committee on International Enterprises was declassified on 7 May 2002 and presented at the OECD Ministerial Council meeting in Paris on 15-16 May 2002. [Hereinafter the Anti-Bribery Convention].

[60] All 30 OECD countries are parties to the Convention and take part in the OECD Working Group on Bribery in International Business Transactions i.e. Australia, Austria, Belgium, Canada, the Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, the Slovak Republic, Spain, Sweden, Switzerland, Turkey, the United Kingdom and the United States.

Convention, even though they are not members of the OECD. Thus, the implementation of the Convention in the hypothetical legal system of our example draws material from actual and pre-existent implementation material.

Generally, the Anti-Bribery Convention of the OECD is exclusively focused on the supply side[62] of the bribery transaction, in the context of international business, and has an integrated mechanism to monitor compliance with the Convention's obligations. The Convention does not alter the character of criminal and corruption laws of the legal systems which are parties to it.[63] It merely[64] introduces an additional blameworthy act (that of bribing foreign officials) into the pre-existent anti-corruption legal corpus of the various countries which are party to the Convention.

The first consideration under the systematics of the general model would be whether the convergent instrument of law (in our case the Convention) could be the subject matter of judicial or other scrutiny. Except for Article 4 (1) of the Convention, which requires that 'Each Party shall take such measures as may be necessary to establish its jurisdiction over the bribery of a foreign public official when the offence is committed in whole or in part in its territory', in *all* legal systems which have implemented the Convention the judiciability, by way of the respective implementation Acts, applies. Thus, e.g. the new Article 322 bis para. 2[65] of the Italian Criminal Code in conjunction with the older provisions (Articles 321 and 322 of the Italian Criminal Code) provide that it is punishable to bribe an official of a foreign country. Similarly, Brazil penalised an act of bribery of a foreign public

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[61] The six non-member countries are Argentina, Brazil, Bulgaria, Chile, Estonia and Slovenia. These countries also take part in the OECD Working Group on Bribery in International Business Transactions. This is provided for in Article 13 (1) of the Convention.

[62] This is called 'active bribery' in some jurisdictions. Active bribery means 'the offence committed by the person who promises or gives the bribe, as contrasted with 'passive bribery', the offence committed by the official who receives the bribe'. See *Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (DAFFE/IME/BR(97)20), p. 12.

[63] That is not to say that the Convention applies automatically. On the contrary, Parties to the Convention are expected 'to make sufficient resources available both at the national level, particularly as concerns the capacity to investigate and prosecute foreign bribery, and at the multinational level in support of the Group's monitoring process'. See the *Report by the Committee on International Investment and Multinational Enterprises: Implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation*, pp. 3-4.

[64] See the *Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (DAFFE/IME/BR(97)20), p. 12, para. 2. Para. 2 of the Commentaries reads as follows: 'This Convention seeks to assure a functional equivalence among the measures taken by the Parties to sanction bribery of foreign public officials, without requiring uniformity or changes in fundamental principles of a Party's legal system'.

[65] As reported in the *Italian Review of Implementation of the Convention and 1997 Recommendation* (Phase 1-April 2001), pp. 2-3.

official through the enactment of the implementing legislation (Brazilian Law No. 10,467 of 11 June 2002)[66], which added to the Penal Code, Section XI, Chapter II-A, entitled 'Crimes committed by individuals against a foreign public administration' which contains the offence of active bribery in an international business transaction and the definition of a foreign public official. This last Chapter, in conjunction with the general clause of Article 317 of the Brazilian Penal Code which provides for the general offence of active bribery vis-à-vis public officials, is judiciable. The approach is largely followed under the new Article 10 bis (1) of the Japanese Unfair Competition Prevention Law in conjunction with the general principles of the Japanese Penal Code, that is, under Article 8 thereof.[67] Similar legal effects are to be found in the laws of all other countries which are parties to the Convention.[68]

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[66] As reported in the *Brazilian Review of Implementation of the Convention and 1997 Recommendation* (Phase 1-September 2004), pp. 2-3.

[67] As reported in the *Japanese Review of Implementation of the Convention and 1997 Recommendation* (Phase 1-May 2002), pp. 2-3.

[68] In Argentina the Penal Code was amended with the Statute on Ethics in the Exercise of Public Office (Law No. 25.188) adding Article 258 bis, which penalises the active bribery of a foreign public official. See the *Argentine Review of Implementation of the Convention and 1997 Recommendation* (Phase 1-April 2001), pp. 1-2. Australia implemented through amendments to the Criminal Code Act 1995. The amendments included a codification of the offence of bribing a foreign public official in s. 70.2, all the relevant definitions including one of 'foreign public official' in s. 70.1 and s. 70.5, which provides for the territorial and nationality requirements of the offence. See the *Australian Review of Implementation of the Convention and 1997 Recommendation* (Phase 1-December 1999), pp. 1-2. In Austria, the Penal Code was amended by adding new subsections to s. 307 and amending section 308. Previously, ss. 307, 308 only covered offences in relation to a *domestic* public official. The amended sections 307, 308 extend to *foreign* public officials. See the *Austrian Review of Implementation of the Convention and 1997 Recommendation* (Phase 1-December 1999), pp. 1-3. In Bulgaria, the Law on the Amendment to the Penal Code amends Article 304 of the Penal Code by extending the punishment provided for the active bribery of a Bulgarian 'official' to the offence of bribing a 'foreign official', through the addition of a new paragraph 2. It also amends Article 93 of the Penal Code by adding a definition of 'foreign official'. See the *Bulgarian Review of Implementation of the Convention and 1997 Recommendation* (Phase 1-July 1999), p. 1. In Denmark, the Danish Act No. 228 made active bribery of foreign public officials a criminal offence equivalent to bribery of Danish public officials. See the *Danish Review of Implementation of the Convention and 1997 Recommendation* (Phase 1-December 2000), p. 1. In Finland, the existing Finnish legislation already corresponded largely to the provisions of the Convention. The only area where Finland needed to enact new legislation was the Penal Code. Accordingly, ss. 13, 14 and 20 of the Finnish Penal Code were amended. See the *Finnish Review of Implementation of the Convention and 1997 Recommendation* (Phase 1-July 1999), pp. 1-2. In France, it is now a criminal offence to bribe foreign officials following the adoption of Act No. 2000-595 of 30 June 2000 amending the criminal code and the code of criminal procedure. See the *French Review of Implementation of the Convention and 1997 Recommendation* (Phase 1-December 2000), pp. 1-4. In Hungary, the inclusion of the offence of bribing a foreign public official and a definition of 'foreign public official' was part of the amendments to the Criminal Code, which have been placed under the new title 'Crimes against the Integrity of International Public Life'. Accordingly, ss. 258/B and 258/F of the Hungarian Criminal Code have been amended. See the *Hungarian Review of Implementation of the Convention and 1997 Recommendation* (Phase 1-updated March 2003), pp. 1-3 and also the supplementary *Hungarian Review of Implementation of the Convention and 1997 Recommendation* (Phase 1bis-updated February 2004) which addresses further implementation concerns of the OECD Working Group on Anti-Bribery. Iceland enacted implementing legislation (Act No.147/1998), amending the General Penal Code, on 22 December

Moreover, as scrutiny of the convergent instrument does not have to be only judicial, one could perhaps find this kind of scrutiny under the 'other scrutiny' heading in the effective monitoring by the OECD of the application of the Convention.[69]

In relation to the requirement for a theoretical binding obligation to implement created under the Convention in question, this is provided for by specific operation of Article 13 (Signature and Accession). This requirement under our model is, therefore, *ab initio* satisfied. With regard to the *pacta sunt servanda* rule, even though Article 5 (Enforcement) of the Convention recognises the prosecutorial discretion of national legal systems,[70] it would seem that the imperative language which the Convention uses therein (i.e. *'[the parties] shall not be influenced by considerations of national*

1998; in particular Article 109 thereof, thereby making bribery of foreign public officials a punishable criminal offence. See the *Icelandic Review of Implementation of the Convention and 1997 Recommendation* (Phase 1-October 1999), pp. 1-2. In Luxembourg, the implementing Law of 15 January 2001 provided for amendments in the Criminal Code, the Code of Criminal Procedure and the Act of 4 December 1967. The most significant change has been the insertion of a new Article in the Luxembourgian Criminal Code; this expands now to cover the bribery of foreign officials. See the *Luxembourgian Review of Implementation of the Convention and 1997 Recommendation* (Phase 1-February 2001), pp. 1-3. In New Zealand, in order for the Convention to be implemented, the Crimes (Bribery of Foreign Public Officials) Amendment Act 2001 was enacted; this amends the Crimes Act 1961 by adding sections 105 C, 105 D and 105 E. See the *New Zealand Review of Implementation of the Convention and 1997 Recommendation* (Phase 1-May 2002), pp. 2-11. In Norway, an existing provision on active bribery of national public servants in section 128 of the Penal Code was amended; consequently and a new paragraph was inserted. See the *Norwegian Review of Implementation of the Convention and 1997 Recommendation* (Phase 1-April 1999), p. 1. Poland amended the Penal Code by adding a new paragraph to Article 229. See the *Polish Review of Implementation of the Convention and 1997 Recommendation* (Phase 1-February 2001), p. 1-3. In Slovakia, Section 161b of the Criminal Code now establishes the offence of bribery of a *foreign* public official, whilst in section 161c of the Criminal Code the offence of bribery of a member of a foreign public assembly, foreign parliamentary assembly, judge or official of an international court, employee or representative of an intergovernmental organisation is dealt with. A minor amendment of the Law on Banks also occurred with regard to Article 9 (3) of the Anti-Bribery Convention. See the *Slovak Review of Implementation of the Convention and 1997 Recommendation* (Phase 1- updated February 2003), pp. 1-3. In Slovenia, the new Article 268 of the Penal Code sanctions the active bribery of 'officials' and the new article 126 thereof defines 'officials' as covering both Slovenian and foreign public officials. See the *Slovenian Review of Implementation of the Convention and 1997 Recommendation* (Phase 1-March 2005), pp. 2-4. Spain brought about the Organic Act 3/2000 of the 11th of January, which modified the Penal Code by adding article 445 bis in order to implement the obligations under the Convention. See the *Spanish Review of Implementation of the Convention and 1997 Recommendation* (Phase 1-March 2000), pp. 1-2. In Sweden, the Penal Code was amended. See the *Swedish Review of Implementation of the Convention and 1997 Recommendation* (Phase 1-October 1999), pp. 1-3. Switzerland had to revise and reorganise its Criminal Code dealing with bribery under a new Title Nineteen entitled 'Bribery', which includes new Articles 322ter to 322octies. See the *Swiss Review of Implementation of the Convention and 1997 Recommendation* (Phase 1-February 2000), pp. 1-2. In Turkey, the Amendment to the Law regarding Prevention of Bribery of Foreign Public Officials in International Business Transactions No: 4782 of 2 January 2003 amended Articles 4, 211 and 220 of the Turkish Criminal Code (Law no: 765 dated 1 March 1926). See the *Turkish Review of Implementation of the Convention and 1997 Recommendation* (Phase 1-November 2004), pp. 2-4.

[69] This is achieved in Phase 2 (OECD evaluation as opposed to Phase 1 which is domestic/national), the purpose of which is to study the structures put in place to enforce the laws and rules implementing the Convention and to assess their application in practice.

[70] See *Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (DAFFE/IME/BR(97)20), p. 15.

economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved')[71] makes it clear that the Convention should be adhered to in practice. The same is true as regards the language used in Article 1 of the Anti-Bribery Convention[72]. More generally, as the Anti-Bribery Convention is by definition an instrument of international law, one could seek the adherence of the hypothetical legal system of our example to the Convention by operation of the recognised principles of international law of which the *pacta sunt servanda* rule is the oldest[73]. Alternatively, one could argue that the hypothetical system of our example might well be bound by Article 26 of the Vienna Convention on the Law of the Treaties 1969/1980[74], which provides for the same rule in a codified fashion.

The next consideration would require a distinction on the part of the hypothetical legal system as to *how* to implement the Anti-Bribery Convention. As already noted, the general model of implementation provides for two variants: the uniformist variant and the directive/instructive variant. In the former case it is both the letter and the spirit of the convergent instrument (in our case of the Convention) which have to be implemented, whereas in the latter case implementation of the spirit thereof would suffice. It is beyond doubt that for the purposes of implementation the Convention is of directive/programmatic nature, even though it has uniformist aspirations, in the sense that it seeks to establish a common regime of protection against active bribery in *all* the legal systems of the Parties to it. There is much authority for the directive/instructive character of the Convention. First of all, in the Preamble of the Convention it is already made clear that the Convention seeks functional[75] 'equivalence among the measures to be taken by the Parties'. This does not mean that the various legal systems have to adopt the Convention in exactly the same fashion. Various means of implementation are open to the legal systems, and indeed this has occurred; legal systems achieved the goals of the Convention by very

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[71] Article 5 of the Anti-Bribery Convention.

[72] E.g. under Article 1 (1) of the Convention it is provided that 'Each Party *shall take such measures* as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business' (author's emphasis).

[73] Shaw, *supra*, fn. 39.

[74] *Supra*, 3.2.3.

[75] The term 'functional equivalence' is taken from the *Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (DAFFE/IME/BR(97)20), p. 12, para. 2.

different technical means; so, for instance, there have been countries such as Belgium[76], Ireland[77] and the UK[78] that have amended existing anti-corruption laws, other countries like Greece[79], Korea[80] and Portugal[81] who have brought about new special criminal law legislation, countries such as Canada[82], Chile[83], the Netherlands[84] or Mexico[85] who have amended their Criminal Codes and other countries like Japan[86] and the US[87] that have amended special business Acts. Second, Article 1 (1) of the

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[76] In Belgium, the Bribery Prevention Act of 10 February 1999 amended (in particular) the provisions contained in Title IV of the Criminal Code in Articles 246-252 of Chapter IV on 'The Bribery of Public Officials'. See the *Belgian Review of Implementation of the Convention and 1997 Recommendation* (Phase 1-October 1999), pp. 1, 2-15.

[77] Ireland has amended its corruption law, set out in the Public Bodies Corrupt Practices Act 1889 and the Prevention of Corruption Acts of 1906 and 1916 (1889-1916 Acts) (which were already amended by the Ethics in Public Office Act 1995), through the Prevention of Corruption (Amendment) Act 2001 (2001 Act). Accordingly, s.1 of the 1906 Act was amended and replaced. See the *Irish Review of Implementation of the Convention and 1997 Recommendation* (Phase 1-June 2002), pp. 1-2.

[78] In the UK, it was initially thought that existing Anti-Corruption legislation and the common law would suffice for the implementation of the Convention. However, at a later stage it was decided that there should be statutory re-alignment and therefore Part 12 of the Anti-Terrorism, Crime and Security Act 2001 has an impact on the Prevention of Corruption Acts 1889 to 1916 and of the common law without altering the main elements of the offences in question however. See with regard to these last two points the *UK Review of Implementation of the Convention and 1997 Recommendation* (Phase 1-December 1999), p. 1 and the *UK Review of Implementation of the Convention and 1997 Recommendation* (Phase 1 bis-released 3 March 2003), pp. 1-16 respectively.

[79] In Greece, Act 2656/1998 was passed, a special criminal Act. The general provisions of the Criminal Code accordingly apply, except as otherwise provided. The Act ranks high in the hierarchy of norms being subordinate only to the Constitution. See *Greek Review of Implementation of the Convention and 1997 Recommendation* (Phase 1-July 1999), p. 1.

[80] Korea enacted the Act on Preventing Bribery of Foreign Public Officials in International Business Transactions. See *Korean Review of Implementation of the Convention and 1997 Recommendation* (Phase 1-July 1999), p. 1.

[81] Portugal enacted the Law no. 13/2001 of 4 June, which establishes the offence of active corruption against international business by adding Article 41-A to the Decree Law no. 28/84 of 20 January. See the *Portuguese Review of Implementation of the Convention and 1997 Recommendation* (Phase 1-May 2002), p. 1-4.

[82] In Canada, the implementing Corruption of Foreign Public Officials Act 1998 sought *inter alia* to meet the obligations set out in the Convention and attempted to marry the Convention wording and requirements with wording that was found already in paragraph 121 (1) (a) of Canada's *Criminal Code*, R.S.C. 1985, c. C-46 as amended. See the *Canadian Review of Implementation of the Convention and 1997 Recommendation* (Phase 1-July 1999), p. 1.

[83] In Chile, compliance with the Convention was achieved via Law No. 19,829, which amended the Chilean Criminal Code by adding Article 250 *bis* A. This provision penalises the bribery of a foreign public official. Under the new Article 250 *bis* B the concept of a 'foreign public official' is defined. See the *Chilean Review of Implementation of the Convention and 1997 Recommendation* (Phase 1-September 2004), p. 2.

[84] Mexico amended the Federal Penal Code by adding Article 222 bis, which establishes the offence of bribing a foreign public official. See *Mexican Review of Implementation of the Convention and 1997 Recommendation* (Phase 1-February 2000), p. 1.

[85] Several minor amendments have occurred in Dutch law; thus, new Articles 177a and 178a have been introduced in the Dutch Penal Code, while Article 51a of the Extradition Act had to be amended so that the offences under Articles 177 and 177a can be considered as extraditable. See the *Dutch Review of Implementation of the Convention and 1997 Recommendation* (Phase 1-February 2001), pp. 1-2.

[86] *Supra*, fn. 67.

[87] In the US, Congress responded to the signature of the Convention by amending the Foreign Corrupt Practices Act. It is noted that the US has outlawed bribery of foreign officials in commercial

Anti-Bribery Convention does not specify the measures which the Parties have to take in order for its implementation.[88] Third, the *Commentaries* of the Convention themselves set out that the Anti-Bribery Convention does not require 'uniformity or changes in fundamental principles of a Party's legal system', nor that they should use the 'precise terms [of the Convention] in defining the offence under their domestic laws'[89].

On the question of sanctions, the Convention does not have a machinery of sanctions; however, *mutatis mutandis* there is an effective system of legal monitoring of implementation which provides for a sophisticated mechanism of follow-up procedures. This can effectively be construed as a form of political sanctions, as it would not be desirable or advisable for any legal system to distort implementation and face criticism in the arena of international law; especially in such a delicate matter as the provision of legal protection against bribery of foreign officials. This kind of political sanction (legal criticism) is apparent in the OECD Phase 2 reports vis-à-vis not fully compliant countries[90].

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transactions by its nationals and companies organised under its laws since 1977. See the *US Review of Implementation of the Convention and 1997 Recommendation* (Phase 1-April 1999), pp. 1-8.

[88] Cf. the language used e.g. in the *Finnish Review of Implementation of the Convention and 1997 Recommendation* (Phase 1-July 1999), p. 1 according to which Finland '*translates* the provisions [of the Anti-Bribery Convention] in its Penal Code…' (author's emphasis).

[89] *Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (DAFFE/IME/BR(97)20), p. 12, paras. 2 and 3 respectively.

[90] See generally the OECD Phase 2 reports. To date the following are available: the *Belgian Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions* (Phase 2-October 2005), the *Bulgarian Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions* (Phase 2-June 2003), the *Canadian Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions* (Phase 2-March 2004), the *Finnish Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions* (Phase 2-May 2002), the *French Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions* (Phase 2-January 2004), the *German Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions* (Phase 2-June 2003), the *Greek Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions* (Phase 2-July 2005), the *Hungarian Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions* (Phase 2-May 2005), the *Icelandic Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions* (Phase 2-March 2003), the *Italian Report on the Application of*

3.3.2. Second exemplification: the United Nations Convention on Contracts for the International Sale of Goods 1980 (Application of the general model vis-à-vis an instrument concerned with Private International Law matters)

The second exemplification for the model acts as the *application of the general model vis-à-vis an instrument concerned with International Private Law matters*. This example is concerned with the UN Convention on Contracts for the International Sale of Goods 1980/1988[91]. The UN Convention on Contracts for the International Sale of Goods is another ever-reaching instrument of convergence of legal principle. As of 17 July 2006 there were 68 ratifications of the Convention, as diagram 5 provides.[92] The only countries of the developed world which have yet to adopt it are Ireland, Japan, Portugal and the UK. Together the national legal systems which have adopted the UN Convention on Contracts for the International Sale of

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the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions (Phase 2-December 2004), the *Japanese Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions* (Phase 2-March 2005), the *Korean Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions* (Phase 2-November 2004), the *Luxembourgian Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions* (Phase 2-June 2004), the *Mexican Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions* (Phase 2-September 2004), the *Norwegian Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions* (Phase 2-April 2004), the *Swedish Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions* (Phase 2-September 2005), the *Swiss Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions* (Phase 2-February 2005), the *UK Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions* (Phase 2-March 2005) and the *US Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions* (Phase 2-October 2002).

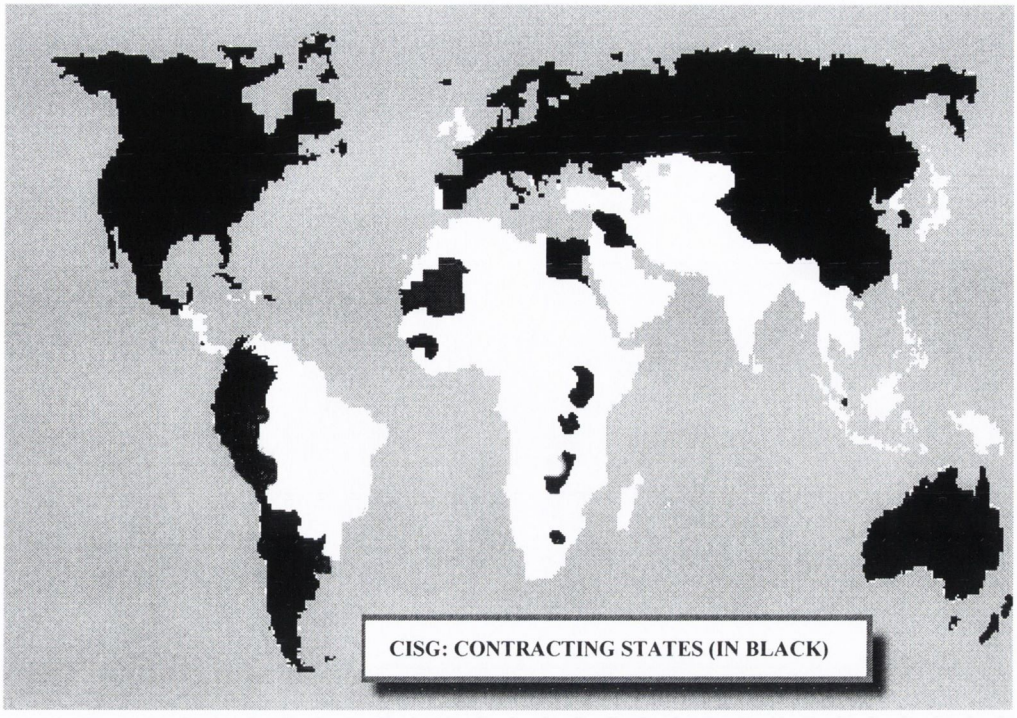
[91] United Nations Convention on Contracts for the International Sale of Goods, April 11, 1980, S. Treaty Doc. No. 98-9 (1984), 1489 U.N.T.S. 3, *reprinted as United Nations: Conference on Contracts for the International Sale of Goods,* 19 I.L.M. 668 (1980). It entered into force on 1 August 1988.

[92] Taken from the Pace University Institute of International Commercial Law UN Convention on Contracts for the International Sale of Goods database; available at http://www.cisg.law.pace.edu/cisg/countries/cntries.html

Goods, however, represent more than two thirds of international commercial transactions. This alone should constitute a good reason for the success of the UN Convention on Contracts for the International Sale of Goods in producing harmonised legal standards of commercial transactions.

As far as the choice of the example is concerned, one first states that it is an excellent example of convergent law with regard to private law matters (even though for the sake of clarity it is under public international law that the UN Convention on Contracts for the International Sale of Goods is to be actually implemented). Second, the UN Convention on Contracts for the International Sale of Goods is gaining force and credibility day-by-day, as has been explained above. Thirdly, as with the previous exemplification, the author has chosen this example, as the Convention in question has produced a wealth of academic works, something which is beneficial for the analysis as a matter of application of our model.

Generally, the UN Convention on Contracts for the International Sale of Goods is a code of commercial law rules which govern the formation of contracts for the international sale of goods, whilst its main aim is to make cross-border trade transactions easier for the business person. It should be noted at the end of this short introduction to the UN Convention on Contracts for the International Sale of Goods that, unlike international human rights treaties, the UN Convention on Contracts for the International Sale of Goods has no particular aspirations as to directly influencing the internal workings of the national legal systems which sought to embrace it. However, the UN Convention enables national courts to question its application, though in a uniformist fashion, as will be seen below.



Item 5

The first enquiry in the application of the general model requires that the UN Convention on Contracts for the International Sale of Goods is a positive creature of law; this is clear, for the UN Convention provides us with a concrete international code of rules. It is now questionable whether the application of a convergent instrument of law as such is capable of judicial or other scrutiny. The answer here is again affirmative. The UN Convention on Contracts for the International Sale of Goods in the very short period of its existence has managed to produce a significant volume of case law in the legal systems which it affects.[93]

The second and third requirements of the model ask for an obligation to implement hard law and adherence to the *pacta sunt servanda* rule. In relation to the former, one must conclude with ease that the UN Convention on Contracts for the International Sale of Goods is indeed a convergent instrument of hard law, since national courts are concerned with the enforcement of international transactions under this instrument[94], except of course for the fact that the UN Convention itself provides (to a certain degree) for such a general obligation of implementation[95]. As regards the

[93] E.g. the Pace Law School Institute of International Commercial Law alone has a record of more than 1,600 reported cases.
[94] *Supra*, fn. 28.
[95] See Articles 1 and 91 of the Convention.

application of the *pacta sunt servanda* rule, a similar analysis to the application of the rule in public international law is offered here. Hence, it is necessary for the Convention to be applied under the *pacta sunt servanda* rule either as a matter of construction by way of implication of the rule or as a matter under the express provision of Article 26 of the Vienna Convention on the Law of the Treaties 1969/1980 which suggests that every treaty must be enforced by the parties; in our case by the national legal systems and all their legal and extra-legal mechanisms. The analysis on this offers no significant variations to the approach taken under public international law.

The fourth requisite of the general model requires a distinction between respect on the part of the legal system of our example to both the letter and the spirit of the convergent instrument of law in question or simply respect to the spirit thereof. If this was established, then we could conclude on whether the minimal discretion afforded by the general model is applicable. This would allow us to see whether the uniformist sub-model or the directive sub-model is relevant to the application of the UN Convention on Contracts for the International Sale of Goods under our model. Generally, the Convention is seen as a uniformist instrument of law.[96] This is the case both as a matter of provision within the Convention but also because most of the academics[97] in the field tend to be of the view that the Convention offers uniform rules in many respects. For instance, Article 7 (1) UN Convention on Contracts for the International Sale of Goods makes it clear that there is a need to promote uniformity in the application of the Convention. This is stipulated as follows:

'*In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.*'

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[96] C. Baasch Andersen, 'Uniformity in the CISG in the First Decade of its Application' in I. Fletcher, L. Mistelis, M. Cremona (eds.), *Foundations and Perspectives of International Trade Law*, 2001, London: Sweet & Maxwell, p. 289ff.; M.G. Bridge, 'Uniformity and Diversity in the Law of International Sale', (Spring 2003) 15 *Pace International Law Review* 55, pp. 72-86; F. Ferrari, 'Uniform Interpretation of The 1980 Uniform Sales Law', (1994-95) 24 *Georgia Journal of International and Comparative Law* 183, pp. 198-206; F. Ferrari, 'The Relationship Between the UCC and the CISG and the Construction of Uniform Law', (1996) 29 *Loyola of Los Angeles Law Review* 1021, pp. 1024-1028; F. Ferrari, 'Applying the CISG in a Truly Uniform Manner: *Tribunale di Vigevano* (Italy), 12 July 2000', (2001-1) *Uniform Law Review / Revue de Droit Uniforme* (2001-1) 203, pp. 203-209; H.M. Flechtner, 'The Several Texts of the CISG in a Decentralized System: Observations on Translations, Reservations and other Challenges to the Uniformity Principle in Article 7(1)', (1998) 17 *Journal of Law and Commerce* 187, pp. 216-217.

[97] *Ibid.*

So ambitious is Article 7 in its effect that national courts are not allowed to interpret the UN Convention on Contracts for the International Sale of Goods under domestic rules, for the main purpose of the Convention is to bring unification of international sale of goods law. Additionally, lawyers, who have to deal with the UN Convention on Contracts for the International Sale of Goods, must do so by leaving behind them the interpretative techniques of their domestic legal systems and instead put forward a more internationalist approach to interpreting the Convention, though one cannot necessarily guarantee that this uniformity will be as 'absolute' as it sounds, when it comes to legal practice.[98] From the above, one must conclude that the UN Convention on Contracts for the International Sale of Goods is operative under the uniformist sub-category of the general model. If this is true, then, since the UN Convention on Contracts for the International Sale of Goods asks for uniform application of its law amongst various legal fora, be it in principle, one must conclude that there is no discretion offered to a national legal system which has incorporated the UN Convention on Contracts for the International Sale of Goods. Hence, the UN Convention on Contracts for the International Sale of Goods makes no allowance for that minimal discretion which the directive sub-model of the general model would offer to the national legal order; thus, this legal system may not deviate from the letter of such instruments of law except, perhaps, where the letter is interpreted otherwise according to leading academic opinion.[99] Therefore, the Convention is applicable under the uniformist sub-model of the general model.

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[98] See R.J.C. Munday, 'The Uniform Interpretation of International Conventions', 27 *International and Comparative Law Quarterly* 450 (1978), stating '[t]he principal objective of an international convention is to achieve uniformity of legal rules within the various States party to it. However, even when outward uniformity is achieved following the adoption of a single authoritative text, uniform application of the agreed rules is by no means guaranteed, as in practice different countries almost inevitably come to put different interpretations upon the same enacted words'; J. Honnold, 'The Sales Convention in Action – Uniform International Words: Uniform Application?', (1988) 8 *Journal of Law and Commerce* 207, pp. 211-212, noting that 'We cannot expect perfect uniformity in applying the convention -- or, for that matter, any other statute. But we can look forward to international commercial law that is more helpful and predictable than the present Babel of competing systems.'; C. Baasch Andersen, 'Uniformity in the CISG in the First Decade of its Application' in I. Fletcher, L. Mistelis and M. Cremona (eds.), *op. cit.*, fn. 96, pp. 291-292.

[99] E.g. Professor Bonell argues that 'Instead of sticking to its literal and grammatical meaning, courts are expected to take a much more liberal and flexible attitude and to look, wherever appropriate, to the underlying purposes and policies of individual provisions as well as of the Convention as a whole.' See M.J. Bonell, 'General provisions: Article 7', in C.M. Bianca & M.J. Bonell (eds.), *Commentary on the International Sales Law: The 1980 Vienna Convention*, 1987, Milan: Giuffrè, p. 73.

Finally, as regards sanctions the UN Convention on Contracts for the International Sale of Goods does not provide a list of sanctions or rules on sanctions. Nor does the UN Convention on Contracts for the International Sale of Goods have a central tribunal to scrutinise misapplications or misinterpretations of the Convention in the national legal systems affected by it. That is not to say that the model fails, as the traditional rules of international law still apply. This case is defined as 'material breach'[100] in international law and it allows in effect the initiation of sanctions; that is, countermeasures on the part of the other parties against the defaulting party. This position is codified in Article 60 (2) (a) of the Vienna Convention on the Law of the Treaties 1969/1980, according to which the other states may by unanimous agreement suspend the treaty either (i) in the relations between themselves and the defaulting State or (ii) as between all the parties.

3.3.3. Third exemplification: the Council Directive (EC) 98/5 (Lawyers' home title Directive) and Council Regulation (EC) No 1/2003 (Implementation of Rules of Competition) (European law applications of the general model)

The third exemplification presents the *European law application of the general model*. It should be noted that although membership alone to the EU creates, as will be seen, legal restructurings in a given legal system, individual EU laws normally create more subtle changes[101], these changes operating within the remit of the general model.

Consequently, any discussion in relation to the general model would be incomplete without applying this to the most dynamic model of convergence: the EU model. The final example for the application of the general model deals, therefore, with a typical EU Regulation, the Council Regulation on the Implementation of Rules on competition 1/2003[102] and a typical EU Directive, the Council Directive (EC) 98/5[103] (Lawyers' home title Directive). The first example chosen is yet another regulation on the part of the EU for the furtherance of the goals of Articles 81 and 82

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[100] See S. Rosenne, *Breach of Treaty*, Cambridge: Grotius, 1985.
[101] Cf. the implementation of Council Directive 93/13/EEC in Ireland and the UK below at 4.3.4.
[102] OJ 2003 L1/1 [Hereinafter Council Regulation 1/2003]
[103] OJ No. L77/36 1998 [Hereinafter Council Directive 98/5]

(ex Articles 85 and 86)[104] of the Treaty Establishing the European Community; these Articles provide the general framework of EU policy against anti-competitive policies and abuse of dominant position within the common market. With effect from 1 May 2004,[105] Council Regulation 1/2003 replaces Council Regulation No 17 of 6 February 1962. The primary reason behind the enactment of this new regulation is that it is 'designed to meet the challenges of an integrated market' and the enlargement of the Community.[106] The second example chosen is another directive to facilitate further[107] with effect from 14 March 2000 the practice of the profession of lawyer on a permanent basis in a Member State other than in which professional qualification was obtained.[108]

With regard to our examples, the first thing to be enquired about under the general model is the requirement of the written and codified form of the instrument in question (positivism) and its susceptibility to judicial or other scrutiny. It is clear that both an EU regulation such as Council Regulation 1/2003 and an EU directive such as Directive 98/5/EC are written instruments of law which are drafted in a codified manner. More particularly, as regards judicial scrutiny, it is equally clear that both the Regulation and the Directive in question are open to such scrutiny. One would be able to construe this under Article 6 (Powers of the national courts) with particular regard to the Regulation and by virtue of Article 234 (ex Article 177) of the Treaty with regard to both of these instruments. According to Article 234 national courts in their application of these two instruments may question their remit and ultimately refer them to the ECJ. Additionally, the Commission itself could indirectly scrutinise the proper application of the Regulation as well as the proper application of the Directive in question. Finally, as with all other instruments of EU law, Council Regulation 1/2003 and Directive 98/5/EC could be scrutinised directly under Article 230 of the Treaty, that is, in actions brought by another EU body (against the Council in our case) or by a Member State or a natural or legal person to whom these laws are of concern.[109]

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[104] All Articles hereinafter refer to the Treaty Establishing the European Community and where the word 'Treaty' is used, this should be taken to mean the Treaty Establishing the European Community.
[105] See Article 45 of the Regulation (Entry into force).
[106] See para.1 of the preamble of the regulation.
[107] Prior to this Directive the law in the area concerned with was governed exclusively by Directive 77/249/EEC, *Official Journal* 1977, No. L78/17 and more widely by Directive 89/48/EEC, *Official Journal* 1989, No. L19/16.
[108] See Article 1 of the Directive in question.
[109] Craig and De Búrca, p. 483ff.

Let us now proceed with the second and third requirements under the general model; those of an obligation to implement and the *pacta sunt servanda* rule. First of all, EU regulations and EU Directives have to be implemented. This is made clear in Article 249 (ex Article 189) of the Treaty:

'*A regulation shall have general application. It shall be* ***binding in its entirety and directly applicable*** *in all Member States.*
A directive shall be ***binding, as to the result to be achieved****, upon each Member Stae to which it is addressed, but shall leave to the national authorities the choice of form and methods*'.

In fact, these instruments of law provide the convergence theorist with the hardest application of EU law except, of course, for the EU treaties. As regards the *pacta sunt servanda* requirement, this is generally satisfied under the general provision of Article 10 (ex Article 5)[110] of the Treaty and it is also encapsulated in a sense within Article 249 thereof. To the directive's effect the national legal systems brought about special legislation. [111] Furthermore, case law also provides for the immediate

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[110] See 3.2.3. herein.

[111] See BGBl. I 27/2000: Free Movement and Establishment of European Lawyers in Austria and Amendment to the Lawyers Regulation (Austria); Law aimed at making legal practice and establishment in Belgium easier for lawyers from another Member State of the European Union (Belgium); No 180(I) of 2002 Act amending the Lawyers Act (Cyprus); Act No. 85/1996 Coll., on Advocacy, as amended by Act No. 210/1999 Coll., 120/2001 Coll., 6/2002 Coll. and 228/2002 Coll. (Czech R.); Law n° 231 of April 4th, 2000, with changes to the Civil Code and Regulation n° 276 of April 14th,2000, regarding the establishment of EU-lawyers in Denmark issued by the Justice Department (Denmark); Bar Association Act (Estonia); Paragraphs 5 b, 3, 8, 9 of the Lawyers' Act (Finland); Act No. 2004-130 of 11/02/2004 reforming the status of certain legal professions (...), published in the OJ No. 36 of 12.02.2004, page 2847 (France); EuRAG (European Lawyers Law) dated March 9th, 2000, published in the 'Bundesgesetzblatt 2000 Teil I Nr. 9', in Bonn on March 13th, 2000 (Germany); Presidential Decree n° 152/2000 of May 23rd, 2000 (Greece); Law No. XI of 2003 on the amendment of Law No. XI of 1998 on attorneys (Hungary); Solicitors (Amendment) Act, 2002, Statutory Instrument Number 732 of 2003 (Ireland); Art. 19 of the Law n° 526, Decree of February 2nd, 2001 (Italy); Law on supplementing articles 7 and 18 and adding a Chapter 10 to the Law on the Bar of 6 December 2001 (Lithuania); Law of November 13rd, 2002 published in the 'Journal Officiel du Grand-Duché de Luxembourg' on December 17th, 2002 (Luxembourg); L.N.273 of 2002: Mutual Recognition of Qualifications of Legal Profession Regulations (Malta); Law of July 13rd, 2002 published in the 'Staatblad van het Koninkriyk der Nederlanden' Jaargang 2002, 440 (Netherlands); Act of 5 July 2002 on the provision by foreign lawyers of legal assistance in the Republic of Poland (Poland); Law 80/2001 of July 20th, 2001 and Regulation for the Registration of lawyers from other Member States of the European Union (Portugal); Act No. 586/2003 Coll. on Advocacy (Slovakia); New Act amending the Attorney's Act published in the Official Gazette of the Republic of Slovenia, No. 24-1455/2001, dated 5 April 2001 (Slovenia); Royal Decree 936/2001 of August 3rd, 2001 published in the BOE 186/2001on August 4th, 2001 (Spain); Chapter 8, paragraph 1 and followings of the Swedish Code of judicial procedure (Sweden); Part V, n° 29 of The European Communities (Lawyer's Practice) Regulations 2000 S.I. N° 1119 (England/ Wales), Law Society of Northern Ireland

application of EU legal instruments in the national legal systems of the Member States by implication of some sort of binding obligation to be performed.[112] For instance, this obligation under EU Regulations is one which creates legal rights to individual litigants and may not be diluted by national measures-consider the case of *Commission v Italy*.[113] In this case the Italian government, although bound to enact directly a series of Regulations, which instituted a system of premiums for milk production and slaughtering cows, failed to fulfil its obligation to implement, since the particular national measures, which it had taken, were distorting the entire and direct applicability of EU law and therefore the principle of *pacta sunt servanda.*

The fourth consideration is related to the adherence to the spirit and letter of the instruments of law in question. Since Council Regulation 1/2003 is 'binding in its entirety and directly applicable' under Article 249 of the Treaty, there is no point in arguing against the fact that this instrument of law falls within the uniformist sub-category of the general model. This was reaffirmed in *Commission v Italy*,[114] where it was said that 'Regulations are... directly applicable in all Member States and come into force solely by virtue of their publication in the *Official Journal* of the Communities...'[115] or as in Council Regulation 1/2003 under a provision in the Regulation itself.[116] Finally, the Regulation in question could not be falling within the directive sub-category of the general model for the simple reason that EU Regulations, unlike EU directives,[117] apply to all Member States.[118] Their application is, therefore, uniform; at least in theory. Hence, if Regulations are uniformist creatures of law, the discretion that they present to the national legislator during implementation is zero. So too the national judges must not deviate from the letter of Regulations, for otherwise different legal systems may perceive their application in a different manner and therefore their convergent character as in uniformity of national laws may be lost altogether in their judicial application within the national legal systems. Article 16 (Uniform application of Community competition law) of Council

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European Communities (Lawyer's practice) Regulations 2000 (Northern Ireland) SI 2000 N° 121 and European Communities (Lawyer's Practice) Regulations 2000 N° 121 (Scotland).

[112] Case 96/81, *Commission v Netherlands* [1982] ECR 1791, p. 104 herein.

[113] Case 39/72, *Commission v Italy* [1973] ECR 101.

[114] *Ibid.*

[115] *Ibid.*, para. 17 of the judgement.

[116] *Supra*, fn. 105.

[117] Even though EU directives can only apply to a certain number of Member States that is not to say that all EU directives are limited as such, since there can be Directives that apply to all Member States. For more see Craig and De Búrca.

[118] Craig and De Búrca, p. 114.

Regulation 1/2003 is crystal clear on its own uniform character and so are other Regulations by way of analogy; the Article provides:

'*When* ***national courts*** *rule on agreements...under Article 81 or Article 82 of the Treaty which are already the subject of a Commission decision, they* ***cannot take decisions running counter*** *to the decisions adopted by the Commission. They* ***must also avoid giving decisions which could conflict*** *with a decision contemplated by the Commission...*'

Equally clear is the fact that in the case of a directive such as Directive 98/5 the national implementer would obviously opt for the directive sub-category of the general model and consequently be given technical discretion ('choice of forms and methods' to use EU terminology), unlike in the case of Regulations. This is also provided in Article 16 of the directive in question.

Finally, with respect to sanctions for non-compliance with the two instruments in question, initial judicial sanction may be brought against the defaulting Member State under Article 228 (1) (ex Article 171 (1)) of the Treaty (first ECJ judgement sanctioning) or under Article 228 (2) (ex Article 171 (2)) thereof by imposition of a pecuniary penalty to this State (second ECJ judgement sanctioning). Therefore, the criterion of sanctions is satisfied and the general model is applicable.

3.4. Conclusion

In conclusion, this chapter presented a general model of implementation for mere alignment of a given legal system to the formalities and minor changes emanating from a convergent instrument of law. The model systematised its considerations by direct reference to international and European law and it was then applied to a number of cases of implementation from public and private international and European law.

Chapter 4

THE SPECIFIC/RESTRUCTURING MODEL OF IMPLEMENTATION OF CONVERGENT LAW

4. THE SPECIFIC/RESTRUCTURING MODEL OF IMPLEMENTATION OF CONVERGENT LAW–IMPLEMENTATION OF MAJOR AND SUBSTANTIVE CHANGES

4.1. Introduction

The analysis of this chapter will engage itself with the specific/restructuring model of implementation of convergent law. As in the other chapters, the main priority of the analysis will be to systematise the model proposed. Moreover, the analysis will also revolve around the key notion of *anacatataxis* (restructuring) and how and when this comes about. As in the previous chapter, the model which is suggested in this chapter is defined, conditioned and exemplified.

In accordance with the unifying hypothesis[1] raised in the parameters chapter of this thesis, convergence can have routine effects or major effects but irrespective, there are certain criteria/considerations that need to be fulfilled before convergence on this analysis can be genuinely effective. Beyond this, it is important for implementers to be aware of whether a particular convergence is so important to require restructuring (as this chapter maintains). Sometimes this is obvious (e.g. the impact of EEC membership[2]/a western view of what human rights mean in an Islamic country[3]) but sometimes it can occur at a more subtle level (Consumer contracts[4]/ UN

[1] See 2.2.1.
[2] See 4.3.1.
[3] See 4.3.2.
[4] See 4.3.4.

Convention on Contracts for the International Sale of Goods[5] etc). It is important to be aware of the level of restructuring necessary, because this will determine both whether the convergence will fit within the system and what needs to be sacrificed in order to make it fit.

In other words, this chapter shows that a change through convergence can be so great that it actually involves a constitutional, legal and mental restructuring for a country, only that for such a restructuring to be effected, 'special arrangements' would have to take place.

4.1.1. Definition of the Specific/Restructuring Model of Implementation

The restructuring model of implementation[6] is that model of alignment of a national or sub-national[7] legal system to a convergent instrument or order of law **according to which the national or sub-national legal system assesses the impact of such an instrument; the system then readily concludes that such an instrument either brings about a significant change to a domestic law (or an area of domestic law) or any change to its constitutional law so that special arrangements are required for its implementation. The model aims at fulfilling the *significant and major changes* brought about by a convergent instrument.** As the other proposed model and factors herein, such a model can operate at a supranational, intergovernmental, federal, regional or international level. In any case, the legislator and/or the respective judges and/or the administration of this legal system must meet the legislative, judicial and administrative implementation requirements respectively of the convergent instrument of law in question. Whether all or any of the three branches of implementation (legislature, judiciary, executive with its administrative extensions) will be 'activated' for the purposes of the model should depend on whether all or any of them face an *anacatataxis* in their premises.[8] With regard to the term ***'anacatataxis'***[9], one should construe this to be either any

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[5] See 4.3.5. But cf. 3.3.2.
[6] [Hereinafter the restructuring model]
[7] *Supra*, Ch. 3, fn. 2.
[8] For the mechanics of this model see 4.3 herein.
[9] Greek for whole reshuffling or restructuring.

significant or more than significant change to any subject area of law in a legal system, or any change to the constitutional law therein.

4.1.2. General application of the Specific/Restructuring Model of Implementation

Hence, the first variant for an *anacatataxis*, as perceived herein, occurs where there is *a significant or a more than a significant legal change in any given area of law*[10] (except in constitutional law) in system X by reason of a convergent instrument of law which system X has willingly adopted. The second variant of an *anacatataxis* occurs where there is *any change in the constitutional law*[11] of system X by reason of a convergent instrument of law that X has adopted.

It can be any change to constitutional law (as opposed to a more than significant change to any other branch of domestic law) by virtue of a convergent law which will do for the model, as constitutional law lies at the heart of any given legal system as a matter of principle[12] as well as a matter of established legal theory.[13] This is the case, since 'a constitution is not the act of a government, but of a people constituting a government [and because] a constitution is a thing antecedent to a government [whilst] a government is only the creature of a constitution.'[14] The analysis for seeking an *anacatataxis* is similar in cases of written and unwritten constitutions. It has to be noted, however, that written constitutions such as the Irish Constitution or the American Constitution (and indeed any other written constitution) offer an advantage to the convergence theorist seeking an *anacatataxis* in that they readily and *ab initio* offer to him a settled and codified state of affairs (as opposed to the rather unsettled and uncodified nature of unwritten constitutions). For example, if

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[10] *Infra*, 4.1.3.
[11] *Ibid.*
[12] See *Royal Commission on the Constitution*, Cmnd 5460 (1973), London: HM Stationery Office, according to which a constitution is 'a body of fundamental doctrines and rules of a nation from which stem the duties and powers of the government and the duties and the rights of the people'.
[13] Sir K.C. Wheare, *Modern Constitutions*, 2nd Edition, 1966, Oxford: Oxford University Press, p. 1. He defines the constitution 'as the collection of rules which establish and regulate or govern the government.' For an American definition see A.S. Miller, 'Toward a Definition of "the" Constitution', (1983) 8 *University of Dayton Law Review* 633, p. 637.
[14] T. Paine, *Rights of Man* (1792, Pt II), 1984, reprinted in 1998, H. Collins (ed.), New York: Penguin, p. 93.

one were to interfere by any remote chance with the ethical and moral values on which the Irish Constitution is based, this may well be regarded as a 'significant change' for the purposes of our model, but most importantly the point here is that, this would be easily observable by reason of the fact that there is a history of 'written composite documents establishing the organs of government and the declaring the fundamental freedoms'[15] in Ireland. Thus, the point here is that written constitutions, such as the Irish Constitution, in their established nature, make the task for a seeker of an *anacatataxis*, easier than the task for the seeker of the same restructuring in the case of a country with an unwritten constitution, even though it should be maintained that it is quite feasible upon careful analysis to achieve the detection of such restructurings in the case of countries with unwritten constitutions as well.

In any case, the analysis of the restructuring model is *impact based* and *system oriented.*[16] Therefore, under this thesis an *anacatataxis* can occur in the following circumstances:

- When system X implements convergent law Z and this law causes a significant or a more than significant change to some domestic law or to an area of domestic law as a matter of substance **(*anacatataxis* of the domestic law of a given convergent system as a matter of substance or literal implementation)**.
- When system X implements convergent law Z, the impact of which is so significant to some domestic law or to an area of domestic law that even its actual implementation requires special arrangements **(*anacatataxis* of domestic law of a given convergent system as a matter of practical implementation)**.
- When system X implements convergent law Z and this law causes some amendment, be it of the least significant kind, to the constitutional law of system X as a matter of substance **(*anacatataxis* of the constitutional law of**

[15] B. Doolan, *Principles of Irish Law*, Dublin: Gill and Macmillan, 4th Edition, 2003, p. 5. See also G. Hogan and G. Whyte, *The Irish Constitution*, Dublin: Butterworths, 4th edition, 2003. Note that this definition applies to the Constitution of Saorstat Éireann but it could be well taken to apply to the Bunreacht na hÉireann, mainly because, as explained in the text there is a string of codified consititutions in the history of modern Ireland, which all seem to be characterised by their written and established character.

[16] *Infra*, 4.2.1.

a given convergent system as a matter of substance or literal implementation).

- When system X implements convergent law Z, the impact of which is so significant to the constitutional law of system X that even its actual implementation requires special arrangements **(*anacatataxis* of the constitutional law of a given convergent system as a matter of practical implementation).**
- In a combination of the first and second variant or a combination of the third and fourth variant above **(*anacatataxis* as a matter both of substance and practical implementation either in general domestic law or in domestic constitutional law).**

There are three significant remarks to be made in relation to the above. First, the model presupposes that convergent laws may bring about three kinds of changes in a given legal system: i) no changes or changes of trivial effect (as in minor changes or formalities)[17], ii) significant changes and iii) more than significant changes or any constitutional law changes (which amount *mutatis mutandis* to more than significant changes). *However, it is only significant and more than significant legal changes to any domestic law or changes of constitutional legal significance which will require the operation of this chapter's model.*

Second, whether a legal change by reason of a convergent law amounts to a legal *anacatataxis* or not, this must be a question that the system which faces such a state of affairs primarily has to answer.[18] However, under this thesis it is also possible that the system may be notified from abroad that it is about to face such a legal overhaul.

4.1.3. How to actually discern of an *anacatataxis*?

More precisely, the question which would have to be dealt with is *how* a system identifies an *anacatataxis*, bearing in mind that an *anacatataxis* is either 'any

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[17] See Chapter 3.

[18] Cf. E. Örücü, *The Enigma of Comparative Law: Variations on a Theme for the Twenty-First Century*, Leiden/Boston: Martinus Nijhoff Publishers, 2004, pp. 87, 123.

change to a constitution' of a country via interference of convergent law or 'a significant change' to the subject area of law concerned with the interference of convergent law.

With regard to the constitutional *anacatataxis*, it has been explained above that any interference of convergent law in the area automatically and *ab initio* qualifies as an *anacatataxis*, the principle here being that *all* legal systems see their constitution (whether written or unwritten) as the supreme and central source of law.[19]

With regard to finding an *anacatataxis* in areas other than constitutional law, one contemplates two different ways to go about it, ways which may *prima facie* seem different but ultimately bring about similar results. The proposed ways to find a 'significant change or a more than significant change' in a given legal area other than the constitution are two:

- Theoretically, the identification of a **change of legal mentality** in such areas of law by operation of convergent law *and/or*
- Practically, the identification of a **repeal or amendment of the 'core rules'** in such areas of law by operation of convergent law.

The former test is self-explanatory. From the very moment that a convergent law touches upon domestic law and this causes the legal mentality of the system to change *in the area of law in question*, then such a change is perceived as an *anacatataxis*. The typical example here has been the introduction of good faith in the consumer laws of Ireland and the UK.

The latter test requires a more pedantic analysis. To achieve such analysis, the national implementer should draw an analogy with the operation of the constitution of his country. In our analogy, for the implementer to discern of an *anacatataxis* in a given legal area other than the constitution, he should divide leading domestic rules between a **microconstitution** and a number of **macroconstitutions.** The microconstitution is defined herein as the normally observable constitution of the

[19] E.g. J. Raz, 'On the Authority and Interpretations of Constitutions. Some Preliminaries' in L. Alexander (ed.), *Constitutionalism. Philosophical Foundations*, Cambridge/New York: Cambidge University Press, 1998, p. 152-193. He confers seven characteristics with regard to the centrality of a constitution: i) it is constitutive of a legal system; ii) it is stable, at least in aspiration; iii) it is (normally) written; iv) it is superior law; v) it is justiciable; vi) it is entrenched, i.e., more difficult to change than other law and vii) it is expressing a common ideology.

country. On the other hand, the macroconstitutions are analogically defined as the observable core rules (as in statute and case law in areas of law other than in constitutional law) which *mutatis mutandis* act as the constitution of rules *in the subject area of law in which an anacatataxis is sought.* It is noted that in any case the *anacatataxis* is something that *the national implementer*[20] *will best qualify as such*, by reason of the fact that the model provides ultimate discretion on the matter to the national implementer. Finally, it is noted that an *anacatataxis* can also be justified both on changes made to the microconstitution of a country as well as on changes made to a number of macroconstitutions thereof, the typical example here being the combination of constitutional and other significant changes that EU membership brings to a legal system.[21]

Additionally, the question of whether the mentality and the macroconstitutions of a given legal system change depends also on the classification of the system as per legal family: thus, in a **common law system** the test could be: Are there any additions, amendments or even repeals to the *core* interpretative or substantive rules, whether in statute or in leading case law in a given legal area by operation of convergent law? Additionally, does such law change (as a consequence) the legal mentality of a given legal system in *that* legal area?[22] In a **civil law system**: In a code with a general part do any of the *leading* interpretative or substantive rules found in that part change? In a statute which governs a whole area of law or, in the specific books/parts of the code or in a code which lacks a general part, do any of the *leading* interpretative or substantive rules found therein change? In other words, are the leading provisions therein interfered with by operation of convergent law? Do such changes cause a change of legal mentality in the subject area of law concerned?[23] In a **religious law system**: Does convergent law interfere with established religious approaches of law as a matter of substance and/or interpretation, especially to the

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[20] Cf. the approach taken by the German legislator and the approaches of the Greek and the Estonian legislator in the implementation of Directive 1999/44/EC in their respective systems, even though one could argue that the German approach was the excuse for an *anacatataxis* in the system rather than the reason for it. *Infra* 4.2.1.

[21] *Infra*, 4.3.1.

[22] *Infra*, 4.3.4. and 4.3.5.

[23] E.g. in the unlikely scenario that such central provision as the provision of good faith in the German law of obligations is amended by reason of convergent law, this would almost certainly amount to an *anacatataxis*. On the centrality of para. 242 (general duty of good faith) in the German Civil Code see e.g. R. Zimmermann and S. Whittaker, *Good Faith in European Contract Law*, Cambridge: Cambridge University Press, 2000, pp. 18-20, Nigel Foster & S. Sule, *German Legal System and* Laws, Oxford: Oxford University Press, 3rd Edition, 2002, pp. 388-390, 406.

point established legal mentality is affected?[24] In a **customary law system**: Does convergent law interfere with established customary approaches of law as a matter of substance and/or interpretation, especially resulting in changes of established mentality?

4.1.4. Initial exemplification of *anacatataxes* via concrete examples

According to the above, there must be some cases of implementation which bring such legal changes to a given legal system so that to discard the argument that they are not clear-cut *anacatataxes* would require particular effort. This is the case without regard, of course, to the fact that the examples of convergent law forwarded herein have already been implemented or will be implemented in the future.

Examples of clear *anacatataxes* have been the alignment of a given legal system to the *Acquis Communautaire* through membership of the EU because this alone entails major changes in this legal system; the full and direct incorporation of universal human rights law and international human rights treaties in an otherwise authoritative and Muslim legal system, because this arguably is *inter alia* a challenge to the current legal mentality in such a system; the implementation of Council Directive 93/13/EEC of April 1993[25] on Unfair Contract Terms in Consumer Contracts as a whole and in particular with its introduction of the good faith concept in consumer contracts (in the cases of implementation in the UK and the Republic of Ireland) and the (final) implementation of the *general framework* of the European Convention on Human Rights 1950 (in the case of the UK, implementation via the Human Rights Act 1998 and in the case of Ireland, via the European Convention on Human Rights Act 2003) because this directly affects the UK constitutional machinery and the Irish human rights jurisprudence (albeit not the Irish Constitution – at least not directly).[26] It also recognises that potential *anacatataxes* will arise when the implementation of the Vienna Convention on Contracts for the International Sale

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[24] *Infra*, 4.3.4.

[25] *Official Journal L 095, 21/04/1993*, pp. 0029 – 0034.

[26] Note that it is the general implementation of the European Convention on Human Rights 1950 which is dealt with in this chapter, for, as it will be shown in another chapter, the Convention may make allowance for sociological considerations in its implementation of particular articles. See chapter 6 herein.

of Goods 1980 will be sought in either the UK or Ireland (with or without curtailments to the whole effect of this instrument of international law).

The model is exemplified through five cases. These cover all the examples above and are dealt with extensively below.[27]

4.2. Requisites/considerations and initial justification thereof

The model which is suggested in this chapter performs its mechanics under a number of criteria/considerations; these are: i) the identification of an *anacatataxis* by parallel assessment of the legal system in combination with the impact which the convergent instrument of law has on that system, ii) the 'in principle' susceptibility of the legal system to the *anacatataxis* in question and iii) the necessity for special arrangements in the legal system so that the legal system implements the *anacatataxic* instrument correctly.

The next thing to be enquired into is the initial justification of the requisites of the model. The justification with regard to the requisites, which follow in detail, asks initially that a major change (an *anacatataxis*) in a legal system is observed. Omitting this criterion from the model would make the model's operation obsolete: how could one ever proceed with a restructuring model without first recognising the restructuring? Thus, the identification criterion is a *sine qua non* to the model. As regards the 'susceptibility to an *anacatataxis* criterion', all that can initially be said is that the arrival of extra-national law need not cause friction or have any adverse effect to the well-functioning of a legal system, irrespective of how important the changes which it comes with are, since something as such would not only render our model obsolete in this case too, but it would also question the purpose of implementation of such extra-national law in the first place. With regard to the necessity for 'special arrangements' criterion, this consideration is a necessary one by reason of the fact that a legal restructuring (by definition) brings major changes in a given legal system or alternatively, because one could raise the hypothesis[28] that major changes in a given legal system normally dictate special arrangements in the enforcement of such

[27] See 4.3.1., 4.3.2., 4.3.3., 4.3.4. and 4.3.5. herein.
[28] See the minor hypotheses already raised in 2.3.2.2.

changes. The application of the model and its criteria are based on propositional logic (if *a*, then *b*). These criteria/considerations are explained further below.

4.2.1. Identification of an *anacatataxis*

First, as already stated above,[29] the analysis of this model is an *impact based* and a *system oriented* one. Bearing these two points in mind further elaboration is needed at this point.

The first thing to be asked is whether the impact on system X may be different from the impact on system Z, albeit that both systems are in receipt of the *same* convergent instrument of law. This is said, because an *anatatataxis* occurring in one system does not mean that such an *anacatataxis* will automatically arise in any other given system. There are two sub-criteria to assess this: the systemic *status quo* or specific legal characteristics of the given legal system and the impact that the convergent instrument of law has on those particular legal characteristics. If – and according to the general application[30] of the restructuring model – the change affects, to a significant or more than significant extent, the legal workings of a law or an area of law in *that* legal system, then the model clearly applies. If, additionally, a constitutional change, any constitutional change, arises as a result of the departure of a convergent instrument of law, that too should amount to the satisfaction of the first consideration (identification of *anacatataxis*) for the operation of the model.

However, as aforesaid there is one important limitation to the above; thus, the potential operation of the restructuring model in any given system by reason of a convergent instrument of law does not necessarily mean that the model is applicable to any other given legal system by reason of the same convergent instrument of law. To depart from abstraction, however, one needs to exemplify this. Therefore, one has to take into account, for instance, the example of the very significant *anacatataxis*[31] which took place in Germany recently as a result of Directive 1999/44/EC (on various aspects of the sale of consumer goods and associated guarantees), in comparison with the implementation of the same convergent instrument of law in other jurisdictions.

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[29] *Supra*, 4.1.2.
[30] *Supra*, 4.1.2.
[31] R. Zimmermann, 'Breach of Contract and Remedies under the New German Law of Obligations' in a presentation at the *Centro di studi e ricerche di diritto comparato e straniero*, Rome, (2002), p. 1.

The particular instrument entailed changes for the Germans, not only to general consumer law but also to general contract law.[32] For example, insofar as consumer contracts are concerned, exclusion clauses cannot be permitted, whereas insofar as contracts other than consumer contracts are concerned, the clauses there, even though not directly affected by the new directive, these may act 'as a frame of reference for the control of standard terms in non-consumer sales contracts'[33]. However, perhaps to the surprise of the German jurist who found himself before an *anacatataxis*, if not the greatest recent restructuring of his civil law, the implementation of Directive 1999/44/EC in other legal systems around Europe has not been or at least has not been seen as an *anacatataxis* at all. Again, this is the result of the model's system orientation, system orientation amounting to a freedom for the legal system to assess the impact of a convergent law and subjectively conclude or not that such a convergent law initiates a restructuring of its law. Hence, the impact of this convergent instrument of law in question on other legal systems has been inconsequential to the point that one may wonder whether systemic differences in Europe are too great for bringing about effective convergence. For example, in both Greece and Estonia what was passed by a mere amendment of the domestic civil laws in Germany has triggered an *anacatataxis* and caused considerable academic debate[34]. In fact, both the Greek and the Estonian legislator used quite intelligent devices to avoid an *anacatataxis* from the implementation of Directive/1999/EC.

In effect, the German example tells us that a perceived restructuring in a given system due to convergent law may not equate to a restructuring in any other legal system, because the identification of an *anacatataxis* is a subjective exercise. In other words, a restructuring is a restructuring only if the national legal system qualifies it as such. This is the choice under our model, because first, the national legal system is presumed to know its own internal legal workings best[35] (and therefore the impact of changes which may affect such workings) and second, because the legal system is to this day largely sovereign.

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[32] P. Rott, 'German Sales Law Two Years After the Implementation of Directive 1999/44/EC', (2004) 5 *German Law Journal*, pp. 237-256.

[33] *Ibid.*, p. 245.

[34] See e.g. generally I. Koller, H. Roth, R. Zimmermann, *Schuldrechtsmodernisierungsgesetz 2002*, 2002, Munich: C.H. Beck.

[35] C. Deligianni-Dimitrakou, *Eisagogi sto Syncritico Dikaio*, Thessaloniki: Sakkoulas Publications, 1997, p. 3 and E. Örücü, *The Enigma of Comparative Law*, Leiden/Boston: Martinus Nijhoff Publishers, 2004, p. 87.

Consequently, the *anacatataxis*, as far as the Greek Civil Code was concerned, was in a sense thwarted, for the Greek legislator chose via Law 3043/2002 to amend both the Greek Civil Code and the Code of Civil Procedure but in such a fashion so that the incorporation of Directive 1999/44/EC followed a teleological/generalised[36] approach. It did not choose to interfere with Law 2251/1994 on consumer protection, the apparently relevant law corpus to the directive; nor did it opt for choosing to draft a new and implementing law to the fulfilment of the requirements of the directive in question. The prevalent consideration of the legislator[37] at the time of transposition of the directive was that its implementation on only certain areas 'of the sale of consumer goods could be generalised [by way of analogy] and, therefore, made applicable to the sale of any property, moveable and immoveable.'[38] Therefore, the reform was[39] (and was considered to be) minor, unlike the reform in Germany.[40]

Nor was there any *anacatataxis* in the Estonian legal system in relation to the implementation of Directive/1999/EC, even though it was understood that directives such as the one in question '[were] going more and more into the deep essence of [domestic] contract law'.[41] As in Greece, the solution pursued in Estonia was concerned with a minor reform of the already liberal Estonian contract law. This was the case, as the Estonians prior to the departure of the convergent instrument in question in their legal system had already aligned their law to the Principles of European Contract Law[42] as well as the Unidroit Principles.[43] '[They] (the Estonians) had to make a few minor changes to the law of obligations draft after the regulation (sic) came out.'[44]

From the two above examples (Greece and Estonia) as compared to the German *anacatataxis*, one has to bear one point in mind: that different legal systems may assess the same convergent law in a different way on the basis of systemic-

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[36] E. Dacoronia, 'The evolution of the Greek civil law: from its Roman-Byzantine origins to its contemporary European orientation' in H. L. MacQueen, A. Vaquer and S. Espiau Espiau (eds.), *Regional Private Laws & Codification in Europe*, 2003, Cambridge: Cambridge University Press, p. 299.

[37] Explanatory Note on the draft of Law 3043/2002, ch. A, 3.

[38] E. Dacoronia, *op. cit.*, fn. 36, p. 299.

[39] Explanatory Note on the draft of Law 3043/2002, ch. A, 4.

[40] E. Dacoronia, *supra*, fn. 36.

[41] M. Kaërdi, 'Estonia and the new civil law' in H.L. MacQueen, A. Vaquer and S. Espiau Espiau (eds.), *Regional Private Law & Codification in Europe*, 2003, Cambridge: Cambridge University Press, p. 257.

[42] Accessible on the internet (1998/1999). See http://www.storme.be/PECL2en.html

[43] The Estonian legal system is Unidroit-compliant but on the 1994 Unidroit Principles; not the 2004 Unidroit Principles.

[44] M. Kaërdi, *op. cit.*, fn. 41, p. 258.

oriented and impact-based differences and assessment techniques. Thus, where an *anacatataxis* is found in any one given legal system in a circle of convergence, this does not mean that the same will occur in other legal systems in that same circle of convergence.

4.2.2. In principle susceptibility of the legal system to the *anacatataxis*

The second consideration under the restructuring model would require that the legal system is able to accept, that is, implement a forthcoming *anacatataxis*, even if such *anacatataxis* causes considerable friction or, to use Teubner's words, 'irritations' in its implementation.[45]

Additionally, in the unlikely scenario that a convergent instrument of law causes considerable friction to the point that e.g. the constitutional legal framework of the country in question is adversely affected, then – under this model – such an *anacatataxis* is neither possible nor desirable, for the restructuring model may put a legal system to the test of extensive legal restructuring but should not go as far as altering the quintessential characteristics of a legal system's laws, in particular constitutional laws; this should be the case, even if it will be argued later in the analysis that some interference on constitutional law of a system may be achieved through the implementation of a convergent instrument of law, as long as the legal system itself has the political will to do so.[46] But what has to be borne in mind is that the restructuring model can go far in altering the legal characteristics of a legal system – perhaps even more than any other model or factor proposed herein – although it cannot go too far.[47]

4.2.3. The necessity for special arrangements

The third and final consideration for the operation of the model is the consideration that asks for special arrangements during the implementation of an

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[45] G. Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences' (1998) 61:1 *Modern Law Review* 11.
[46] *Supra* 2.3.1.3.
[47] Cf. Chapter 6.

anacatataxic convergent instrument of law. In any case, inherent to the notion of *anacatataxis* is the need for special legal arrangements, for otherwise there would be no such *anacatataxis* in the first place.[48]

The special arrangements are a precondition for the right transposition of convergent law in a scenario of legal *anacatataxis* and can range from obvious arrangements to less obvious arrangements. **Thus, the restructuring model is different to the general model, in that it asks amongst others for such arrangements.** Some proposed special arrangements are:

- More time[49] than may initially be prescribed
- Operation of comparative law, as in the studying of foreign implementation material[50] or in the importation of foreign experts into the system (especially where the *anacatataxis* would be wholly foreign to the established workings of the system)
- Training of the legal world within the system
- Additional legislative efforts
- Ad-hoc reform committees

Thus, an obvious special arrangement is that of time; this occurs especially in cases where the implementation sought goes beyond the literal transposition of the convergent law in question. Thus, when system X faces an *anacatataxis*, it may seek to have more time in the final implementation of a convergent instrument of law. This occurs time and again. The typical example here would be the self-imposed time limitation (or rather time extension) of the British to implement the European Convention on Human Rights 1950 into their domestic law within two years. Thus, the Human Rights Act 1998 was passed on the 9th of October 1998 and came into force on the 2nd of October 2000. Other special arrangements can be the importation of foreign experts into the country,[51] when the legal system does not have experts in

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[48] Cf. the minor hypothesis raised in 2.3.2.2. in relation to the mode of reasoning for the restructuring model.

[49] To this effect see also Markesinis' call for 'gradual' convergence (as opposed to sudden and immediate convergence): *The Gradual Convergence,* Oxford: Clarendon Press, 1994.

[50] See Chapter 5.

[51] This has happened in the past e.g. in the case of the modernisation of the Civil Law of Estonia in the last ten years. Renowned European academics such as Schlechtriem, Kötz and Schmidt-Räntsch from

an area of law and the study of comparative material, so that the implementation of the *anacatataxic* instrument of law is kept up to date with implementation developments in the rest of the convergent legal systems. Special training may also be provided when a special change in the form of *anacatataxis* occurs, as in the training British judges received prior to the enactment of the Human Rights Act 1998. Finally, the system may see it proper that it produces 'add-on legislation'[52] to digest the changes in question, because the initial implementing efforts may have not been fully adequate.

4.3. Application and mechanics

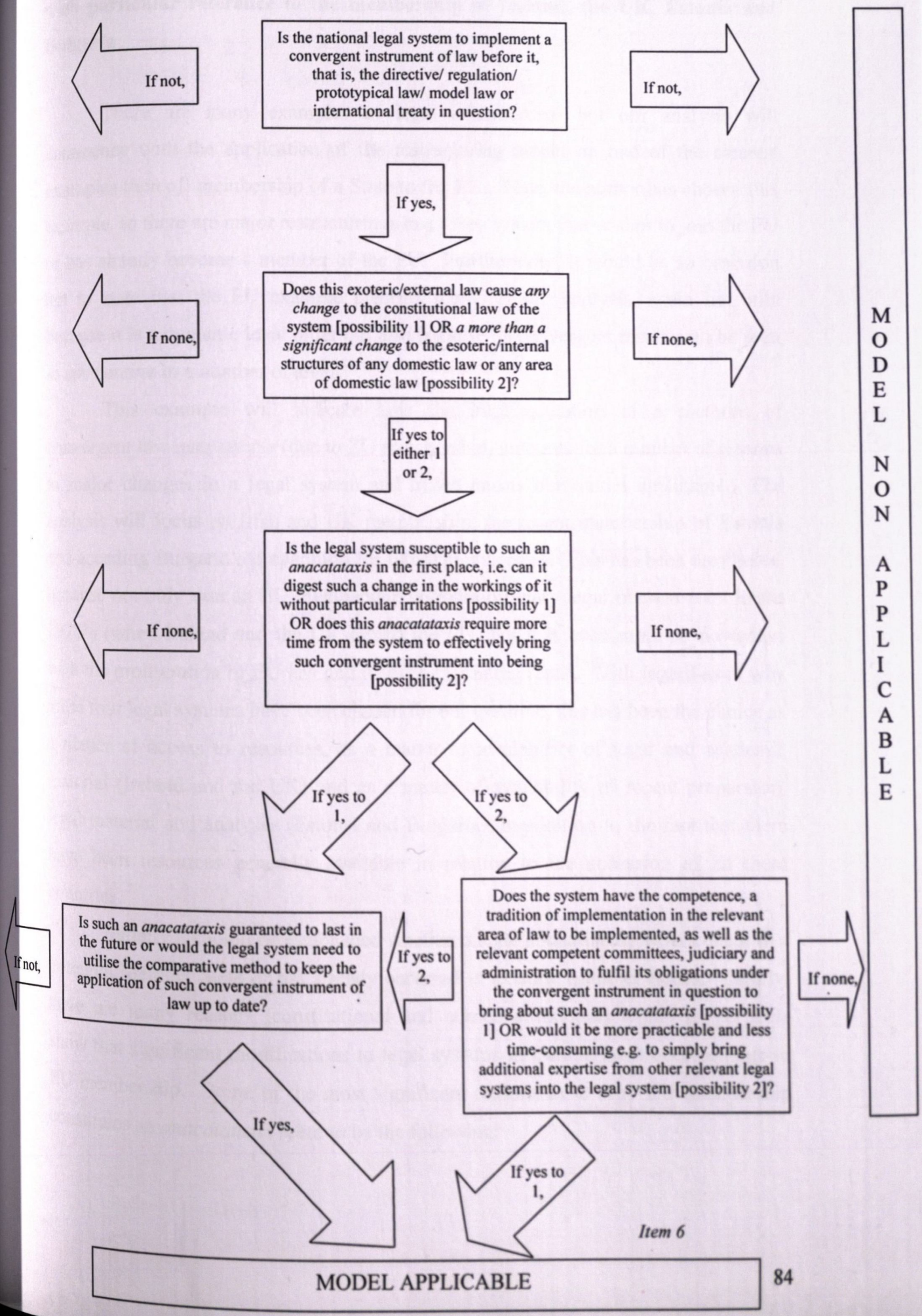
The model is modifiable but normally operates under the criteria/considerations that have been explained and justified above (see also item 6 which follows for a general diagrammatical exposition of the model).

The exemplifications which follow crystallise the application of the restructuring model by its correspondence to them. The examples which are conferred are: the restructuring as a whole which normally takes place in a legal system by EU membership; the restructuring which may take place in a Muslim legal system by the full incorporation of the international code of human rights; the partial restructuring of legal mentality in Ireland and the UK by the domestication of the European Convention on Human Rights; the restructuring caused in Irish and British consumer law by operation of the Council Directive 93/13/EEC and the restructuring which may take place in the international branches of Irish and British contract laws by the incorporation of the UN Convention on Contracts for the International Sale of Goods.

Germany and Gras from Holland were brought in Estonia to assist in the drafting of the Estonian civil law; M. Kaërdi, *op. cit.*, fn. 41, p. 259.

[52] See the subsequent implementing efforts of Ireland and especially the repeal of the initial implementing effort in the United Kingdom for the enactment of the good faith in consumer contracts directive.

SPECIFIC/RESTRUCTURING MODEL OF IMPLEMENTATION



Item 6

4.3.1. First exemplification of the restructuring model: Membership of the EU with particular reference to the membership of Ireland, the UK, Estonia and Bulgaria

There are many examples of legal *anacatataxes* but our analysis will commence with the application of the restructuring model on one of the clearest examples thereof: membership of a State to the EU. Thus, the author has chosen this example, as there are major restructurings in a given system that wishes to join the EU or has already become a member of the EU. Furrthermore, it would be an omission not to state that the EU example presents merit for our analysis, again not only because it is a dynamic legal order but also because its convergent results can be seen as substantive in a number of areas.

This example will indicate how the implementation of a plethora of convergent law instruments (due to EU membership) amounts for a number of reasons to major changes in a legal system and hence makes our model applicable. The analysis will focus on Irish and UK membership, the recent membership of Estonia and acceding Bulgaria's preparation for future membership. This has been the choice, because not only was an EU membership an extra-ordinary legal phenomenon in the 1970's (when Ireland and the UK joined the EU) but it is even more so nowadays with the proliferation of EU law and its ever-expanding remit. With regard as to why these four legal systems have been chosen for our example, this has been the choice as a matter of access to resources, as a matter of availability of legal and academic material (Ireland and the UK) and as a matter of availability of recent preparatory legal material and analyses (Estonia and Bulgaria), in addition to the fact that there have been resources generally available in relation to the accession of all these countries.

Initially it should be established whether a legal *anacatataxis* would occur in a potential Member State or has already occurred in existing Member States. Clearly, there are many reasons (constitutional and non-constitutional) which *prima facie* show that significant modifications to legal systems in Europe have occurred due to EU membership. Some of the most significant reasons as to why EU membership constitutes an *anacatataxis* seem to be the following:

- In many EU Member States EU membership through what is nowadays called the Consolidated Treaty Establishing the European Community has *directly* affected the pre-existent domestic constitutional structures[53].
- Partial conferment[54] of sovereignty to extra-national bodies of law[55] e.g. the European Court of Justice.
- The fact that the *acquis communautaire* alone comprises 80,000 pages of legal text[56] and some thirty legal chapters[57] which have to be implemented *prior* to membership.
- Smaller and more specific legal *anacatataxes*[58] within the general legal *anacatataxis* which may occur *post* membership.
- Centralised top-down EU law reigns supreme[59] in the areas of its competence, unless subsidiarity[60] would provide better means for the attainment of EU goals. Thus, in the areas of competence of EU law, the Member States should not normally act unilaterally e.g. legislate unilaterally.

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[53] K. Lenaerts and P. Van Nuffel (ed. R. Bray), *Constitutional Law of the European Union*, London: Thomson/Sweet & Maxwell, 2nd Edition, 2005, pp. 678-700 and G. Anthony, 'Clustered Convergence? European Fundamental Rights Standards in Irish and UK Public Law' (2004) *Public Law* 282, p. 288.

[54] N. MacCormick, *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth*, Oxford: Oxford University Press, 1999, p. 117, G. Anthony, *op. cit.*, fn. 53, p. 288.

[55] N. MacCormick, *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth*, Oxford: Oxford University Press, 1999. MacCormick argues that, even though he does not immediately recognise the revolutionary character of the change which has occurred in 1972, there effectively is power devolved to the European Community and its organs (p. 94).

[56] As reported in the BBC article 'EU deadlocked over Turkish entry', 3 October 2005. Accessible at http://news.bbc.co.uk/1/hi/world/europe/4301532.stm

[57] The European Commission, *Enlargement of the European Union Guide to the Negotiations Chapter by Chapter*, December 2004. Accessible online at http://www.europa.eu.int/comm/enlargement/negotiations/chapters/negotiationsguide.pdf The chapters are particularly wide-ranging and include: Free Movement of Goods, Freedom of Movement for Persons, Freedom to Provide Services, Free Movement of Capital, Company Law, Competition Policy, Agriculture, Fisheries, Transport Policy, Taxation, Economic and Monetary Union, Statistics, Employment and social policy, Energy, Industrial Policy, Small and Medium-sized Enterprises, Science and Research, Education and Training, Telecom and IT, Culture and Audiovisual Policy, Regional policy and co-ordination of structural instruments, Environment, Consumer protection, Justice and Home Affairs, Customs Union, External Relations, Common Foreign and Security Policy, Financial Control, Finance and Budgetary Provisions, Institutions and Other Matters.

[58] See e.g. the analysis that follows on the introduction of good faith in consumer contracts in the UK and Ireland from the introduction of Council Directive 93/13/EEC.

[59] B. de Witte, 'Direct Effect, Supremacy, and the Nature of the Legal Order' in P. Craig and G. De Búrca (eds.), *The Evolution of EU Law*, Oxford: Oxford University Press, 1999, p. 177ff.

[60] J. Temple Lang, 'The Core of the Constitutional Law of the Community – Article 5 EC' in L. Gormley (ed.), *Current and Future Perspectives on EC Competition Law*, London/The Hague/Boston: Kluwer Law International, 1997, p. 47.

- The EU is a dynamic and unique[61] legal order with no direct equivalent in other parts of the world.
- Because legal education in Europe has changed; thus, 'A student from the University of Leuven, who follows one year of his law studies in Dublin in the frame of an Erasmus exchange, may obtain his Belgian law degree without having learned anything about, e.g., Belgian labour law and/or company law, but with a sound knowledge of Irish labour law and/or Irish company law'[62].

With regard to the constitutional changes which have taken place in Europe, one could initially argue that throughout many systems this has occurred time and again. For instance, in Ireland it was thought that, even though s. 2 of the European Communities Act 1972 (as amended) could suffice for the recognition of EC supremacy, it would be better to bring about a constitutional amendment for this to be recognised[63]. Consequently and after three constitutional amendments on the matter, the Constitution provides for enabling provisions[64] which recognise this supremacy, even though it has been argued that these provisions do not necessarily bind Ireland to remain a member of the EU in the future[65]. With regard to the constitutional change which took place in the UK in 1972, the analysis is analogous to a great degree; only that, as the UK does not on its face have a written consolidated constitutional text, the focus is invariably on the UK European Communities Act 1972 (as amended). This Act, however, is of constitutional significance for the UK and in that sense it has created a restructuring by definition for the purposes of our model. It is s. 2 (1) of the Act which effectively recognises the supremacy of EU law and at the same time creates a self-imposed obligation by way of the parliamentary sovereignty doctrine to implement EU law in the UK. Yet at the same time, the critical approach on the matter would make us think that both in Ireland and the UK there has been partial loss

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[61] T.C. Hartley, *European Union Law in a Global Context: Text, Cases and Materials*, Cambridge: Cambridge University Press, 2004, p. 44.

[62] M. van Hoecke, 'The Harmonisation of Private Law in Europe: Some Misunderstandings' in M. van Hoecke and F. Ost (eds.), *The Harmonisation of European Private Law*, Oxford/Portland, Oregon: Hart Publishing, 2000, p. 8.

[63] D.R. Phelan, *Revolt or Revolution: The Constitutional Boundaries of the European Community*, Dublin: Round Hall Sweet & Maxwell, 1997, p. 333.

[64] Articles 29.4.3 and 29.4.4. of the Constitution.

[65] D.R. Phelan, *op. cit.*, fn. 63, p. 335. Cf. the similar position in the UK. See N. MacCormick, *op. cit.*, fn. 54, p. 88: 'The [UK] constitution remains a customary constitution, and one can say with reasonable confidence that this power of repeal, that is of unilateral and valid secession from the EC, subsists in the constitution of the United Kingdom and is exercisable by an Act of Parliament expressly enacted to that end'.

of national sovereignty, since supremacy of EU law means that 'any conflicting national norm should immediately be *set aside*'[66].

In relation as to why one can justify a restructuring in EU Member States one could also argue that except for constitutional law interference of EU law, EU law greatly affects many areas of law in a very significant, if not definitive fashion. Thus, for instance, in order for Bulgaria to be ready on January 1 2007 for full membership of the Union, Bulgaria is under an obligation pursuant to Article 69 of the European Agreement with Bulgaria[67] to gradually conform its legislation with that of the EU. The approximation to the *acquis communautaire* here and therefore restructuring (where e.g. Bulgarian law would be incompatible to EU legal standards) takes place through either the legislative method or to a lesser degree the so-called 'sympathetic' method, by which domestic law (prior to membership) is aligned by a more pro-European interpretation.[68] All in all, the approximation of a legal system to the *acquis* presents, due to its diversity (30 legal chapters in total and some 80,000 pages of legal text), is an almost titanic legal task; not only for Bulgaria[69] but for any country. This quantity of law alone presents a restructuring into a given legal system without regard e.g. to other even more particular *anacatataxes* such as the incorporation of the Council Directive 93/13/EEC into Ireland and the U.K.[70] *inter alia*.

Finally, another matter, often overlooked, pinpointing to the restructuring which has taken place in the various European legal systems is that the EU has affected the law curricula of the various schools of law in Europe; this too can justify the restructuring of legal mentality which has taken place throughout the Member States in the EU.

Assuming that the current members and the future members have been in principle ready and able to sustain such an *anacatataxis* (as this occurred with twenty-five Member States to date), the next question under our model would ask whether a potential member of the EU has the competence to bring about such a restructuring in its laws by itself or whether it would be more appropriate for such a state to refer to

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[66] B. de Witte, *op. cit.*, fn. 59, pp. 189-190.
[67] *Official Journal L 358 , 31/12/1994*, pp. 0003 – 0222.
[68] A. Łazowski, 'Approximation of Laws' in A. Ott and K. Inglis (eds.), *Handbook on European Enlargement: A Commentary on the Enlargement Process*, The Hague: T·M·C·Asser Press, 2002, pp. 635-637.
[69] For the most recent accession report on Bulgaria, see 2004 *Regular Report on Bulgaria's progress towards accession*, COM (2004) 657 final.
[70] See below at 4.3.4.

comparative law in doing so. By all means, it is submitted that, even though new Member States should in principle be able to implement or at the very least attempt to implement convergent law to the length of 80,000 pages, it would be more appropriate for them to implement this voluminous legislation with some sort of comparative law advice taken from outside the legal system, that is, from current Member States. This is provided in our model and it has time and again occurred in Europe. Hence Estonia, in order to create a modern civil code and comply with EU law has in recent times 'imported' renowned law academics from Germany and the Netherlands.[71] Furthermore, as our model provides, the EU itself institutionalises (in a sense) the indirect use of comparative law for the implementation of the *acquis*; consequently, under the various Accession Partnerships and in particular under Council Regulation 622/98 [72] (on assistance to applicant states) and Council Regulation 1266/99 [73] (the 'co-ordinating regulation'), the Council Regulation 555/2000 [74] (on the implementation of operations in the framework of the pre-accession strategy for the Republic of Cyprus and the Republic of Malta) etc. provision is made for foreign, that is, extra-national *technical assistance* through cooperation projects and operations. In more concrete terms, this occurs in the form of pre-accession assistance with the so-called **Twinning Projects**[75] i.e. direct foreign and expert help to candidate countries in their development of modern and efficient administrations, with the structures, human resources and management skills needed to implement the *acquis* to the same standards as Member States. Finally, the use of comparative law in the implementation of the *acquis* may also be found *post* membership; this already occurs in European legal adjudication. [76] Hence the restructuring model is fully satisfied.

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[71] M. Kaërdi, *op. cit.*, fn. 41, p. 259

[72] Council Regulation (EC) No 622/98 of 16 March 1998 on assistance to the applicant States in the framework of the pre-accession strategy, and in particular on the establishment of Accession Partnerships, *Official Journal* L 85, 20.3.1998, p. 1.

[73] Council Regulation (EC) No 1266/1999 of 21 June 1999 on coordinating aid to the applicant countries in the framework of the pre-accession strategy and amending Regulation (EEC) No 3906/89, *Official Journal* L 161, 26.6.1999, p. 8.

[74] Council Regulation (EC) No 555/2000 of 13 March 2000 on the implementation of operations in the framework of the pre-accession strategy for the Republic of Cyprus and the Republic of Malta, *Official Journal* L 68, 16.3.2000, p. 3.

[75] Not to be confused with the Town Twinning initiative.

[76] See e.g. M. Kiikeri, *Comparative Legal Reasoning and European Law*, Dordrecht/Boston/London: Kluwer Academic Publishers, 2001.

4.3.2. Second exemplification: The direct incorporation of universal human rights treaties in a hypothetical Muslim *and* authoritative legal system

The second exemplification of the restructuring model will be assessed vis-à-vis the full incorporation of the international human rights treaties in a hypothetical Kingdom. The author's primary reason for using the example in question is that almost invariably in a given Muslim legal system there are great and wide-ranging changes to be made in respect of the application of international human rights law (at least from a western point of view), changes which may go beyond traditional attitudes, beliefs, expectations from the law and indeed established religious ideologies. The example seeks to signify that the direct introduction of international human rights law in a given Muslim and authoritative legal system would amount to a restructuring of such a system, hence dictating a number of special arrangements to it, as our model argues. For the purposes of our example the Kingdom has to be deemed to be a haven of human rights abuses, these abuses being 'interpreted' and therefore 'dictated' under the Koran or rather, under the old interpretation of the Koran. In this hypothetical legal system, the freedom of press is suppressed, women cannot drive or vote, decapitations of children for criminal offences take place in public etc. However, a Royal decree by the new King was to change all that; the Decree ordered that there be 'with immediate effect full, direct and unreserved incorporation of the international corpus of human rights law within the legal system' and that there accordingly be 'also with immediate effect a scholarly re-interpretation of the Shari'a without regard to the justification of past abuses under the old interpretation of Shari'a'. It is submitted that the above decree, if adhered to, would almost certainly constitute an *anacatataxis*[77] achieving simultaneously at the very least a *convergence of expectations*[78] between the Kingdom in question and the international human rights regime.

Thus, the analysis will commence with an example of the convergent law which is seen as the most penetrating of all: international human rights. It is clear

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[77] In a more general sense, one could well argue that the international human rights instruments such as the Universal Declaration of 1948 and the ensuing covenants could truly be seen as revolutionary legal instruments in any legal system of the world post-1945, as their protection had no place at all under international law. On this, see A.H. Robertson and J.G. Merrills, *Human Rights in the World*, Manchester/New York: Manchester University Press, 4th Edition, 1996, p. 1.

[78] S. Anderson-Gold, *Cosmopolitanism and Human Rights*, Cardiff: University of Wales Press, 2001, p. 88.

from statistical enquiries that international human rights law is universal and its application is, therefore, the most wide-ranging example of legal convergence which the theoretician addresses. Taking into account that the world of ours has approximately 200 national legal systems, the Office of the UN High Commissioner of Human Rights[79] reports that by the 16th of June 2006, some 194 nations had ratified the Convention on the Rights of the Child 1989, 184 nations the Convention on the Elimination of all Forms of Discrimination Against Women 1979, 176 nations the Convention on the Elimination of All Forms of Racial Discrimination 1965, 162 nations the Covenant on Civil and Political Rights 1966, 158 nations the Covenant on Economic, Social and Cultural Rights 1966 and 151 nations the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984. These technically binding human rights conventions, all emanating[80] from the jewel in the crown of international human rights law, the Universal Declaration 1948, will be referred to as the 'Code of Human Rights' herein.

Assuming that our hypothetical Kingdom is a signatory to all 'six chapters' of the Code and on the basis, of course, that the Royal Decree of the King is adhered to, the application of the restructuring model will commence with the basic consideration of the model: a legal *anacatataxis*. There are many reasons for such a legal restructuring:

- The legal system in question could move from the sphere of cultural relativism vis-à-vis human rights to the sphere of cultural universalism.
- The interpretation of the Shari'a would have to be calibrated anew.
- In the new environment the system would almost certainly avail itself of the opportunity to diminish the number of human rights abuses; thus, an *anacatataxis* could also be justified not on the mere theoretical basis dealing

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[79] *Office of the United Nations High Commissioner of Human Rights-Status of Ratifications of the Principal International Human Rights Treaties*, 16 June 2006. Accessible on the internet at http://www.ohchr.org/english/bodies/docs/RatificationStatus.pdf

[80] Cf. M.O. Maduagwu, *Ethical Relativism Versus Human Rights*, Vienna/London: International Progress Organization/Third World Centre for Research and Publishing, 1987, p. 176: 'These International Covenants, [...], are meant to translate the so-called **moral norms** or ideals of the Universal declaration into realities or enforceable **legal norms**'. See also A. Dundes Renteln, *International Human Rights: Universalism Versus Relativism*, Newbury Park/California, London, New Delhi: Sage Publications, 1990, p. 9. See also A.H. Robertson and J.G. Merrills, *Human Rights in the World*, Manchester/New York: Manchester University Press, 4th Edition, 1996, p. 28.

with the realignment of the Shari'a but also because the legal system would actually have to diminish human rights abuses.

- *Both* the word of the Koran and international human rights would be respected.
- The system would slowly move from the sphere of collective rights to the sphere of individual rights or, at the very least, to a hybrid position of collective and individual rights for its citizens.
- Even though the political system would not change, the law would become much less authoritative.
- Certain groups of people would receive enhanced protection through the new human rights regime.

A legal restructuring in the Kingdom would *prima facie* be justifiable under our first consideration above, i.e. the effective application of universal international human rights law in the law of the Kingdom; thus the Kingdom would have to provide the same rights for all its people. This is also provided under Article 2 of the Universal Declaration[81] which stipulates that *'Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind'*. A right is [and should be] something to which everyone is entitled.[82] As this would be true under the new Royal Decree, then one might expect that our hypothetical legal system moves to the sphere of cultural universalism, thereby departing from a legal state of affairs concerned with cultural relativism[83]; this despite the fact that the Universal Declaration is of Western provenance in the main[84]. This is true, as, even though

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[81] Adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948.

[82] S. Foster, *Citizenship in Focus: Human Rights*, London: Harper Collins Publishers, 2nd Edition, 2003, p. 1. On the universal aspirations of Article 2 of the Universal Declaration see M.O. Maduagwu, *op. cit.*, fn. 80, p. 123. See also, S. Anderson-Gold, *op. cit.*, fn. 78, p. 41: 'Universal human rights, the type of rights that every individual has everywhere regardless of race, nationality or gender, would, because of their universality, have to be determined at an international level. Human rights then are specifications of international law'.

[83] An acceptable definition of cultural relativism suggests that '[T]he rightness or wrongness of actions varies from society to society and as such there are no universal ethical principles binding on all men. Ethical relativism arises from the fact that a glance across the world would reveal not only differences in ethical beliefs of a particular society in different historical epochs. Already in antiquity Protagoras, the Sophist could point out, for example, that the Athenians consider the killing of unwanted infants wrong, while the Spartans, on the other hand, consider it as morally right. Thus the thesis of ethical relativism is that moral judgments are not universally applicable but relative to a particular society'. See M.O. Maduagwu, *op. cit.*, fn. 80, p. 10.

[84] A. Woodiwiss, *Making Human Rights Work Globally*, London/ Portland, Oregon/ Sydney: Glasshouse Press, 2003, p. viii. Cf. M.O. Maduagwu, *op. cit.*, fn. 80, p. 130.

modern international human rights law is of Western provenance[85], human rights have come to be seen nowadays as the global moral minimum[86] or rather, rights creating a cosmopolitan medium of law[87]. Additionally, it would seem that an unreserved incorporation of human rights, as the Royal Decree provides, would at the very least question, if not negate, the relativist approach to human rights in our hypothetical Kingdom prior to the Royal Decree, despite the fact that human rights tend to be restrictable and open to interpretation in relativist legal systems.

The second justification for the significant restructuring is that the Shari'a would have to be calibrated anew. This would be the case, because first of all, the Royal Decree has so dictated and second, because the old interpretation of Shari'a seemed to 'cultivate' an environment of human rights abuses; at least from a western point of view. Such an environment of abuses 'in the name of Islam', of course, occurs in some Muslim legal systems or legal systems which have a significant Muslim law element to this day[88]; also, it is highly unfortunate that many of the fundamental legal systems based on the Shari'a *use* the Shari'a in such a manner e.g. to repress women's freedoms. Hence, '[t]he *shari'a* is the shield behind which the political ruler and the fundamentalist leader corroborate to check women's impulse to freedom and equality [...]'.[89] In fact, the Shari'a is there to establish a clear set of rights for women, though in a different fashion to human rights in the western sense.[90] The realignment of the Shari'a by a modern formulation in our hypothetical legal system would, therefore, have to be as Islamic as ever.[91]

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[85] Indeed, the Western law element is so paramount nowadays in international human rights that certain authors argue that this is a sort of cultural imperialism emanating from the West. See e.g. D. Kandiyoti, 'Reflections on the Politics of Gender in Muslim Societies: From Nairobi to Beijing' in M. Afkhami (ed.), *Faith & Freedom: Women's Human Rights in the Muslim World*, London: I.B. Tauris Publishers, 1995, p. 20.

[86] C. Jones, *Global Justice: Defending Cosmopolitanism*, Oxford: Oxford University Press, 2001, pp. 50-84.

[87] N. Whitty, T. Murphy and S. Livingstone, *Civil Liberties Law: The Human Rights Act Era*, London: Butterworths, 2001, p. 7.

[88] See e.g. the *Human Rights World Watch Report 2003 (Iran)*, pp. 441-450, *Human Rights World Watch Report 2003 (Iraq and Iraqi Kurdistan)*, pp. 450-459, *Human Rights World Watch Report 2003 (Saudi Arabia)*, pp. 472-481, *Human Rights World Watch Report 2003 (Syria)*, pp. 482-488. Also, J.S. Ismael and T.Y. Ismael, *Civil Society and the Oppressive State in the Arab World*, London: Frank Cass, 2001, pp. 20-48.

[89] M. Afkhami, 'Introduction' in M. Afkhami (ed.), *op. cit.*, fn. 85, p. 9.

[90] A. An-na'im, 'The Dichotome between Religious and Secular Discourse in Islamic Societies' in M. Afkhami (ed.), *op. cit.*, fn. 85, p. 51.

[91] *Ibid.*, p. 58-59. The author argues here that a reformulation of law, including the rights of women, in an otherwise Muslim legal system, will be as Islamic as Shari'a has ever been.

However, it is believed that an *anacatataxis* would occur in this legal system not only because of this theoretical realignment but also because the system would, under the new Royal Decree, have to give further effect or rather full effect in the domestic protection of human rights under international law. Thus, for instance, the otherwise unjustifiable ban on women being able to drive would have to be lifted, as, for instance, there is no provision for such ban under the letter of the Koran. Arguably, even though the legal system would not have to face a political *anacatataxis*[92] through international law, it would most likely have to allow women to take part in politics, vote and be voted for, if they so wish.[93] Together with this new environment of human rights law which would have to be created in our hypothetical legal system, one should expect that this is achieved through the respect of both the (new) Shari'a in the hypothetical legal system as well as the international human rights treaties. Is this possible? The immediate answer which comes to one's mind is that the Koran is there e.g. to uphold the rights of both men and women. Thus, the unfortunate state of affairs in relation to the rights of many women in the Muslim world is the result not of the Koran but the result of 'the gender-biased interpretation of the Qur'anic text by [some] men of religion'[94]. Nor should one argue that Muslim family structures are much different than those in other parts of the world so as to make the position of woman inferior to that of man in the face of international human rights, as it has been argued that the essential components of patriarchal structures in a Muslim society are the same as elsewhere.[95] Moreover, it has also been argued that '[I]t is the ambiguity in the language of rights in Islam that keeps the door open for the future and allows the *shari'a* to become the vehicle of actual change'[96]. It is submitted that it is under this last position that the new interpretation of the Shari'a in our hypothetical legal system could well protect human rights in practice, if the Royal Decree were adhered to.

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[92] It is argued that the importation of a democratic political system is not legally necessary for the adoption of international human rights law in the Muslim world. See e.g. F. Mernissi, 'Arab Women's Rights and the Muslim State in the Twenty-first Century: Reflections on Islam as Religion and State' in M. Afkhami (ed.), *op. cit.*, fn. 85, p. 33. The author argues there that when asking whether Islam and democracy are compatible this amounts to a racist question, as one automatically assigns rationality to democracy and irrationality to Islam

[93] Cf. the recent historic alteration (May 2005) in this respect in the laws of Kuwait, whereby women are now allowed to vote and be voted for in local and parliamentary elections.

[94] B. Shaaban, 'The Muted Voices of Women Interpreters' in M. Afkhami (ed.), *op. cit.*, fn. 85, p. 64.

[95] F. Shaheed, 'Networking for Change: The Role of Women's Groups in Initiating Dialogue on Women's Issues' in M. Afkhami (ed.), *op. cit.*, fn. 85, p. 78.

[96] E. Abdella Doumato, 'The Ambiguity of *Shari'a* and the Politics of 'Rights' in Saudi Arabia' in M. Afkhami (ed.), *op. cit.*, fn. 85, p. 155.

Also, one would have to expect that the theoretical realignment of the Shari'a (as opposed to a realignment of the Koran) to international human rights law would probably necessitate a move of the new human rights law in the country of our example from collectivism to individualism or rather, a move to a mixed state affairs, whereby human rights would be protected both under a collectivist and individualist regime of law. This is argued, as it is beyond doubt that in fundamentally Muslim legal systems human rights (if any) are protected in a much different fashion than e.g. in a 'Western liberal' republic. So, for instance, the starting point of human rights protection in Islam is theocentric, when the same point in western and international human rights law is anthropocentric.[97] Second, our hypothetical country would have to move from a legal system of prioritisation of duties to a legal system of rights and duties, as occurs in the largely individualist western world.[98] Thus, pure Islam (and therefore the old regime of law in our hypothetical country) would think of the individual in the context of his/her total community, while the re-alignment of the Shari'a by way of the Royal Decree would tend to emphasize the rights of the individual, as occurs in the international arena and the west.[99]

Additionally, other reasons which would justify an *anacatataxis* in the legal system in question under the Royal Decree would be the fact that the legal system would become more democratised, even though the political system *per se* would not have to change.[100] As already suggested, certain groups of people would enjoy more rights under the quasi-revolutionary reforms dictated in and expected by the Royal Decree. Let us say, therefore, that the implementing country of our example seeks to successfully implement the Convention on the Elimination of all Forms of Discrimination Against Women 1979 *inter alia*. In doing so, this national legal system must draw a balance between the Koran on the one hand and the convergent instrument of law on the other. Thus, it has to promote a policy against discrimination of women, as in Article 1 of the Convention on the Elimination of all Forms of Discrimination Against Women 1979 but, on the other, it has to respect its traditions which emanate from respect for the Koran. So, for instance, verse 2:228 of the Koran provides as follows:

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[97] C. Chapman, *Islam and the West*, Carlisle, Cumbria: Peternoster Press, 1998, pp. 118-119.
[98] *Ibid.*, p. 119.
[99] *Ibid.*, pp. 119-121.
[100] *Supra*, fn. 92.

'*[women] have rights similar to those [of men] over them in kindness, and men are a degree above them*'

This does not necessarily mean that the bridging effect of the Convention on the Elimination of all Forms of Discrimination Against Women is distorted; it might have been distorted under the old interpretation of the Shari'a but under the new and expected interpretation thereof under the Royal Decree, one would expect that this principle of religious law be modified and further elaborated, notwithstanding the fact that the interpretation of the verse 'men are a degree above women' does not mean that men and women are not equal under the Koran, as the first and main part of verse 2:228 clearly provides. Let us make our example more onerous now; let us further assume that our hypothetical country *prior* to the Royal Decree has made the following declaration which states:

'*In case of contradiction between any term of the Convention and the norms of Islamic law, the Kingdom is not under obligation to observe the contradictory terms of the Convention.*'[101]

Certainly, in such a case an Islamic national legal system is in an onerous pursuit to bridge itself, not only with other legal cultures especially from the West which share the authority of the Convention on the Elimination of all Forms of Discrimination Against Women, but also to bridge an imported principle of law with traditional norms such as that of the Koran. There are two ways for this Declaration on the part of our hypothetical country to be bypassed. First, we can either argue that the Royal Decree effectively obliterates its effect under the *lex posterior derogat legi priori*[102], as the new Royal Decree provides for 'unreserved incorporation' of international human rights law or alternatively, we can argue that such a declaration should not be construed as a major deviation from the spirit of the Convention on the Elimination of all Forms of Discrimination Against Women, for otherwise the Islamic

[101] The above example is the case of Saudi Arabia's reservation to the Convention in question. Saudi Arabia, 7 September 2000, Reservation to the Convention on the Elimination of All Forms of Discrimination Against Women.

[102] Under this established principle of law, an older law which conflicts a more recent law is normally overridden by the effect of the more recent law by way of presumption. Obviously, in our case, the more recent Royal Decree of our hypothetical country would override any reservation made on the part of this country, if any.

legal system of our example would not have attempted to ratify the Convention in the first place. It would be a truism that it is this hypothetical country which would decide on the effect of both its Declaration (if any) and the Royal Decree, as international human rights are state-dependent[103] but, as the Royal Decree stipulates, there should 'full, direct and unreserved' implementation of international human rights law. Furthermore, one should not jump to the conclusion that a general reservation such as the above equates to superficial implementation of the Convention.[104]

The next consideration under the restructuring model would be whether the hypothetical legal system of our example has the competence to bring about such a restructuring in its laws by itself (susceptibility of *anacatataxis*) or whether it would be more appropriate for such a state to refer to comparative law in so doing and/or have other special arrangements in place during the re-alignment of its laws to international human rights. The Royal Decree is silent on the matter, even though it purports that changes take place with 'immediate effect'. It also suggests that there be 'scholarly reinterpretation of the Shari'a' so that international human rights treaties are adhered to. Yet, one could argue that it would be appropriate for the ecclesiastical and legal scholars of the legal system in question to ask the advice of experts of other legal systems, as unfortunately the country has not in the past respected human rights whatsoever. Obviously, it is not necessary that comparative experts are brought into the system from the Western world, as something such as that might cause reactions in the system. This is particularly true, as one cannot simply import experts from the West into a traditional legal system, because the West has a *recent* good record of human rights protection. Nor is a holus bolus westernisation of the law in our hypothetical country suggested.[105] Islam can, if properly understood and applied,

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[103] R. Wieruszewski, 'National Implementation of Human Rights' in A. Rosas, J. Helgesen and D. Gomien (eds.), *Human Rights in a Changing East-West Perspective*, London/New York: Pinter Publishers, 1990, p. 264; J. Connors, 'An Analysis and Evaluation of the System of State Reporting' in A.F. Bayefsky, *The UN Human Rights Treaty System in the 21st Century*, The Hague/London/Boston: Kluwer Law International, 2000, p. 15.

[104] See A.M. Bolin Pennegård, 'Overview over Human Rights – the Regime of the UN', in G. Alfredsson, J. Grimheden, B.G. Ramcharan and A. de Zayas (eds.), *International Human Rights Monitoring* Mechanisms, 2001, the Hague/London: Martinus Nijhoff Publishers, p. 20. A.M. Bolin Pennegård argues that reservations are a normal phenomenon of international law and that in relation to human rights treaties there are only very few rights which 'are absolute by a strict yardstick'.

[105] A.E. Mayer, *Islam and Human Rights: Tradition and Politics*, Boulder, Colorado/Oxford: Westview Press, 3rd Edition, 1999, p. 36: ' "We cannot import the methods used by people in other countries and apply them to our people. We have our Islamic beliefs that constitute a complete and fully integrated system" [...]' (quoting Middle East Watch, *Empty Reforms*, p. 2).

provide its own code of protection of human rights. Thus, what is suggested here is that this legal system could in principle bring expertise from another country with a significant Muslim law element into its system.

Does this legal system exist? Tunisia might act as a good *starting point*[106] for the importation of human rights experts, if the country so considered. 'The status of women in Tunisia is relatively good and Tunisian personal status law is the most advanced in all the Arab countries. Polygamy was ended in 1956, and divorce is available to men and women on an equal footing'.[107] Under our model however, it is not enough that our hypothetical country brings in the system scholars from other legal systems to help in implementation matters of international human rights law. We would have to argue that the country *should* keep its enforcement mechanisms up-to-date with international developments. This should be the case, largely for the same reasons as for the importation of some foreign expertise in the country: the abuses of human rights in a massive scale in the past. Thus, the ecclesiastical and legal scholars of our hypothetical system should in this case, as they have to uphold the intent of the Royal Decree now *and* in the future, take into account of developments in other countries (not necessarily with a strong Muslim law element in this case).

4.3.3. Third exemplification: A legal *anacatataxis* in Ireland and the UK with the the incorporation of the general corpus of the European Convention on Human Rights 1950

A third example for the application of the restructuring model may have occurred in the case of implementation of the general corpus (and therefore jurisprudence) of the European Convention on Human Rights 1950[108] in the UK and Ireland, in 2000 and 2003 respectively. *Unlike the major changes both of substance and mentality that an international human rights treaty would bring to a Muslim legal system, the domestication of the European Convention on Human Rights is concerned in the main with a restructuring of legal mentality and technique in certain areas of*

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[106] But the Tunisian legal system is not perfect either. See e.g. *Human Rights World Watch Report 2003 (Tunisia)*, pp. 488-496.

[107] A.E. Mayer, 'Rhetorical Strategies and Official Policies on Women's Rights: The Merits and Drawbacks of the New World Hypocrisy' in M. Afkhami (ed.), *op. cit.*, fn. 85, p. 114.

[108] The official name is the Convention for the Protection of Human Rights and Fundamental Freedoms 1950.

law (constitutional law in the UK and human rights law in Ireland respectively), even though, it is also argued here that some major changes of substance may also have occurred. To the effect of implementation of the European Convention on Human Rights, the UK drafted the Human Rights Act 1998 and Ireland drafted the European Convention on Human Rights Act 2003. Also, it has to be emphasised at this point that it is the general framework that is dealt with in this chapter rather than particular provisos of the European Convention on Human Rights which may lead to socio-legal juridical deviations in their implementation; such deviations are dealt with in the chapter of the socio-legal factor of implementation.[109]

The choice for the examples of Ireland and the UK is based on the fact that there have been great developments to these legal systems, even though, as stated above, here we do not deal with examples of legal systems where human rights are not a usual state of affairs or where their human rights protection is so different as a matter of legal substance from the rest of Europe. Here we deal, to put it otherwise, with legal systems which, even though they present us with a high commitment to uphold human rights law, the recent developments vis-à-vis the incorporation of the European Convention on Human Rights in their systems, cannot simply be escaped by the convergence theorist, since for him to do otherwise would cause him to miss some of the most significant restructurings of legal technique and mentality in contemporary legal Europe.

Generally, what the European Convention on Human Rights 1950 did for Europe was to bring it from the European lows in relation to civil liberties of the 1940's to being the vanguard of protection of human rights in the world of our times.[110] The vast majority of European countries ratified and implemented the European Convention on Human Rights quite early, thereby allowing their nationals to claim under the European Convention on Human Rights 1950 in the domestic

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[109] Chapter 6 of this thesis.

[110] See e.g. M.O. Maduagwu, *op. cit.*, fn. 80, pp. 13-14, 136; K. Coates, *Human Rights in the World: A Report to the European Parliament*, Nottingham: Spokesman, 1992, pp. 15, 43; A.H. Robertson and J.G. Merrills, *Human Rights in the World*, Manchester/New York: Manchester University Press, 4th Edition, 1996, p. 156; M. O'Boyle, 'Reflections on the Effectiveness of the European System for the Protection of Human Rights' in A.F. Bayefsky, *op. cit.*, fn. 103, p. 169ff; C. Gearty, 'Reflections on Human Rights and Civil Liberties in Light of the United Kingdom's Human Rights Act 1998', (2001-2002) 35 *University of Richmond Law Review* 1, p. 6. Cf. R. Wieruszewski, 'National Implementation of Human Rights' in A. Rosas, J. Helgesen and D. Gomien (eds.), *op. cit.*, fn. 103, p. 264.

courts. The UK[111] and Ireland did not follow suit, because, even though they ratified the European Convention on Human Rights early, on 8 March 1951 and 3 September 1953 respectively,[112] they did not allow to their citizens to claim under the European Convention on Human Rights in the domestic courts prior to the enactment of the European Convention on Human Rights 1950 with the Human Rights Act 1998 and European Convention on Human Rights Act 2003. Petition to the European Court of Human Rights in Strasbourg was allowed[113] but only upon exhaustion of all domestic remedies. In other words the European Convention on Human Rights 1950 was of persuasive authority within the sphere of their domestic courts.[114] This dramatically changed in 2000 and 2003, when the British and the Irish human rights Acts came into being.[115] The Irish and the British legal system would now have to take into account not only the European Convention on Human Rights 1950 but 'also the jurisprudence of the Commission and Court of Human Rights'.[116] Secondly, for many years the non-enactment of the Convention into UK and Irish domestic law meant that UK and Irish laws were incompatible[117] in many cases with the Convention, although

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[111] Even though it was mainly British lawyers who drafted the European Convention. F. Brookman and H. Pierpoint, 'The Implications of the Human Rights Act for Young Suspects and Remand Prisoners in England and Wales', (2002) 1 *Journal of the Institute of Justice and International Studies* 45.

[112] See http://conventions.coe.int/Treaty/EN/CadreListeTraites.htm

[113] Yet Ireland was the first country 'to recognise the compulsory jurisdiction of the European Court of Human Rights'. See S. Egan, 'The European Convention on Human Rights Act 2003: A Missed Opportunity for Domestic Human Rights Litigation' (2003) 25 *Dublin University Law Journal* 230, p. 231. The UK government permitted applications from the UK to the European Court on Human Rights in 1966. Also, F. Brookman and H. Pierpoint, *op. cit.*, fn. 111, p. 45.

[114] E.g. the use of Convention case law in an Irish court, when raising an issue of constitutional interpretation, was acceptable, even before the enactment of the European Convention on Human Rights Act 2003. W. Binchy, 'Incorporation of European Convention on Human Rights into Irish domestic law' in J. Sarkin and W. Binchy (eds.), *The Administration of Justice: Current Themes in Comparative Perspective*, Dublin: Four Courts Press, 2004, p. 187 quoting *Murphy v IRTC* [1997] 2 ILRM 467, at 476, *de Rossa v Independent Newspapers Plc* [1999] 4 IR 432, at 450 and *Kelly v O'Neill* [1999] 4 IR 432; E. Egan, *supra*, fn. 113, p. 233 quoting G. Hogan, 'The Belfast Agreement and the Future Incorporation of the European Convention on Human Rights in the Republic of Ireland' (1999) (Jan/Feb) *Bar Review* 205.

[115] The main reason for this delay in the UK has been the negative freedom of government interference rather than a positive culture of human rights, as is the case in written constitutions, and the presumption that common law alone could suffice for the protection of human rights. See F. Brookman and H. Pierpoint, *op. cit.*, fn. 111, p. 45. In Ireland the reasons were slightly different, as Ireland has a written constitution. Thus, it was felt that the Constitution provides sufficient protection of human rights, whilst politicians were hesitant about incorporating the Convention with changing attitudes in continental Europe relating to life, death and sexual conduct. See W. Binchy, 'Incorporation of European Convention on Human Rights into Irish domestic law' in J. Sarkin and W. Binchy (eds.), *op. cit.*, fn. 114, pp. 185-186.

[116] H. Barnett, *Constitutional & Administrative Law*, London/Sydney: Cavendish Publishing, 3rd Edition, 2000, pp. 879-880.

[117] See e.g. the divergent definition of family under Article 8 (Respect for private and family life) of the European Convention on Human Rights and Article 41 (The Family) of the Irish Constitution. E. Egan, *op. cit.*, fn. 113, pp. 234-236.

the presumption was that the UK and Ireland should legislate by paying some attention to the European Convention on Human Rights 1950;[118] third, it was only upon exhaustion of all domestic remedies in the UK and Ireland that a British or Irish citizen or resident would have the right to petition in the court in Strasbourg. For the rest of Europe the Convention simply applied by taking precedence over domestic law, except perhaps where this would conflict somehow with a national constitution, if such conflict would arise.[119] Additionally, prior to the enactment of the Human Rights Act 1998 on the 2nd of October 2000, one could argue that the recognition of the European Convention on Human Rights 1950 was more political rather than legal, for every time that the UK was found in breach of the European Convention on Human Rights 1950 by the human rights Court in Strasbourg, it was obliged politically to amend the situation, if not always its domestic law. In Ireland too, it was felt that, if the legal system was found in breach of any of the provisions of the European Convention, the country should proceed by amending the domestic legislation or introducing new legislation. For instance, in Ireland the introduction of civil legal aid was necessitated by the European Court on Human Rights[120] decision in *Airey v Ireland* (1979)[121] or the Fourteenth Amendment of the Constitution Act 1992 was the result *inter alia* of the *Open Door and Dublin Well Woman v Ireland* (1992)[122]. The approach in the UK prior to the enactment of the Human Rights Act 1998 and therefore the enforcement of the European Convention on Human Rights 1950 in its domestic law was analogous.

Furthermore, in the case of the inability of UK citizens to claim under the European Convention on Human Rights 1950 in the British courts, one could argue that it may not have been a particular source of pride for UK lawyers that the implementation of the Convention came so late, for it was mainly British lawyers who drafted the European Convention on Human Rights 1950[123] and the UK was the first country to sign it, even though it was almost the last to give effect to it in its domestic

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[118] J. Coppel, *The Human Rights Act 1998: Enforcing the European Convention in the Domestic Courts*, Chichester: John Wiley & Sons, 1999, p. xix. This is a weak presumption; however, it must have become stronger in the subject area of human rights law in the UK. See D. Feldman, 'The Human Rights Act 1998 and Constitutional Principles', (1999) 19 *Legal Studies* 165, p. 195.

[119] This is the position taken in France. In a conflict between the European Convention on Human Rights and the French Constitution the latter would prevail. E. Egan, *op. cit.*, fn. 113, p. 237.

[120] [Hereafter the European court or the court in Strasbourg]

[121] (1979) 2 E.H.R.R. 305.

[122] (1993) 15 E.H.R.R.; see J. Casey, *Constitutional Law in Ireland*, Dublin: Round Hall Sweet Maxwell, 3rd Edition, 2000, p. 204.

[123] J. Coppel, *op. cit.*, fn. 118, p. 3; F. Brookman and H. Pierpoint, *op. cit.*, fn. 111, p. 45.

legal order. The Human Rights bill was hotly debated (and one often wonders why) but it finally became law.[124]

At this stage the reader is reminded that the European Convention on Human Rights 1950 is a convergent instrument of legal principle applying nowadays throughout Europe and it, therefore, brings the European laws and mentalities ever closer through its highly uniform (but *not* without exceptions[125]) patterns.[126]

Turning to the application of the restructuring model, one has first to find whether there has been an *anacatataxis* in the legal systems of Ireland and the UK; to this, one also has to ask what kind of *anacatataxis* this has been and whether this was a mere transposition of law or whether this was concerned additionally with the application of European Convention on Human Rights by the judiciary and the public administration bodies in these two legal systems. A crucial distinction needs to be made here as regards the legal areas which the Human Rights Act 1998 and the European Convention on Human Rights Act 2003 have affected in the UK and Ireland respectively. This is important, because one has to assess the impact of the *anacatataxis* according to the law area this *anacatataxis* affects.[127] To assess this initially, one must admit that the Human Rights Act 1998 is indeed the latest instalment of statutory law in the UK constitution, as it clearly is;[128] thus, the Human Rights Act 1998 is a constitutional law Act in the UK, for it 'incorporates the rights enshrined in the European Convention on Human Rights and freedoms into domestic law [and] represents a fundamental change[129] in the protection of rights'.[130] In other words, even if such a constitutional change would not be 'fundamental' as Barnett

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[124] After 'a campaign in which judges joined forces with other political activists'; K.D. Ewing, 'The Human Rights Act and Parliamentary Democracy', (1999) 62 *Modern Law Review* 79.

[125] See chapter 6 (the socio-legal factor in the implementation of convergent law) herein.

[126] See generally A.H. Robertson, *Human Rights In Europe*, Manchester: Manchester University Press, 2nd Edition, 1977.

[127] *Supra* 4.1.2.

[128] Feldman argued that the Act is a 'fundamental constitutional change by introducing new values and an altered frame of reference to UK public law' and that 'As a matter of constitutional law the statute has already a...superior status to that of most other legislation (except perhaps the Acts of Union the European Communities Act 1972)'. D. Feldman, *op. cit.*, fn. 118, pp. 165, 178. Lord Kingsland suggested that the British have crossed (with this Act) their 'constitutional Rubicon'. HL Deb vol. 582 col. 1298 3 November 1997.

[129] Cf. K.D. Ewing, 'The Human Rights Act and Parliamentary Democracy', (1999) 62 *Modern Law Review* 79. He spoke of a 'fundamental restructuring of [the UK] 'political constitution''. Also, D. McGoldrick, 'The United Kingdom's Human Rights Act 1998 in Theory and Practice', (2001) 50 *International & Comparative Law Quarterly* 901, pp. 901, 952. He spoke of a revolutionary Act that 'may have not turned the UK legal and political culture upside-down but it may just have turned it the right way around'.

[130] H. Barnett, *op. cit.*, fn. 116, p. 27.

describes it, the fact of the matter would remain that the change would be in the constitutional law of the UK by reason of a convergent instrument of law (European Convention on Human Rights 1950) and the requirement of the restructuring model for any constitutional legal change would *prima facie* be satisfied.

The case of Ireland is rather more complicated. First of all, Irish constitutional law must be taken to be the Irish Constitution. This is the case, as the Irish Constitution 1937 (as amended) represents *inter alia* the highest law of the land on the one hand and it prescribes the constituent characteristics of the Irish legal system on the other.[131] If this is true, then the European Convention on Human Rights Act 2003 must not be categorised within the core category of the Irish Constitution, because taxonomically it did not affect the provisions of the Irish Constitution whatsoever.[132] It is an Act of Parliament but not an Act of constitutional significance *stricto sensu.* In fact, except for the preamble of the European Convention on Human Rights Act 2003 which states that the Act is subject to the Constitution and therefore subordinate to it, nowhere in the text of the European Convention on Human Rights Act 2003 is there a referral which makes any implications against the supremacy of the Irish Constitution. Thus, the European Convention on Human Rights Act 2003 does not fall within the core of Irish constitutional law, because it does not affect it.[133] The opposite is not true, for the European Convention on Human Rights Act 2003 is subjected to the Irish Constitution, as Walsh J. had predicted already in the 1980's.[134] However, one can counter argue that the European Convention on Human Rights Act 2003 represents at least a significant change in the area of Irish human rights law, as according to ss. 2 (1) and 3 (1) European Convention on Human Rights Act 2003, for instance, both the judiciary and all the rest of the state organs have to apply the law and perform the State's functions under the light of the State's obligations under the Convention's provisions.

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[131] See e.g. Articles 12-14 (President), 15-27 (National Parliament), 28 (Government), 28A (Local Government) etc.

[132] Not even a European Convention on Human Rights Act by 'direct incorporation' would affect the Constitution, as the Constitution would prevail, if conflict between the Act and the Constitution arose. W. Binchy, 'Incorporation of European Convention on Human Rights into Irish domestic law' in J. Sarkin and W. Binchy (eds.), *op. cit.*, fn. 114, p. 191.

[133] Cf. the position in UK law. Clearly, the Human Rights Act is now perceived as part and parcel of the UK constitution. D. Feldman and Lord Kingsland, *supra*, fn. 128.

[134] B. Walsh, 'Reflections on the Effects of Membership of the European Communities in Irish Law' in Capotorti *et al.* (eds.), *Du Droit International au Droit d l'integration: Liber Amicorum Pierre Pescatore*, Baden-baden, 1987, p. 805 as quoted in J. Casey, *Constitutional Law in Ireland*, Dublin: Round Hall Sweet & Maxwell, 3rd Edition, 2000, pp. 198-199.

As regards the taxonomical question in relation to the Human Rights Act 1998 and the European Convention on Human Rights Act 2003, one has to ask whether these are mere transposing Acts or Acts that require both literal and practical implementation, by the mere fact that they aim to enforce the text of the European Convention on Human Rights 1950. Thus, both the Human Rights Act 1998 and the European Convention on Human Rights Act 2003 are clearly Acts that ask for practical implementation of their remits, except for the obvious fact that they literally transpose the European Convention on Human Rights 1950 into the UK and Irish law. This becomes apparent if, for instance, one refers to the lengthy list of British Acts amended due to their incompatibility with the European Convention.[135] Thus, both the Human Rights Act 1998 and the European Convention on Human Rights Act 2003 aim at restructuring their legal orders, not only as a matter of literal transposition but also as a matter of practical implementation and domestic judicial application as far as the Convention rights are concerned.

At this point one must ask why a legal *anacatataxis* has occurred in Ireland and the UK with the deployment of the European Convention on Human Rights in their domestic laws. The following list contains the most significant reasons for the

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[135] Section 73 of the Mental Health Act 1983 (Amended by Mental Health Act (Remedial) Order 2001 (made 18/11/01, in force 26/11/01)); Penalty Scheme contained in Part II of the Immigration and Asylum Act 1999 (Amended by Nationality, Immigration and Asylum Act 2002, section 125, and Schedule 8 (Amendments to the Bill tabled on Report in the House of Commons, 12 June 2002. In force 14 November 2002/ 8 December 2002)); Section 62 of the Offences Against the Person Act 1861 Criminal Justice (Northern Ireland) order 2002 (2003 No 1247 (N.I. 13), Article 19 and Schedule 1. Made 8 May 2003. (No prosecutions have been brought under section 62 since the declaration of incompatibility); Section 262 of the Income and Corporation Taxes Act 1988 (The sections declared incompatible are no longer in force); s. 29 of the Crime (Sentences) Act 1997 (Amended by Clauses 254 – 262 and Schedule 17 to the Criminal Justice Bill (amendments introduced at Report stage in the House of Commons, 2 April 2003)); Section 74 of the Mental Health Act 1983 (The declaration declared the absence of any power in s. 74 or any other statutory provision for the release of a prisoner in the circumstances of the applicant to be incompatible with the Art. 5 (4). The declaration is not being appealed – it is intended to remedy matters in the Criminal Justice Bill and the amendments to do so are being prepared); Section 28 (6) (b) Human Fertilisation and Embryology Act 1990 (The declaration was given by consent (incompatibility with Art 8, and/or Art.8 with Art 14). Amended by Human Fertilisation and Embryology (Deceased Fathers) Act (which received royal assent 18 September 2003 (the Bill, a private member's Bill, received its 1st reading on 11 December 2002, and was assisted by the government)); Section 11 (c) Matrimonial Causes Act 1973 (Incompatible with Art 8, and Art 12. The Gender Recognition Bill was published on 10 July 2003. It will be introduced in Parliament in the next session); Section 26 (1) and 29 Mental Health Act 1983 (Incompatible with Article 8, in that the Claimant has no choice over the appointment or legal means of changing the appointment of her nearest relative); Sections 33 (2), 37 (4) (a) and section 39 of the Criminal Justice Act 1991 (Incompatible with the rights conferred under Article 7 of the European Convention on Human Rights 1950, insofar as it provides that he will be released at the two-thirds point of his sentence on licence with conditions and be liable to be recalled to prison).

requirement of an *anacatataxis* in Ireland and the UK, even though the list should not be seen as exhaustive:

- The Human Rights Act 1998 is a domestic instrument of constitutional law[136] at least in the UK now but it is of 'foreign' inspiration in the sense that the European Convention on Human Rights, which it implements, was decided for the peoples of Europe rather than the people of the UK alone.[137] In the case of Ireland, even if it is not a constitutional law *anacatataxis*, it is at least a significant change in the area of human rights law.[138]
- Almost full implementation of European Convention on Human Rights jurisprudence in the UK and Irish legal systems,[139] even though the European Convention on Human Rights is not directly implemented wholesale.[140]
- Direct recognition of the right of a UK or Irish petitioner to refer to the European Convention on Human Rights 1950 in UK and Irish courts as a matter of domestic law rather than as a matter of persuasive authority.[141]
- There are three layers of human rights protection in the UK and Ireland (common law, constitutional law and the European Convention on Human Rights).
- The common law protection was not abolished by the Human Rights Act 1998 but the Act under the European Convention on Human Rights 1950 has a significantly different *modus operandi* to common law.[142]
- All future UK (but not all future Irish Acts[143]) have to be stated as either compliant with the European Convention on Human Rights or not (a 'statement of compatibility tag' in every new law passed)[144].

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[136] H. Barnett, *op. cit.*, fn. 116, p. 27.
[137] Note that the 'part of the constitutional law' argument does not apply in the case of Ireland.
[138] W. Binchy, *op. cit.*, fn. 114, p. 196. He argues that the effect of an 'interpretative' European Convention on Human Rights Act would be considerable. Cf. E. Egan, *supra*, fn. 113, pp. 231, 245, 247, 248.
[139] J. Coppel, *op. cit.*, fn. 118, p. 4.
[140] Both in the UK and Ireland the choice has been for an 'interpretative' Act of incorporation. R.A. Edwards, 'Reading Down Legislation under the Human Rights Act', (2000) 20 *Legal Studies* 353; W. Binchy, *op. cit.*, fn. 114, pp. 195-196; S. Egan, *op. cit.*, fn. 113, pp. 238-239.
[141] See s. 2 (1) and s. 2 (1) of the British Human Rights Act 1998 and the Irish European Convention on Human Rights Act 2003 respectively.
[142] F. Brookman and H. Pierpoint, *op. cit.*, fn. 111, p. 45.
[143] W. Binchy, *op. cit.*, fn. 114, pp. 200-201.
[144] See s. 19 (1) of the Human Rights Act 1998.

- All public authorities in Ireland and the UK, such as government departments, local authorities or the police will act unlawfully, if they are in breach of some proviso in the European Convention on Human Rights 1950.[145]
- The existence of an embryonic species of declaration of unconstitutionality power for the UK judges (declaration of incompatibility) acting as a tool of political pressure for law reform of the incompatible Act of parliament.[146]
- Long implementation period, especially for the Human Rights Act 1998, and therefore the implementation of the European Convention on Human Rights; 2 years for all the ministries and public authorities to conform.
- Common law axis of protection of human rights (negative rights) is at least challenged by the European Convention on Human Rights approach (positive rights)

Commenting on the above there are some points to be made in relation to the slightly different kinds of *anacatataxis* that occurred in the UK and Ireland. The first remark is that, as suggested above, the *anacatataxis* in Ireland was one of human rights law and not one of constitutional law. This is true, because the UK is a state without a written constitution, whilst the constitutional settlement there is in a state of flux as government and people seek to come to terms with the new realities of the 21st century. On the other hand, the more confined basis of the Irish constitution does not make allowance for the argument that the European Convention on Human Rights Act 2003 is an Act with direct constitutional law implications.[147] Therefore, the *anacatataxis* is signified in the area of Irish human rights law,[148] even though the Irish Constitution provided and provides to this day a sufficient basis for the protection of fundamental human rights.[149] As regards the partial deployment of the Convention (in comparison to other European countries deployment of the European Convention

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[145] See ss. 3 (1) and 6 (1) of the British Human Rights Act 1998 and ss. 2 (1) and 3 (1) of the Irish European Convention on Human Rights Act 2003. However, under s. 1 (1) of the European Convention on Human Rights Act 2003 the courts are excluded.

[146] See s. 4 (2) and 5 (1) of the British Human Rights Act 1998 and the Irish European Convention on Human Rights Act 2003 respectively. D. McGoldrick, *op. cit.*, fn. 129, p. 924. Such declaration, he argued, 'will put social, political and legal pressure on the government to introduce remedial legislation'.

[147] 'Subject to the Constitution' is the wording which the Preamble of the European Convention on Human Rights Act 2003 uses.

[148] G. Hogan, 'Incorporation of the ECHR: Some Issues of Methodology and Process' in U. Kilkelly (ed.), *ECHR and Irish Law*, Bristol: Jordans, 2004, pp. 15-17.

[149] Articles 40-44 of the Irish Constitution 1937 (as amended).

on Human Rights), which occurred mainly for the preservation of parliamentary sovereignty in the UK and parliamentary powers in Ireland,[150] it should suffice for one to say that this has been the case, because it was thought that the Irish and British judges would have more powers in their hands, if they would be able to declare certain Acts 'unconstitutional.' Moreover, in Ireland this could not be a possibility for the simple reason that the European Convention on Human Rights Act 2003 is not part and parcel of the Constitution. Therefore, since it is only under the Constitution and under no other Act that unconstitutionality may be declared in Ireland,[151] then the European Convention on Human Rights Act 2003 cannot act as a direct legal basis e.g. for a judge of the Supreme Court to declare a Bill unconstitutional thereon.

As regards the direct right of the Irish and British citizens/residents to have a right to petition in their domestic courts, this has been explained above.[152] The *anacatataxis* occurs here, for this right enables the citizens to claim under the European Convention on Human Rights 1950 as a matter of law within domestic justice. As regards the three layers of human rights protection (common law, constitutional law and European Convention on Human Rights jurisprudence), such an *anacatataxis* is indeed a welcome development for both Ireland and the UK, even though this might cause some initial overlap, if not confusion, amongst the legal circles. This might become especially apparent in relation to the fact that traditional common law precedents, even though quite wide-ranging in their sphere of application, did not provide for the clear cut distinction between 'positive' and 'negative' obligations on behalf of the public bodies of Ireland and the UK which is implied in the Human Rights Act 1998 and European Convention on Human Rights Act 2003.[153] Together with this comes the additional burden for the public authorities to comply with the letter and spirit of the European Convention on Human Rights, something which did not occur before the Human Rights Act 1998 and the European Convention on Human Rights Act 2003.[154]

Additionally, the *anacatataxis* in relation to the Human Rights Act 1998 and European Convention on Human Rights Act 2003 is also justified, because the British

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[150] Judges in the UK (as well as in Ireland) enjoy 'no mandate of democracy'; see H. Barnett, *op. cit.*, fn. 116, p. 926.
[151] Article 34.4.5° of the Irish Constitution 1937 (as amended).
[152] *Supra*, fn. 141.
[153] E.g. the state can be held responsible for oppressive acts against the European Convention on Human Rights and for failures to act under the Convention. See J. Coppel, *op. cit.*, fn. 118, p. 148ff.
[154] *Supra*, fn. 145.

and Irish courts can now exercise direct 'legal' control over the Acts of parliament of the UK and Ireland respectively.[155] Thus, they may declare an Act of Parliament as 'incompatible' with the European Convention on Human Rights,[156] albeit that this is not a power of the Irish and British judges to declare an Act as 'unconstitutional' *per se*. However, the fact that the British and Irish judiciary can declare an Act incompatible acts as a strong incentive for the British and Irish governments to amend older legislation, so that this legislation is given a virtual 'tag of compatibility' with the European Convention on Human Rights. Finally, all legislation prepared in the UK must, prior to its enactment, come with a statement that the Bill is either European Convention on Human Rights compliant or not.[157]

The second line of enquiry, for the restructuring model to have been applicable, asks for the criterion of 'in principle susceptibility' and subsequently the 'special arrangements' criterion; thus, the legal systems of Ireland and the UK should have been able to implement the convergent instrument of law in question, the Human Rights Act 1998 or the European Convention on Human Rights Act 2003, without the initiation of special arrangements, the first of which is that of time extension for implementation. Again, the presumption here is that both legal systems could in principle implement the above convergent instrument of law on time. For this, Ireland required a maximum of 6 months to enforce it, whereas the UK required 2 years to implement it fully into its own system. Therefore, both Ireland and the UK faced an *anacatataxis* but were not able to implement the European Convention on Human Rights with immediate effect after the human rights Acts were passed, even though they were not required by any extra-national authority to adhere to some sort of deadline. Strict as this may sound, the UK in particular, which was instrumental in the drafting of the European Convention on Human Rights in the late 1940's, found itself in the unfortunate position of not being able to implement the European Convention on Human Rights which it drafted itself, albeit for Europe as a whole. Since the restructuring model requires *inter alia* foreign expertise in cases where additional time is required, one has to ask whether this option was utilised. Regrettably this was not utilised by either Ireland or the UK. However, with regard to

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[155] Lord Borrie once famously said that 'whilst historically the courts [in the UK] have sought to carry out the will of the Parliament, in the field of human rights the Parliament will carry out the will of the Parliament' and that 'government and Parliament will faithfully implement any declaratory judgement made by the High Court'. HL Deb vol. 582 cols. 1275-1276 3 November 1997.
[156] *Supra*, fn. 146.
[157] *Supra*, fn. 144.

implementation of the human rights Acts *per se*, the 6 months this took can be seen as within a reasonable time period under the model, as it is unusual for Irish law to be commenced immediately. The 2 year period which the UK required can also be justified under the model. In short, even though this is a long period of time, after one has legislated in an area which should otherwise be very easy to implement, due to the fact that the UK belongs to the western legal tradition, it should be noted that the UK experienced a very significant change to its system and for this reason its judges, for instance, had to undergo special training.[158] The model thus applies, since under the 'additional time' heading or under the 'special training' heading special arrangements have been the case. Thus, the UK's delay to enforce its Human Rights Act *is* justifiable under our model. In any case, both Ireland and the UK could have used some foreign expertise prior to the enactment of the Human Rights Act 1998 and European Convention on Human Rights Act 2003 but they did not.

Additionally, it is proposed that the comparative method should be used in both Ireland and the UK for the legal systems to be up to date with the jurisprudence and legal developments emanating from the Court in Strasbourg (and ideally from the developments of other European Convention on Human Rights compliant legal systems). Fortunately, this is prescribed in a way both in the Human Rights Act 1998 and the European Convention on Human Rights Act 2003,[159] whilst in Ireland s. 8 (c) of the Human Rights Commission Act 2000 (as amended) requires the Irish Human Rights Commission:

'To consult with such national or international bodies or agencies having a knowledge or expertise in the field of human rights as it sees fit'.

Such a legislative proposition on the part of the Irish parliament is a remarkable and a proactive step in the right direction at least for the comparative lawyer, for if the provision will be used in the future by the human rights commission, as this is anticipated, it will cover even the 'necessity for comparative material' criterion of the restructuring model, thereby utilising the model potentially to its fullest extent. The

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[158] The British Government spent an amount of about £5 million to train the UK judiciary. McGoldrick describes this as the most extensive training programme in the history of Judicial Studies Board. See D. McGoldrick, *op. cit.*, fn. 129, p. 910, at fn. 74.

[159] S. 2 (1) of the Human Rights Act 1998; s. 4 of the European Convention on Human Rights Act 2003.

position of the UK is analogous but it may well be that the British refer to the more comparative implementation material of the European Convention on Human Rights as well, be it without the legal 'backing' that the Irish Human Rights Commission enjoys. This can be done broadly under the s. 3 (1) (f) of the Law Commissions Act 1965.

In conclusion the deployment of the *anacatataxic* model with regard to the incorporation of the European Convention on Human Rights seems to have been quite likely in Ireland and in the UK.

4.3.4. A fourth illustration of the restructuring model in the UK and Ireland: implementation of Council Directive 93/13/EEC

Another more particular application of the restructuring model may have occurred in the case of implementation of the Council Directive 93/13/EEC on Unfair Terms in Consumer Contracts[160] in the UK and Ireland.

The author deems the introduction of the particular directive into the legal systems of Ireland and the UK of paramount importance and that is why he deals with this directive *in these* legal systems for the purposes of our chapter. Further below it is explained how why this convergent instrument has had a significant impact on the consumer laws of Ireland and the UK. Moreover, it has to be noted, that the particular directive has produced considerable academic debate.

However, prior to the application of the restructuring model in the implementation of the directive a brief introduction to the content and purpose of the directive is necessary for the purposes of familiarisation of the reader to this convergent instrument of law. Even if there has been a lengthy preparation of this directive,[161] 'its ambitions were lowered as [this] so often happen[s] during the

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[160] *Official Journal L 095, 21/04/1993*, pp. 0029 – 0034.

[161] The first EU resolution on the matter, Resolution (76) 47 on unfair contract terms in consumer contracts on appropriate method of control, adopted by the Committee of Ministers of the Council on the 16th of November 1976. However, the drafting of the directive in question started with the Commission Proposals 1990 (*Official Journal 1990 c 243/2*) and 1992 (*Official Journal 1992 C 73/7).* The almost final delimitation of the directive was achieved to a large extent in the EC Council on the 22nd of September 1992; see 'Council Directive 92/ /EEC of 22 September 1992 on unfair terms in Consumer contracts (common position)' (1992) 15 *Journal of Consumer Policy* 473.

preparation of EC legislation.'[162] The purpose of the Unfair Consumer Contract Terms Directive is to eliminate unfair terms from contracts drawn up between a professional and a consumer so that the approximation of laws, regulations and administrative measures in the area of the Member States becomes a reality.[163] So paramount is the operation of this directive that it has been said that the Directive on Unfair Terms in Consumer Contracts sets 'a general fairness standard for European consumer contract law'.[164] The directive does not apply to contractual terms reflecting mandatory provisions or regulations; nor does it apply to provisions arising from international agreements to which the Member States or the Community are signatories.[165] Most importantly however, under this directive EU consumers are not bound vis-à-vis traders in relation to unfair contract terms in consumer contracts, when the requirement for good faith has been breached,[166] whilst reasonable standardisation of consumer contract forms is promoted by the directive.[167] This is achieved mainly through the uniform interpretation clause of 'unfairness' in relation to consumer contracts.[168] Thus, the EU member states are expected to interpret unfairness in relation to: i) the nature of the goods or services covered by the contract, ii) the circumstances surrounding the drawing up of the contract and iii) the other terms in the contract or in another contract to which it relates.[169]

The next issue to be discussed is how the restructuring model could ever have been applied in Ireland and the UK in relation to the Directive on Unfair Terms in Consumer Contracts. The first remark is that the restructuring model had to be applied (inadvertently) and that such *anacatataxis* was naturally a more than significant change in the legal systems of UK and Ireland, requiring both literal and practical law transpositions.[170] The directive in question caused this.

In particular, the first line of enquiry under our model (identification of *anacatataxis*) would necessitate us to demonstrate that a legal *anacatataxis* in the UK

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[162] G. Howells and T. Wilhelmson, *EC Consumer Law*, Brookfield USA: Ashgate/Aldershot: Dartmouth, 1997, p. 88.
[163] Article 1, para. 1 of the Unfair Terms in Consumer Contracts Directive 1993.
[164] G. Howells and T. Wilhelmsson, *op. cit.*, fn. 162, p. 88.
[165] Article 1, para. 2 of the Unfair Terms in Consumer Contracts Directive 1993.
[166] Article 3, para. 1 of the Unfair Terms in Consumer Contracts Directive 1993.
[167] G. Howells and T. Wilhelmsson, *op. cit.*, fn. 162, p. 89.
[168] Article 4, para. 1 of the Unfair Terms in Consumer Contracts Directive 1993. However, 'total harmonisation is not expected and cannot be achieved.' See M. Dean, 'Unfair Contract Terms: The European Approach', (1993) 56:4 *Modern Law Review* 581, p. 582.
[169] Article 4, para. 1 of the Unfair Terms in Consumer Contracts Directive 1993.
[170] See the fifth subspecies of *anacatataxis* as defined in 4.1.2. herein.

and Ireland has occurred by reason of the Directive on Unfair Terms in Consumer Contracts. Since this convergent instrument by definition bears no relation to the constitutional laws of either Ireland or the UK, a more than significant change to the respective affected area of law has to be shown. There are many reasons why the legal systems of the UK and Ireland faced such an *anacatataxis* in their consumer laws due to this directive;[171] the most important seem to be the following:

- The impact of the Unfair Terms in Consumer Contracts Directive has been enormous in European legal doctrine as a whole.[172]
- The domestic consumer laws of the UK and Ireland have changed in a more than significant way, since new legal devices were introduced in the area e.g. in the absence of good faith in the Irish and British consumer laws, these areas of law came to incorporate for the first time a notion of good faith.[173]
- So crucial were the changes, that the law academia spoke of 'irritations'.[174]
- Not only have the Irish and British consumer laws been transformed but the legal mentality of lawyers concerned with the subject area had to change.[175]
- The continental consumer law-inspired directive has changed fundamental characteristics of British and Irish consumer laws.[176]
- Good faith was introduced in consumer contracts as a matter of statute, whilst prior to such introduction it was introduced in statute but in a very limited fashion in other areas of law[177].

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[171] M. Dean, *supra*, fn. 168, p. 581 ('far reaching impact on UK contract law'); S. Bright, 'Winning the battle against unfair contract terms', (2000) 20:3 *Legal Studies* 331, pp. 331-332 where she argues that 'the [implementing] Unfair Contract Terms Regulations 1994 have transformed the protection available to consumers against the use of unfair terms in contracts' having 'a particularly marked impact within the UK'.

[172] *Report of the Commission on the Implementation of Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts*, Brussels, 27.04.2000 COM (2000) 248 final, pp. 35-36.

[173] *Ibid.*, p. 30.

[174] G. Teubner, *op. cit.*, fn. 45, p. 11ff. See also P. Nebbia, 'Unfair Terms in Consumer Contracts: An Anglo-italian Comparison' in M. van Hoecke and F. Ost (eds.), *The Harmonisation of European Private Law*, Oxford/Portland, Oregon: Hart Publishing, 2000, p. 186 where the word 'shock' instead of 'irritations' is used.

[175] G. Teubner, *op. cit.*, fn. 45, p. 12; M. Dean, *supra*, fn. 168, pp. 589-590 on the introduction of representative actions in the UK, a state of affairs 'going against traditional orthodoxy of English contract law in that it is contrary to the principle of privity of contract'; E. MacDonald, 'The Emperor's Old Clauses: Unincorporated Clauses, Misleading Terms and the Unfair Terms in Consumer Contracts Regulations', (1999) 58:2 *Cambridge Law Journal* 413, p. 416, on the perception of good faith quoting Bingham L.J.; S. Bright, *supra*, fn. 171, p. 332.

[176] M. Dean, *supra*, fn. 168, p. 584.

[177] See e.g. the limited and peripheral referral to it in ss. 23, 24, 25 (1), 47 (2) and 61 (3) of the Sale of Goods Act 1979 (as amended) in the UK; M. Dean, *supra*, fn. 168, at p. 584, argues that 'Although

- Traditional common law solutions were preserved but have been to put at the same level of authority as the new directive.

Except, of course, for the very significant impact of the Unfair Terms in Consumer Contracts Directive in European legal doctrine as a whole,[178] the analysis on the above points shows that, first of all, both UK and Irish law have indeed been restructured to a significant extent with the implementing regulations that their legal systems enacted: the Unfair Contract Terms in Consumer Regulations 1999[179] and the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995[180] in the UK and Ireland respectively. This became apparent in the UK, because considerable problems arose from the innovative restructuring that the Unfair Terms in Consumer Contracts Directive brought to its consumer law, to the point that the first implementing effort (Unfair Contract Terms in Consumer Regulations 1994)[181] was aborted altogether. Thus, a negative way for one to assess the *anacatataxis* in question was the fact that there had been a spread of 'foreign legal viruses' to the UK legal order [and Irish legal order] which caused much irritation.[182] This occurred *inter alia*, because the British allowed an *anacatataxis* to enter their system by not vetoing the Unfair Terms in Consumer Contracts Directive, thereby creating a chaotic regime of consumer law under three different masters: i) Common law e.g. Lord Denning's

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good faith is widely used in insurance law, where there is an established case law on the principle of "utmost good faith", in the main it is little used [in English and Irish law]'; R. Goode, *Commercial Law*, Harmondsworth: Penguin Books, 2nd Edition, 1995, p. 117. See also *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1988] 1 All ER 348, at 353 (C.A.), where Lord Bingham argued that 'English law has, characteristically, committed itself to no such overriding principle [of good faith] but has developed piecemeal solutions in response to demonstrated problems of unfairness' and more recently see *Walford* v. *Miles* [1992] 2 W.L.R. 174, at 181 (H.L.), where the House of Lords stated that 'the concept of[...]good faith is inherently repugnant to the adversarial position of the parties[...][and] unworkable in practice as it is inherently inconsistent with the position of a negotiating party.' For criticism of the decision see Lord Steyn 'Contract Law: Fulfilling the Reasonable Expectations of Honest Men' (1997) 113 *Law Quarterly Review* 433, p. 439, who argues that the notion of good faith is practical and workable, although unnecessary. Yet, significant elements of what the Continentals perceive or tend to perceive as 'good faith' should perhaps be looked for in the subject areas of 'equity' and 'unreasonableness' in the common law.

[178] The Unfair Terms in Consumer Contracts Directive has been described as 'the first inroad into general principles of [European] private law and, perhaps, the start of a journey towards harmonization of [European] private law'. See S. Bright, *supra*, fn. 171, p. 333.

[179] S.I. 1999/2083, which replaced the initial S.I. 1994/3159.

[180] S.I. 95, No. 27 of 1 February 1995. These are the so-called 'Principal regulations' in Irish law. This is provided for in the more recent Irish Statutory Instrument No. 307 of 2000 (European Communities (Unfair Terms in Consumer Contracts) (Amendment) Regulations, 2000) partially amending the 1995 Statutory Instrument.

[181] S.I. 1994/3159.

[182] G. Teubner, *op. cit.*, fn. 45, p. 11.

'Red Hand rule',[183] ii) the old statutory regime of the Unfair Contract Terms Act 1977 and iii) the new statutory regime, albeit by secondary legislation with the Unfair Contract Terms in Consumer Regulations 1999.[184] The position in Ireland is somewhat different to that of the UK but this does not seem to change the fact that also in Ireland the changes were quite significant with the departure of the Unfair Terms in Consumer Contracts Directive. Here too there are three limbs of consumer law protection in the main: i) Common law, ii) the regime under the Sale of Goods and Supply of Services Act 1980[185], which sought to meet some of the criticisms and to modernise sales law[186] under the Sales of Goods Act 1893 e.g. by defining such terms as 'merchantable quality'[187] *inter alia* and iii) the European Community (Unfair Terms in Consumer Contracts) Regulations 1995 and 2000. It is noted that the Irish implementing instruments as well as the 1980 Act are not the only bodies of law which afford protection to consumers in Ireland.[188] With regard to the differences by a brief comparative analysis between UK and Irish law in the subject area, one notes for example the rather stricter regime in relation to the use of exclusion clauses as in *Clayton Love v B & I* Transport[189], even though it is argued in Irish legal bibliography that the case was decided before the more recent authorities in this area in England to the point that this authority is rendered uncertain nowadays.[190] What matters in this part of the analysis is that the statutory change was paramount both in the UK and Ireland. Additionally, one has to add the fact that British and Irish lawyers would not only face an *anacatataxis* in the literal and practical application of the Unfair Terms in Consumer Contracts Directive but also an *anacatataxis* of legal mentality because of it. Thus, for all the voices of concern,[191] British and Irish lawyers would have to

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[183] *Thornton v Shoe Lane Parking Ltd* [1971] 2 QB 163.

[184] R. Bradgate in the 1999 conference organised in Brussels by the EU attacked the approach followed by the UK legislature in relation to the implementation of the directive. See R. Bradgate, 'Some National Experiences: The Experience in the United Kingdom' in *The Integration of Directive 93/13 into the National Legal Systems,* 1-3 July 1999 EU Conference on the Integration of Directive 93/13 into the National Legal Systems, Brussels, pp. 29-30.

[185] The relevant sections here are: ss. 10, 11, 22, 23 and 24. See also the Schedule of the Act in question.

[186] R. Clark, *Contract Law in Ireland*, 2004, Dublin: Thomson Round Hall, p. 176. See also more generally F. White, *Commercial Law*, 2002, Dublin: Thomson Round Hall.

[187] 1893 Act, s 14 (3) inserted by s. 10 of the 1980 Act. Note that according to Clark the English and the Irish definition on what amounts to 'merchantable quality' do not always coincide. See R. Clark, *Contract Law in Ireland*, 2004, Dublin: Thomson Round Hall, pp. 261-262.

[188] R. Clark, *op. cit.*, fn. 186, pp. 178-179.

[189] (1970) 104 I.L.T.R. 157.

[190] R. Clark, *op. cit.*, fn. 186, p. 211.

[191] M.G. Bridge, 'Does Anglo-Canadian Contract Law Need a Doctrine of Good Faith?', (1984) 9 *Canadian Business Law Journal* 385, p. 426; A. de Moor, 'Common and Civil Law Conceptions of

learn to live with the rather novel notion of good faith in their domestic consumer laws,[192] 'mysterious and exciting' as these may be to their mind.[193]

Thus, as regards good faith in particular it would not be an exaggeration for one to claim that good faith, as in the continental law sense, did not exist in either Irish consumer law[194] or British consumer law.[195] One could argue that for the British and the Irish the notion of good faith was almost an alien legal notion to them, even if some narrow inroads of the notion could be found in the law of insurance or other equitable notions such as undue influence, forfeiture, penalties and mistake.[196] At most, one could argue that a claim of bad faith was possible only pre-contractually, for matters that arose during negotiations leading to a contract.[197] Therefore, even if one could argue that it existed, it never existed as a general concept of good faith from the times that the law merchant ceased to have effect in England.[198] As a result, one must argue that the Unfair Terms in Consumer Contracts Directive brought a more than significant change in the UK and Ireland, for it profoundly introduced a general concept of good faith in British and Irish contract laws, albeit only in the areas of consumer contract law; therefore the *anacatataxis* criterion was met, for a virtually non-existing legal notion came to life in the consumer laws of the UK and Ireland. This, of course, may have not signified an automatic change in the traditional solutions afforded to the consumers in Ireland and the UK by the respective consumer laws of the two legal systems. However, the additional layer of consumer protection provided by the directive's jurisprudence cannot be ignored. Thus, the *anacatataxis* here is justified not so much from the fact that there has been an overhaul of existing national legal remedies but rather that there has been an overhaul in the way of reaching remedies which pre-existed in Ireland and the UK, for in the UK e.g.

Contract and European Law of Contract: The Case of the Directive on Unfair Terms in Consumer Contracts', (1995) 3 *European Review of Private Law* 257, G. Teubner, *op. cit.*, fn. 45, p. 11.

[192] Article 4, para. 1 of the Unfair Terms in Consumer Contracts Directive 1993.

[193] H. Collins, 'Good Faith in European Contract Law', 14 *Oxford Journal of Legal Studies* (1994) 229, p. 249.

[194] B.S.J. Collins, 'Report on the practical implementation of Directive 93/13/EEC in the United Kingdom and the Republic of Ireland' in *The Integration of Directive 93/13 into the National Legal Systems,* 1-3 July 1999 EU Conference on the Integration of Directive 93/13 into the National Legal Systems, Brussels, pp. 328-329.

[195] However, it has been argued that in relation to UK law, 'if the test of unfairness is applied with reference to good faith, the result would not be very different from that arrived at using the more familiar test of reasonableness.' See M. Dean, *op. cit.*, fn. 168, p. 585.

[196] B.S.J. Collins, *op. cit.*, fn. 194, p. 328.

[197] H. Collins, *op. cit.*, fn. 193, p. 249.

[198] R. Goode, 'The Concept of Good Faith in English Law' in a presentation at the *Centro di studi e ricerche di diritto comparato e straniero*, Rome, (1992), p. 1.

especially prior to the Unfair Contract Terms in Consumer Regulations 1999 (that revoked the 1994 Regulations), the UK actions for injunctions could not be mounted by anyone other than the Office of Fair Trading. This went against both the letter and the spirit of Article 7 (2) of the Unfair Terms in Consumer Contracts Directive and was thus abolished on the part of the UK with the 1999 UK Regulations.[199]

Another way for one to establish the *anacatataxis* is the fact that this has been apparent throughout the years, since already in 1999 it was reported that the Unfair Terms in Consumer Contracts Directive 'generated considerable academic literature',[200] whilst the Commission's 2000 report states that 'hundreds of articles and dozens of monographs have been published on the subject of [the directive's] unfair contracts terms'.[201] The criterion of identification of *anacatataxis* is thus satisfied.

Finally, the next criteria under our model are those of 'in principle susceptibility' and 'special arrangements'; again with regard to the criterion of susceptibility, the presumption here is that both legal systems could in principle implement the above convergent instrument of law as this was something decided in the EU organs with the participation of the countries in question. In fact, Ireland was on time in implementing the law and no great objection was ever raised by the official bodies of the EU in its implementation initiatives. Therefore, Ireland faced an *anacatataxis* by its own expertise in the area. No great special arrangements (e.g. additional time or import of foreign expertise and the use of the comparative method) were ever required, yet Ireland had to subsequently commit to add-on legislation[202] for fully enforcing the Directive; nor should these arrangements have been required, except perhaps use of the comparative method in cases where the Irish legal system may have to update its application of the Unfair Terms in Consumer Contracts Directive in accordance with the developments on the directive in the rest of Europe.

However, the UK legal order was not ready to embrace in principle the jurisprudence of the Unfair Terms in Consumer Contracts Directive, for it clearly failed to correctly implement the directive with its first attempt to transpose it, for as aforementioned it revoked altogether its 1994 Regulations by the 1999 Regulations.

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[199] *Supra*, fn. 172, pp. 7, 30.
[200] R. Bradgate, *op. cit.*, fn. 184, p. 37.
[201] *Supra*, fn. 172, p. 35.
[202] Irish Statutory Instrument No. 307 of 2000 (European Communities (Unfair Terms in Consumer Contracts) (Amendment) Regulations, 2000) partially amending the 1995 Statutory Instrument.

In accordance with the restructuring model, the UK should initially ask for additional time in relation to the implementation of the Unfair Terms in Consumer Contracts Directive. Additionally, the UK legal system should ask whether it has the relevant expertise for implementing the directive. Its 1994 failure has clearly shown that it did not or if it did, it never made use of it. Therefore, foreign legal experts in the area of unfair contract terms should have been consulted; at least partially. The fact that the British might never have not considered this option, as they already had their 'own regime' of law, that is the Unfair Contract Terms Act 1977, is irrelevant. If it had to ask for foreign expertise, it would then have to use the comparative method to keep domestic developments up to date with European developments.

In any case, it is concluded from the above that there has been an almost complete deployment of the restructuring model in the case of Ireland and a partial deployment thereof in the UK, perhaps for reasons of national juridical pride. Although national juridical pride is not necessarily a negative thing, the approach which the UK has followed is regrettable. As regards the Irish case, one could simply argue that upon the use of some comparative law material in relation to the application of the Unfair Terms in Consumer Contracts Directive in the future, then the model could well have been applicable to its fullest extent (of variant 1 thereof).

4.3.5. A fifth illustration of a potential application of the restructuring model in the UK and Ireland: the incorporation of the general corpus of the Vienna Convention on Contracts for the International Sale of Goods 1980

The fifth exemplification for the application of the restructuring model comes from the area of private international law; it deals with the possible application of the Vienna Convention on Contracts for the International Sale of Goods 1980[203] in the laws of Ireland and the UK. It will be shown that, unlike other common law and non-common law systems, the UK and Ireland may have to face a legal *anacatataxis* in a potential case of incorporation of the general framework of the Vienna Convention on Contracts for the International Sale of Goods 1980 in their domestic laws.[204] Thus,

[203] Also known as the UN Convention on Contracts for the International Sale of Goods.

[204] To this effect see also A. Platsas, 'The Potential Impact of the CISG on the Common Laws of England and the Republic of Ireland: A Legal Anacatataxis of a Trivial Matter of Implementation?:

there are two points to be borne in mind prior to the commencement of the analysis in relation to this: i) the UN Convention on Contracts for the International Sale of Goods *per se* may not have amounted to a legal *anacatataxis* in other legal systems and thus the implementation of the Convention under an analysis as raised in the previous chapter (general model)[205] may have sufficed, ii) it is the Convention's general corpus which may trigger an *anacatataxis* and therefore trigger the application of the restructuring model, for even the incorporation of the general framework of the UN Convention on Contracts for the International Sale of Goods in the UK and Ireland may bring significant changes to these legal systems.

Bearing the above crucial remarks in mind, the author considers it appropriate to state why the example is used. First of all, the UN Convention on Contracts for the International Sale of Goods is a particularly interesting example from the point of the convergence theorist and secondly it is expected that the Convention will have a great impact on the international limbs of the common laws of Ireland and the UK, as this is explained below. Perhaps, that is why these systems have been quite reluctant to date to proceed with incorporating the instrument, when for example other common law countries such as the US or the Australian have already done so. It is thus, in anticipation of the great impact which the incorporation of the UN Convention on Contracts for the International Sale of Goods may have to Ireland and the UK, why this Convention is dealt with here.

Briefly, the UN Convention on Contracts for the International Sale of Goods is a code of commercial law rules which govern the formation of contracts for the international sale of goods, whilst its main aim is to make cross-border trade transactions easier for the business person. However, the Convention does not *per se* affect the internal legal structures of the legal system which adopts it. Yet, it somewhat affects domestic law, i.e. the commercial law area which governs the international sale of goods.[206] In that sense it affects the international limb of domestic law, which seeks to govern international commercial transactions; it thus brings convergence of principle and substance in the sphere of international sale of goods. To this effect, the Convention asks additionally for a uniform application,

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The Lessons of Comparative Law', *Denning Law Journal* (2004-2005), pp. 43-62. For a copy of the article see Appendix 5.

[205] See 3.3.2.

[206] See Irish Law Reform Commission on this; LRC 42-1992: *Report on the United Nations (Vienna) Convention on Contracts for the International Sale of Goods*, p. 30.

when and where it is adopted (party autonomy principle). Thus, national courts, when the parties invoke the UN Convention on Contracts for the International Sale of Goods, must apply the Convention in a uniform manner (under the autonomous interpretation principle[207]) as explained above, though in the UK and Ireland such tactics would almost certainly amount to an *anacatataxis*.

The first field of enquiry is to ask which category would the incorporation of the UN Convention on Contracts for the International Sale of Goods fall into taxonomically and why would there be an *anacatataxis* in a case of ratification of the Convention. As regards the taxonomy of the incorporation of the UN Convention on Contracts for the International Sale of Goods in the UK and Ireland, one would readily conclude that both a literal and practical implementation of the Convention would be required in the UK. With regard to the literal implementation of it, Ireland and the UK would have to pass a separate Act of parliament to enforce the Convention rather than merely sign it, as they are dualist legal systems. As regards the question of the practical implementation/application necessity of the UN Convention on Contracts for the International Sale of Goods, one may merely observe the thousands of cases which have been generated by the domestic courts of the countries which are signatories to the UN Convention on Contracts for the International Sale of Goods.[208] Therefore, the Convention would necessitate both a literal and practical (judicial in this case) transposition on the part of the legal systems of the UK and Ireland, as proposed in the general application of the restructuring model.[209]

Turning now to the substance of a potential *anacatataxis* in relation to the ratification and subsequent implementation of the UN Convention on Contracts for the International Sale of Goods in the UK and Ireland, one must ask whether there would be a significant change to a given area of law in these legal systems. As regards the area of law affected, clearly the subject areas of contract law in the UK and Ireland would have to be affected (due to their legal characteristics), with the

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[207] C.M. Bianca & M.J. Bonell (eds.), *Commentary on the International Sales Law: The 1980 Vienna Convention*, 1987, Milan: Giuffrè, p. 74; M. Roth and R. Happ, 'Interpretation of the CISG According to Principles of International Law', (1999) 4 *International. Trade & Business Law Annual* 1, pp. 2-3; L.A. DiMatteo *et. al.*, *International Sales Law: A Critical Analysis of CISG Jurisprudence*, Cambridge: Cambridge University Press, 2005, pp. 11-13 but cf. 174-177 in the same work.

[208] For extensive coverage of many leading cases on the UN Convention on Contracts for the International Sale of Goods by country, by jurisdiction within a country and by Convention articles at issue in each case, see http://www.cisg.law.pace.edu/cisg/text/casecit.html

[209] See 4.1.2. herein.

qualification that this would not necessarily affect contract law of domestic proportions in either the UK or Ireland. It would, thus, alter some of the characteristics of their contract laws but only in the sphere of international law, as long as the British and Irish traders *choose in practice* to opt for the Convention rules rather than their old and well-established common law rules. This is the case, since the UN Convention on Contracts for the International Sale of Goods is an *à la carte* instrument. As regards the particular reasons why a significant change would be brought about in the contract laws of Ireland and the UK, the following should be seen as the most crucial reasons to justify such a claim:

- General contract laws of the UK and Ireland are abortive of a general concept of good faith[210] unlike the UN Convention on Contracts for the International Sale of Goods, which actively asks for one.[211]
- General contract laws of the UK and Ireland are far more generous[212] on misrepresentation than the UN Convention on Contracts for the International Sale of Goods, which asks for the stringent test of 'fundamental breach'.[213]
- Even though both the Convention[214] and the general contract laws of the UK and Ireland recognise 'anticipatory breach', common law does not systematise[215] the notion and sees it not as a matter of course but rather as a matter of exception.
- Avoidance/termination of contracts may be sustained for the slightest of breaches under the general contract laws of the UK and Ireland, whilst the UN Convention on Contracts for the International Sale of Goods is a more 'pro-contractual'[216] instrument asking for a 'fundamental breach' to occur.[217]

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[210] Goode has once famously said 'we in England find it difficult to adopt a general concept of good faith'; 'we do not know quite what it means'. R. Goode, 'The Concept of Good Faith in English Law' in a presentation at the *Centro di studi e ricerche di diritto comparato e straniero*, Rome, (1992), p. 2. The position in Irish law is analogous. See M. Forde, *Commercial Law*, Dublin: Butterworths, 2nd Edition, 1997, pp. 70-71 (paras. 2.094-2.101). For exceptions in relation to good faith in the UK and Ireland *supra*, fn. 177.

[211] Article 7 (1) of the Convention.

[212] M.G. Bridge, *The International Sale of Goods: Law and Practice*, Oxford: Oxford University Press, 1999, p. 84 (para. 3.21).

[213] Article 25 of the Convention.

[214] Article 71 (1) (a) or (b) of the Convention.

[215] M.G. Bridge, *op. cit.*, fn. 212, p. 89 (para. 3.29). For some systematisation of anticipatory breach see *Universal Cargo Carriers Corporation v Citati* [1957] 2 QB 401 as per Devlin J.

- No recognised notion of *Nachfrist* (additional time for performance)[218] in the general contract laws of the UK and Ireland, unless the parties have made a provision as such.
- The UN Convention on Contracts for the International Sale of Goods allows both cure of documents and goods,[219] whereas the general contract laws of the UK and Ireland normally only allow cure of documents, when time allows.[220]
- The Convention does not recognise the 'inconsistent act doctrine', when the general contract laws of Ireland and the UK do so.[221]
- The Convention uses a different method of quantification of damages[222] (*actio quanto minoris*[223]) to the method of quantification used under the general contract laws of the UK and Ireland.[224]
- The UN Convention on Contracts for the International Sale of Goods does not prospectively discharge contracts upon frustration, as the contract laws of the UK and Ireland do; it allows for different methods to be followed in this respect.[225]

In relation to the above, one has to first of all note that the good faith requirement is more prevalent in the jurisprudence of the UN Convention on Contracts for the International Sale of Goods than the common laws of Ireland and the UK, as it is a notion expressly recognised in Article 7 (1) of the Convention. In common law it was decided, for instance, in *Re Moore & Co v Landauer & Co*[226] that a buyer was entitled to reject certain goods, since description of the goods had not been complied with. This was the case, because he was promised cans of fruit in cases of 30 but was delivered cans of fruit in cases of 24. Additionally, in *Arcos v*

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[216] A. Kazimierska, 'The Remedy of Avoidance', (1999-2000) *Pace Review of the Convention on Contracts for the International Sale of Goods* 79, 175 ('continuation of contract principle').
[217] Article 25 of the Convention.
[218] Articles 47 (1) and 63 (1) Convention.
[219] Articles 37 and 48 of the Convention.
[220] M.G. Bridge, *op. cit.*, fn. 212, pp. 91-92 (para. 3.32).
[221] Article 82 (2) of the Convention. Cf. s. 35 (1) (b) of the Sale of Goods Act 1979 (as amended) and s. 35 of the Irish Sale of Goods Act 1893 (as amended).
[222] Article 50 of the Convention.
[223] A good analysis on this is provided by E. Bergsten and A. Miller, 'The Remedy of Reduction in Price' (1979) 27 *American Journal of Comparative Law* 255.
[224] M.G. Bridge, *op. cit.*, fn. 212, pp. 101-102 (paras. 3.48-3.50).
[225] M.G. Bridge, *op. cit.*, fn. 212, p. 106 (para. 3.57).
[226] [1921] 2 KB 519

Ronaasen,[227] the buyers were entitled to repudiate the contract for mere breach of condition, but really in order to take advantage of the falling market price of timber. This would probably not fall within the interpretation of good faith under Article 7 (1), because such an approach is strictly based on the absence of good faith between traders during the performance of contracts in the UK and Ireland. However, it has to be noted at this point that clear voices of scepticism against the more technical and rigid nature of the older common law cases stated above are raised nowadays and that these cases have to be read in the light of more recent case law developments. So, for instance, Lord Wilberforce has argued in *Reardon Smith Line v Hansen-Tangen*[228] that one must not be too technical when it comes to the description of goods and that related old cases confined to themselves are due 'for fresh examination'[229]. On the other hand, despite this more lenient approach of the common law in recent years, in a potential case of implementation of the UN Convention on Contracts for the International Sale of Goods for the international contracts of sale in the UK and Ireland, the common lawyer would have to face an *anacatataxis* of legal approach/mentality in the workings of international contracts for the sale of goods. As stated above, this would be the case only if the lawyer opted for the Convention rules rather than common law rules. This applies to all the analysis in this chapter which follows in relation to the UN Convention on Contracts for the International Sale of Goods, for under Article 6 of the Convention[230] the contracting parties from different states may well exclude the application of the Convention or derogate/vary its effect.

As regards misrepresentation under the UN Convention on Contracts for the International Sale of Goods and the contract laws of the UK and Ireland, one has to note that it is more onerous for the plaintiff under the Convention to launch a claim, since he would have to show that the breach on the part of the defendant has been 'fundamental'. A fundamental breach occurs, when the party in breach has caused detriment to the innocent party and the party in breach did not foresee this.[231] Clearly,

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[227] [1933] AC 470

[228] [1976] 1 W.L.R. 989, at p. 998.

[229] *Ibid.*

[230] Article 6 of the Convention stipulates as follows: 'The parties may exclude the application of this Convention or, subject to Article 12, derogate from or vary the effect of any of its provisions.'

[231] In order for the buyer to claim this, he must make a declaration of avoidance by notice to the party in breach as in Article 26 of the Convention. If this succeeds, then 'avoidance' under Article 49 of the Convention is the case. The seller too, if he is the innocent party, can claim avoidance under Article 64

since no such onerous requirement is found in either the contract laws of the UK or Ireland, one notes perhaps the strictness for practical purposes of these systems. However, the effect of breach in these systems has generally developed, along much more rational lines in recent decades (e.g. *Hong Kong Fir v Kawasaki Kisen Kaisha*[232]), i.e. 'in attending to the nature and gravity of a breach or departure rather than in accepting rigid categories which do or do not automatically give a right to rescind'[233]. Thus, in *Hong Kong Fir v Kawasaki Kisen Kaisha* it was held that no breach will discharge the innocent party from further liability unless it goes so much to the root of the contract that it makes further performance impossible.[234] In any case, the divergence between the contract laws of these legal systems and the UN Convention is also exacerbated by reason of the fact that 'particular purpose' presents particular difficulties between the common law and the Convention; thus, under Article 35 (2) (b) of the Convention, fit for any 'particular purpose' has been taken to mean a 'special purpose', whilst under *Preist v Last*[235], a case which interpreted the meaning of 'particular purpose' in s. 14 (1) of the old Sale of Goods Act 1893,[236] particular purpose has to be taken to mean a 'commonplace purpose'[237]. The *anacatataxis* here in the legal systems of the UK and Ireland would be signified by mere realignment of the meaning of 'particular purpose' to the UN Convention, even if such realignment might not have to change the meaning of 'particular purpose' for domestic transactions in these systems.

Moreover, it would seem that the traditional perception of common law does not give formal recognition to anticipatory breach *per se* and that is why the approach of the UN Convention on Contracts for the International Sale of Goods towards anticipatory breach is seen as a major point of departure from common law,[238] even if statute law may have made some indirect allowance for this in the common law

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of the Convention. Obviously the provisions on damages (Articles 74-77 of the Convention) may also be triggered.

[232] [1962] 2 Q.B. 26.

[233] Per Lord Wilberforce in *Reardon Smith Line v Hansen-Tangen* [1976] 1 W.L.R. 989, at p. 998.

[234] [1962] 2 Q.B. 26 at 64, [1962] 1 All E.R. 474 at 484, per Upjohn LJ.

[235] [1903] 2 KB 148.

[236] This provision is found in the same section of the Sale of Goods Act 1979 (as amended), which has replaced the old Sale of Goods Act 1893. The interpretation of the section as a matter of case law also remains the same.

[237] See M.G. Bridge, *op. cit.*, fn. 212, p. 80 (para. 3.14). Nowadays, see s. 14 (2) of the English Sale of Goods Act 1979 (as amended) and s. 10 of the Irish Sale of Goods and Supply of Services Act 1980. Both the modern English and Irish statutory provision emanate to a certain degree from the old s. 14 (1) of the Sale of Goods Act 1893.

[238] See M.G. Bridge, *op. cit.*, fn. 212, p. 89 (para. 3.29).

systems of Ireland and the UK.[239] Thus, under Article 71 (1) of the Convention 'a party may suspend the performance of his obligations if, after the conclusion of the contract, it becomes apparent that the other party will not perform a substantial part[240] of his obligations...'. As the notice requirement is usual in the UN Convention on Contracts for the International Sale of Goods, the party intending to suspend performance after the conclusion of the contract must give reasonable notice to the other party.[241] Even though the notion of anticipatory breach is recognised to a certain extent in common law,[242] it does not successfully tackle cases in the systematic and organised manner of the Convention. This is due to the fact that suspension or anticipatory breach is seen not as a matter of course but rather as a matter of exception in common law.[243] Thus, an *anacatataxis* would be the case here, for the indirect and partial recognition of the notion in s. 28 of the English Sale of Goods Act 1979 and s. 28 of the Irish Sale of Goods Act 1893 should be extended to give full recognition to such cases of anticipatory breach which are not currently recognised by the above Acts.

In relation to termination/avoidance of contract, the contract laws of the UK and Ireland would have to recognise (in their international limbs) the necessity for a fundamental breach to exist, as in Article 25 of the Convention, and the necessity for notice of termination of contract, as in Article 26 of the Convention. This, of course, would not have to render the convoluted regime of the common law in the area (distinction between express, implied and intermediate terms) obsolete for the domestic and international contracts but the *anacatataxis* here would be the addition of another layer of choice for the practitioners of the UN Convention on Contracts for the International Sale of Goods in the commercial laws of the UK and Ireland.

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[239] See s. 28 of the Sale of Goods Act 1979 (as amended) and s. 28 of the Irish Sale of Goods Act 1893 (as amended).

[240] That is, if the party cannot perform because (a) he is seriously deficient in his ability to perform or non-creditworthy or (b) his conduct in preparing to perform or in performing the contract makes it apparent that he will not perform a substantial part of his obligations, as in Article 71 (1) (a) and (b).

[241] As in Article 72 (2) of the Convention.

[242] See *Universal Cargo Carriers Corporation v Citati* [1957] 2 QB 401. Devlin J provides the criteria for anticipatory breach to arise in English law.

[243] Suspension at common law arises only in the rather rare instances where the buyer's duty to make payment is not essential, whilst the seller's concurrent duty to make delivery is. In this case, the seller declines to perform so long as the buyer fails to do so. See *Total Gas Marketing Ltd v Arco British Ltd* [1988] 2 Lloyd's Rep 209.

With respect to the novel legal device of *Nachfrist*[244] in the Convention, a mechanism that (if properly utilised) may give a new lease of life to the international transaction in question, one could argue that this would clearly signify a particularly significant change in the commercial laws of the UK and Ireland, for something which never existed before to the strict jurisprudence of these commercial laws would have to be introduced.

As regards cure of defective goods and documents, the UN Convention on Contracts for the International Sale of Goods is clearly more 'pro-contractual' than the common law rules. This *per se* should amount to an *anacatataxis*, if the Convention is ever introduced in the UK and Ireland. Common law, on the other hand, remains strict to the extreme in relation to the legal results expected. Common law is, therefore, a rather more predictable legal species on the other hand, when it comes to international trade law. Other than that, in the case where the UN Convention on Contracts for the International Sale of Goods would be chosen to operate in an international contract, the traders in Ireland and the UK would have to appreciate that the Convention is more lenient than the current common law rules and that it makes considerable allowances for the cure of defective goods as well as that of documents. In this case the change which would come about would be a matter of adjusting legal mentality; common lawyers would find themselves in a substantially different environment of legal technique. Further, the relevant Sale of Goods Acts of both countries in question should perhaps be susceptible to slight amendments or rather, to provisions which would make it clear in the case of the UN Convention on Contracts for the International Sale of Goods being adopted for the conclusion of an international sale. This would allow the parties to use the full machinery of the Convention (if they so intend) and therefore be able to cure both defective goods and documents. This too would be an additional reason for a potential *anacatataxis*, since, as already stated, the contract laws of the UK and Ireland would recognise cure of a non-conforming tender (rather than a non-conforming delivery) on the part of the seller and this would not be the exception of course but the norm, as Bridge argues.[245]

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[244] That is novel for the UN Convention on Contracts for the International Sale of Goods itself but not so novel for the German trade law system, from which it derives.
[245] M.G. Bridge, *op. cit.*, fn. 212, pp. 197-201.

In relation to the inconsistent act doctrine, which is explicitly recognised under s. 35 (1) (b) of the English Sale of Goods Act 1979 and s. 35[246] of the Irish Sale of Goods Act 1893, there are three possibilities on how this characteristic would have to be 'watered down' for the UN Convention on Contracts for the International Sale of Goods to be successfully implemented. The changeover in such a case would occur either if the national legislators of the UK and Ireland would omit the above sections and thus render this doctrine obsolete or, even more interestingly, if they would allow these sections to continue to operate as well as recognising the mechanics of the Convention by statutory amendment on the matter or allow the preservation of the above sections but give a sufficient margin of choice for the traders to choose the mechanics of their contract by recognising their autonomy to choose the appropriate legal environment for their international contracts. In any case a more than significant change would be apparent, since the inconsistent act doctrine would at least have to be limited to a certain degree.

As regards the *actio quanto minoris* quantification of damages in the UN Convention all that can be said at this point is that a similar pattern of law reform could be followed. Again, there are three paths which could be followed in relation to s. 53 (3) of the British Sale of Goods Act 1979 and s. 21 of the Irish Sale of Goods and Supply of Services Act 1980; repeal these clauses altogether (which is not suggested, since they have served well so far), draw a parallel provision to the existing sections or simply incorporate a freedom of choice of law clause in a potential UN Convention on Contracts for the International Sale of Goods Act. This last possibility is again seen as the least detrimental to the functioning of the legal system, because, even though legal adaptation would be the legal result of such an Act, such an *anacatataxis* would not bring disorder to the existing practices.

The final point on a potential *anacatataxis* in the laws of Ireland and the UK could be justified by the introduction of an American approach on the matter of frustration, from which the UN Convention on Contracts for the International Sale of Goods is largely inspired. Thus, as Bridge notes, British law (and most probably Irish law too) would necessitate changes to face questions of partial or temporary frustration.[247]

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[246] As amended by the Sale of Goods and Supply of Services Act 1980.
[247] M. Bridge, *op. cit.*, fn. 212, p. 93 (para. 3.34).

Moreover, law academia recognised that a potential *anacatataxis* by reason of the UN Convention on Contracts for the International Sale of Goods is very much possible, even if it was quick to blame the Convention. Thus, at the preface to *Benjamin's Sale of Goods*, Professor Guest has made his case for the non-adoption of the Convention quite clear:

> '...the Convention is not well adapted to sales on c.i.f., f.o.b. and other terms common in overseas sales, and its often vague or open-textured terminology would, if it were to displace the present relatively settled English judge-made rules governing contracts on such terms, be a source of considerable (and regrettable) uncertainty.'[248]

The stress here is on the word 'displace' which Professor Guest uses. Erroneous as this approach may be, since the UN Convention on Contracts for the International Sale of Goods could exist in parallel with the common law rules and be a matter of choice, one cannot but justify Professor Guest's approach by counter-arguing that this displacement he argues against might rather be seen as a retreat of the common law rules which he so admires. This alone justifies an *anacatataxis* due to the Convention.

The second field of enquiry under the restructuring model deals with the susceptibility in principle of the UN Convention on Contracts for the International Sale of Goods in the Irish and British legal systems; that is, in conjunction with the special arrangements that these systems may necessitate in the implementation of this instrument. At first instance, one must presume that these systems are capable of implementing the Convention on their own initiative and legal expertise. However, unlike other common law systems such as the American, Canadian or Australian legal systems which have been susceptible in principle to the UN Convention on Contracts for the International Sale of Goods, one must counter-argue that the UK and Ireland present the most traditional of approaches in the common law world of private law. Thus, it would be rather peculiar, if not unnatural, if these systems would implement the Convention with no delays whatsoever. It would also be peculiar, if Ireland and the UK did not use some expertise from other countries, at least from common law countries which have implemented the Convention already. Finally, in a potential

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[248] A.G. Guest (ed.), *Benjamin's Sale of Goods*, London: Sweet & Maxwell, 4th Edition, 1992, p. ix.

ratification scenario of the UN Convention on Contracts for the International Sale of Goods in the UK and Ireland it is expected that the use of the comparative method in cases where the Irish and British legal systems may have to update their application of the Convention in accordance with the developments on the Convention in the rest of the world. This comes both in accordance with Convention jurisprudence as well as in accordance with the relevant requirement of the restructuring model.

In conclusion, even though it is regrettable that neither Ireland nor the UK have implemented the UN Convention on Contracts for the International Sale of Goods, one must admit that the *anacatataxis* which such an implementation would bring about may be a good enough reason for these systems to postpone such incorporation for the future. All in all, the incorporation of the Convention, even if curtailed, since the Convention is an *à la carte* instrument, would almost certainly amount to an *anacatataxis* in the legal systems of the UK and Ireland and therefore the application of the restructuring model could well be possible, if not necessary.

4.4. Conclusion

In conclusion, it was the purpose of this chapter to set forth a system-oriented and impact-based model which, unlike the general model, aims to introduce in a legal system major legal changes due to convergent law. The model was conditioned and thereafter applied as per exemplifications.

PART III

Preface to the factors

In this part of the thesis something distinctly different yet directly relevant to the legal models proposed beforehand is dealt with. One speaks here of *auxiliary* legal factors of implementation, which may be taken into account during the implementation stage in conjunction with the *main* models herein.

To begin, the incorporation of the factors in this thesis sits well in agreement with the unifying hypothesis of the thesis, i.e. that there are models dealing with implementation but at the same time there must be other subordinate, auxiliary considerations; factors which may be taken into account in a given implementation scenario.

Second, with regard to the particular choice of factors made, the choice for a 'comparative law factor' and a 'socio-legal factor' seems natural to the author. The reason for this is the fact that these factors take respectively into account the 'external' and the 'internal' in an implementation exercise and because both of these factors are most certainly *questions of law.* The former[1] factor takes into account 'external sources of law', whilst the latter[2] takes into account 'internal sources of law'. In other words, both factors *are* in one way or another 'legal' in essence. What better proof is there to this effect than the fact that the corresponding branches of legal knowledge (comparative law and legal sociology) of the factors proposed *are* part and parcel and well established branches of knowledge in modern law academia? Also, as this is a *legal* thesis, it is to be noted that even with particular regard to the socio-legal factor, as will be seen, the factor, if it is to be taken into account, acts on the basis that political considerations are apprehended.

Third, the choice between a comparative law factor and socio-legal factor is also dictated by reason of the fact that comparative law and legal sociology are normally seen as contrasting and antithetical[3] (though not always and not necessarily

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[1] '"Comparative law" is the comparison of the different legal systems of the world'. Note also that comparative is par excellence the academic subject concerned with law convergence. K. Zweigert & H. Kötz, *Introduction to Comparative Law*, Oxford: Clarendon Press, 3rd Edition, 1998, p. 2, 21, 24-28.

[2] Sociology of law 'aims to discover the causal relationships between law and society'. See K. Zweigert & H. Kötz, *op. cit.*, fn. 1, p. 10.

[3] The traditional accusation of comparative lawyers is that sociologists have 'too instrumentalist and functionalist an approach to law', whereas the sociologists traditionally blame comparative lawyers for 'adopting an approach which is often formalistic, microscopic, rule based and overly concerned with the niceties of private law rather than the problems of legal regulation and administration.' See D.

conflicting) schools of legal thought. One can therefore not exclude the theoretical possibility that indeed the implementer of convergent law may use the comparative law factor *in conjunction* with the socio-legal factor[4].

Nelken, 'Legal Transplants and Beyond: of Disciplines and Metaphors' in A. Harding and E. Örücü (eds.), *Comparative Law in the 21st Century*, London/The Hague/New York: Kluwer Academic Publishers, 2002, p. 21.

[4] Cotterrell, for instance, argues that comparative law and legal sociology are inseparable. See R. Cotterrell, 'Comparatists and sociology' in *Comparative Legal Studies: Traditions and Transitions*, edited by Pierre Legrand and Roderick Munday, Cambridge: Cambridge University Press, 2003.

Chapter 5

THE COMPARATIVE LAW FACTOR IN THE IMPLEMENTATION OF CONVERGENT LAW

5. THE COMPARATIVE LAW FACTOR IN THE IMPLEMENTATION OF CONVERGENT LAW–IMPLEMENTATION THROUGH THE CLAIM OF EXTERNAL SOURCES TO THE LEGAL SYSTEM

5.1. Introduction and Comparative Law in the dawn of the new century

'A world law must be created – not today, perhaps not even tomorrow – but created it must be, and comparative law must create it.'
[1]

Comparative law may have been the hobby of yesterday but is destined to be the science of tomorrow'.[2]

Based on our hypothesis[3], already raised in the abstract of the thesis and elaborated in the introduction, the comparative factor of this chapter may be seen as the first auxiliary factor (as opposed to the main models of implementation analysed in the prior chapters). The factor is defined, conditioned and applied.

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[1] K. Zweigert and H. Kötz, *An Introduction to Comparative Law*, 3rd Edition, 1998, Oxford: Oxford University Press, p. 3.
[2] Lord Goff, 'The Future of the Common Law' (1997) 46 *International and Comparative Law Quarterly* 745, pp. 747-748.
[3] See 2.2.1.

As background information to the factor, it can be said that in the dawn of the new century, comparative law is regarded as the future of legal science.[4] In fact the new century has been characterised as 'the era of comparative law',[5] whilst others see the subject as 'strategic' and having reached the time of its majority.[6] An estimate suggests that in the last ten years only, the bibliography on the subject of comparative law has quadrupled.[7] So important has comparative law been for legal science as a whole even during the last century that American jurists reached the conclusion that, 'if comparative law did not exist it would have to have been invented'.[8] As regards a definition of the subject, comparative law is conventionally defined as that branch of legal science in which law itself is its subject matter, whereas comparison is its process.[9] However, to compare is to highlight both differences and similarities. In the case of the comparative law factor under this thesis it will become apparent that it is mainly similarities[10] of the systems or what Schlesinger calls 'integrative comparative law'[11] that make this factor functional in praxis; thus, system Y chooses to implement convergent instrument of law X,[12] as system Z has implemented this,

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[4] Cf. 'Comparative law is the ultimate in sophistication in legal research': E. Örücü, *The Enigma of Comparative Law: Variations on a Theme for the Twenty-First Century*, Leiden/Boston: Martinus Nijhoff Publishers, 2004, p. 12.

[5] T. Koopmans, 'Comparative Law and the Courts' (1996) 45 *International and Comparative Law Quarterly* 545.

[6] E. Örücü, 'Unde Venit, Quo Tendit Comparative Law' in A. Harding & E. Örücü, *Comparative Law in the 21st Century*, The Hague: Kluwer Law International, 2002, p. 1.

[7] E. Örücü, 'Critical Comparative Law: Considering Paradoxes for Legal Systems in Transition' (2000) 4 *Electronic Journal of Comparative Law*, p. 2.

[8] H.J. Ault and M.A. Glendon, 'The Importance of Comparative Law in Legal Education: United States – Goals and Methods of Legal Comparison' in J.N. Hazard and W.J. Wagner (eds.), *Law in the USA in Social and Technological Revolution (*Bruylant, Brussels, 1974), p. 69.

[9] K. Zweigert and H. Kötz, *An Introduction to Comparative Law*, 3rd Edition, 1998, Oxford: Oxford University Press, p. 2.

[10] One should not forget that comparative law as a subject highlighting differences is a rather recent academic phenomenon. This came about mainly through the nationalism and positivism in Europe and the world, whereas when comparative law was taught as legal history from the 16th to the 19th century, its predominant interest was in the understanding of similarities of legal systems. For this see L. Moccia, 'Historical Overview on the Origins and Attitudes of Comparative Law' in B. De Witte and C. Forder, (eds.), *The Common Law of Europe and the Future of Legal Education* (Metro, Kluwer Law International, Deventer, 1992), p. 618.

[11] In such a model the stress is on similarities between different legal systems or norms. The opposite to 'integrative comparative law is 'contrastive comparative law'. In this latter case the emphasis is on the highlighting of differences. Schlesinger is of the opinion that the future clearly belongs to integrative comparative law. For this see R.B. Schlesinger, 'The Past and Future of Comparative Law' (1995) 43 *American Journal of Comparative Law* 479.

[12] On the use of comparative law in the implementation of convergent law see e.g. M. Kiikeri, *Comparative Legal Reasoning and European Law*, Dordrecht: Kluwer Academic Publishers, 2001, p. 23.

the main criterion being the similarities of legal mentality/technique between system Y and system Z.[13]

5.1.1. Definition of the Comparative Law Factor of Implementation

The comparative law factor of implementation[14] under this thesis is that factor of alignment of a national or sub-national[15] legal system to a convergent instrument of law (be it at a supranational, intergovernmental, federal, regional or international level), **according to which the national or sub-national legislator and/or his respective judges and/or the administration of his may choose[16] to compare the legislative[17], judicial[18] and administrative implementation respectively of the above convergent instrument in other relevant legal systems and thereafter apply such an implementation.** This can be done either before they are required to

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[13] For a more concrete explanation of this see below at 5.2.1. (the *Affinitatis Formula).*

[14] [Hereinafter the comparative factor]

[15] Even though the comparative factor of implementation, as prescribed herein, mainly addresses the convergence of national legal systems to each other and the convergence of the national legal systems to supranational and or international forms of law, sub-national legal systems of a federation, such as the American states in the USA or a confederation such as the cantons in the Swiss Confederation cannot be precluded from the application of the factor. In such a case, the sub-nations (US states and Swiss cantons) have to be taken to act as the national legal systems; only that the question of convergence here would address the convergence of the sub-national legal systems to each other and their convergence/alignment to a federal or confederative system of law.

[16] On the reasons for such a choice see e.g. W. Twining, *Globalisation & Legal Theory*, London/Edinburgh/Dublin: Butterworths, 2000, pp. 73-74, 175.

[17] E.g. see the *Comparative Implementation of EU Directives (I) – Insider Dealing and Market Abuse* (City Research Series Number 8, British Institute of Comparative and International Law, December 2005).

[18] Judges throughout the world already make extensive use of comparative law. Indicative case law includes such cases as *Kennedy v The Law Society & ors* [2005] IESC 23 per Geoghegan J., *Greatorex v Greatorex* [2000] 1 WLR 1976 and *White v Jones* [1993] 3 All ER 481 at 501. Cf. the dicta of Lord Bignham of Cornhill in *Fairchild v Glenhaven Funeral Services Ltd* [2002] 3 WLR 89 at 119 for a more expansive approach than the one argued herein. Selected bibliography on the matter includes: On the use of comparative law by national judiciaries see e.g. U. Drobnig and S. van Erp (eds.), *The Use of Comparative Law by Courts: XIVth International Congress of Comparative Law, Athens 1997*, The Hague: Kluwer, 1999; H. Kötz, *Sonderdrucke aus 50 jahre Bundesgerichtshof Festgabe aus der Wissenschaft*, Munich: Verlag C.H. Beck, 2000; more recently G. Cavinet, M. Andenas and D. Fairgrieve, *Comparative Law Before the Courts*, London: British Institute of Comparative Law, 2004 and B. Markesinis, *Comparative Law in the Courtroom and Classroom: The Story of the Last Thirty-Five Years*, Oxford/Portland, Oregon: Hart Publishing, 2004, pp. 157-182 and C.H. McCrudden, 'A Common Law of Human Rights: Transnational Judicial Conversations on Constitutional Rights', (2000) 20 *Oxford Journal of Legal Studies* 499, B. Markesinis & J. Fedtke, 'The Judge as Comparatist', (2005) 80 *Tulane Law Review* 11, C.L. Rozakis, 'The European Judge as Comparatist', (2005) 80 *Tulane Law Review* 257 and K. Schiemann, 'A Response to the Judge as a Comparatist', 80 *Tulane Law Review* 281. On comparative legal reasoning see H. Hohmann, 'The Nature of the Common Law and the Comparative Study of Legal Reasoning', (1990) 38 *American Journal of Comparative Law* 143 and more recently M. Kiikeri, *Comparative Legal Reasoning and European Law*, Dordrecht: Kluwer Academic Publishers, 2001.

implement any such instrument or even after they have wrongfully implemented it or not implemented it at all.[19]

As noted[20] such a factor operates in the premises of this thesis as an *auxiliary* to the main models presented beforehand. So, for instance, the implementer may to a certain degree find it convenient[21] to refer to comparative material with regard to the general model and even more so under the restructuring model, i.e. refer to comparative implementation material in the form of a special arrangement[22].

5.1.2. General application of Comparative Law Factor of Implementation

Generally, comparative law has been used by the national legislatures mostly for the study of laws of other jurisdictions and for the transplantation of them into their own jurisdiction with minor or major amendments; and though this tactic is to be applauded, it would seem that the national legislatures fail to scrutinise how the implementation of such laws has come about in the jurisdictions from which they acquire any such laws by way of the comparative method. Thus, one can agree to the fact that the comparative method of law is almost universal in its use, though one would be more reluctant to claim this of comparative implementation tactics, as the presumption is that legislatures tend to focus on comparisons of substantive law rather implementation thereof. There are two different modes where a comparative factor of implementation may arise in relation to the time factor of applying this factor. Thus, this can apply either before the national legal system has implemented the convergent instrument of law (on time application of the factor) or after an implementation deadline (off time application of the factor) and the legal system has either implemented the instrument incorrectly or has failed to implement it altogether.

Also, one must note that even though the factor is mainly concerned with comparative implementation tactics *per se*, the factor may also make usage of specific comparative substantive material, such as provisions, forms, structures and styles.[23]

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[19] For the mechanics of this factor see 5.3. herein.
[20] *Supra*, 2.2.1.
[21] *Infra*, 5.2.1.
[22] *Supra*, 4.2.3.
[23] *Infra*, 5.2.1.

In the former case, one speaks of a more general approach to the factor, whereas in the latter case a more specific approach to the factor is taken.

5.1.3. Indirect relevance of transplantation tactics to the factor

Because the factor effectively deals with 'transplantation of implementations', one would have to critically address (to a certain extent) the relevance of the factor vis-à-vis the general transplantation of laws theory. As an introduction to transplantation tactics, the first thing to be defined is what a transplant amounts to. Generally, a transplant is seen 'As the moving of a rule or a system of law from one country to another, of from one people to another'.[24] More recently, Watson has maintained that in his view a rule is 'not just statutory rules [but also] institutions, legal concepts, and structures that are borrowed'[25]. In relation to this, the question here is whether mainstream *transplantation of rules* (Watson's transplantation of a 'system' and 'structures' included) is relevant to *transplantation of implementations*, this being an inherent characteristic of the comparative factor under this thesis.

Undeniably, the proposition that the factor requires the unconditional application of transplants must be rejected. However, as long as transplantation of implementation tactics is a conditional one, as the factor herein argues, then no real problems of theory and practice would occur, when such transplantation tactics are adopted. The analysis below should suggest the main transplant theories and the main dangers that come with them, as well as the suggested rightful application of a transplantation mode for the comparative factor of implementation.

According to Nicholas Foster there are two kinds of transplantation tactics: the 'culturalist' approach and the 'transferist' approach.[26] The latter approach is represented by Watson. He suggested quite disturbingly that 'legal rules may be very successfully borrowed where the relevant social, economic, geographical and political circumstances of the recipient are very different from those of the donor system'.[27] The former approach, that of the 'culturalists', is represented by such scholars as

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[24] A. Watson, *Legal Transplants*, Edinburgh: Scottish Academic Press Ltd, 1974, p. 21.
[25] A. Watson, 'Legal Transplants and European Private Law', *Electronic Journal of Comparative Law*, Vol. 4.4, December 2000, p. 8; the article is accessible at http://www.ejcl.org/44/art44-2.doc .
[26] N. Foster, 'Transmigration and Transferability of Commercial Law in a Globalised World' in A. Harding & E. Örücü (eds.), *op. cit.*, fn. 6, pp. 58-60.
[27] A. Watson, 'Legal Transplants and Law reform' (1976) 92 *Law Quarterly Review* 79, 80.

Legrand,[28] the Seidmans[29] and Kahn-Freund.[30] In particular, Kahn-Freund presents us with a rather 'watered-down' version of Legrand's ideas. Both of them suggest, however, that law is a culturally determined artefact, which *per se* cannot be transplanted. As F.S.C. Northtrop put it: 'in introducing foreign and legal norms into any society, those norms will become effective and take root only if they incorporate also a part at least of the norms and philosophy of the native society'.[31] This thesis maintains that the proposition of Northtrop is correct. This means that, even though Legrand is right in suggesting that there has to be some sort of context for transplantation to come about,[32] he fails to convince us why Europe, for instance, is not a good environment for transplantations of laws or implementation tactics (as this thesis suggests) to work; especially if in Europe there is a clear political consensus for EU law transplantation to the member states. And whilst Watson, who is on one extreme, is wrong, Legrand must be at least partially wrong for inhabiting the other extreme with regard to the European Union example, for as Kahn-Freund suggests[33] a willing political system may negate the side-effects of transplantation. Therefore, Northtrop and Kahn-Freund's ideas must be closest to what the comparative factor of implementation maintains. As Kahn-Freund put it:

> '...there are degrees of transferability. In most cases one must ask what chances there are that the new law will be adjusted to the home environment and what are the risks that it will be rejected. The chance and, inversely the risk, may be smaller or larger and the magnitude of this chance and of this risk determine the point on the scale at which we have to place the foreign law.'[34]

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[28] See P. Legrand 'European Legal Systems are not Converging' (1996) 45 *International and Comparative Law Quarterly* 52; P. Legrand, 'Against a European Civil Code' (1997) 60 *Modern Law Review* 44; P. Legrand, 'The Impossibility of "Legal transplants"' (1997) 4 *Maastricht Journal of European and Comparative Law* 111.

[29] See A. Seidman and R.B. Seidman, *State and Law in the Development Process: Problem Solving and Institutional Change in the Third World*, Basingstoke: Macmillan, 1994, pp. 44-46.

[30] O. Kahn-Freund, 'Uses and Misuses of Comparative Law' (1974) 37 *Modern Law Review* 1. In particular one should refer to pp. 5-6, where Kahn-Freund suggests to us that the some areas of law are more closely linked to a society than others and are thus more 'organic' than others. According to him, if these areas of law are affected by legal transplants, then their success is only possible through the political system.

[31] Quoted in Legrand's article 'The Impossibility of "Legal transplants"' (1997) 4 *Maastricht Journal of European and Comparative Law*, p. 118.

[32] Along similar lines see the excellent 'English Oak in Africa' metaphor of Lord Denning J. in *Nyali Ltd. V Attorney General* [1955] 1 All E.R. 646 at 653.

[33] *Op. cit.*, fn. 30, pp. 3-4.

[34] O. Kahn-Freund, 'Uses and Misuses of Comparative Law' (1974) 37 *Modern Law Review* 6.

In relation to the risks and chances argument that Kahn-Freund suggests to us, one must admit that the main danger of transplanting laws from one legal system to another is probably given by the analogy that one can draw with the fact that a human organism, when operated upon, can reject an organ from another human organism. When a person receives a transplant from another person, it does not necessarily mean that the receiving person's organism will accept this. Transplants must be accurate and fit for purpose. Likewise a legal rule in one country expressed in exactly the same wording in another country, is not necessarily the same law. Context is everything. Additionally, Watson is of the opinion that 'a transplanted rule is not the same thing as it was in its previous home.'[35] If this is true, then one should perhaps think that, even if the same tactics of implementation are followed in a system of law as in another system of law, this may not necessarily equate to the same result. Perhaps this may be the case, not so much because the intention would not be to reach the same results but because implementation transplants may cause irritation, to use the term that Teubner adopts[36] for transplants.

Conversely, to say that the comparative factor of implementation in this chapter is incompatible with the basic principles of the transplanting method would also be a mistake. Indeed, many legal orders 'with the help of outside models chosen from *competing systems*[37] are experiencing a fundamental upheaval as they re-shape themselves.'[38] As Nelken suggests: 'Borrowing other peoples' law is seen as just a method of speeding up the process of finding legal solutions to similar problems - a process being encouraged all the more by the pressures towards convergence brought about by globalisation'.[39] Moreover, to say that the application of the comparative factor for the implementation of a convergent instrument of law from one legal order to another, is a straightforward process of legal transplantation, would also miss the point. However, one could perhaps argue that the detection of context and the substance in the transposition of any such instrument must not be a very onerous

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[35] A. Watson, *Law Out of Context*, Athens, Ga.: University of Georgia Press, 2000, p. 1.
[36] G. Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences' (1998) 61 *Modern Law Review* 11.
[37] Italics not found in the original source from which the quotation is taken. For what Örücü refers to as 'competing systems', one should refer to section 3.2.1. herein.
[38] E. Örücü, 'Unde Venit, Quo Tendit Comparative Law' in A. Harding & E. Örücü, *op. cit.*, fn. 6, p. 13.
[39] D. Nelken, 'Legal Transplants and Beyond: Of Disciplines and Metaphors' in A. Harding & E. Örücü (eds.), *op. cit.*, fn. 6, pp. 26-27.

process or rather, that it should at least be easier[40] for one to implement law from a legal order to another as opposed to approximating the legal culture of the recipient to the sender's legal system. This must be true by way of the fact that the comparative factor of implementation does not require a wholesale transplantation of foreign laws that other systems have implemented well but rather, a very specific kind of transplantation. Even more interestingly and despite the fact that the comparative factor of implementation does not require a wholesale and constant application of the otherwise 'foreign' sender's tactics, but application on a specific-problem basis, one could argue that its continuous use may produce the eventual approximation of the recipient legal system's culture to the sender legal system's culture. Thus, a constant use of an implementation tool such as the comparative factor should equate to convergence of laws between the recipient and the sender legal system.

However, one should make no mistake; that is, the overriding virtues of the socio-legal factor of implementation are unquestionable in certain cases[41] and thus, the attacks of Allan Watson's 'legal transplants' tactics to the sociology of law tactics must be rejected. In short, Watson's argument in total favour of legal transplants must be avoided at all costs as it presents a rather one-sided approach for the correct application of the comparative factor. This thesis presents to us collaboration or at least an interconnection to a certain degree between the socio-legal factor and the comparative factor of implementation. And there are many scholars who pursue this approach.[42] Watson denies a reality that laws of a system are influenced by the society itself and politics; as he put it:

> 'Over most of the field of law, and especially of private law, in most political and economic circumstances, political rulers have no interest in determining what the rules of law are or should be (provided always of course that revenues roll in and that the public peace is kept). It follows...that usually legal rules are not peculiarly devised for the particular society in which they now operate and also that this is not a matter of great concern'.[43]

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[40] *Ibid.*

[41] See the socio-legal factor in Chapter 6 of this thesis.

[42] R. Cotterrell, 'Is There a Logic of Legal Transplants?' and L. Friedman, 'Some Comments on Roger Cotterrell and Legal Transplants' in D. Nelken and J. Feest (eds.), *Adapting Legal Cultures*, Oxford, Hart Publishing, 2001.

[43] A. Watson, *Roman Law and Comparative Law*, University of Georgia Press, Athens, Georgia, 1991, p. 97.

However, even though the application of the comparative factor of implementation *per se* denies the influence of a society's influence or even that of politics, this does not equate with a whole exclusion of the socio-legal factor; especially in cases which touch upon the very structures of a legal system and where the comparative factor alone would produce illogical results.

5.1.4. No deviatory patterns of convergence by the use of the factor

Furthermore, one can argue that under this factor no divergences occur but many different convergent patterns could, even if different national legal systems (recipients of comparative implementation material) choose different implementation tactics from a number of different legal systems (senders of such material). Let us think e.g. that system X chooses the implementation tactics of system Z and system O chooses the implementation tactics of system Q. Both systems Z and Q must be 'convergence compliant' for the comparative factor of implementation to present us with convergence results. The next question to arise is who dictates this, that is, that Z and Q present good converging examples for X and O respectively. The immediate answer is a supranational or international authority to which X, Z, O and Q are all bound.[44] Does this authority exist anywhere in the world? The immediate answer that comes to one's mind is the European Commission in Europe and the UN International Human Rights Committee on a global basis. Therefore, not only can the factor succeed but it also allows for some variation of choice between different implementers/ national legal systems as long, of course, as this variation of comparative implementation models that different legal systems may choose is declared 'convergence compliant' by a relevant watchdog. All in all, the result of the application of this factor should be convergence.

5.2. Requisites and initial justification thereof

[44] Just as in track competition sports where all athletes have the same ultimate goal i.e. to win but are all bound by the referee's judgement, so too legal systems can under the comparative factor proposed herein compare and choose the implementation of another system, as long as this is affirmed extra-nationally. Cf. Rule 125.2 of the International Association of Athletics Federations Competition Rules 2006-2007.

The factor, under this thesis, is operational under certain criteria only. There are two *main* criteria; the first criterion is what is called herein the *Affinitatis Formula* (extraction of implementation material from 'affiliated' legal systems) and the second criterion is that of applicability of foreign implementation from other legal systems into the recipient system. A *de facto* criterion or rather a variable for the factor suggested in the diagrammatical exposition (see item 7) is the time factor for application of it.

In brief, the '*Affinitatis Formula*' is used, because this is a formula of systemic relevance as a matter of practicality (in the extraction of foreign implementation material), whereas the second criterion is used, because this is also found in the Promethean comparative law test, that of applicability of legal solutions[45] (whether something has succeeded in a foreign legal environment and why, and whether this can succeed in a domestic legal environment and why); this can help us in detecting effective comparative implementation material. These two criteria are explained below.

5.2.1. The *Affinitatis Formula*

> '*The reception of foreign legal institutions is not a matter of nationality but of usefulness and need. No one bothers to fetch a thing from afar,*[46] *when he has one as good or better at home but only a fool would refuse quinine just, because it didn't grow in his back garden.*'[47]

The *Affinitatis Formula* is a formula of convenience as well as practicality.[48] It indicates to the implementing legislator a pool of other relevant or (in the narrow

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[45] See e.g. J. Bell, 'Comparing Public Law' in A. Harding & E. Örücü (eds.), *op. cit.*, fn. 6, p. 236.

[46] Cf. with the general presumption that 'domestic legal science is on the whole nationalistic, the classical view being that the legal system has nothing to learn from elsewhere'. See E. Örücü, *op. cit.*, fn. 4, p. 87.

[47] Rudolph von Jhering, *Geist des römischen Rechts*, Part I, 9th Edition, 1955, p. 8f. See also the dicta of Lord Bingham of Cornhill in *Fairchild v Glenhaven Funeral Serices Limited* [2002] 3 WLR 89 at 119. It is to be noted that Lord Bingham speaks in the general context of comparative law as opposed to the more narrow context of comparative law, that is on implementation matters with which this thesis engages itself.

[48] Cf. the minor hypothesis raised in 2.3.2.2. in relation to the mode of reasoning for the comparative factor.

sense of Zweigert and Kötz) other 'affiliated'[49] legal systems which have already implemented the convergent instrument of law in question. It is a formula of legal proximity. As will be seen further below, this proximity can be systemic proximity but it can also be a problem-based proximity, as long of course as certain conditions are met.

Moreover, though it suggests primarily that the comparative method of law should not be used in a way which necessitates very wide research including all other legal systems (even if these other legal systems have converged with the same convergent instrument), the factor, as prescribed herein, asks for a rather more specific research of certain legal systems with which the national legislator feels at ease. It is expected that this will save the implementer time in his comparative implementation research. Nevertheless, one should not construe the *Affinitatis Formula* very narrowly, at least not always, for – as will be seen further below – e.g. the British or the Irish implementer may necessitate the use of comparative implementation material from a civilian legal system e.g. the French.

Additionally, one can say that the *Affinitatis Formula* suggests to us a separation between comparative law as a purely academic discipline and comparative law as a practical tool of implementation. The formula recognises this distinction and one must see it as a tool for the implementer who uses the comparative method rather than the theoretician of comparative law. By illustrating the differences between comparative law as an academic discipline and the formula's main goals one can see why this is the case. In the main, comparative law as an academic discipline serves the following areas:

- Human curiosity or knowledge according to Zweigert and Kötz[50]
- The understanding of one's law by comparing his law to other legal systems[51]
- Heuristics in law and social theory; that is, it is probably only comparative law that can act as the transmitter of foreign ideas, concepts and notions in the worlds of social theory and law

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[49] K. Zweigert and H. Kötz, *op. cit.*, fn. 9, p. 41. N.B. that what Zweigert and Kötz refer to as 'affiliated' legal systems must be a narrower approach to the more general perspective the *Affinitatis Formula* suggests herein.

[50] K. Zweigert and H. Kötz, *op. cit.*, fn. 9, p. 15 and pp. 21-24.

[51] *Ibid.*, p. 18.

- Hermeneutics in law; that is, comparative law acts as the interpreting tool of foreign laws and solutions to legal problems that otherwise would seem bizarre and absurd
- The provision of benefit via alternative legal solutions in the pursuit of legal convergence with other systems[52]

On the other hand, the comparative factor of implementation as based on the *Affinitatis Formula* has a rather more limited but indeed a more specific scope of application:

- First, it avoids time-consuming comparisons by limiting the comparative method of law to a relevant subject matter, that is, to relevant legal systems
- Second, it systematises the comparative factor of implementation, since this is perhaps the single most important criterion for the factor to operate
- And third, it corresponds to the main principle of the comparative methodology as a whole, that is, the principle of functionality (of comparisons),[53] for 'incomparables cannot be usefully compared.'[54]

One must stress that the definition of the *Affinitatis Formula* is also related to the most basic problem that the comparative lawyer faces: the pursuit of valid comparisons.[55] First of all, the comparative implementer must proceed on the basis of identity of legal problem. Effectively, this means that his/her comparison must be a comparison of two subject matters that share at least some common characteristics. Thus, when one has to implement convergent instrument X by looking to country Z, he should not normally look at how country Z implemented convergent instrument Y but rather he has to look at how country Z implemented convergent instrument X, for X is in question. This is also very relevant to the comparative method, as we know it, since the legislator of Ruritania, for instance, who is in pursuit of modernising his intellectual property law as a matter of form, should not scrutinise the Civil Code of

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[52] *Ibid.*, pp. 24-31.
[53] *Ibid.*, p. 34.
[54] *Ibid.*
[55] On this, see G. Langrod, 'Quelques réflexions méthodologiques sur la comparaison en science juridique', *Revue Internationale de Droit Comparé*, 1957, p. 366ff.

France as a matter of substance; one might say that this is obvious. However, what is not so obvious is that the legislator of Ruritania, a common law country for the purposes of our example, may refer to the Civil Code of France, if he is in pursuit of the 'fresh and flexible' spirit and structure[56] of the French Civil Code as a matter of form,[57] so that this is incorporated in the Ruritanian Act to be drafted, even if such an act deals with intellectual property rather than civil law, as the French Civil Code does. Likewise, the *Affinitatis Formula* suggests that the comparisons to be made by the comparative implementer, though they are mainly of substance and application, may sometimes be of form too.[58]

Additionally, consideration has to be given to what is comparable under this formula. Traditionally, there are perhaps three different schools of thought as to what can be comparable in law: the first school of thought is the approach whereby common legal principles and notions between two or more legal systems must exist; the second school of thought suggests the approach that comparability is a matter of common structural characteristics between the legal institutions compared and the third school of thought is that there must be functionally equivalent rules for comparisons to be fertile.[59] But no single school must be absolutely right. An alternative and combining school of thought takes a rather more subjective approach on the matter; it suggests that the method of assessing what is comparable or not must be the outcome of the scope of the comparative legal research in question on the one hand and the particularly relevant tactics that the comparative researcher adopts on the other.[60]

Moreover, the *Affinitatis Formula* is a tool that seeks tendencies rather than absolute answers. Mattei is correct, when he says that 'Comparative law has matured from the *common core* approach to *legal transplants*, from *legal formants* to the idea of *legal traditions* as a phenomenon of *path dependency*, and on to the notion of the

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[56] K. Zweigert and H. Kötz, *op. cit.*, fn. 9, pp. 90, 91, 100 & 145. Zweigert and Kötz praise the *Code Civil* with the following expressions: 'The Code civil avoids the danger of being too detailed...often been praised for its clear and memorable phrases, and for avoidance of cross-references and jargon...its language [is] forceful and thrilling, free from heavy logic and detailed digression. In France...ordinary citizens may have a feeling of warm affection, of closeness to their Code'.

[57] M.Bogdan, *Comparative Law*, 1994, Kluwer/Stockholm: Borstedts Juridik/Oslo: TANO, p. 57ff.

[58] It is suggested in bibliography that the transposition of substance and form/structure is not a particularly arduous task, though the beginner must always proceed with caution. See A. Harding & E. Örücü, *Comparative Law in the 21st Century*, 2002, The Hague: Kluwer Law International, p. 13.

[59] K. Zweigert and H. Kötz, *op. cit.*, fn. 9, pp. 36-40.

[60] D. Kokkini-Iatridou, 'Some methodological Aspects of Comparative Law, The Third Part of a (Pre-) Paradigm', *Netherlands International Law Review*, 1986, p.158ff.

mute dimension of the law.'[61] It is this maturity that the *Affinitatis Formula* seeks to reach.

In relation to the above one must now ask: **'What makes a legal system similar and therefore relevant to another?'** No direct answer can be given on this, for as already mentioned above the formula seeks tendencies rather than exact patterns. However, if some sort of approximate answer is given on this, then the formula – the single most important criterion of our factor – is satisfied and the factor is applicable in principle. The proposition is that an *Affinitatis* between two or more systems can be established when at least some of the following manifestations occur:

- Similarities of principles and key notions
- Similarity of problems and similarity of solutions
- Similarity of legal mentality and *modus operandi*
- Affiliation by way of a families division
- Shared properties of nomothetics[62] tactics (i.e. shared properties of legislative techniques), and also shared properties of judiciary and administrative operations
- Historical correlation
- Wider compatibility, e.g. is it part of the Western legal tradition or another legal tradition?
- Miscellaneous factors of similarity

Hence, with regard to the similarities of principles and key notions between two or more legal systems making the *Affinitatis Formula* operational, it should be stressed that in any case, in all modern legal interpretative scholarship the emphasis is on the identification of similarities rather than differences between legal systems.[63]

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[61] U. Mattei, 'An Opportunity Not to be Missed: The Future of Comparative Law in the United States' (1998) 46 *American Journal of Comparative Law* 709, p. 715.

[62] Nomothetics is that branch of the legal science which examines the legislative techniques of a legal system or a number of legal systems. The word is derived from the Greek words of *nomos* (the law) + *tithemi* (to pose) = *nomotheto*, i.e. to legislate (νόμος + τίθημι = νομοθετώ). Note that from the same root of the word *tithemi* comes the word thesis (θέσις) as well, literally meaning position.

[63] R. Cotterrell, 'Seeking Similarity, Appreciating Difference: Comparative Law and Communities' in A. Harding and E. Örücü (eds.), *op. cit.*, fn. 6, p. 38 where he argues that 'In all modern legal interpretation...the search for unity, integrity or consistency of meaning is usually privileged, in certain ways, over the identification of difference'.

This is particularly true, since our times are in pursuit of legal unity[64] through, for example, the European Union model on a regional basis or through the plethora of international treaties on a global basis. On the other hand, the pursuit of similarities between two or more legal systems under the formula does not necessarily mean exclusion from the analysis of identification of differences.[65] This must be the case, for 'the identification of likeness and difference go together in legal interpretation generally.'[66] To verify this, Cotterrell suggests the example of the common law lawyers, who find themselves in a constant effort of reconciling precedents and only upon failure do they admit the existence of judicial disparities or differences of interpretation. He goes on to suggest to us that the [main] task of the common law lawyer is to generalise past decisions, so that these can play their role in the larger corpus of legal doctrine.[67] However, since it would be very time-consuming for the national implementer to engage himself with comparisons of identifying differences, it would be undeniably better as a matter of practicality for him to concentrate on the similarities of his system to another legal system's characteristics; obviously, the more the similarities between the recipient's and the sender's systems, the better for the *Affinitatis Formula* to operate and consequently, the more that similarities are found, the easier for the comparative factor of implementation to operate too. Thus, one should promote the idea that comparative law as a discipline of law is engaged both with differences and similarities between legal systems; however, the lawyer who would have to make analysis to see whether the *Affinitatis Formula* applies and

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[64] On the relationship between projects concerned with the unity or approximation of laws through the medium of comparative law see R.H. Graveson, *One Law: On Jurisprudence and the Unification of Law: Selected Essays Volume II*, North-Holland, Amsterdam, 1977; H.C. Gutteridge, *Comparative Law,* 2nd Edition, Wildy reprint, London, 1971, particularly chapters 11 and 12.

[65] This thesis recognises the need of both similarities and differences for the *Affinitatis Formula* but it clearly gives priority to the findings of similarities, rather than differences, in the construction of the formula. See Lambert already in 1900: 'the comparatist, in order to fulfil his task, must select [as the object of his comparison] the most similar laws.' As quoted by Legrand in 'The Same and the Different' in P. Legrand and R. Munday (eds.), *Comparative Legal Studies: Traditions and Transitions*, Cambridge: Cambridge University Press, 2003, p. 246. Also, Zweigert and Kötz warn us that there is a presumption of similarity in problem solving between developed nations; thus, if the comparative lawyer finds great differences across different laws, this denotes inadequate research. See K. Zweigert and H. Kötz, *op. cit.*, fn. 9, p. 40. See also B.S. Markesinis, 'Why a Code is Not the Best Way to Advance the Cause of European Legal Unity', (1997) 5 *European Review of Private Law* 519, p. 520; cf. P. Legrand, 'Structuring European Community Law: How tacit Knowledge Matters', (1998) 21 *Hastings International & Comparative Law Review* 871, p. 872. Then there is Merryman, who avoids the question altogether in his reply to Legrand: 'As to your suggested choice between difference and similarity, why must one choose?' See Pierre Legrand, 'John Henry Merryman and Comparative Legal Studies: A Dialogue', (1999) 47 *American Journal of Comparative Law*, pp. 21-2.

[66] R. Cotterrell, 'Seeking Similarity, Appreciating Difference: Comparative Law and Communities' in A. Harding & E. Örücü (eds.), *op. cit.*, fn. 6, p. 38.

[67] *Ibid.*, pp. 38-39.

consequently whether the comparative factor of implementation applies, would have primarily to ask himself whether the similarities between his recipient system and the sender system are adequate. The question of differences must come second, if not come at all, for the reasons explained above.

Second, the relevance of two (or more) systems comes about as a matter of similar problems that they have to face and similar solutions that they may suggest. Additionally, it is a matter of routine for comparative law to compare not only the rules themselves but also the function which these laws come to serve.[68] However, any approach which would make the formula applicable only by way of similarity of legal problems or solutions would not be sufficient. Legrand is crystal clear on this:

> '[R]ules and concepts alone actually tell one very little about a given legal system... They may provide one with much information about what is apparently happening, but they indicate nothing about the deep structures of legal systems. Specifically, rules and concepts do little to disclose that legal systems are but the surface manifestation of legal cultures and, indeed, of culture *tout court*. In other words, they limit the observer to a "thin description" and foreclose the possibility of the "thick description" that the analyst ought to regard as desirable.'[69]

Additionally, Bell suggests that the comparative researcher need not only examine the rules and functions, 'but also the context in which they operate and in which legal problems arise.'[70] Thus, the fact that system X presents to us similarities of problems and solutions to the problems and solutions of system Z does not *per se* make the *Affinitatis Formula* operative. If, however, – as Bell suggests – the context of the comparison between two or more legal systems with similar solutions and problems is found to be similar as well, then the comparison taking place is an 'effective' one and the formula suggested herein is clearly operative. According to Bell, this context can be one of similar institutional settings and perhaps one of similar systemic, that is, structural, socio-legal features.

Third, the formula requires that the very *modus operandi* and the general legal mentality of two (or more) systems are mutually intelligible. If one tries to fragment this into a more concrete argument, it becomes apparent at first instance that the first

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[68] K. Zweigert and H. Kötz, *op. cit.*, fn. 9, p. 40.
[69] P. Legrand, 'European Legal Systems Are Not Converging' (1996) 45 *International and Comparative Law Quarterly* 52, p. 56.
[70] J. Bell, *op. cit.*, fn. 45, p. 236.

thing which makes the mentality of one legal system similar or different to the mentality of another legal system is tradition/history. To return to abstraction, this mentality is observed with the 'focus [of the comparative lawyer] on the cognitive structure of a given legal culture and, more specifically, on the epistemological foundations of that cognitive structure'.[71] Tradition, on the other hand, may mean of course different things to different scholars but one should construe it as being the historical substratum that has come to prevail in any one society. In a legal system this may be a particular legal culture, its legal ethos[72], which may have been developed by a professional elite[73] (in our case lawyers), rather than by the wider society.[74] Thus, when the comparative implementer seeks to construe the *Affinitatis Formula*, he would most probably have to follow a tactic which seeks to find similarities between his own legal system's *modus operandi* and the mentality of a potential sender legal system, that is, the system from which he extracts the material that he requires to implement convergent law.[75] Again, the fact that he has to follow a rather legalistic approach in the construction of the formula, does not necessarily mean that he should preclude any sociological considerations altogether. Actually, the safest path for him to follow would be the one on which he primarily follows a pursuit of common legal characteristics to another legal system and then to take into account wider sociological considerations or even more contemporary themes such as globalisation.[76]

Fourth, in a comparative implementation model, one system (recipient system) must be a 'neighbour' or rather, 'affilliated' in law to another or to other(s) (sender systems), since this makes comparative implementation systemically convenient. This affiliation principle comes hand in hand with the long-established theory of legal families. There are many divisions of the legal systems of the world into legal

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[71] P. Legrand, *supra*, fn. 69, p. 60.

[72] Cf. B. Grossfeld, *The Strength and Weakness of Comparative Law*, Oxford: Clarendon Press, 1990, p. 33. Grossfeld argues that '[in interpretation matters] comparisons are made within 'the circle of systems culturally linked by common ethical standards'.

[73] Watson promotes this idea; see generally A. Watson, *The Evolution of Law*, Oxford: Blackwell, 1985.

[74] R. Cotterrell, 'Seeking Similarity, Appreciating Difference: Comparative Law and Communities' in A. Harding & E. Örücü (eds.), *op. cit.*, fn. 6, p. 42.

[75] Unlike academic comparative law which does not necessarily reject the findings of differences between different legal systems. For an extreme view to this effect, see Legrand, who argues that comparative lawyers 'must make themselves into *difference engineers*'. See Legrand in 'The Same and the Different' in Legrand and Munday, *op. cit.*, fn. 65, p. 288.

[76] R. Cotterrell, *supra*, fn. 74, p. 42. For more on this see Chapter 6 herein.

families.[77] The two most convincing divisions according to Zweigert and Kötz[78] remain that of Arminjon/Nolde/Wolff,[79] who have divided the legal families as a matter of substance 'paying due heed to originality, derivation, and common elements' by rejecting external criteria and that of René David,[80] who classified the legal systems through the criterion of legal ideology and the criterion of legal technique. The formers' classification into families produced a division into seven legal families: the French, German, Scandinavian, English, Russian, Hindu and Muslim, whereas the latter's classification produced a division of five legal families: Western systems, socialist systems, Islamic law, Hindu Law and Chinese Law.[81] It would seem that Arminjon/Nolde/Wolff's distinction is correct for the purposes of law as a matter of substance but it is too specific for the purposes of legal ideology and technique that David's model suggests to us. Therefore, even if Arminjon/Nolde/Wolff's distinction could ideally be used under the **direct usage** of *Affinitatis Formula*, the formula accepts in practice that a common law country could follow an implementation pattern of a civilian country as a matter of common legal ideology, that is western law ideology.[82] Therefore, David's distinction is preferable in the **indirect usage** of the formula, that is, when, for example, a common law and a civilian law legal system 'share' implementation material as a matter of legal ideology. In this case David's distinction would mean that comparative implementation is a relatively unproblematic task as a matter of ideology for a system

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[77] Many are the names to describe these families too. Glenn made a list recently on this, distinguishing other academicians work on the distinction of legal families by quoting that the laws of the world are grouped as 'systems, traditions, styles, mentalities, families, circles or spheres (*Rechtskreise*) or civilizations'. H.P. Glenn, 'Legal Cultures and Legal Traditions' in M. Van Hoecke (Ed.), *Epistemology and Methodology of Comparative Law*, Oxford and Portland, Oregon: Hart Publishing, 2004, p. 7.

[78] K. Zweigert and H. Kötz, *op. cit.*, fn. 9, pp. 64-65. [Hereinafter Zweigert and Kötz]

[79] Arminjon/Nolde/Wolff, *Traité de droit comparé I*, 1950, pp. 42-53.

[80] R. David, *Traité élémentaire de droit civil comparé*, 1950, pp. 222-226.

[81] R. David came to modify his position after some years and he suggested that the legal families of the world have to be only three: the Romanistic-German, the Common Law family and the Socialist family. The rest of the legal systems such as Muslim law systems, Jewish Law and Far East systems, fall into a category of 'other systems' according to him. See R. David, *Les grands systèmes de droit contemporains*, 9th Edition by Jauffret-Spinosi, 1988, p. 19ff. However, this latter distinction of his can come very easily under attack, since the socialist legal systems do not exist anymore, whereas it is always arguable that families such as the Muslim Law can be simply categorised as belonging to a group of 'other systems'. Therefore, David's initial division of families remains a more plausible classification not only for the purposes of the *Affinitatis Formula* in this analysis, but also for the better understanding of legal families as a whole.

[82] To this effect, see Markesinis, who said that 'We must try to overcome obstacles of terminology and classification in order to show that foreign law is not very different from ours but only appears to be so.' B.S. Markesinis, 'The Destructive and Constructive Role of the Comparative Lawyer', *Rabels Zeitscrift für ausländisches und internationales Privatrecht*, 1993, p. 443.

that belongs to the same family with another system, from which it extracts comparative implementation material. One has to conclude, therefore, that Arminjon/Nolde/Wolff's distinction is most suitable for the direct and ideal usage of the formula and that David's distinction is most suitable for the indirect and perhaps more realistic usage of the formula. If one considers that there are so many strong forces that make this world a smaller place through globalisation, then one should promote David's more general division of legal families. Consequently, one should not always attempt to restrict the formula in its direct form and therefore restrict it in the narrow confines of the Arminjon/Nolde/Wollf division of families. This would be anachronistic in our times. Systems lose their colours. One is not sure anymore whether nowadays he is an Irish Irish lawyer or a Europeanised Irish lawyer, for instance.

Fifth, the relevance of one system to another is a matter of common nomothetics tactics, that is, lawmaking in country X must not be too different from lawmaking in country Z. Their administrations and judiciaries too must share some common elements, though these do not have to be identical.

Sixth, the historical correlation of the recipient legal system and the sender system could also be helpful for comparative implementation material to be drawn.[83] This consideration alone, of course, is not adequate for the formula and the factor to operate. However, legal systems are mirrors of their histories. Similar or related histories must result in similar or related legal systems. Legal systems must be – to a considerable extent – reflections of their past and one should not neglect this. The spread of the common law through the British Empire is perhaps the best example as to how history can be a very important determining factor of the identity of a legal system. A common basic historical substratum between the recipient and the sender legal system must exist. Some common past, even a distant one, would do. *Ius commune* in Europe is a good example of this substratum, since, even though this does not exist anymore, a new *ius commune* is in the making with attempts to find a common core of efficient principles amongst legal systems.[84]

Seventh, a further situation in which the formula could operate is where there is some wider compatibility between the sender and the recipient legal system. Thus

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[83] E. Örücü, *op. cit.*, fn. 4, p. 102.

[84] According to Mattei there exists 'a common core of efficient principles hidden in the different technicalities of [...] legal systems'. U. Mattei, *Comparative Law and* Economics, Ann Arbor: University of Michigan Press, 1998, reprinted in 2004, p. 144.

as Berman[85] suggests to us, in the western legal world there are some very general principles that are common to all the western legal orders; these include *inter alia*: the [more or less] clear cut distinction between legal institutions and other institutions (religion, politics, morality and custom); the fact that the administration of legal institutions is entrusted to a special corps of people who engage in such activities; the fact that the law contains within itself a legal science, a meta-law, by which the law can be both evaluated and analysed; the fact that law is a coherent whole and has an ongoing character, a capacity for growth and so on. This seventh consideration is particularly useful, when one needs to construe the formula in cases where there is no direct affiliation between the recipient and the sender legal system. It is, thus, a very wide condition that allows a western legal system to draw comparative implementation material from another western legal system, as David suggests in his classification of legal families.[86] As Lawrence Friedman insists, 'the contemporary legal systems in the developed world have much more in common with each other than with their own legal histories.'[87] The legal historian and comparatist cannot but be struck by the fact that the present societies deal essentially with the same institutions and problems, such as company and transport matters or the rights of the individual and the consumer, whilst Zweigert and Kötz suggest that one should infer at least a *presumptio similitudinis* as regards solutions to given problems in the western or developed legal systems.[88]

Finally, there are other minor factors which may have to be taken into consideration; these can be e.g. the very climate, soil, location of the recipient and the sender legal system, the presence and role of NGOs in them and so on. Some of these factors, as will be seen in the following chapter, are also relevant to the socio-legal factor.

It is clear that if none of the above characteristics is satisfied then the *Affinitatis Formula* cannot apply and the application of the comparative factor of implementation, at least as prescribed herein, collapses. It is equally clear that if all of

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[85] H.J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition*, Cambridge, Massachusetts, Harvard University Press, 1983.
[86] R. David, *supra*, fn. 80, pp. 222-226.
[87] L. Friedman, 'Borders: On the Emerging Sociology of Transnational Law', (1996) 32 *Stanford Journal of International Law* 65; 'Comments on Applebaum and Nottage' in J. Feest and V. Gessner (eds.), *The Proceedings of the 2nd Onati Workshop on Changing Legal Cultures* (Onati Institute, Spain, 1998), pp. 139-149.
[88] Zweigert and Kötz, p. 40.

the above characteristics are satisfied then the *Affinitatis Formula* applies and therefore the factor is applicable. It is now questionable, whether, if some of the above criteria for the formula apply, the factor can be applied. The answer must be that the more criteria/manifestations are satisfied, the easier it is for the factor to be employed, whereas one could not reasonably expect that, if only one criterion is satisfied, the factor can be operative.

Application of the *Affinitatis Formula* within a federal legal system is normally an easier task than applying the formula between two different national legal systems. This is particularly true not only because American states and Swiss cantons exist under the scope of the American and the Swiss constitution but also because the American states and the Swiss cantons must have formed a common *modus operandi* of legal thought through time, as presumably has the EU. Thus, convergence in a federal model under the formula requires a federation or a confederation which is constituted by sub-nations (states in the US or cantons in Switzerland) that, even though have a separate substantive law of their own, may share implementation on the same subject matter, if this arises. Accordingly, it would e.g. be legitimate for one to argue that the state of Texas can in principle withdraw implementation material from the state of California and *vice-versa*, even though they do not share the same specific substantive law in many matters, because in any case a) *both* Texas and California would have to borrow implementation material from each other on the *same* implementation matter (if any), irrespective of their differences[89] and b) because applying David's distinction of legal systems per ideology and technique (raised above), one readily concludes that *both* Texas and California share the same general legal ideology, the common law (as opposed to a specific legal mentality of substance in various matters) as well as the same legal technique, the common law method.[90] Hence, the formula (and hence the factor as a whole) could in principle be operative between these two US states. Similarly, states in the US, cantons in Switzerland, *Länder* in Germany can also develop their laws as a matter of convergence by 'looking around' to the legal developments of other constituent members of the federations which they are members of.

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[89] Cf. the modern approach in comparative law, whereby the stress is on the identification of similarities rather than differences. For more on this see *supra*, R.B. Schlesinger, fn. 11 and R. Cotterrell, fn. 63.

[90] Cf. the dicta of Scalia J. (dissenting) in *Lawrence v Texas* (2003) 539 U.S. 558 at 586-605 and especially 589-592. It is to be noted that Scalia J. brings on the equivalent of an 'autonomy of legal systems on questions of morality' argument which this thesis upholds. To this effect see Chapter 6.

It is quite remarkable, to the great surprise of the European comparatists, that their American counterparts are *de facto* habitual comparatists due to the style of the American legal order. Thus, the American lawyer may routinely consult the law of other states of the federation in relation to matters arising under his own state's law. In the American case of *New State Ice Co. v Liebmann* (1932)[91], what is called the *Affinitatis Formula* herein, was best identified for a federal system of law, whereby each constituent state seeks to converge their laws to another 'pioneer' legal state. The case involved the question of whether a private Oklahoma manufacturer of ice could sell ice against an Oklahoma statute but under the US constitution. It was held that it could but it was recognised that the American legal order offers great advantages not only to the American attorney but also to the American state legislator as Justice Louis D. Branders has suggested, even if the state of Oklahoma had acted repugnant to the due process of law clause of the XIV Amendment of the US constitution. He went on to add that:

'...it is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory and try novel social and economic experiments without risk to the rest of the country.'[92]

One perhaps has to add that, if this single 'courageous' state succeeds in its legal experiment as a matter of substance as well as a matter of implementation, then the rest of the states may follow soon after by transposing this experiment in their own state laws.

5.2.1.1. Directly and indirectly relevant systems

From the analysis on the *Affinitatis Formula* it must follow that, when a national legislator chooses implementation material from a directly relevant system as in the case e.g. where the Irish legislator would choose such material from the British legal system, one talks about the direct use of the formula. It is true enough, however, that post 1921 Irish and British history became effectively two separate entities; it is

[91] 285 U.S. 262, 311 (1932)
[92] *Ibid.*, (Branders, J., dissenting).

also true that there is a significant departure of Irish constitutional law from British constitutional law mainly because of the written character of the former, whilst Irish politics too departs significantly from its British counterpart, since the political structures of the two countries vary significantly, that is to say that Ireland is a Republic, whilst the UK is a Monarchy. And yet all these do not negate the direct use of the formula, for both the British (with the exception of the Scottish legal system) and Irish systems, as examples, are purely common-law systems, in addition to the fact that these legal systems treat the legal profession similarly and use very similar legal techniques. Consequently, this example leads us to think that a 'directly relevant legal system' must be one that falls within the narrow confines of the Arminjon/Nolde/Wolff[93] definition of legal families. If, on the other hand, the Irish legislator would choose material from the Swedish legal system, then one would clearly talk about the indirect use of the formula. Therefore, an 'indirectly relevant legal system' must be one that falls within the wider confines of David's[94] classification of legal families.

5.2.2. 'Litmus' of applicability

The second essential criterion of the comparative factor of implementation is concerned with the litmus of applicability of comparative implementation tactics. Generally, the principle of applicability is true of all comparative law methodology. Thus, under this principle there are two pairs of questions for the comparative implementer of the recipient system to ask: first, has the relevant implementation tactic worked elsewhere, that is, in the sender system(s) and why and second, can the relevant implementation tactic work here, that is, in the recipient system, and why. If the answers to the 'has it worked elsewhere and can it work here' questions are affirmative and are sufficiently justified, then the factor, as prescribed herein, clearly applies (on the basis of course that the *Affinitatis Formula* is also satisfied). Minor modifications and adaptations of the imported implementation material from another system legal system are permissible, if not welcome; Zweigert and Kötz suggest that 'a solution tried and tested abroad, because of differences in court procedures, the

[93] Arminjon/Nolde/Wolff, *supra*, fn. 79, pp. 42-53.
[94] R. David, *supra*, fn. 80, pp. 222-226.

powers of the various authorities, the working of the economy or the general social context into which would have to fit' may prove impossible to adopt without modification.[95]

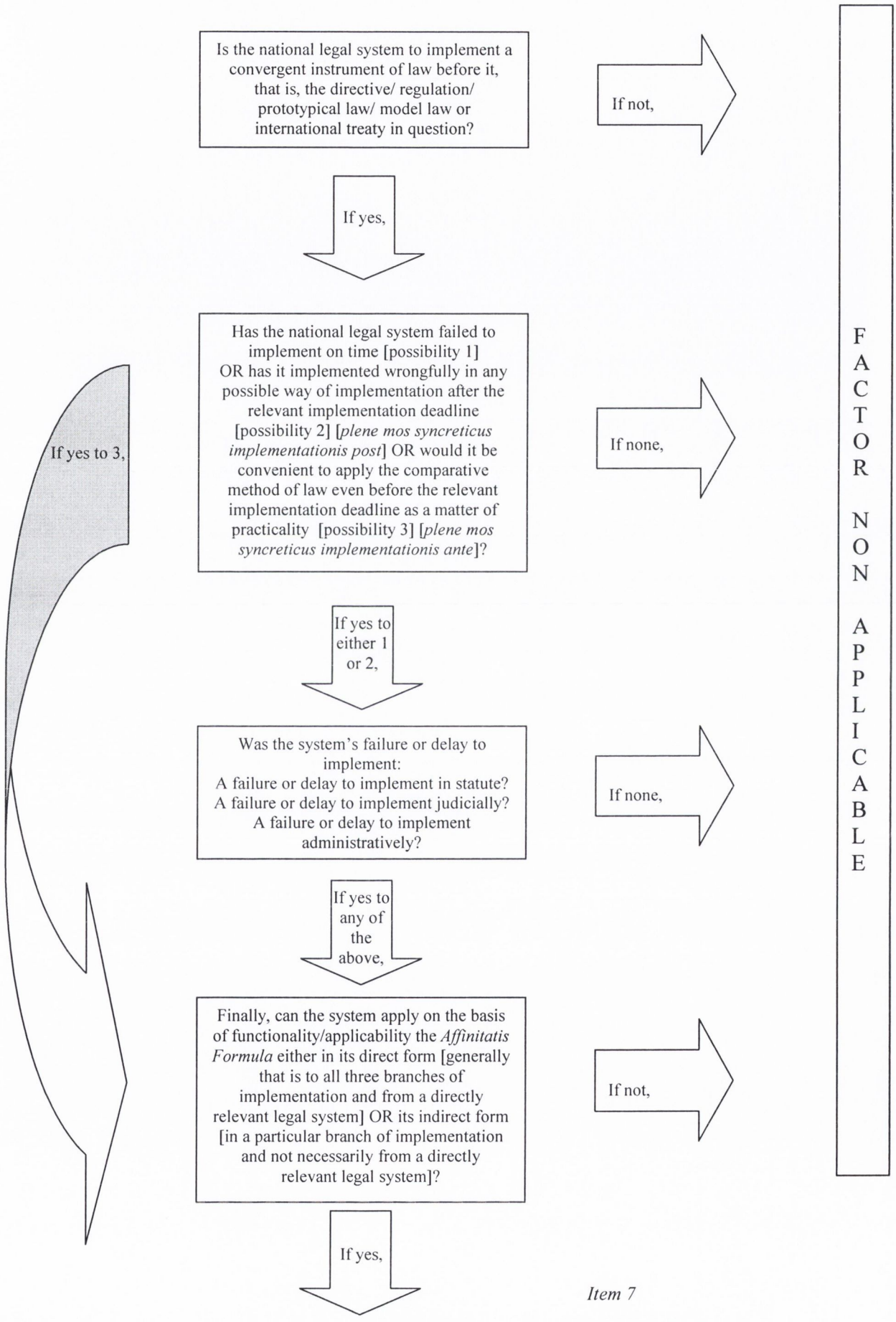
5.3. Application and mechanics

Let us now see how the comparative factor of implementation works or rather, could work in practice. As the models raised in the previous chapters, the comparative factor of our chapter, though open to adaptation, as e.g. the national legislator would think proper, normally operates under the diagram provided below (see item 7). This, as all other models and factors, is based on propositional logic.

The exemplifications which follow prove the operation of the factor. The first hypothetical example proves the use of the factor from both 'directly relevant' and 'indirectly relevant' systems (i.e. implementation material for France from Quebec and the U.S.A. respectively); the second example shows us that there has been extensive usage of the factor from a national law-preparatory committee (the Irish Law Reform Commission) in almost *all* its reports and consultations vis-à-vis implementation of extra-national law, whilst the third exemplification addresses and proves the possibility of the factor in a federal system. Prior to the exemplifications, the dangers of misapplying the factor are dealt with.

[95] Zweigert and Kötz, p. 17.

COMPARATIVE LAW FACTOR IN IMPLEMENTATION



Item 7

5.3.1. The Scylla of the Language Barrier in applying the factor and the Charybdis of domesticating the latter

There are two great hazards which the comparative lawyer must avoid when applying a comparative factor of implementation. In applying the factor, he should proceed with caution by being aware of the fact that, except for the legal barriers between legal systems, linguistic barriers are also a reality. Secondly, an even perhaps greater mistake, which he may commit, is the mistake of domesticating the factor via influences of domestic legal theory or method. The factor proposed herein becomes a figment then and its application is rendered unsuccessful.

As to the question of the language barrier, the answer is given by the attitude that the comparative lawyer adopts or at least should adopt in any research in the subject area: be it in matters of substantive and/or implementation relation. The person(s) that are to apply the factor should be at least fluent users of the language of the system from which they extract information, for it is significantly more rewarding to extract material from the original text (as opposed to translated legal text), though extraction of material from translated text is a possibility. It is obvious that when the Irish lawyer for instance obtains material from other common law systems that this should be a relatively easy task, for most – if not all – use the English language. Things become increasingly difficult when it comes to studying systems which belong to another legal family and use another language altogether. One must then proceed with discipline and imagination.[96] These are the main tools (as well as virtues) that the comparative lawyer must have. In such a comparative exercise not only is the fluent use and understanding of the foreign language necessary but also the fluent use and understanding of the foreign legal terminology.[97] This is particularly true, for almost invariably in every language of the world the legal world has formed or rather preserved a linguistic microcosm that seems to be so distant and archaic to the layman.

To make matters worse, even in legal systems which may use the same language and belong to the same state, one would find inconsistent language use. The

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[96] Zweigert and Kötz, p. 37.

[97] For this, see in particular the article 'The Problems of Legal Translation' of Steiner in E.K. Banakas (ed.), *United Kingdom Law in the 1980's*, London: United Kingdom National Committee of Comparative Law, 1988, p. 239 and the traditional writer on the matter: H.C. Gutteridge, *Comparative Law: An Introduction to the Comparative Method of Legal Study and Research*, Cambridge: Cambridge University Press, 1946.

example of the United Kingdom is striking to the comparative lawyer. Thus, terms such as burglary, covenant, habeas corpus, subpoena that exist in the English legal system are not found in the Scottish legal system, which borrows many common law legal features,[98] even if it is not a common law legal system. In Scotland there is no distinction whatsoever between libel and slander as the Scottish legal system recognises only defamation as a concept of law. Also, several terms which are found in English Law bear no linguistic resemblance in Scottish Law and thus, an advocate in Scottish legal terms is a barrister for the English, an arrest for the English is an apprehension for the Scottish, an injunction for the English is an interdict for the Scottish and culpable homicide for the Scottish is a manslaughter for the English.[99] This list is, of course, not exhaustive but it aims to show the reader the linguistic deviation between two constituent legal systems of the same country, the United Kingdom. Lord Denning once said that even experienced domestic lawyers have significant difficulties in coming into terms with what exactly statutes suggest. In *Davy v Leeds Corporation* [1964][100] he stated this proposition in the following terms:

> 'I must say that rarely have I come across such a mass of obscurity, even in statute. I cannot conceive how any ordinary person must be expected to understand it. So deep is the thicket...that both of the very experienced counsel lost their way. Each of them missed the last 20 words of subsection 8 of section 9 of the Act of 1959. So did this expert tribunal itself. It might happen to anyone in this jungle.'[101]

Things can only be worse[102] for the comparative lawyer, when he crosses the frontiers of his legal system.[103]

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[98] 'The purity of Scots law has been sullied by the introduction of English legal ideas' and 'Scotland must often trim its legal sails to the winds blowing from Westminster', Zweigert and Kötz suggest. See Zweigert and Kötz, pp. 203-4.

[99] D. Crystal, *The Cambridge Encyclopedia of the English Language*, 2nd Edition, 2003, Cambridge: Cambridge University Press, p. 328.

[100] [1964] 3 All ER 390, [1964] 1 WLR 1218, 16 P&CR 244, 62 LGR 628, [1964] RVR 776, 128 JP 541

[101] *Ibid.*, per Lord Denning.

[102] Frantzeskaki, Eurugeni, Simeonidi, *Syncritico Dikaio*, Athens, 1978, p. 141ff.

[103] There are many typical examples of this. For instance, what the English name 'Civil Law', the continental languages refer to as Roman Law, whereas the literal translation of the term 'Civil Law' in French or German refers to that part of the substantive of law in France and Germany which refers to private law matters. Additionally, the term 'jurisdiction' in French means the exclusive legal competence of a court for a particular matter of law; in English the term 'jurisdiction' has a rather geographical connotation, implying, amongst others, the territoriality of a court's authority. Another striking example comes with the term 'jurisprudence', which normally refers to the general

As regards avoiding the danger of domestication of one's research in applying the comparative factor of implementation, one should be even more cautious; for one to reach excellent results in avoiding domestication, good language skills and adequate practice in foreign terminology should normally suffice. The question then of trying to avoid domesticating foreign concepts in an inept fashion is purely a matter of good tactics in the application of the comparative method as a whole.

For the latter to be avoided a number of steps have to be followed. There is no such thing as a general recipe which the comparatist has to follow, since 'the right method must largely be discovered by trial and error'.[104] First, one must follow the international, that is, the universally[105] accepted character of the comparative method and not the domestic comparative law that a researcher's system may have developed for itself. Second, one should bear in mind that foreign law is derived as material, which is examined in the light of the legal system from which it derives.[106] The comparatist can only reach ideal results, if he undresses himself from the 'national clothes' that he wears; if he 'eradicates the preconceptions of his native legal system.'[107] He must, therefore, proceed by bearing in mind that he has to use the concepts and notions, the logic and the hermeneutics of the legal order to which he refers for his comparison; not the concepts and notions of his own system[108]; equally, he may have to see in the light of the foreign context whether or not the foreign rules will fit into the context of his *own* system. In an implementation study such as the one the factor of this chapter suggests, one must, therefore, proceed by bearing in mind that the systemic differences and similarities of the system to which one refers with the recipient system must all be taken into account. This must be particularly helpful for the 'smoother' transposition of the foreign application of the convergent instrument of law, into the comparatist's domestic system, since the transposition will indeed take into account all the specificities of the systems in question. Moreover, obvious as this may be, the comparatist should try to proceed to the original sources. For instance, if by any remote and hypothetical chance the English legislator would

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theory/philosophy of law in England, whereas the French 'jurisprudence' is roughly equal to the English 'precedent' and the German 'Jurisprudenz' means the legal science as a whole.

[104] Zweigert and Kötz, p. 33.

[105] L.J. Constantinesco, *Traité de droit comparé, vol. II : La méthode comparative*, Paris: Ed. LGDJ, 1974, p.48ff on the unity of the comparative method.

[106] *Ibid.*, p. 135ff.

[107] Zweigert and Kötz, p. 35.

[108] L.J. Constantinesco, *Traité de droit comparé, vol. II : La méthode comparative*, Paris: Ed. LGDJ, 1974, p. 135ff.

have to implement the French Civil Code in England, the English comparatist should study the original French text[109] rather than refer to the English translation and see from French bibliography how the French legal system has managed in the last 200 years to implement the spirit of the Code in France with all the major or minor amendments that the Code has sustained through this period.

5.3.2. First exemplification: Application of the factor in the potential case of introducing the notion of universal securities in the UK, France and Quebec

Let us now work on the hypothesis that one day in the next few years the French, the Canadians, and the British decide to introduce into the world arena of international commerce the notion of 'universal security' by introducing it within their domestic systems. For the sake of our example, they all sign the relevant hypothetical international instrument and no matter whether they bring implementation thereof by a monist or dualist approach, the treaty as such acquires the force of law in these three systems. It is this example which is used here, because on the one hand it offers us the opportunity to see how a common law device may have to be implemented in a civil legal system such as the French, whether the French would absorb comparative implementation material from a directly relevant legal system (Quebec) or an indirectly relevant legal system (US), systems which already have this device into their law.

Naturally, the enforcer in the UK would probably not face great difficulties in implementing such an international instrument. It would not be an exaggeration for one to suggest that the universal security is a creature of the common law. In English law a security is a charge but one which is to be distinguished from a charge such as the mortgage (a transfer of legal title) and from a charge such as the pledge (a transfer of possession). As already mentioned, since the security is a charge in English law this means that it is a transfer of rights, a grant of rights.[110] What it does is that, when X grants to Z a right over the former's property, Z secures an expected performance of an obligation by X. If X fails to perform such an obligation, Z may take possession

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[109] C. Deligianni-Dimitrakou, *Eisagogi sto Syncritico Dikaio*, 1997, Thessaloniki: Sakkoulas Publications, p. 35.

[110] Established as a notion in *Brown v Bateman* (1867) LR 2 CP 272.

of the asset in question; sell it and be reimbursed out of the proceeds of sale. Common law distinguishes between a floating and a fixed charge: the former may be created by a company to secure debentures, whereas the latter is a charge on a specific property.[111] Additionally, another major difference between the two is that there is variation of control, since in a fixed charge the chargor must request permission from the chargee before disposing of any charged asset, whereas in a floating charge the charger does not have to ask for such permission, as long as he sells the charge in the ordinary course of business. In English Law the ability of a company to charge a security is seen as essential for the well-being of the companies, since they have the chance to increase their available credit by way of this notion.

The implementers in Canada and France would have to deal with a significant amount of problems in enforcing such an instrument of law. The first question that they would have to pose to themselves is whether they would have to introduce such an instrument in their domestic systems. The fact that they would have signed the relevant international instrument and that they have set in motion the relevant ratification procedure should make one believe that they have to fulfil the intents and purposes of this international instrument. Unlike Canada, France adopts a monist approach in the implementation of international instruments and therefore France would – on the face of it – seem to adopt the instrument less laboriously than the Canadians would.

The second question that the Canadian and French legislator would have to ask is whether they would have to use the comparative factor of implementation prospectively as a matter of practicality. In both Canada and France the implementer would reach the conclusion that it would at least be helpful to do so. However, since to this day France has not introduced into its law of obligations any such thing as the universal security, it would almost be of the essence that the French implementer utilises our comparative factor of implementation. The Canadian implementer would not, however, have to actively use the factor, for he may have done so inadvertently, when even the civilian limb (Quebec) of the Canadian legal order has introduced the universal security into its Civil Code and has thus successfully connected civilian law with the Common Law.[112] Thus, Article 2666 of the Quebec Civil Code 1994[113]

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[111] L.B. Curzon, *Dictionary of Law,* Harlow: Longman, 6th Edition, 2002, p. 62.

[112] For other examples of Quebec Civil Code's attempt to connect with other orders of law see Zweigert and Kötz, pp. 117-118.

introduces the hypothec of a universality. Article 2715 et seq. QCC 1994 elaborate further on the general provision that is found in Article 2666 QCC and introduce the *hypothèque ouverte* (floating hypothec), which must be seen as the closest equivalent of the civilian QCC to the English universal security notion. The Quebecois, when they introduced this alien notion[114] into their civil code, did not necessarily implement this into a legal reality by scrutinising the English tactics on the matter but rather referred to the American approach on this. Thus, according to academic opinion[115] Article 2715 et seq. are closely linked to and strongly resemble Article 9 of the United States Uniform Commercial Code.[116] Since neither the Canadian nor the British legislator would have problems in implementing the universal security into their domestic systems, the question now turns to the French. The French – unquestionably – would have to face a number of problems when incorporating such a notion into their Civil Code and implementing this into French legal life. As already said, it would be convenient for the French to apply the comparative factor of implementation as a matter of convenience and practicality, for such a 'foreign notion' as the universal security would present particular difficulties for its application in France without prior consultation of foreign material.

The final question that the French implementer would have to ask himself would be whether he could use the *Affinitatis Formula* and if so, in which form and from which systems. That is, from amongst the British, the Quebecois and the American, which one or any of these would most suitably qualify for something as such. In relation to the general question of whether the formula applies or not, the answer must be in the affirmative. Without doubt, he would be able to use the formula by way of utilising comparative implementation material from Quebec, which is, of course, a directly relevant legal system to the French legal system, since Quebecois lawyers use legal bibliography from France both in the academia and in

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[113] [Hereinafter QCC 1994 or simply QCC]

[114] Another alien notion they introduced into their civil code was that of the trust. On the QCC in general and the changes it brought to the Quebecois legal order, see G. Remillard, 'Présentation du Projet de Code Civil du Québec' (1991) 22 *Revue Générale de Droit* 5.

[115] See e.g. J. Farley, 'Canada' in Norton Rose, *Norton Rose on Cross-Border Security*, Butterworths, London, 2000, p. 23 and in particular p. 43 *et seq.* For Quebec; P.G. Jobin, 'La Modernité du Droit Commun des Contrats dans le Code Civil du Québec : Quelle Modernité ?' [2000] *Revue Internationale De Droit Compar*é 49.

[116] One must not exaggerate this, however. Article 9 UCC has been taken into account but not adopted wholesale. In essence, it was mainly its content which was taken into account in the drafting of the Quebec Civil Code 1994. See Nicholas Foster, 'Transmigration and Transferability of Commercial Law in a Globalised World' in A. Harding & E. Örücü (eds.), *Comparative Law in the 21st Century*, The Hague: Kluwer Law International, 2002, p. 66.

their every day legal practice to this day.[117] Additionally, the contemporary QCC is a substantially French piece of legislation.[118] Thus, it is apparent that the direct use of the *Affinitatis Formula* is possible, when it comes to the utilisation of Quebecois material by the French implementer. For instance, Article 2755 QCC 1994 leads us to think that the French implementer would identify the civilian tradition in the implementation of the notion by the QCC, since, as in France, but contrary to the approach taken by the English legal system, registration of the 'floating hypothec' must be the case.[119] For the French, Quebec is a directly relevant legal system. However, one might be able to argue that, even if the French legislator/implementer would use comparative implementation material from the UK and the US, this would amount to a possible utilisation of the formula though in its indirect form. Thus, one cannot but agree with the proposition that the British and the American legal orders are not directly relevant legal orders to the French legal order, as the systemic differences between France and the US and the UK are more than their similarities. However, one could in the year 2006 take a rather more unprejudiced approach. One would be able to suggest, for instance, that, despite the great number of differences between the French legal system on the one hand and the US and the UK legal orders on the other, the French implementer may have to refer to the implementation of these systems as a matter of convenience.[120] This must be true, if one admits that the universality of a security is the brainchild of the common law in the first place. However, one should make no mistake; for all the advantages of the *Affinitatis Formula* and the comparative factor of implementation, the French implementer and any implementer who would utilise the factor of this chapter, should recognise that his legal order is a distinct legal system no matter whether he uses comparative implementation material from a directly (Quebec in this example) or indirectly (US and UK here) relevant legal system. Therefore, utilisation of the formula and the tecnique should come about in conjunction with a 'functional parallel evolution' by a

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[117] Zweigert and Kötz, p. 118.
[118] *Ibid.*, p. 117.
[119] Under Article 2755 Quebec Civil Code 1994: 'The possessor of a floating hypothec may not exercise any of his hypothecary rights until after registration of notice of crystallisation.'
[120] See e.g. Zweigert and Kötz, p. 42.

'domesticated and endogenous cultivation'[121] of the foreign comparative material or 'in the context'[122] of the recipient legal system.

5.3.3. Second exemplification: The Irish experience-The Law Reform Commission's recommendations in the incorporation of international conventions and the use of the comparative factor of implementation

The next example to be considered is how a national law reform group has applied the comparative factor of implementation. The Irish cases of implementing international conventions will be used. It will be argued that the Irish Law Reform Group has used comparative implementation tactics by referring to other relevant legal systems and that it has done so by using the comparative factor of implementation to a certain extent. What is important is that the Irish have not only exercised the comparative method as a matter of substance but also as a matter of implementation tactics; exactly as the factor suggests. It is for this reason that the Irish experience is analysed here, in addition, of course, to the fact that the research material for such an exemplification has been readily available to the author.

Thus, the Irish Law Reform Commission [123] has used comparative implementation material in the vast majority of cases relating to international conventions, which would have to be implemented into Irish law. Normally, the ILRC in such cases either issues a consultation paper, a report or both.

The first time that the Irish had to examine comparative implementation tactics by reporting on them was the ILRC Report on the Hague Convention on Civil Aspects of International Child Abduction and Some Related Matters (1985).[124] The 1980 Convention was scrutinised and it was observed which other countries had implemented it. Initially, the ILRC questioned whether they should make a

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[121] This approach is mainly prescribed by theorists such as Teubner. *Supra*, fn. 36, p. 12.

[122] This approach is prescribed by theorists such as Legrand. See P. Legrand, 'The Impossibility of "Legal Transplants"', 4 *Maastricht Journal of European and Comparative Law*, 1997, pp. 111 ff.

[123] [Hereafter the ILRC] The ILRC is the result of the Irish Law Reform Commission Act 1975. Pursuant to s. 3 (1) of the Act the Irish Law Reform group was established, whereas by virtue of s. 4 (3) (b) comparative law tactics are recognised in a triumphant fashion: [the Commission may] *'examine and conduct such research in relation to the legal systems of countries other than the State as appears to the Commission likely to facilitate the performance of its functions'*. Cf. s. 4 (3) (b) of the Act with s. 3 (1) (f) of the British Law Commissions Act 1965.

[124] LRC 12-1985: *Report on the Hague Convention on Civil Aspects of International Child Abduction and Some Related Matters*.

reservation under Article 42 of the Convention and for this they looked at the approach which the relevant (to a greater or lesser degree) legal systems of Canada, France, Portugal and Switzerland had taken on this particular matter.[125] Additionally, the ILRC used in its amendment proposals law material from the UK, such as the Child Abduction Act 1984[126], for comparative purposes.

The ILRC used comparative implementation material for the second time in its **Report on the Hague Convention of the Taking Evidence Abroad in Civil and Commercial Matters (1985).**[127] The ratification of this 1968 Convention was the subject matter of the report. Again comparative implementation material was used from such relevant legal systems as the Federal Republic of Germany, Singapore, Portugal and Denmark.[128] Additionally, case law from the USA[129] and British Acts of parliament, the Criminal Jurisdiction Act 1975[130] and the Protection of Trading Act 1980[131] were used as sources of comparative material. There were other referrals to relevant systems, such as the Swedish, the Italian and the British,[132] as to how these systems implemented the Convention in relation to internal arrangements that they had to make. Particular attention was paid to the reservations of relevant systems (to the Irish legal system), such as the UK, the US, the German, the French and other European systems, such as the Dutch, the Norwegian, the Danish and the Italian.[133] Generally, the ILRC has been using, in a constant and systematic manner, implementation material from other relevant legal systems too.[134] All of them are either European legal systems or systems with strong civilian and common law elements, such as the Israeli legal system or countries that are of 'common law flavour' such as the Singaporean legal system and of course the US legal system.

In another report, the **Report on the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial**

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[125] *Ibid.*, p. 24.
[126] *Ibid.*, pp. 40, 43.
[127] LRC 16-1985: *Report on the Hague Convention of the Taking Evidence Abroad in Civil and Commercial Matters*. N.B. where chronology is used in brackets in 3.3.3. of this thesis, it refers to the publication year of the Irish Law Reform Commission reports.
[128] *Ibid.*, see footnote of p. 18
[129] *Ibid.*, p. 22.
[130] *Ibid.*, p. 27
[131] *Ibid.*, p. 23.
[132] *Ibid.*, p. 24.
[133] *Ibid.*, pp. 25, 26, 28.
[134] *Ibid.*, see pp. 29-33, 38, 43, 44.

Matters (1987)[135] the ILRC used comparative implementation material as well as case law from the USA and the UK[136] to see how these relevant legal systems had implemented certain aspects of the 1965 Convention or what the law of these systems suggested in certain matters relevant to the Convention.

The fourth report which used comparative material for implementing an international law convention was the ILRC **Report on the Recognition of Foreign Adoption Decrees (1989).**[137] The commissioners introduce us to the Irish approach on the matter by referring at first to Europe and North America by mentioning that – as in Ireland, one has to add – the goal of adoption in the societies of these geographical areas is the promotion of the welfare of the child, though the commissioners warn us that there are differences in a number of these societies as to the legal effects of adoption.[138] Once again the commissioners drew comparative material from relevant legal systems such as the English and the Canadian.[139] Additionally, in relation to particular matters concerned with the Hague Convention on Adoptions 1964, the ILRC refer to the British, the Austrian and the Swiss approach.[140] However, as regards the *Affinitatis Formula*, not only have the commissioners used the above comparative material but they also rejected the insular approach of Veisey J in relation to the recognition of adoptions in systems that are not directly relevant to the English, who said:

> 'Am I to scrutinise the laws of the Province of Quebec, which are by no means the same as the English laws of adoption, and see whether, in my judgement, they come sufficiently close to such last-mentioned law to oblige or allow me to say that an adoption effected in that province is for the relevant purposes is exactly the same in its consequence as one made under the law of England? Such a task is, in my judgment, quite beyond my powers.'[141]

The above statement might have been correct in the 1950's, when this decision was made in England. Many would doubt such a statement today (as the ILRC did 30

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[135] LRC 22-1987: *Report on the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters.*
[136] *Ibid.*, pp. 9, 11, 13.
[137] LRC 29-1989: *Report on the Recognition of Foreign Adoption Decrees.*
[138] *Ibid.*, p. 3.
[139] *Ibid.*, pp. 4, 8.
[140] *Ibid.*, pp. 19, 21.
[141] *Re Wilson* [1954] Ch. 733, at 741.

years after the decision was made). Thus, the right judicial approach which comes hand in hand with the *Affinitatis Formula* is the one suggested by Lord Denning who said elsewhere in relation to adoption:

> '[W]hen is the status of adoption duly constituted? Clearly it is so, when it is constituted in another country *in similar circumstances*[142] as we claim for ourselves. Our courts should recognise a jurisdiction which mutatis mutandis they accept for themselves...'[143]

The fifth attempt of the ILRC to use comparative implementation material was with the **Report on the United Nations (Vienna) Convention on Contracts for the International Sale of Goods (1992).**[144] Except for constant referrals to European law of enforcement, such as the Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters 1968[145] and the Convention on the Law Applicable to Contractual Obligations 1989[146], the ILRC dedicated almost the whole of chapter 12 (Recommendations)[147] in the report to cases of implementation in other countries. In a sense, the analysis of the ILRC follows closely the pattern of the *Affinitatis Formula* which seeks to divide legal systems into directly relevant and indirectly relevant for the purposes of implementation. Thus, the report is divided into common law legal systems implementation of the Vienna Convention 1980 or what is called herein 'directly relevant legal systems to the Irish legal order' and European Community legal systems or what is called herein 'indirectly relevant legal systems to the Irish legal order'. In the cases of implementation of the Convention in other common law legal systems the examples of the USA[148] and the UK[149] have been chosen. In the cases of implementation of the Convention in European Union states the members of the ILRC chose to use the term 'fellow members of the Community' and one could argue that this alone should make one perceive the legal systems which

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[142] Emphasis added to the words 'in similar circumstances' by the author of this thesis. Cf. with the turn of comparative law to identification of similarities in 5.1. and the 'similarity approach' of the *Affinitatis Formula* in 5.2.1. herein.
[143] *Re Valentine's Settlement* [1965] Ch. 831 (C.A.)
[144] LRC 42-1992: *Report on the United Nations (Vienna) Convention on Contracts for the International Sale of Goods.*
[145] *Ibid.*, pp. 20-22.
[146] *Ibid.*, pp. 23-25.
[147] *Ibid.*, pp. 76-88.
[148] *Ibid.*, pp. 77-78.
[149] *Ibid.*, pp. 78-80.

the ILRC referred to as indirectly relevant systems to the Irish legal order. These were Germany,[150] the Netherlands,[151] Denmark[152] and France, Italy and Spain.[153]

Sixth, the ILRC used comparative material as regards implementation in other relevant legal systems in its **Report on the Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents (1995).**[154] With the exception of the Saudi Arabian example[155] – which one must infer as a purely comparative example – in this report too the ILRC makes constant and systematic use of legal systems that are directly or even indirectly relevant to the Irish legal order. Thus, comparative material is drawn from European law in general, such as the European Convention on the Abolition of Legalisation of Documents Executed by Diplomatic or Consular Officers 1968 and the Convention Abolishing the Legalisation of Documents in the Member States of the European Communities 1987, whereas in another part of the report comparative implementation material in relation to the 1961 Hague Convention is drawn from other relevant legal systems, such as the Federal Republic of Germany,[156] France,[157] England and Wales,[158] the USA,[159] Hungary[160] and Spain.[161]

More recently the ILRC used extensive implementation material by way of the comparative method in the **Consultation Paper on the Implementation of the Hague Convention on the Protection of Children and Co-operation in respect of Intercountry Adoption (September 1997)**[162] as well as in the following **Report on the Implementation of the Hague Convention on the Protection of Children and**

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[150] *Ibid.*, p. 81.
[151] *Ibid.*
[152] *Ibid.*
[153] *Ibid.*, p. 82.
[154] LRC 48-1995: *Report on the Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents.*
[155] *Ibid.*, p. 39. The fact that the Irish used Saudi Arabian material as a matter of a purely comparative example is also proved from the fact that at least at the time of the LRC 48-1995, Saudi Arabia had not been a party to the 1961 Hague Convention. For this refer to p. 40 of the report.
[156] *Ibid.*, pp. 36-37.
[157] *Ibid.*, p. 37.
[158] *Ibid.*, pp. 37-39, 76-77.
[159] *Ibid.* pp. 39, 70, 73-74.
[160] *Ibid.*, p. 74.
[161] *Ibid.*, p. 74.
[162] ISSN 1393-3140: *Law Reform Commission's Consultation Paper on the Implementation of the Hague Convention on the Protection of Children and Co-operation in respect of Intercountry Adoption.*

Co-operation in respect of Intercountry Adoption (June 1998).[163] Both of the analyses are concerned with the particular implementation matters that the Irish legal system would have to face in the enforcement of the 1993 Hague Convention. As regards the former, the ILRC used European and international law material such as the case of *Keegan v Ireland* [1994][164] of the European Convention on Human Rights and the United Nations Convention on the Rights of the Child 1989. Comparative implementation referrals were made with regard to the US[165] and the UK legal order.[166] As regards the latter, the ILRC dedicates a whole chapter (Comparative Measures of Implementation)[167] to comparative implementation tactics, to enlighten us on how other predominantly relevant legal systems have implemented the 1993 Convention in question. Consequently, one can find separate referrals as to how the UK,[168] France,[169] Sweden,[170] Canada,[171] New Zealand[172] and Ecuador[173] implemented this Convention. In relation to the justification of the *Affinitatis Formula* on the part of the Irish, as regards the UK, Canada and New Zealand, one should simply refer to the fact that all these systems belong to the common law world. The use of the formula in these cases has been direct and crystal clear. As regards France and Sweden, both of these legal systems were and still are members of the European Union and indeed are members of the wider western legal family. The use of the *Affinitatis Formula* in relation to them must have been indirect, however. Finally, as regards the example of Ecuador, to which the ILRC refers, the comparative lawyer must admit that Ecuador too belongs in a broad sense to the western family of legal systems,[174] as Ireland does. If this is true, even though the Ecuadorian legal system is not directly relevant to the Irish legal order by way of the common law, one must also

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[163] LRC 58-1998: *Report on the Implementation of the Hague Convention on the Protection of Children and Co-operation in respect of Intercountry Adoption.*
[164] 18 European Human Rights Reports [1994] 342.
[165] ISSN 1393-3140: *Law Reform Commission's Consultation Paper on the Implementation of the Hague Convention on the Protection of Children and Co-operation in respect of Intercountry Adoption*, p. 64.
[166] *Ibid.*, pp. 72, 74.
[167] LRC 58-1998: *Report on the Implementation of the Hague Convention on the Protection of Children and Co-operation in respect of Intercountry Adoption*, Chapter 2: Comparative Measures of Implementation, pp. 6-14.
[168] *Ibid.*, pp. 6-8.
[169] *Ibid.*, p. 8.
[170] *Ibid.*, pp. 8-10, 14.
[171] *Ibid.*, pp. 10-11.
[172] *Ibid.*, pp. 11-13, 14.
[173] *Ibid.*, pp. 13-14.
[174] For instance the Civil Code of Ecuador (1860) is based on the Chilean Civil Code (1855), which in turn is predominantly based on the French Civil Code. For this see Zweigert and Kötz, p. 114.

confess that even in this case the *Affinitatis Formula* was applied by the ILRC, be it in its indirect form. Alternatively, one can argue that Ecuador does not belong to the wider western family of law and therefore the *Affinitatis Formula* is absent here. Either way, the Ecuadorian example is open to debate but since it is one of the very few examples which the ILRC referred to without direct relevance to the Irish legal system, this does not negate the extensive use of the comparative factor by the ILRC in all other cases.

Finally, another use of the *Affinitatis Formula* – though in its indirect form – was made by the ILRC with its **Report on the UNIDROIT Convention on Stolen or Illegally Exported Cultural Goods (1997).**[175] In this report the ILRC refer to European, regional and international law in general to examine the potential application of the 1995 UNIDROIT Convention to Irish law. As a result they use the Declaration of London 1943,[176] the European Cultural Convention 1954,[177] the Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954,[178] the Vienna Convention on the Law of Treaties 1969,[179] the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Cultural Property 1970,[180] the Convention on the Law Applicable to Contractual Obligations 1980,[181] the Council of Europe Convention on Laundering, Search, Seizure and Confiscation from the Proceeds of Crime 1990,[182] Council Regulation 3911/92,[183] Council Directive 93/7/EEC,[184] the Scheme for the Protection of Cultural Heritage within the Commonwealth 1993.[185] National law of other legal systems is merely referred to; the examples include: the Law on International Private Law (Switzerland),[186] the Cultural Property Import and Export Act 1977 (Canada),[187] the Convention on Cultural Property Implementation Act 1983

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[175] LRC 55-1997: *Report on the UNIDROIT Convention on Stolen or Illegally Exported Cultural Goods.*
[176] *Ibid.*, p. 8. This instrument was concluded by the Allied Powers.
[177] *Ibid.*, p. 3.
[178] *Ibid.*, p. 9.
[179] *Ibid.*, p. 55.
[180] *Ibid.*
[181] *Ibid.*, p. 14.
[182] *Ibid.*, pp. 115-116.
[183] *Ibid.*, p. 12. Council Regulation 3911/92 on the Export of Cultural Goods.
[184] *Ibid.*, p. 11. Council Directive 93/7/EEC on the Return of Cultural Goods Unlawfully Removed from the Territory of a Member State.
[185] *Ibid.*, p.13.
[186] *Ibid.*, p. 14.
[187] *Ibid.*, p. 17.

(USA),[188] common law case law[189] and the Sale of Goods (Amendment) Act 1994 (England).[190] However, the ILRC had to refer to other relevant legal systems with regard to the solutions that these give in relation to the retrieving of an object from a *bona fide* purchaser. Comparative material was used from Italy,[191] Spain,[192] Switzerland,[193] France,[194] Germany[195] and Portugal.[196]

Finally, with particular regard to this thesis, the constant use on the part of the Irish of comparative implementation material from generally 'affiliated' legal systems, makes us safely assume as a whole that such an exercise of comparatism is well within the remit of the *Affinitatis Formula*, whereas as far as the satisfaction of the applicability principle would be concerned, one could merely argue that the use of comparative material is normally made with a purpose to draw at least some implementation material from it; thus, one would be safe to assume that the Irish did so; hence, the applicability consideration is at least in theory satisfied.

5.3.4. Third illustration: The factor in the case of the 'laboratory state'

As analysed above,[197] the comparative factor of implementation can occur in a model of internal alignment/convergence, as in the case of the USA and the Swiss Confederation, whereby a federal state or canton acts as a laboratory of law. This law is then imitated by the other members of a federation/confederation by the enactment of similar laws to the law pioneered by that laboratory state. Consequently, and in agreement with our factor, because the states in a federation share the same juristic tradition (existence of *Affinitatis*), the transfusion of implementation material from one state to another must be a particularly simple process. The typical example here would be the corporate law of tiny Delaware in the USA, which governs 'more than

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[188] *Ibid.*
[189] *Ibid.*, pp. 20-21, 26-27, 93. The commissioners referred to *Winkworth v Christie, Manson & Woods* Ltd [1980] 1 All ER 1121; *Cammell v Sewell* (1858) 157 ER 1371; *Reid v Metropolis Police Commissioner* [1973] 2 All ER 97; *Attorney-General for New Zealand v Ortiz* [1982] 1 QB 349, [1982] 3 WLR571 (CA), [1983] 2 WLR809 (HL).
[190] *Ibid.*, pp. 27-28.
[191] *Ibid.*, p. 109.
[192] *Ibid.*, p. 110.
[193] *Ibid.*
[194] *Ibid.*, pp. 110-111.
[195] *Ibid.*, p. 111.
[196] *Ibid.*
[197] *Supra*, at 5.2.1.

half of all publicly owned companies in America' and is 'imitated' in its substance and implementation by other American states too.[198]

5.4. Conclusion

In summary, this chapter has presented a proposed comparative implementation factor for convergent law implementation, the focus being on the relevance of other legal systems in the extraction of comparative material and whether such extraction can ultimately be maintained in the domestic legal environment (applicability), to which the comparative material is aimed. Prior to this, the factor was criticised and the analysis revolved around the relevance of the factor to transplants, whereas the argument that the factor may give birth to deviatory patterns of implementation was rejected. Finally, the factor was exemplified and illustrated as per considerations set earlier in the chapter.

[198] 'Triumph of the Pygmy State', *The Economist*, November 6th 2003. The case that affirmed the laboratory state principle was *New State Ice Co. v Liebmann* (1932); the case has been explained above. *Supra*, at 5.2.1.

Chapter 6

THE SOCIO-LEGAL FACTOR IN THE IMPLEMENTATION OF CONVERGENT LAW

6. THE SOCIO-LEGAL FACTOR IN THE IMPLEMENTATION OF CONVERGENT LAW–IMPLEMENTATION THROUGH THE CLAIM OF INTERNAL/DOMESTIC SOURCES TO THE LEGAL SYSTEM

'*Les lois...de chaque nation...doivent être tellement propres au peuple pour lequel elles sont faites, que c'est un grand hazard si celles d' une nation peuvent convenir à une autre.*'
[1]

'You cannot transplant [the English oak] to the African continent and expect it to retain the tough character which it has in England. It will flourish indeed, but it needs careful tending. [...] [O]ff-shoots must be cut away. In these far-off lands the people must have a law which they understand and which they will respect. [...] The task of making these qualifications is entrusted to the judges of these lands. It is a great task which calls for all their wisdom.'[2]

'To converge does not mean to attempt to create sameness, but to accept diversity. Only when diversity is accepted can there be 'healthy infusion'.'[3]

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[1] [The...laws of each nation...should be so peculiar to the people to which they are made that it is a great coincidence, if those of one nation can suit another [nation]]. Charles de Secondat, Baron de Montesquieu, *The Spirit of Laws* [1748], Book 1, Ch. 3 in M.J. Adler (ed.), *Great Books of the Western World*, Chicago: The University of Chicago/ Encyclopaedia Britannica, Inc., 2nd Edition, 1990, p. 3. Trans. here by V. Grosswald Curran, 'Cultural Immersion, Difference and Categories in U.S. Comparative Law', 46 *American Journal of Comparative Law* (1998), see fn., p. 43.

[2] Lord Denning's famous 'English oak in Africa' metaphor. See *Nyali Ltd v Attorney General* [1956] 1 Q.B. 1, at 16-17.

[3] E. Örücü, *The Enigma of Comparative Law: Variations on a Theme for the Twenty-First Century*, Leiden/Boston: Martinus Nijhoff Publishers, 2004, p. 99.

6.1. Introduction

This chapter deals with the socio-legal factor of implementation of convergent law. As will be shown, this factor differs from the other models and factors explored in this thesis, in that it makes allowance to the **good faith implementer**[4] upon overriding socio-legal reasons for deviation from the strict application of convergent law or exceptionally for rejection of such instrument,[5] *as long as this is affirmed* by the extra-national. Furthermore, it has to be stressed from the outset that the factor operates on the basis that **political considerations are not normally taken into account,** being extra-legal in essence.[6]

In any case the factor is systematised, as the other models and factors are. Furthermore, defining, conditioning and exemplifying the factor will be the main priority of the analysis in this chapter, as has been the case with the other methodological chapters proposed in this thesis. Under the leading hypothesis of this thesis which was elaborated in the background chapter thereof, the socio-legal factor may be seen as the second auxiliary factor (together with the comparative factor raised in the previous chapter).

6.1.1. Definition of the Socio-Legal Factor of Implementation

The proposed socio-legal factor of implementation[7] is that factor of alignment of a national or sub-national legal system to a convergent instrument or order of law (be it at a supranational, intergovernmental, federal, regional or international level), **according to which the national legal system, upon overriding socio-legal considerations, adapts the implementation of the convergent instrument of law or ultimately rejects this as an instrument of law wholly incompatible with its**

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[4] This has been analysed above. *Supra*, 3.2.3.

[5] Thus, to use Falkner's terminology, such opposition on the part of the national implementer to the strict application of convergent law is 'intentional'. For this as well as 'unintentional' opposition to convergent law see G. Falkner, O. Treib, M. Hartlapp and S. Leiber, *Complying With Europe: EU Harmonisation and Soft Law in the Member States*, Cambridge: Cambridge University Press, 2005, pp. 11-14.

[6] *Infra*, 6.2.3.

[7] [Hereinafter the socio-legal factor of implementation]

legal order. In this latter case, the factor acts as a call for renegotiation[8] between the national legal system and the dispensing authority of convergent law, as long as the authority agrees to this.[9] The legislator and/or the respective judges and/or the executive (with its administrative extensions of this legal system) must meet the legislative, judicial and administrative implementation requirements respectively of the convergent instrument of law in question. However, the main consideration in this factor is whether any of the above bodies, a national law preparatory committee or indeed the law academia of that legal system, 'feel at ease' with an implementation that, on the face of it, goes against the current socio-legal *status quo* of the legal system in question.

6.1.2. General application of Socio-Legal Factor of Implementation

Therefore, under stringent considerations and in exceptional circumstances for good socio-legal reasons [10], a legal system may, as a last resort, adapt the implementation of the convergent instrument of law in question and in extreme cases reject the proposed implementation, so that the previous proposed and rejected implementation model can be renegotiated; this is the epitome of the definition above.

Good synonyms for the socio-legal factor of implementation are: the sociological factor, the culturalist or socio-cultural, the legal-cultural, the contextual or the history-orientated or the socio-political factor / historico-socio-cultural factor.

6.1.3. How to discern of the need for the application of a socio-legal factor?

The question that would have to be addressed now is how one should opt for such an introvert legal exercise such as the application of the socio-legal factor; how should one operate in legal insularity vis-a-vis convergent law. To begin with, one

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[8] See 6.1.7.3.

[9] This has been envisaged at least since 1798 by Jeremy Bentham: 'This respects the case where...the governing bodies of a number of states agree to take directions in certain specified cases, from some body or other of members, for instance, appointed out of each'. See W. Harrison (ed.), J. Bentham, *A Fragment on Government and an Introduction to the Principles of Morals and* Legislation, Oxford: Basil Blackwell, 1967, Ch IV fn. to para. 23.

[10] See below at 6.1.3. and also 6.1.4.

must admit that, even though legal cultures do not exist in a vacuum and they are living organisms interacting with their environment (e.g. other legal cultures), they are normally introvert systems, 'the classical view being that the legal system has nothing to learn from elsewhere'[11]. However, this is to most legal systems nowadays an old-fashioned approach by reason of law convergence and the globalisation forces; hence, 'there is no single culture that constitutes an autarchic, self-established, and self-sufficient unity. Every [legal] culture cultivates itself with regard to other [legal] cultures and is cultivated by other [legal] cultures. There is no culture that has not emerged from the configuration of others [...].'[12] On the other hand, the legal environment of the legal system itself may affect its legal culture; thus, the continental law division between public and private law is not readily available in Anglo-Saxon legal theory, whereas one could equally argue that continental legal theory does not, on the face of it, recognise the distinction between and the corresponding role played by law and equity as in common law theory.[13] Also, things like the socio-economic substratum of a legal system cannot be omitted in law convergence analysis, as every legal system presents us with a certain perception of life, society and man.[14] For instance, how could one ever make a non-liberal legal system converge to global free market-oriented law without taking into account the economic environment of such country? Moreover, how could such a legal system ever accept such a free market-oriented law without taking into account the legal system's ignorance of capitalist law and its underlying theories? These are, of course, rhetorical questions, for everyone knows that no two legal systems are exactly the same socio-legal creatures.[15]

Ultimately, as it is **not a legal cliché for one to state that different societies constitute different legal systems with different socio-legal features**[16] and because

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[11] E. Örücü, *The Enigma of Comparative Law: Variations on a Theme for the Twenty-First Century*, Leiden/Boston: Martinus Nijhoff Publishers, 2004, p. 87.

[12] W. Hamacher, 'One 2 Many Multiculturalisms', in De Vries and S. Weber (eds.), *Violence, Identity, and Self-Determination*, Stanford: Stanford: Stanford University Press, 1997, pp. 295-296.

[13] C. Deligianni-Dimitrakou, *Eisagogi sto Sygkritko Dikaio*, Thessaloniki: Sakkoulas Publications, 1997, pp. 40-42.

[14] *Ibid.*, p. 42.

[15] Cf. Örücü, who argues that 'All legal systems are born of different parentage, from marriages between systems and sub-systems of such. Some parents cohabited, some had life-long and some passing relationships'. E. Örücü, *op. cit.*, fn. 11, p. 161.

[16] Notwithstanding the fact that even from within the same society/legal system there may be different socio-legal features corresponding to different communities of that society. See N.R. Cox, *Irish Blasphemy law: past, present and possible future, and the theories of John Stuart Mill and Sir Patrick Devlin*, PhD Thesis, Trinity College Dublin, 1998, p. 59. Cf. the socio-legal factor with the comparative law factor of this thesis, the paradox being that where the comparative law factor takes for granted in a number of cases that there is considerable affiliation between legal systems, the socio-legal

there at the very least[17] are **200 socio-legal orders throughout the world**, it is – just as in the identification of a legal restructuring –[18] for the legal system as *a matter of fact* to discern whether legal sociology comes into play. Given the above, it would be fair to argue that the system must generally display a genuine need to refer to legal sociology and hence deviate. Whether this will be accepted by the extra-national or not, constitutes a different matter altogether. [19] As a result, the proposed considerations[20] for the operation of the socio-legal factor, together with the 'system's autonomy' to identify areas where legal sociology can play a role during implementation, constitute a **composite model of analysis** for our factor.

6.1.4. Occasions of justifiable insularity

The next question to be addressed is when one should normally expect the operation of the socio-legal factor. First of all, one would most likely have to admit that the socio-legal factor can occur a) in the creation of convergent law stage as well as b) in the implementation stage. As this thesis deals with implementation, the proposition is that the socio-legal factor *prima facie* operates where a **margin of appreciation**[21] exists; manifestations of such margin can be said to exist:

- Where questions of overriding domestic morality, ethics, religion, religious sensitivities and generally speaking questions of cultural specifism arise[22]
- Where public policy, security and health derogations[23] occur
- Where convergent law explicitly goes against miscellaneous established socio-legal features of a legal system; especially where such law would lack rationality (i.e. being contrary to the principle of *ratio legis est anima legis*)[24]

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factor acts on the basis that in culture-specific areas such affiliation is non-existent. To this effect see 6.1.7.2.

[17] *Ibid.*

[18] See 4.1.3.

[19] 6.2.4.

[20] 6.2.1, 6.2.2., 6.2.3., 6.2.4. and 6.2.5.

[21] Also, *infra* 6.2.5. and 6.3.1.

[22] See 6.3.1.

[23] See 6.3.3. On these headings as a matter of EU law see generally P. Craig and G. De Búrca, *EU Law: Text, Cases, and Materials*, Oxford: Oxford University Press, 3rd Edition, 2003, pp. 825-841.

[24] See 6.3.2.

- Where a society (and hence the legal system) has agreed to a law and such law is given birth through society by operation of the principle of democracy; especially where such law precedes convergent law and where such a society has not conferred any specific powers to an extra-national authority with regard to the matter with which the convergent law is concerned[25]

6.1.5. The theoretical possibilities

To clarify the practical possibilities (exemplifications/illustrations) in relation to the socio-legal factor, one must first refer to the theoretical possibilities under the factor, as proposed in this chapter (provided that a proposal for a convergent law or the convergent law is not rejected *ab initio*). The theoretical possibilities are:

- An approximate implementation outcome in a given case by reason of differentiation of legal technique and/or sociology of the legal systems or both; this outcome has to be 'affirmed' by an extra-national authority; thus,

  Convergent rule X implemented in manner A in jurisdiction A; result Z
  Convergent rule X implemented in manner B in jurisdiction B; result Z±

- The same implementation outcome in a given case, even though the legal systems have different techniques or different socio-legal backgrounds or both; thus,

  Convergent rule X implemented in manner A in jurisdiction A; result Z
  Convergent rule X implemented in manner B in jurisdiction B; result Z

- An approximate implementation outcome in a given case by reason of different socio-legal characteristics of two or more legal systems, even though these systems use the same or similar legal technique or *vice versa*; this outcome has to be 'affirmed' by an extra-national authority; thus,

[25] See 6.3.5

Convergent rule X implemented in manner A in jurisdiction A; result Z
Convergent rule X implemented in manner A in jurisdiction B; result Z±

- The same implementation outcome in a given case, because the legal systems may have either the same or similar implementation techniques or similar socio-legal backgrounds or both; thus,

Convergent rule X implemented in manner A in jurisdiction A; result Z
Convergent rule X implemented in manner A in jurisdiction B; result Z

From the above, the following points are concluded:

- that different legal systems may, upon different socio-legal characteristics and legal techniques, result in bringing different (but approximate) implementation results that may be 'tolerated' by an extra-national body (possibility 1);
- that different legal systems may bring about the same implementation results, even though they share neither common legal technique nor common socio-legal features, unlikely as this may be as a possibility (possibility 2);
- that different legal systems may, even though they have similar socio-legal features and use different legal techniques (or *vice versa*), bring about approximate results that may be 'tolerated' by an extra-national authority of law (possibility 3);
- finally, that different legal systems may reach the same implementation outcome, because they share the same or similar socio-legal features or legal technique or both (possibility 4).

6.1.6. Three minor hypotheses for the factor to apply

Before referral to the considerations (requisites) of the socio-legal factor of implementation, one must note that there are three minor hypotheses necessary for the factor, as perceived herein, to apply; in any case, it should be noted that the major

hypothesis of this thesis raised in the background chapter is not affected; the hypotheses relavant to the factor in this chapter are:

- The theory behind the convergence of legal systems and national laws does not necessarily go against sociological considerations on the part of the national legal system in the implementation of law.
- One cannot deny, wholesale, that, at least in a limited number of cases, all legal systems may have some cultural predisposition; this occurs, despite the *presumptio similitudinis* of legal problems and solutions,[26] which must equally exist amongst most of the legal systems.
- There must exist an implied 'social contract' between the national state and the extra-national supervising authority (for implementation purposes); a contract broadly similar – by way of analogy – to that between citizen and state, which has been set out by Rousseau.

6.1.7. The hypotheses in perspective

The next point of argument turns to the validity of the above hypotheses by putting them in perspective.

6.1.7.1. Sociological considerations and convergent law

As regards the validity of the hypothesis for a certain minimum of tolerance of the theory of convergence towards sociological or socio-legal considerations, one could initially argue that it is now more than accepted that legal culture and social structures are both a *cause* and *effect* of law.[27] In fact, law has an impact on social

[26] See for example K. Zweigert, 'Different Paths to Identical Solutions: Some Comments on Comparative Law' and F. Werro, 'Harmonization of the Rules of Private Law between Civil Law and Common Law Countries' in V. Gessner, A. Hoeland and C. Varga (eds.), *European Legal Cultures*, Aldershot: Dartrmouth Publishing Company Limited, 1996, pp. 160-164 and pp. 164-166 respectively.
[27] V. Gessner, 'The Transformation of European Legal Cultures' in V. Gessner, A. Hoeland and C. Varga (eds.), *op. cit.*, fn. 26, p. 513.

change and social change has an impact on law.[28] However, by referring to legal culture, one should not pursue a narrow approach, for as Friedman argues:

> 'By legal culture we mean the ideas, values, attitudes, and opinions people in some society hold, with regard to the law and the legal system...[it]...is the *source* of law – its norms create legal norms...In short, legal culture is a kind of *intervening* variable...in principle measurable; it is not a mysterious invisible substance'.[29]

Legrand seems to agree with such a wide perception of culture, for, as he argues, a 'legal culture' is not only the product of professional traditions, legal styles of thought or legal practices amongst lawyers of a legal system but also the product of a wider cultural experience in that legal system.[30]

Sociological/contextual considerations in the implementation of convergent law are not only possible but also preferable to non-sociological approaches, at least to a limited extent. This suggestion, of course, puts the socio-legal factor of implementation in the so-called school of 'legal relativism'[31], 'historicism' and (to a lesser degree) 'comparativism'.[32] One is tempted, therefore, to refer to Montesquieu and Rousseau, for both Montesquieu and Rousseau agree on these three bases of the factor herein. Thus, according to Montesquieu:

> '[Laws] should be in relation to the climate of each country, to the quality of the soil, to its situation and extent, to the principal occupations of the natives, whether husbandmen, huntsmen, or shepherds: they should have relation to the degree of liberty which the constitution will bear; to the religion of the inhabitants, to their inclinations, riches, numbers, commerce, manners, and customs.'[33]

Rousseau draws his analysis along the same lines by the following example:

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[28] R. Cotterrell, *The Sociology of Law: An Introduction*, London/Dublin/Edinburgh: Butterworths, 2nd Edition, 1992, p. 49.
[29] L. Friedman, 'Is There a Modern Legal Culture?', 7 *Ratio Juris* (1994), p. 117.
[30] P. Legrand, *Fragments on Law-as-Culture*, Deventer: W. E. J. Tjeenk Willink, 1999, pp. 1-13.
[31] For more on this, see below at 6.3.5.
[32] R. Launay, 'Montesquieu: The Specter of Despotism and the Origins of Comparative Law' in A. Riles (ed.), *Rethinking the Masters of Comparative Law*, Oxford/Portland-Oregon: Hart Publishing, 2001, pp. 23-25.
[33] Charles de Secondat, Baron de Montesquieu, *The Spirit of Laws* [1748], Book 1, Ch. 3 in M.J. Adler (ed.), *Great Books of the Western World*, Chicago: The University of Chicago/ Encyclopaedia Britannica, Inc., 2nd Edition, 1990, p. 3.

> 'As, before putting up a large building, the architect surveys and sounds the site to see if it will bear the weight, the wise legislator does not begin by laying down laws good in themselves, but by investigating the fitness of the people, for which they are destined, to receive them'.[34]

All that one has to do now, to understand why the national legal system may adapt implementation according to the socio-legal factor of implementation of our analysis, is to add the word 'convergent' before Montesquieu's 'laws' and Rousseau's 'legislator'. The theory of Montesquieu and Rousseau was later followed in nineteenth-century Germany with Savigny's theory of the *Volkgeist*.[35]

Additionally, except for the *loci classici* of Montesquieu and Rousseau and their reflection in German jurisprudence, there are many far more modern law scholars who point to the fact that legal systems are at least partially legal cultures and that law is thought to be to a certain extent a product of local conditions. Thus, Zweigert and Kötz agree that when it comes to the *statement of the rules* [of a given legal system], then [one must take into account] 'everything whatever which helps to mould human conduct in the situation under consideration'.[36] Gessner is of the opinion that 'EC law *has* attempted to take the political, legal and legal-cultural differences of the Member States into consideration' despite the deficit in its attempt to do so.[37] He goes on to add that one cannot exclude such considerations [in the implementation of convergent] law, for otherwise a 'cultural lag' may entail unavoidable legitimation problems.[38] Münch goes farther than Gessner; he argues thus that 'positive law needs to be rooted in local, regional and national traditions, if it is to enjoy a binding validity' and that what has to be achieved is not legal traditions to live together but legal traditions to *belong* together.[39] Most recently, Legrand considered this question and he too concluded that 'if the comparative project is to

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[34] J. J. Rousseau, *The Social Contract or Principles of Political Right* [1762], Book II, Ch. 8 in M.J. Adler (ed.), *Great Books of the Western World*, Chicago: The University of Chicago/ Encyclopaedia Britannica, Inc., 2nd Edition, 1990, p. 402.

[35] G. Ebbers and S. McLeay, 'Acccounting and *Volksgeist* – Territorial Claims on Accounting Regulation', (1997) 1 *Journal of Management and Governance* 67, pp. 67, 71.

[36] K. Zweigert & H. Kötz, *Introduction to Comparative Law*, Oxford: Clarendon Press, 3rd Edition, 1998, p. 11.

[37] V. Gessner , *op. cit.*, fn. 26, p. 513.

[38] *Ibid.*, p. 516.

[39] R. Münch, 'Project Europe' in V. Gessner, A. Hoeland and C. Varga (eds.), *op. cit.*, fn. 26, pp. 524-525.

produce anything of value, we need to develop an acute sensitivity to the peculiarities of the local'.[40]

At other times biological reasons may affect the socio-legal characteristics of a legal system. Of course, Hitler's *Reichsgesetze*, the Apartheid laws of South Africa or the racial discriminations in the USA did not have a legal basis based on true biological justification; in fact they were the result of a racist ideology and propaganda that promoted the idea of superiority of the white race to other races. However, true biological reasons *may* affect the socio-legal environment of a legal system; for instance, the pension age differs amongst countries, even amongst different countries that have inhabitants of the same race. This, of course, is the case, for the life expectancy rate differs between countries.[41] These biological reasons may in turn be explained by climatological, economic, geographical and dietary causes.

Ultimately, the very history of any one legal system is part and parcel of its socio-legal packaging, because, whether by historical choice or accident, legal systems are affected. For instance, the fact that the USA is a common law system or rather a constellation of the common laws of fifty states (be it of a modified nature in comparison to the English common law), is the result of the historical choice by the thirteen original American states to uphold such a system for their nation.

To return to the original proposition, the balanced view entails that one achieves an equilibrium in his analysis. Thus, convergent law may act in a uniform, 'one size fits all' manner in many cases throughout many varied 'different' legal systems; however, the socio-legal mode of implementation suggests that the legal systems are more legal cultures than anything else in a certain limited number of occasions[42] and may, therefore, adapt or reject the 'one size fits all' pattern. These occasions are illustrated at the end of the chapter.

6.1.7.2. *Praesumptio similitudinis* arises but not always

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[40] P. Legrand, 'The Same and the Different' in P. Legrand and R. Munday (eds.), *Comparative Legal Studies: Traditions and Transitions*, Cambridge: Cambridge University Press, 2003, p. 281. The quote with which Legrand agrees is from L. Zedner, 'In pursuit of the Vernacular: Comparing Law and Order Discourse in Britain and Germany, (1995) 4 *Social and Legal Studies* 517, p. 519.
[41] C. Deligianni-Dimitrakou, *op. cit.*, fn. 13, pp. 51-52.
[42] *Supra*, 6.1.4.

The second broad hypothesis to be examined suggests that a legal system in pursuit of convergence is not always to have a *praesumptio similitudinis* to other legal systems in the same pursuit.

Even though this thesis upholds the principle of *presumptio similitudinis*,[43] according to which there is a presumption of similarity of practical legal results amongst different legal systems,[44] one must state that this presumption is not boundless, for such a presumption is not unqualified; as the fathers of the concept agree such extensive areas of law as law related to moral values, the law of succession or family law are automatically excluded from an endeavour in finding the *praesumptio*.[45] For instance, the first exemplification in this chapter will seek to uphold the claim that where a margin of appreciation due to socio-legal concerns such as pre-existent conceptions of morality or other similar sensitivities in a society occurs, this will operate just because the *praesumptio similitudinis* is not always to be found throughout Europe when it comes to such sensitive issues. Also, one should note that the *praesumptio* is not always found without criticism in private law,[46] even though one must uphold that it is in private law where most similarities amongst legal systems may be found. But one cannot go as far as Alan Hunt did, when he attempted to 'excommunicate' the presumption via the following:

'the universalism claimed by functionalism is an unsupported assertion which carries the dangerous implication of being likely to result in the misleading imposition of uniformity upon the diversity of social reality.'[47]

The above is rejected as an extreme approach, especially with regard to the fact that Zweigert and Kötz clearly qualify the *praesumptio* as stated before.

On the other hand, the socio-legal factor of implementation does not in principle require the utilisation of this presumption for its application. In fact, where

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[43] See 5.2.1 herein.
[44] K. Zweigert & H. Kötz, *op. cit.*, fn. 36, p. 40.
[45] *Ibid.* Also, H. Kötz, 'The Trento Project and its Contribution to the Europeanization of Private Law' in M. Bussani and U. Mattei (eds.), *The Common Core of European Private Law*, The Hague/London/New York: Kluwer Law International, 2003, p. 212. Kötz characteristically states that 'the [*praesumptio similitudinis*] is a rebuttable presumption, and rebutted it must be when there is evidence for doing so'.
[46] H. Collins, 'European Private Law and the Cultural Identity of States', *European Review of Private Law* 1995, pp. 353-365.
[47] A. Hunt, *The Sociological Movement in Law*, London: Macmillan, 1978, p. 53.

such a principle exists all other models and factors of this thesis could be used except the sociological one, for such a factor places the emphasis on the uniqueness of the socio-legal features of a given legal system. Thus, even though the contention of the thesis remains to this day that legal systems share legal solutions together with legal problems, the socio-legal factor of implementation operates in the absence of the *praesumptio*.

6.1.7.3. A social contract between state and supra-state

Let us now turn to the third hypothesis of our factor. This hypothesis is based on Rousseau's thesis by way of analogy. Rousseau believed that a social pact exists between the citizens and the sovereign as well as a contract between the citizens themselves.[48] Moreover, he argued that just as individual wills are directed towards individual interests, the general will, once formed, is directed towards the common good, understood and agreed to collectively. Included in this version of the social contract is the idea of reciprocated duties: the sovereign is committed to the good of the individuals who constitute it, and each individual is likewise committed to the good of the whole.[49]

It is questionable how the above example wherein the citizens reach a contract with the sovereign could as well *inter se* sustain a hypothesis that an analogous social contract exists: a) as between convergent member states and b) as between these convergent member states and a higher authority which dispenses (or supervises) convergent law.

For our analogy to function in respect of the purposes of the socio-legal factor of implementation, one is required to 'replace' Rousseau's citizens with member states in pursuit of convergence; Rousseau's sovereign with an extra-national sovereign and, ultimately, the reciprocated duties between citizens and sovereign that he proposes with reciprocated duties between these member states and the extra-national sovereign. Thus, our hypothesis would create an international social compact between the national and the extra-national.

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[48] J.J. Rousseau, *op. cit.*, Book I, Ch. 6, *supra*, fn. 34, pp. 391-392.
[49] J.J. Rousseau, *op. cit.*, Book I, Ch. 7, *supra*, fn. 34, pp. 392-393.

However, one should always keep in mind that just like our factor, this ultimately aims at convergence; not at a clash between the intra-national and the international legal order, because there is in a sense a relationship of 'reciprocated duties' between them (by analogy to Rousseau's original reciprocated duties).[50] This relationship of duties creates except for legal expectations to the national legal system e.g. to implement extra-national laws, another very stark implied obligation to the supra-state, a sort of a moral obligation to respect the domestic socio-legal structures in particular cases of implementation. In other words, this mutual state of affairs creates an obligation to the extra-national legislator to respect the 'irreducible element of autochthony' [of every legal system] and move from an analysis of globalisation to an analysis of 'glocalisation'[51].[52]

6.1.8. The abstract character of the factor

In any case, the question under our factor is how the national legislator could avoid mistakes when adapting implementation, as socio-legal considerations may be an abstract exercise.

There are no hard and fast rules as to how a legal system may avoid abstraction by 'adapting' or fine-tuning the implementation of convergent law. The balanced view would most likely require the national legal system to balance two elements: i) the convergent instrument of law before it and ii) the overriding socio-legal considerations which may be adversely affected by this instrument.

Örücü provides us with two variations as to how to 'tune' convergent law. According to her, a good way for tuning may be provided by comparing other implementations e.g. as the British judges do in relation to the 'compatibility' of British law with the European Convention on Human Rights post the Human Rights Act 1998.[53] However, even if the British judges sometimes refer to comparativism as

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[50] D. Goldberg and E. Attwooll, 'Legal Orders, Systemic Relationships and Cultural Characteristics: Towards Spectral Jurisprudence' in E. Örücü, E. Attwool & S. Coyle (eds.), *Studies in Legal Systems: Mixed and Mixing*, The Hague/London/Boston: Kluwer Law International, 1996, p. 318.
[51] On 'glocalisation' see R. Robertson, 'Glocalisation: time-Space and Homeogeneity-Heterogeneity', in M. Featherstone, S. Lash and *id.* (eds.), *Global Modernities*, London: Sage, 1995, pp. 25-44.
[52] P. Legrand, 'The Same and the Different' in P. Legrand and R. Munday (eds.), *op. cit.*, fn. 40, p. 293.
[53] E. Örücü, *The Enigma of Comparative Law: Variations on a Theme for the Twenty-First Century*, Leiden/Boston: Martinus Nijhoff Publishers, 2004, pp. 80-81.

regards implementation of convergent law, one may not be asked to do so. This occurs in cases 'related to legal rules of a purely domestic character.'[54] The socio-legal factor stands in the middle of the two variations above.

Örücü again provides us probably with the best illustration as to how a national legal system may adapt foreign, that is, extra-national laws, in respect of legal sociology:

> 'Each note (legal institution or rule) is sung (introduced and used) at the same place in the scale of the new key (of the recipient) as it did in the original key (of the model); the 'transposition' occurring to suit the particular voice-range (socio-legal culture and needs) of the singer (the recipient)'.[55]

6.2. Considerations under the factor and initial justification thereof

The next question to be addressed is that of the actual considerations in our factor. The first consideration asks the national legal system not to abuse the factor, as this would go against the presumption that the legal system is to converge in the first place. With regard to the deviation made under our factor, this should be sustainable (second proposed line of enquiry) in the face of comparisons with other legal systems in similar situations (if any) and open to extra-national judicial scrutiny (if any). The third proposed line of enquiry asks that the implementer omits from his analysis political/nationalist considerations by reason of the fact that the factor is primarily a legal factor. Also, because the legal system is presumed to be bound by convergent law, its deviatory implementation must be affirmed by the extra-national source of law (fourth proposed consideration). Finally, the system has to show that there is a margin of appreciation for it to act in a deviatory manner to the strict application of extra-national law (fifth consideration).

6.2.1. No excuse for abuses under the factor

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[54] E. Örücü, *supra*, fn. 53, p. 84.
[55] E. Örücü, 'Law as Transposition', *International and Comparative Law Quarterly* 51 (2002), p. 205.

The first consideration under the proposed factor of this chapter asks that one should not abuse the factor, as the factor cannot act as a wild card in the hands of the national legal system, to avoid implementation of a convergent law. Moreover, the national legal system should not use the socio-legal mode of implementation for justifying its inability, unwillingness or failure to implement convergent law. It should not use the factor to alter the whole character and spirit of the convergent instrument of law in question or go against legal principle. Thus, additional safeguards to these can be said to be:

- First, it is the last choice of the legislator to reject convergent law; not the first, then
- Second, the other stringent considerations of the factor may be overridden
- Third, renegotiation is the best thing that the national implementer may be offered as long as this is offered by the supranational legislator.

6.2.2. Sustainability of deviation or rejection

Perhaps the most subjective consideration of the socio-legal factor of implementation is sustainability of deviation or rejection of the convergent instrument of law in the face of extra-national authorities or in the face of similar situations in other legal systems. Under this factor, systems cannot simply deviate. When a legal system unilaterally acts to either adapt implementation of the convergent instrument of law or even reject such a project, this must be a sustainable state of affairs: it has to make sense. There are two questions here which may have to be answered: i) whether a comparison with solutions of other systems in similar situations may be sustainable and ii) whether the deviation or rejection is sustainable in extra-national justice. Obviously, the answers to these questions are found in the context of each particular case of implementation.

6.2.3. Apprehension of the factor to nationalist or political considerations

Furthermore, because the socio-legal factor is part of a *legal* typology of implementation, the socio-legal factor, it is believed, should be repugnant of political/nationalist considerations. Arguably, however, it is not a nationalist approach for a national legislator to uphold long-established legal doctrines, legal ideas and other socio-legal features which have served him well, when the substitution of them would amount to backwardness or a reduction of quality in his legal system. Moreover, it is not legal nationalism for the national legislator to attempt to balance extra-national jurisprudence with national jurisprudence and ultimately the socio-legal factor of implementation could not act as a nationalist factor, especially because the national legislator cannot reject implementation *ad infinitum*, as the factor acts as a constant call for renegotiation between the national and extra-national authorities, if the latter does not affirm the adaptation or rejection of the convergent law in the implementation stage.

Secondly, the factor is abortive of political interferences of any kind at the phase of implementation of convergent law, as, by definition, the socio-legal factor of implementation is what the term itself suggests: a legal factor of implementation, like all other models and factors proposed in this thesis. Obviously, one cannot reject the argument that political interference is particularly strong in the lawmaking of convergent law. Also, one cannot deny the argument that politics may manipulate law. It is also true that it is the political world which provides the will for implementing laws.[56] However, that is not to say that politicians may use the factor for their own purposes and with a disregard to convergent law and the expectations of implementation created from this.

The socio-legal factor takes into account the socio-legal characteristics of a legal system. It is, therefore, repugnant of political theory. Of course, a national legal system in following such a model of implementation may use the factor in a political fashion to renegotiate the convergent instrument of law which is not compatible with its socio-legal features. Additional reasons for which the factor should not be construed as a political one are:

- Politics may see the factor as a vehicle for avoiding implementation of convergent law.

[56] *Supra*, 2.3.1.3.

- Politics can be easily manipulated by various lobbies, something which is not necessarily the essence of the socio-legal characteristics, as the socio-legal factor of implementation asks for.
- Populist politics may abuse the legal character of the factor.

6.2.4. Upon rejection or adaptation the extra-national authority affirms

As the legal system may abuse the factor, an important safeguard may be put in place as another consideration of the factor. This is the consideration according to which all deviations on the part of the national legislator must be safeguarded against by an extra-national authority which supervises the implementation of the convergent instrument of law. The same or another authority should grant renegotiation for the implementation of the convergent instrument of law.

It is believed that this consideration is the strongest safeguard, which the factor offers for the avoidance of abuse against the factor by the national legal system and is something that goes hand in hand with the established approach taken by Jeremy Bentham:

'This respects the case where...the governing bodies of a number of states agree to take directions in certain specified cases, from some body or other of members, for instance, appointed out of each'[57]

6.2.5. Margin of appreciation

The final consideration under the socio-legal factor proposed asks the state to justify a deviation from the strict application of the convergent law in question i.e. to show that a margin of appreciation occurs. As explained, there are a number of areas in which this readily occurs.[58]

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[57] W. Harrison (ed.), J. Bentham, *A Fragment on Government and an Introduction to the Principles of Morals and* Legislation, Oxford: Basil Blackwell, 1967, Ch IV fn. to para. 23. Also, D. Goldberg and E. Attwooll, *supra*, fn. 50, p. 318.
[58] *Supra*, 6.1.4.

In any case, it has to be stressed that such a margin is to be used in its wider socio-legal capacity as opposed to its narrower human rights capacity except, of course, in cases touching upon human rights. Yet it also has to be stressed that the European Court of Human Rights margin serves us well, especially by way of analogy, as a starting point for our analysis. This is the case as the doctrine originates from the workings of the European Court of Human Rights,[59] even though nowadays other extra-national fora may make use of it[60].

Use of the margin of appreciation doctrine is suggested because this essentially enables the national implementer, as international judicial practice shows, to have i) a degree of deference and b) normative flexibility in implementation matters.[61]

As will be seen below, to achieve an analysis on the margin of appreciation doctrine in the context of human rights case law, the national legal system simply needs to act on the classical approach taken under the European Court of Human Rights, i.e. **interference** with the strict letter of human rights law must be **'necessary in a democratic society'**[62] and **reasons for such interference** must be **'relevant and sufficient'**[63] (bold print is added by the author for effect).

By way of analogy, the same could be said, if one were to detect a margin of appreciation in areas irrelevant to the narrow confines of the margin of appreciation doctrine in human rights law, yet relevant to the wider confines of legal sociology. Such relevance to areas of legal sociology arises by reason of the fact that the margin of appreciation test is *inter alia* of socio-legal flavour (note e.g. the words 'pressing *social* need' or 'necessary in a democratic *society*').

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[59] Y. Shany, 'Towards a General Margin of Appreciation in International Law?', (2006) 16 *European Journal of International Law* 907, p. 909.

[60] E.g. the Inter-American Court in *Advisory Opinion OC-4/84 of January 19, 1984, Proposed Amendments to Naturalisation Provisions of the Constitution of Costa Rica*, Inter-Am. Ct. H.R., A 4 (1984); and the Separate Opinion of Judge Cot in The 'Volga Case' (Russian Federation v. Australia), International Tribunal on the Law of the Sea, Judgment of 23 December 2002. See also the discussion in P. Mahoney, 'Principles of Judicial Review as Developed by the European Court of Human Rights: Their Relevance in a National Context', in P. Betten (ed.), *The Human Rights Act 1998-What it Means*, The Hague, London: M. Nijhoff Publishers, 1999, pp. 65-86, at p. 82.

[61] Y. Shany, *op. cit.*, fn. 59, pp. 909-910.

[62] *Handyside v. The United Kingdom*, No. 5493/72, Judgment of 7 December 1976, para. 50. See also *Sunday Times* v *United Kingdom* 2 EHRR 245 (para. 59) where it was argued that interference with human rights must meet a 'pressing social need'.

[63] *Sunday Times* v *United Kingdom* 2 EHRR 245 (para. 50).

6.3. Application and mechanics

With regard to the application of the factor three exemplifications and two illustrations are provided for. The analysis will focus on the following three examples: i) the margin of appreciation under the European Convention on Human Rights 1950, ii) the rejected implementation of the European Commission's Decision 97/534/EC in Greece and iii) the possible implementation of the hypothetical Highways Speed Limit Convergent Law in the Republic of Snowdonia. More general illustrations on the application of the socio-legal factor are also provided for in an analysis of the Transposition of European and American laws in Japan and in an analysis of Relativism and Universalism.

Certainly, the author would like at this point to explain why the above examples and illustrations can all fall under the remits of our analysis in this chapter. Indeed, one could in general argue that all legal examples have a socio-legal flavour, as it is a legal cliché to state that law and society affect each other and depend on each other. Yet, it must be borne in mind that the above examples can be denominated under a legal sociology discussion, because they, at any rate, are examples which touch upon legal sociology not only at their law creation stage but most importantly because these raise paramount socio-legal questions at the stage of their implementation (with which we are interested mainly here). The same reasoning applies to the illustrations in this chapter.

The exemplifications prove respectively that the factor may operate under the margin of appreciation premises provided for in the European Convention on Human Rights jurisprudence; that a legal system can exceptionally reject implementation of convergent law upon other overriding socio-legal considerations and that a system may deviate from convergent law in cases of public safety. Finally, the last two illustrations of the factor, though not strict exemplifications, act as general discussion concerned with legal sociology in Japan vis-à-vis western laws and with effect of legal sociology (relativism) in the area of human rights law.

6.3.1. First exemplification of the factor: Margin of Appreciation *per se* under the European Convention on Human Rights 1950

The first exemplification of the socio-legal factor will revolve around indicative successful and non-successful attempts of conferring the factor under the margin of appreciation doctrine as such margin emanates from the various provisions of the European Convention on Human Rights 1950.

The example of the margin of appreciation cases is a *sine qua non* for a socio-legal analysis vis-à-vis convergent law. It first of all shows to us how an extra-national forum may or may not accept considerations of socio-legal flavour under the very well known nowadays doctrine of margin of appreciation. Second, as will be seen, the margin of appreciation is in any case vital to the mechanics of the socio-legal factor and thirdly, there are few human rights cases (at least in Europe) which do not touch upon the doctrine. The example is thus seen as crucial for our analysis.

With regard to defining this wide-ranging[64] doctrine all that can initially be said is that 'The national margin of appreciation or discretion can be defined in the European Human Rights Convention context as the freedom [for a High Contracting Party] to act; maneuvering, breathing or "elbow" room'[65]; or the latitude of deference or error which the Strasbourg organs will allow to national legislative, executive, administrative and judicial bodies.[66] Generally, with regard to the European Convention on Human Rights itself the margin of appreciation is in all probability the single most important doctrine, as it operates 'at the heart of nearly all the cases coming before the Court'[67]. Obviously, the fact that margin of appreciation arguments are found in nearly all the cases before the court in Strasbourg does not always mean that a) this margin will be recognised and b) even if the Court discusses the margin that is not to say that socio-legal considerations (and hence national laws) will be upheld.

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[64] The margin of appreciation affects: i) the details of protection of Conventions rights, ii) the rights which may be restricted under the clauses in the second paragraphs of Articles 8 to 11 of the European Convention on Human Rights; and iii) under the 'public emergency clause' in Article 15 of the Convention, which permits emergency measures 'in time of emergency clause', which permits emergency measures 'in time of war or other public emergency threatening the life of the nation'. See R. Bernhardt, 'The Convention and Domestic Law', p. 32 and R. St. J. Macdonald, 'The Margin of Appreciation', p. 83 in R. St. J. Macdonald, F. Matscher and H. Petzold (eds.), *The European System for the Protection of Human Rights*, Dordrecht/Boston/London: Martinus Nijhoff Publishers, 1993.

[65] B.B. Lockwood *et al.*, 'Working Paper for the Committee of Experts on the Limitations Provisions – Symposium: Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights', (1985) 7 *Human Rights Quarterly* 35, p. 67.

[66] H.C. Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence*, The Hague/London/Boston: Kluwer Law International, 1996, p. 13.

[67] C. Ovey and R. White, *Jacobs and White, The European Convention on Human Rights*, Oxford: Oxford University Press, 2002, p. 215. See also R. St. J. Macdonald, 'The Margin of Appreciation' in R. St. J. Macdonald, F. Matscher and H. Petzold (eds.), *op. cit.*, fn. 64, p. 122.

Our application of the socio-legal factor will commence with the application of Article 10 of the European Convention on Human Rights on the part of the UK with regard to the leading[68] case of *Handyside*[69] prior to the enactment of the Human rights Act 1998. Parallels will be drawn with the *Otto Preminger Institute* case[70] in Austria and *Murphy v Ireland* in Ireland. Even though the analysis concentrates on the above, it is to be noted that recognition of legal sociology as in the recognition of legal insularity is found time and again in many of the findings of the Strasbourg authorities.[71]

Article 10 (Freedom of expression) with which both cases are involved suggests as follows:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. [...]

2. The exercise of these freedoms, since it carries with it duties and responsibilities, ***may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society,***[72] *in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the*

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[68] R. St. J. Macdonald, 'The Margin of Appreciation' in R. St. J. Macdonald, F. Matscher and H. Petzold (eds.), *op. cit.*, fn. 64, p. 84.

[69] 7 December 1976, A/24.

[70] 20 September 1994, A 295-A (1995) EHRR 34.

[71] There are numerous decisions of the Court where the need to recognise this variety and these regional or national peculiarities is expressly stated: the Anglo-Saxon peculiarities of the 'common law' as a source of law alongside written law (*The Sunday Times* judgment of 26 April 1979, Series A no. 30, para. 47); the 'life sentence' (*Weeks* judgment of 2 March 1987, Series A no. 114, paras. 40, 47, 50-53); the continental European peculiarities of the judge's greater responsibility for the conduct of the proceedings in criminal (*Neumeister* judgment of 27 June 1968, Series A no. 8, pp. 42-43, para. 21) and civil matters (*Buchholz* judgment of 6 May 1981, Series A no. 42, para. 50; *Guincho* judgment of 10 July 1984, Series A no. 81, para. 32; *Capuano* judgment of 25 June 1987, Series A no. 119, para. 25); the insertion of administrative proceedings or disciplinary proceedings before professional bodies as a preliminary to court decisions in certain civil and criminal cases (*Le Compte I* judgment of 23 June 1981, Series A no. 43, para. 51); the inclusion of experts and civil servants on panels of judges (*Ettl and others* judgment of 23 April 1987, Series A no. 117, para. 40); the Swiss peculiarity of ordering a defendant to pay the costs of criminal prosecution despite an acquittal of the withdrawing of charges (*Minelli* judgment of 25 March 1983, Series A no. 62, paras. 34, 35); different views in different regions as to what is necessary for the protection of morals (*Handyside* judgment of 7 December 1976, Series A no. 24, paras. 54, 57; *Dudgeon* judgments of 22 October 1981, Series A no. 26, para. 56; *Müller and others* judgment of 24 Maz 1988, Series A no. 133, para. 36). See F. Matscher, 'Methods of Interpretation of the Convention' in R. St. J. Macdonald, F. Matscher and H. Petzold (eds.), *op. cit.*, fn. 64, pp. 75-76.

[72] The author's emphasis.

reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

The *Handyside* case dealt with a situation where a publisher had been charged and convicted under British law[73] for having obscene books in his possession. Consequently, the books were seized, forfeited and destroyed. The book was also circulated elsewhere in Europe and in some parts of the country where the parties in dispute came from. Both the European Commission of Human Rights (set up in 1954) and the European Court of Human Rights (set up in 1959) did not find a breach of Article 10 or rather, the Court justified the acts of the British government under Article 10 (2) of the Convention.

The British proved to the court that some leeway should exist when it comes to the application of Article 10 (1); this leeway – they claimed – appeared on Article 10 (2), for it clearly provides that in 'a democratic society the duties [on the part of the UK in this case] may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law.' The court agreed. In finding in favour of a margin of appreciation in the case the Court developed a twofold test: first, the Court asked itself whether the actual interference was 'relevant and sufficient' and second, whether the interference was necessary, the assumption being (in the light of the margin of appreciation) that it was necessary[74] unless the applicant could prove otherwise'.[75] It agreed with the British position on the matter, for, on the face of it, there has been *a paramount absence of any general concept of European morals.*[76] It went farther than that; it argued that not only is there an absence of a unified doctrine of morality in Europe but that the UK was justified in acting as it did, for there is a 'margin of appreciation' on the part of the national legal system.[77] This margin 'is given both to the domestic legislator ('prescribed by law') and to the bodies, judicial

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[73] Obscene Publications Act 1959, as amended by the Obscene Publications Act 1964.

[74] As to the meaning of necessity in a democratic society, see generally A. Lester, 'Freedom of Expression' in R. St. J. Macdonald, F. Matscher and H. Petzold (eds.), *op. cit.*, fn. 64, pp. 489-490.

[75] R. St. J. Macdonald, 'The Margin of Appreciation' in R. St. J. Macdonald, F. Matscher and H. Petzold (eds.), *op. cit.*, fn. 64, p. 87.

[76] H.C. Yourow, *op. cit.*, fn. 66, pp. 46, 113. In fact there does not seem to be general concept of freedom expression in the Western world as a whole either. See C. McCrudden, 'The Impact on Freedom of Speech' in B.S. Markesinis, *The Impact of the Human Rights Bill on English Law*, Oxford: Oxford University Press, 1998, pp. 104-109.

[77] Para. 48 of *Handyside* judgement of 7 December 1976, Series A, No.24; 1 EHRR 737 (1979-80) [Hereinafter *Handyside*, 7 December 1976, A/24].

amongst others, that are called upon to interpret and apply the [domestic] laws in force.'[78] Thus, this margin 'is generally elastic enough to allow for local variations'[79].

The court took a similar stance and affirmed this position in the *Otto Preminger Institute* case[80]. In this case, an Austrian association had been announcing a series of public showings of a satirical film from an Austrian artist, the subject matter of which was religious. The Austrian state initially seized the film and later forfeited it in the Tyrol area; thereafter extending this to the whole of Austria. In this case, the European Commission of Human Rights found a violation of the principle of freedom of expression based mainly on the ideas of artistic methodology, limited publicity and the general applicability of the restrictions in Austria. However, it found no breach of the right to freedom of expression in relation to the forfeiture and in defining the scope of 'margin of appreciation' the judges pointed out to *Müller* that:

> 'With regard to "morals" the Court noted that there was no uniform European conception: the view taken of the requirements of morals varies from time to time and from place to place, especially in our area [...]. By the reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the "necessity" of a "restriction" or "penalty" intended to meet them'.[81]

Therefore, it becomes apparent in a string of cases which form the main supranational interpretation of morality in questions of freedom of expression, one may safely assume, based on the findings of the Commission and the Court of Human Rights, that the discrepancies of European morality is a phenomenon which is based on geographical, historical (time and place argument) and socio-philosophical differences ('typical to our area'). Finally, it was recognised that national judges are in closer contact with the 'vital forces' (environment or culture) of their legal systems

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[78] *Ibid.*

[79] *Submission on the European Convention on Human Rights Bill 2001 to the Joint Oireachtas Committee on Justice, Equality, Defence and Women's Rights* (June 2002), p. 7.

[80] Judgement of 20 Sept. 1994, Series A, No.295-A; 19 EHRR 34 (1995)

[81] *Müller and others v Switzerland* judgement of 24 May 1988, Series A, No.133; 13 EHRR 212 (1991) See the opinion of Mr F. Ercamora, MM.A. Weitzel and L. Loucaides.

and that they can see or experience these forces more 'authentically' than international judges (phenomenological interpretation).[82]

With respect to the first proposed consideration of the factor, one needs to show that the socio-legal considerations on the part of the British in *Handyside* did not amount to an abuse of the sociological factor of implementation or went against legal principle.[83] Subjective as this may be, the European Court of Human Rights recognised without hesitation that a 'margin of appreciation' could in principle exist, when it comes to the interpretation of morality. Therefore, the British did not diverge from the jurisprudence on European human rights theory and having done so, it would seem that they did not abuse sociological considerations, as the factor in this chapter requires. So too in the more recent case of *Murphy v Ireland*[84], a case that involved the banning of a television broadcast of a religious advertisement under s. 10 (3) of the Radio and Television Act 1988, the Irish having argued that socio-legal considerations such as religious sensitivities in the Irish society come into play, the Court found in favour of Ireland as there apparently existed a significant margin; hence, the strict application of Article 10 of the European Convention on Human Rights was circumvented and Ireland was not found violating the provision in question, even though one could argue that the European judges may have taken the view of another, more stereotypical Ireland in reaching their decision as opposed to the view of modern and contemporary Ireland in 2003.

In relation to the second proposed consideration under the socio-legal factor, that of sustainability of European human rights law (Article 10) adaptation or law-localising on the part of the British, one could claim that the British may have inadvertently used the comparative method, when they localised Article 10 for their country, even though the European Court of Human Rights was quick to stress that it was not for it 'to compare different decisions taken, even in apparently similar circumstances, by [national] prosecuting authorities and courts.'[85] However, it is not always the case that the authorities in Strasbourg will be willing to recognise deviations

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[82] M. Kiikeri, *Comparative Legal Reasoning and European Law*, Dordrecht/Boston/London: Kluwer Academic Publishers, 2001, p. 196.

[83] E. Benvenisti, 'Margin of Appreciation, Consensus, and Universal Standards', (1998-1999) 31 *New York University Journal of International Law and Politics* 843, p. 844. Thus, he notes that one must not be very liberal in applying the margin of appreciation doctrine, since such approach would undermine the international enforcement of human rights.

[84] [2003] ECHR 352, 10 July 2003.

[85] Para. 56 of *Handyside*, 7 December 1976, A/24.

or legal insularity under the conferment of socio-legal considerations. Nor would it be true that merely because a socio-legal feature such as a society's perception of morality is conferred before the authorities in Strasbourg that such a claim will automatically be upheld. Thus, the fact that a legal system, as a socio-legal creature, may make use of the margin of appreciation doctrine does not mean that socio-legal considerations will have to be recognised in the end.

For example, socio-legal considerations of morality were not upheld in *Dudgeon v United Kingdom*[86], a case that involved an applicant living in Belfast who was homosexual and complained to Strasbourg that his right to respect for his private life under Article 8 of the European Convention on Human Rights was being unjustifiably violated by the Northern Ireland laws prohibiting and imposing criminal sanctions upon homosexual activities between consenting male adults in addition to a claim that this was unjustifiably discriminatory against him under Article 14 of the European Convention on Human Rights on the basis that as a homosexual he was subject to greater restrictions than female homosexuals and male homosexuals in England and Wales where homosexual acts between consenting adults in private life was not a criminal offence. As a consequence, the Court refused to find the protection of morals in Northern Ireland an adequate justification for its criminal laws directed at homosexual activity. This despite the fact that the margin of appreciation was permitted under the different perception[87] of morals in the UK in *Handyside.* Strikingly, the decision in *Dudgeon v United Kingdom* was reached, even though the UK submitted evidence, which the Court accepted, that the prevalent moral sentiment in Northern Ireland was that 'a change in the law [for the criminalisation of male homosexuality] would be seriously damaging to the fabric of society'[88].

A similar finding was reached in *Norris v Ireland*[89] and more recently in *Modinos v Cyprus*[90]. In the former case, in particular, a challenge was posed to the very same statutes as in *Dudgeon v United Kingdom* insofar as they were continued in

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[86] 23 September 1981 (No. 45), 45 EHRR 149.

[87] This comes in agreement with M. Janis, R. Kay and A. Bradley, who argue that there are two assumptions in relation to a margin of appreciation: 'First, what is necessary to achieve the stated interests may vary from state to state even in 'democratic societies'; and second, a government's estimate of that necessity is entitled to some deference by an international court, presumably less familiar with relevant local circumstances'. See M. Janis, R. Kay and A. Bradley, *European Human Rights Law: Texts and Materials*, Oxford: Oxford University Press, 2nd Edition, 2000, p. 146.

[88] Para. 57 of the judgement.

[89] 26 October 1988 (No. 142), 13 EHRR 186.

[90] 22 April 1993 (No. 259), 16 EHRR 485.

Ireland after independence from Great Britain. Along similar lines to the UK government the Irish government wished to urge 'the Court to adopt a more deferential approach to a state's determination that challenged the moral fibre of a democratic nation is a matter for its own institutions'.[91] The Court rejected this argument, since to accept this argument would be equal to accepting that the state's 'discretion in the field of morals [is] unfettered'[92].

From the above it would seem that the European Court of Human Rights has time and again approved the idea that legal systems maintain a kind of moral autonomy, a notion which is inherent 'to highly extensive philosophical and quantitative sociological considerations on the part of the Court'[93], even though it would be fair for one to argue that morality and a possible margin of appreciation does not *per se* seem to always justify socio-legal considerations. Yet the Court took a more lenient approach on the matter of morality (vis-à-vis the UK), since it might not want to interfere with the idea of 'societal peace' within the legal system which it examined and because modern international and regional law are 'polycentric'[94]; because the Contracting Parties adhere to diverse and often contradictory conceptions of human rights, attributable to differences in economic, social and cultural traditions, as Judge Macdonald has argued elsewhere.[95] Therefore, as the factor in this chapter maintains, an international Court such as the one in Strasbourg could in principle make allowance for socio-legal considerations in the implementation/application of extra-national law, in our case European Convention on Human Rights jurisprudence.

With regard to the apprehension of the factor to political and nationalist considerations it could be argued for that, at the very least in the successful usage of cases, reality has shown that it was not so much politics but rather societal sensitivities which have been forwarded e.g. under *Murphy v Ireland* in Ireland it was not so much of a political argument that a pastor could advertise religion through a television broadcast but rather the fact that the Irish society perceives religious matters as particularly sensitive issues.

Finally, what is of the greatest significance in relation to the last consideration (affirmation stage) of our factor is that the European Court of Human Rights was

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[91] M. Janis, R. Kay and A. Bradley, *op. cit.*, fn. 87, p. 282.
[92] Para. 45 of the judgment.
[93] M. Kiikeri, *op. cit.*, fn. 82, p. 201.
[94] *Ibid.*
[95] R. St. J. Macdonald, 'The Margin of Appreciation' in R. St. J. Macdonald, F. Matscher and H. Petzold (eds.), *op. cit.*, fn. 64, p. 122.

willing to uphold the idea of (ultimate) 'European level supervision' combined with that of (initial) national level supervision in all three cases (*Handyside*, *Otto Preminger Institute* and *Murphy v Ireland*).[96] This satisfies the affirmation consideration of our factor, for the ultimate interpreter of the British approach on morality with regard to application of Article 10 in the UK is the European Court of Human Rights.[97] With regard to the margin of appreciation concern under our factor this has been dealt with from within the cases explained above.

6.3.2. Second exemplification: On intestines and convergent law

The second exemplification of the socio-legal factor of implementation will prove that a legal system can in rare cases reject *ab initio* the implementation of convergent law due to certain socio-legal reasons; especially where such law is in conflict with the *ratio legis est anima legis* principle.

Our example deals with a Commission's decision, Commission Decision 97/534/EC of 30 July 1997 on the prohibition of the use of material presenting risks as regards transmissible spongiform encephalopathies.[98] Spongiform encephalopathy is understood as that condition transmissible by prions which in essence causes the human brain tissue to appear like a sponge thereby making mental and physical abilities to deteriorate. The analysis will proceed on the basis that at least in the case of one EU country the terms of rejecting the implementation of the Commission's decision were largely sociological rather than economic, economic terms being irrelevant to the socio-legal factor of implementation, as defined in this chapter.

There are a number of reasons as to why the author engages with this example: First of all, the example can be denominated in the sphere of socio-legal theory (it is thus directly concerned with the factor in this chapter) in that the banning of certain meats (in our case meat made out of sheep intestines) can affect the socio-legal habits of a people. Second, the example presents an interesting opportunity for one to

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[96] Paras. 49, 50 and 67 of *Handyside*, 7 December 1976, A/24.

[97] Cf. 'Nevertheless, Article 10 Sec. 2 does not give the Contracting States an unlimited power of appreciation. [...] The domestic margin of appreciation goes hand in hand with a European supervision. Such supervision concerns both the aim of the measure challenged and its "necessity"; it covers not only the basic legislation but also the decision applying it, even one given by an independent Court.' See para. 49 *Handyside*, 7 December 1976, A/24.

[98] *Official Journal L 216 , 08/08/1997,* pp. 0095 – 0098.

explore, albeit briefly, the precautionary principle and proportionality in their application vis-à-vis socio-legal concerns. Thirdly, the author would like to point to the fact that by reason of his origins, he is familiar with the legal concerns of the example in question, even if he would have to recognise that the danger of bias may come to the fore in the analysis that follows. It should be stated though that every effort is made to ensure that the example is as objective and unbiased as possible.

The 1994-1999 EU Commission[99] was responsible for the management of the crisis, as it was to direct national governments to take appropriate measures to cope with the matter. To the support of the EU Commission, a great deal of scientists were suggesting that bovine spongiform encephalopathy[100] *might* have jumped to sheep from cattle, and be disguised as scrapie, a related brain disease.'[101] Sheep spleen and intestines were to be banned from any use as 'specified risk material' under Article 1 (b) of the decision. Undeniably, however, the decision in question was problematic in that it was not based on cogent scientific evidence but it was rather taken as a spasmodic measure on the part of the Commission, all in the name of the 'precautionary principle'.

Commission Decision 97/534/EC was, thus, heavily resisted by such countries as Denmark, Sweden, Finland, Austria, Greece, Spain and Germany and resulted in one of the most dramatic retreats of EU law and EU bureaucracy to date, even though it drew the support of the UK and France at the time. At the very least, in the case of Greece the reasons for resisting implementation of Article 1 (b) were both legal and socio-legal, for the Greek cuisine would have to omit certain dishes had the decision been implemented into the Greek legal system. Therefore, a good way to rename the title of our exemplification would probably be: 'You can change our laws but you will never go as far as changing our food taste by changing our laws; at least not without good reason'. In any case, after the BSE crisis hit Europe in 1996, large parts of the EU food industry seemed to have been in a state of nervous breakdown and quite rightly so, one might have thought. The EU thought to itself that it would be a

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[99] In addition to the unfortunate decision in question taken by the Commission, a great number of Commissioners of the College of Commissioners at the time, it is noted, were also the recipients of allegations for fraud, mismanagement and nepotism. See the *Committee of Independent Experts First Report on Allegations regarding Fraud, Mismanagement and Nepotism in the European Commission* (15 March 1999), pp. 11-14, 123-134, 137-139. The composition of the independent committee was fixed by the European Parliament. To this the then President of the European Commission consented. As a result of the report, the Commission stood down.

[100] Hereinafter BSE.

[101] *EU Food Law Monthly: June 1997*, p. 9.

very good idea to legislate on the matter; still, from very 'loose' laws, the laws in the EU suddenly became all too strict. EU food law became draconian so suddenly due to the precautionary principle. According to the principle, 'Erring on the side of caution means to ban a product even where there is not 100 per cent scientific evidence to justify this decision'.[102] In those days, however, the principle was abused and it would seem that the 'precautionary principle' became a term of favouring the creation of rules rather than the creation of exceptions in law. The first victims of these laws have clearly been legal systems.

Strategically, Greece together with a number of other countries resisted the implementation of Article 2 (general prohibition of specified risk material) as prescribed in Article 1 (b) Commission Decision 97/534/EC (prescription of the spleens of ovine and caprine animals as specified risk materials), as mentioned above. Unlike other countries, however, which maintained that such a ban might affect their food industries, as they used (to a greater or lesser extent) natural sheep intestine casings to produce sausages, Greece's line of defence was at a wholly different level of argument. Therefore, whilst for the other EU nations which resisted the ban of the instrument purely on reasons of economic principle, for the Greeks this was at least only partially so. For them, it was never an issue of whether or not their cattle were BSE-hit, for they simply were not. For them, the arrival of Commission Decision 97/534/EC would signify the alteration of their food appetites. That is why it was resisted to the point that the decision's particular provisions were rejected in practice or 'regionalised' for certain countries only at a later stage.

For the Greeks the general ban of sheep spleen and intestines was seen as a particularly sensitive issue sociologically; it was an issue of every day life, an issue interconnected with how the Greek people form their eating habits. The stress for the purposes of our factor is not of course on how a certain people ate but on how a certain people would have to eat post Commission Decision 97/534/EC without good reason. The decision, in effect and without good reason (no cogent scientific evidence), asked from the Greeks to ban the consumption of *kokoretsi* and *mayiritsa*. In the former case (*kokoretsi*) the ban would affect its yearly consumption, since *mayiritsa* is mainly consumed during the Greek Easter period, being only a seasonal dish in the Greek menu.

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[102] *EU Food Law Monthly: January 1999*, p. 3.

As regards *kokoretsi*, it is made out of a lamb's liver, lungs, and spleen all wrapped in its intestines and roasted skewered on a spit.[103] It is not exactly what one would be able to describe as a first class dish in a five star hotel in New York, London or Tokyo. In fact, it and its taste are most probably unknown to such people as the British, the Americans and the Japanese. Therefore, one would not be able to find it in any of the hotels in the above countries. *Kokoretsi* is also largely unknown to continental Europe. One would still be able to find it in the region that extends from the Balkans to Turkey; not necessarily in a five star hotel there either. However, one can to this day see the Greeks eating a dish made essentially out of sheep intestines as easily as the French would consume snails and frogs' legs or the Scottish would consume haggis. So do the Turks, as well as the peoples in the southern part of the Balkans. The difference of those people and Greece is that Greece connected its legal fortunes in 1981 with those of the peoples in the rest of the European Union, whilst the rest of the Balkan countries, as well as Turkey, did not have to do so. Consequently, Greece had to implement the *kokoretsi* ban.

In relation to the first consideration under our factor, the Greeks would have to show that they did not abuse the socio-legal factor of implementation through rejecting implementation Article 1 (b) of the decision in question, thereby going against legal principle. Clearly, the Greeks were not foul of going against legal principle (e.g. *ratio legis est anima legis*). What was against legal principle e.g. proportionality, to name only one principle, was the Commission's draconian Article 1 (b). The Greek arguments in relation to the Greek refusal to implement the infamous Article 1 (b) were simple: i) Greece did not have any reported BSE cases whatsoever, ii) For this reason Greece could not apply the same standards as BSE-hit countries, for this would not only be politically unfair but also (and most importantly) legally disproportionate (see below on proportionality), iii) Most importantly, one could, therefore, not expect that the Greeks apply the same 'precautionary standards' thereby effectively changing their traditional appetite standards to a certain though limited extent. In short, Greece or any other country cannot and should not be expected to conform its laws with something that goes beyond reason[104]. Bad laws

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[103] On the preparation of kokoretsi see e.g. V. Alexiadou, *Elliniki Kouzina: Mageiriki*, Thessaloniki: Ekdoseis Vefa Alexiadou, 1988, p. 26; A. Aggelikopoulou, *Paradosiakes Syntages: Elliniki Kouzina*, Athens: Ekdoseis Stelios Kontaratos, 1999, p. 168.

[104] *Infra*, fn. 114.

are to be refused implementation under the socio-legal factor of implementation, if the alternative adaptation path of the factor is not chosen, and that is what the Greeks did.

To illustrate our point on proportionality vis-à-vis the approach taken by the Commission, it would be useful to explain and apply at this point the test of proportionality. However, prior to this, it would be useful for the reader to be reminded that the test of proportionality is more of an objective test as opposed to the precautionary principle, which is of a rather more subjective nature and refers to potentialities. This was made apparent in *UK v Commisssion of the European Communities*[105] where it was said that:

> 'Where there is uncertainty as to the existence or extent of risks to human health, the institutions may take protective measures without having to wait until the reality and seriousness of those risks become fully apparent.'[106]

On the other hand, proportionality offers a more secure path and by all means a more globalised legal standard for us to follow (as opposed to the more uncertain path of potentialities under the precautionary principle), the test of it having emanated from German policing law vis-à-vis abuses of state power.[107] Thus applying in our case, the classical approach of proportionality entails three limbs:

- Whether the measure in question (here the Commission's decision) has been suitable to achieve the desired end (suitability limb of proportionality);
- Whether it was necessary to achieve the desired end (necessity limb of proportionality) and

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[105] *United Kingdom of Great Britain and Northern Ireland v Commission of the European Communities*, Case C-180/90 [1998] ECR I-2265.

[106] See *United Kingdom of Great Britain and Northern Ireland v Commission of the European Communities* (C–180/96) [1998] ECR I-2265, I-2298

[107] P. Craig and G. De Búrca, *EU Law: Text, Cases, and Materials*, Oxford: Oxford University Press, 3rd Edition, 2003, p. 372 and T.C. Hartley, *The Foundations of European Community Law: An Introduction to the Constitutional and Administrative Law of the European Community*, 5th Edition, 2003, Oxford University Press, pp. 151-152.

- Whether the measure imposed a burden on the individual that was excessive in relation to the objective sought to be achieved (*stricto sensu* proportionality limb)[108]

As regards the first sub-test of suitability, one states *ab initio* that the Commission's decision to ban the consumption of sheep intestines in Greece went beyond the desired end in that Greece was not having any cases of BSE in the first place, irrespective of whether this has been the case in other EU countries e.g. in the UK. The differentiating and crucial factor here is that then and to this day Greece did not and does not have any reported BSE cases whatsoever. Therefore, there could be no desired end in the case of Greece. In turn, as suitability is to exist only where a real desired end exists, one cannot, as a matter of principle, create such end simply because the sub-test here is to be satisfied. Second, the Commission could not claim necessity here either. Again, necessity for the decision in question might well exist in a country which was actually hit by BSE but not necessarily a country that was not having such reports. In other words, not only did the European Commission exceed the necessary measures for BSE in all of the EU (based arguably on the precautionary principle) but wished to expand this well beyond the remit of BSE in such animal material as sheep intestines, in countries with no BSE cases in the first place, such as Greece, even if the author concedes that the Commission may have acted so for the whole benefit of the food industries affected throughout the EU. Third, were the measures imposed by the Commission's decision on Greece excessive vis-à-vis the objective being sought? The answer is most probably in the affirmative, as one would expect that such measures are to be imposed on the countries where the problem initiated and persisted rather than the countries were the problem did not actually ever occur. As the decision did not present any discretion whatsoever for such countries as the legal system in question, the approach may well be seen as not proportionate *stricto sensu.*

Turning to the second consideration of the factor, one would have to ask whether Greece would be able to sustain its rejection to implement Article 1 (b). As regards the sustainability question, one would be able to argue first that Greece could

[108] P. Craig and G. De Búrca, *EU Law: Text, Cases, and Materials*, Oxford: Oxford University Press, 3rd Edition, 2003, pp. 372-373. For more on proportionality but from the food law perspective see also C. MacMaoláin, *EU Food Law: Protecting Consumers and Health in a Common Market*, Oxford: Hart Publishing, 2007.

sustain its refusal to implement Article 1 (b) at the time, as it had no BSE reported cases whatsoever (see above, in the previous paragraph on proportionality). Therefore, one could not force its legal system to implement a ban on spleen and sheep intestines as BSE 'specified risk material'; that would be wholly irrelevant. How could any legal system implement a BSE related ban on ovine meet, a different kind of meat, when it had no BSE reported cases? The question is, of course, rhetorical but perhaps shows how some of the decisions of the EU are taken. Thus, Greece's position was sustained. Second, not only even after the postponement of implementation decision 97/534/EC by the Commission,[109] Greece would be able to sustain such a refusal to implement a ban on sheep intestines even today, even though decision 97/534/EC has been repealed altogether,[110] since Greece does not have any reported cases according to the latest EU report on the matter.[111]

With regard to the third consideration (non-interference of political and nationalist approaches with the factor) all that could be said to the satisfaction of this is that simply because a people wishes to maintain its food habits (in the absence of scientific evidence that the preservation of such habits results in dangers to to its health), this cannot be seen as a nationalist or a politicised approach. For otherwise, the fact e.g. that the Scottish prefer haggis would have to be seen as a nationalist trend, when it is not.

As regards the need for affirming Greece's rejection on implementing Article 1 (b), it has been apparent on a number of occasions. First of all, the fact that the entry into force of decision 97/534/EC was postponed twice,[112] until it was rejected

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[109] The entry into force of the Decision changed twice: i) To 01/01/1999 (98/745/EC: Council Decision of 17 December 1998 amending Commission Decision 97/534/EC on the prohibition of the use of material presenting risks as regards transmissible spongiform encephalopathies), *Official Journal L 358, 31/12/1998*, p. 0113 and ii) to 31/12/1999 (1999/881/EC: Council Decision of 14 December 1999 amending Commission Decision 97/534/EC on the prohibition of the use of material presenting risks as regards transmissible spongiform encephalopathies), *Official Journal L 331 , 23/12/1999,* p. 0078.

[110] 2000/418/EC: Commission Decision of 29 June 2000 regulating the use of material presenting risks as regards transmissible spongiform encephalopathies and amending Decision 94/474/EC (notified under document number C(2000) 1735) (Text with EEA relevance), *Official Journal L 158, 30/06/2000,* pp. 0076 – 0082. It was Article 10 of this decision repealed Decision 97/534/EC.

[111] See European Commission *Report* on the monitoring and testing of ruminants for the presence of transmissible spongiform encephalopathy (TSE) in the EU in 2004, including the results of the survey of prion protein genotypes in sheep breeds, (June 2005), p. 1. Accessible on the internet at http://europa.eu.int/comm/food/food/biosafety/bse/annual_report_tse2004_en.pdf. According to the report the only countries in the European Union which have had no reported cases in 2004 were Austria, Cyprus, Estonia, Greece, Hungary, Latvia, Lithuania, Luxembourg, Malta, Finland and Sweden.

[112] *Supra*, fn. 109.

altogether, can amount to an indirect affirmation of Greece's refusal to implement on the part of the Commission. Of course, this was a sort of affirmation for other legal systems which may have not have had the socio-legal considerations that Greece has had. Second, the fact that 97/534/EC collapsed in the year 2000.[113] Third, the fact that a number of reports (all emanating from the European Commision) have never shown that Greece has been hit by BSE and that there is no cogent evidence for a link between BSE and sheep intestines is another indirect affirmation on the part of the Commission for the position taken by the Greek legal system.[114] Fourth, Greece and a number of other countries renegotiated the decision 97/534/EC with the Commission; this renegotiation resulted in the postponement of the entry into force of the decision and its final death with the Commission Decision 2000/418/EC of 29 June 2000.[115] Greece did not refuse the implementation of this decision. Thus, Greece converged to the European legal order more happily this time upon renegotiation, as the socio-legal factor proposes.

Finally, one has to ask whether Greece had a margin of appreciation to act as it did. To prove this the Greeks would have to show that their interference with the European decision to ban sheep intestines was 'necessary in their society'. On the presumption that for Greek society this was actually necessary, they would have to establish that the reasons for interference with such European decision were 'relevant and sufficient'. For the reasons explained above, it would seem that there has been a sufficient basis for the Greeks to reject the European decision, as they did and as this was later implicitly affirmed by Commission Decision 2000/418/EC of 29 June 2000.

6.3.3. Third exemplification: The highways speed limit convergent law

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[113] *Supra*, fn. 110.

[114] See e.g. *European Commission Scientific Steering Committee Complecent to the SSC Opinion 4-5 on small ruminant materials April 2002 on safe sourcing (with special reference to the safety with regard to BSE risks of sheep intestines and casings.)* (adopted by the scientific steering committee at its meeting of 12-13 September 2002), *European Commission Report on sheep intestines and natural casings derived therefrom in regard to risks from animal BSE and TSE in particular* (7 May 2002), *European Commission Report on the monitoring and testing of ruminants for the presence of Transmissible Spongiform Encephalopathy (TSE) in 2002* (July 2003), *European Commission Report on the monitoring and testing of ruminants for the presence of transmissible spongiform encephalopathy (TSE) in the EU in 2003, including the results of the survey of prion protein genotypes in sheep breeds* (May 2004) etc.

[115] *Official Journal L 158, 30/06/2000*, pp. 0076 – 0082.

The third example of application of the socio-legal factor of implementation is a hypothetical one; the example is construed in such a manner, so that some obvious results will be reached in respect of our analysis. The hypothetical convergent law asks that the highway speed limit is raised to 150 km/h throughout the year for all the highways of supranational union X, because it is thought that this would increase the swift transportation of goods amongst the member states of the hypothetical union of our example. The Republic of Snowdonia has to adhere to this, as it is a member state of union X.

Our example here is one which pertains to a state of affairs where a national legal system may refuse implementation of an otherwise reasonable law by way of some higher domestic concern. As far as the hypothetical nature of our example is concerned, this has been the conscious choice here because the author submits that the literature does not seem to provide similar examples to date.

Snowdonia in our hypothetical example is a country where snowfalls occur six months per year and this causes blockages on its highways in many instances. Additionally, the temperatures in Snowdonia are very low throughout the year and this causes its road networks to get ice, making the passage through them virtually impossible, when the winter sets in. Furthermore, the Snowdonian transportation analysts have ruled against a recent proposal of the government to increase the speed limit on its highways from 120km/h to 130 km/h, because this would be devastating to road safety. This – they argued – would increase the road accidents in the country. Consequently, the Snowdonian government also refused to implement the speed limit convergent law.

Let us now see whether Snowdonia could abuse the factor by forwarding non-legal considerations or by going against principle by refusing to implement the 150 km/h speed limit on the highways law. It would not be a non-legal consideration for Snowdonia to claim that increasing its current speed limit from 120 km/h to 150 km/h would amount to breach of the free movement of goods or people, as supranational union X could claim. This would be especially true, as one would claim that public road safety is of higher value in comparison to the free and swifter transportation of goods under the 150 km/h speed limit of the highways convergent law. Free movement of goods is one thing, whilst road safety is quite another. Without doubt, however, the latter outweighs the former in terms of importance for the Snowdonian legal system. The Snowdonian legal system would not go against legal principle by

refusing to implement the 150 km/h speed limit on its highways, even if this would amount to a slower movement of goods when imported from and exported to the rest of the member states in the supranational union X.

The second consideration asks that Snowdonia can sustain its argument for non-implementation of the speed limit convergent law in the face of other legal systems with similar problems, if any. Snowdonia might be able to reinforce its argument by suggesting that its legal system together with other legal systems may not have a road network good enough to sustain their current (even if arguably low) speed limits. Thus, even if Snowdonia were to refer to the bad state of the roads of another country which does not necessarily share its climate, one would be able to see that Snowdonia could reinforce and therefore sustain its position in refusing to implement.

For the same reason (bad road infrastructure) Snowdonia could well argue that their claim under the socio-legal factor does not interfere with politics or nationalist claims. Thus, such a consideration could well be preserved by reason of the fact that Snowdonia in our example has an infrastucture that cannot sustain higher speed limits than the current ones.

The fourth consideration of the factor asks that the position of Snowdonia be affirmed from supranational union X. This cannot be answered but may be anticipated in a hypothetical scenario, since an unconditional speed limit of 150 km/h throughout supranational union X would be dangerous, at least for the transporters in Snowdonia. Snowdonia could then under the factor ask for a renegotiation of the particular speed limit convergent law or preferably an opt-out, if Snowdonia was a unique case, i.e. a country of terrible roads and terrible weather.

It should be noted at this stage that there is a parallel to be drawn between EU law and our example. Under EU law, for instance, had Snowdonia been a member of the EU, it could well have drawn parallels with the application of our factor under the heading of 'public policy derogations', thereby dissallowing all drivers (non-Snowdonian drivers included) to exceed its 120 km/h. Under this heading, even though this heading is not strictly socio-legal, it seems to take into account the features of EU states when it comes to public policy, health and security, as long as

general principles of law such as proportionality are satisfied under Directive 64/221.[116]

The last question to which Snowdonia should give a satisfactory answer under our factor is whether it had a margin of appreciation to keep a speed limit of 120 km/h as opposed to the one of 150 km/h proposed under the convergent law in question. On the basis that Snowdonia considers its deviation 'necessary for its society', Snowdonia would have to show that its reasons to do so were 'sufficient and relevant'. Arguably and judging from the current state of Snowdonia road network and its specific weather conditions, such reasons are both sufficient and relevant, especially in the face of road safety. As a result, Snowdonia has a margin to deviate from the 150 km/h speed limit rule and retain the 120 km/h speed limit.

6.3.4. Fourth illustration: The deviatory character of law-adapting under the socio-legal factor in the Japanese paradigm

A fourth illustration, though not a strict application, under the socio-legal factor of implementation is concerned with law adapting in the transposition of Western laws in Japan. Such a discussion is not a strict application of our factor, as Japan did not have to converge to convergent law but merely to Western laws. This exploration is thus used, as it offers an intriguing analysis from the comparatist's viewpoint as to how foreign laws can be 'adapted' during the transplantation stage by reason of socio-legal forces.

It could well be argued that the application of legal sociology in Japan amounted to an all abstract procedure. However, reality dictates otherwise. Japan is perhaps the clearest example of where western law clashed with a pre-existing socio-legal culture, the indigenous culture. This clash was the inevitable result of a gap between western law and Japanese social reality.[117] In fact, the motive of the

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[116] P. Craig and G. De Búrca, *EU Law: Text, Cases, and Materials*, Oxford: Oxford University Press, 3rd Edition, 2003, p. 826. It is noted that the Directive will no longer be in force post April 30 2008, as this was recently repealed by the European Parliament and Council Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States. See European Parliament and Council Directive 2004/38/EC of 29 April 2004 *Official Journal L 158, 30.4.2004,* pp. 77-123, *Official Journal L 229 , 29/06/*2004, pp. 35-48 (Corrigendum) and *Official Journal L 197, 28/07/2005*, pp. 0034-0034 (Corrigendum to the Corrigendum).

[117] H. Oda, *Japanese Law*, Oxford: Oxford University Press, 2nd Edition, 1999, p. 60.

Japanese Emperor after the 'Meiji Restoration' was different: that Japan be modernised and unified in law under a new modern, centralised government structure.[118]

There have been no winners or losers in this clash but one could argue that modern Japanese law is more 'western' than most laws of the other legal systems in Asia, notwithstanding the fact that to this day the pre-existing Japanese social norms play a more significant role in the average Japanese person's life than the largely imported rules in to legal system, law [being] important in a symbolic and ornamental sense[119]. At the very least however, one could argue that a western-style system does exist in form/structure[120], albeit with the function of law quite different to that of Western Europe.[121] Rather, as the socio-legal factor of implementation implies, there has been assimilation of western law into the Japanese society.[122] At other times there has been no assimilation; there has been confrontation. Again, this could – by way of analogy – be compared to the rejection option which is offered by the socio-legal factor of implementation.

The question is how can convergent law avoid being 'castigated' in the process of being adapted during implementation thereof under the socio-legal factor proposed herein. The Japanese example proves this to us in the most coherent fashion, as 'Although Japan succeeded in faithfully and skilfully imitating the French and German legal systems, its own culture could not help but give an original character to the system that was received'[123].

What is of greatest importance in relation to the socio-legal factor of implementation is that the Japanese example offers us a good practical guide as to how convergent law may be assimilated (as long as this is not rejected / confronted so that it can be renegotiated). The analogy can be drawn based on the model of assimilation of western law in the Japanese legal system of Katsuta (item 8).[124] It is

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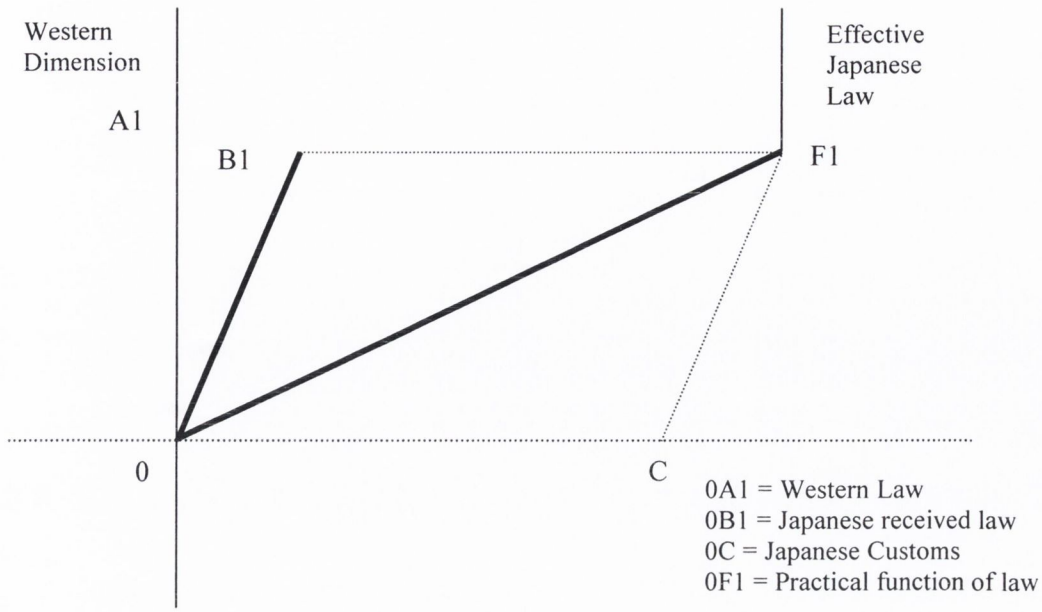
[118] A. Katsuta, 'Japan: A Grey Legal Culture' in E. Örücü, E. Attwool & S. Coyle (eds.), *Studies in Legal Systems: Mixed and Mixing*, The Hague/London/Boston: Kluwer Law International, 1996, p. 251.
[119] K. Fujikura (ed.), *Japanese Law and Legal Theory*, Aldershot: Dartmouth, 1996, p. xvi.
[120] Y. Noda (trans. By A.H. Angelo), *Introduction to Japanese Law*, Tokyo: University of Tokyo Press, 1976 (French original 1966), 10th Printing, 1997, p. 8.
[121] A. Katsuta, *op. cit.*, fn. 118, pp. 259, 261.
[122] H. Oda, *op. cit.*, fn. 117, p. 9.
[123] Y. Noda, *op. cit.*, fn. 120, p. 58; T. Kawashima, 'Japanese Way of Legal Thinking' (excerpt from the (1979) 7:2 *International Journal of Law Libraries*, pp. 127-131) in C. Varga (ed.), *Comparative Legal Cultures*, Aldershot: Dartmouth, 1992, p. 395.
[124] A. Katsuta, *op. cit.*, fn. 118, p. 260.

noted that when European laws met Japanese customs, the Meiji regime was at great pains to give practical effect to received law and educate the public 'in the name of civilisation and enlightenment'.[125] This was so, as the imported European bourgeois codes were destined for societies very much different to the Japanese society in the Meiji period.[126] Hence, as it becomes obvious from Katsuta, 'effective Japanese law' (0F1) has not always coincided with the 'western dimension' of European laws (0A1), for such laws were distorted a) because of objective reasons such as translation problems at the time during the reception stage (0B1) and b) because Japanese customs (0C) were strong enough to water down the western dimension of such laws. Such assimilation occurred through modifying European laws and some applications have been 'Japanised' to make them indigenous law; others have failed to become Japanese law.[127] For instance, natural rights, a concept inherent in western legal theory, were promoted in Japanese jurisprudence in a Confucian manner as 'rights given by Heaven'.[128] Thus, the introduction of natural rights in Japan was the result of a religious influence which, of course, pre-existed European laws in the Japanese society.

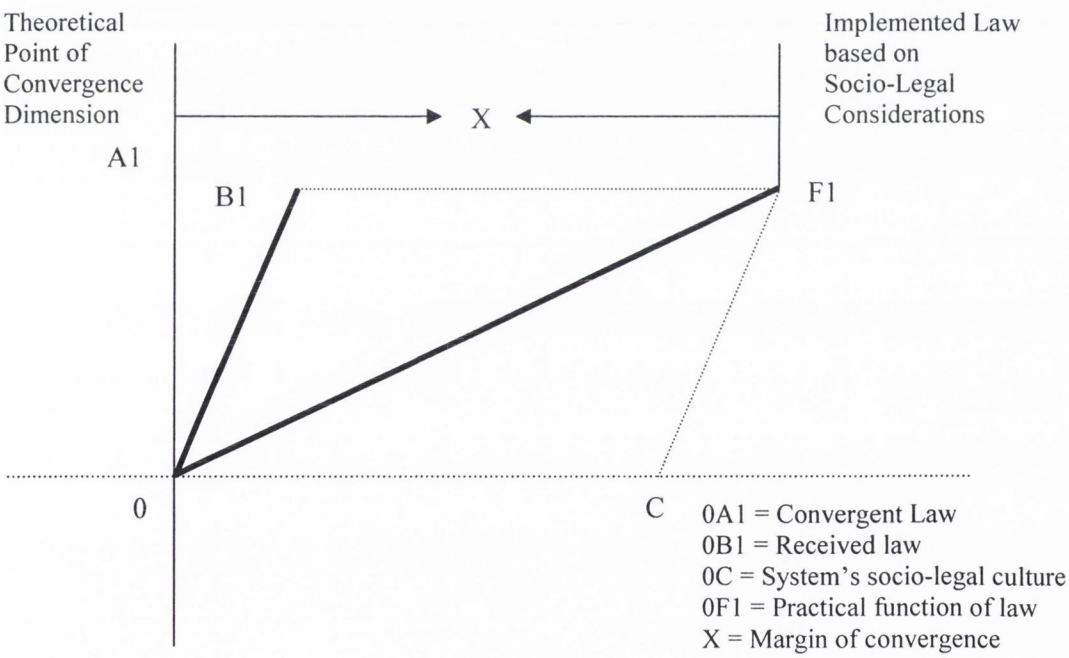
Analogically applying Katsuta's analysis on the reception of European law in Japan, one can draw particularly useful conclusions in relation to the sociological implementation of convergent law (item 9). For these to become readily apparent, one needs, as noted in the first paragraph of this section, to replace 'Western law' with 'Convergent law' and 'Japanese customs' with 'overriding socio-legal considerations' of a legal system and 'Japanising foreign laws' with 'localising convergent law'. By doing so, the analogy with the reception of foreign laws into Japanese law and the implementation of convergent law under the socio-legal factor of this chapter becomes obvious. Thus, as in Japan, when a legal system is asked to assimilate extra-national law (0A1) into national legislation (0B1) and practical law (0F1), one may need to take into account certain overriding socio-legal considerations (0C) which, of course, are pre-existent to the arrival of convergent law. The point of some ambiguity is how far the practical function (0F1) can deviate from convergent law (0A1), for the 'margin of convergence' (X) cannot be infinite for obvious reasons.

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[125] A. Katsuta, *op. cit.*, fn. 118, p. 259.
[126] K. Zweigert and H. Kötz, *An Introduction to Comparative Law*, 3rd Edition, 1998, Oxford: Oxford University Press, p. 299.
[127] A. Katsuta, *op. cit.*, fn. 118, p. 259.
[128] *Ibid.*


Western
Dimension
A1
B1
Effective
Japanese
Law
F1
0
C
0A1 = Western Law
0B1 = Japanese received law
0C = Japanese Customs
0F1 = Practical function of law

Item 8


Theoretical
Point of
Convergence
Dimension
A1
X
Implemented Law
based on
Socio-Legal
Considerations
B1
F1
0
C
0A1 = Convergent Law
0B1 = Received law
0C = System's socio-legal culture
0F1 = Practical function of law
X = Margin of convergence

Item 9

The obvious solution would be that there has to be some renegotiation between the national and extra-national authority during the implementation phase so that this margin is not exceeded.

Convergence then is approximate; not exact. But approximation[129] here is a blessing, not a curse. This is because of the hypothesis that the convergence theory does not necessarily contravene socio-legal considerations of a legal system's culture. There are other reasons, such as practical considerations but the main reason remains the tolerance of sociological considerations under a convergence thesis.

6.3.5. Fifth illustration: Relativism and universalism vis-à-vis the socio-legal factor of implementation and the convergence theory with particular regard to the Universal Declaration of Human Rights 1948

An illustration of the socio-legal factor would be incomplete without regard to international human rights relativism and law adaptation under such a factor of implementation, human rights representing part of a 'constitutional framework for the international society of states'[130]; the first admission to be made is that, even though a factor of implementation as such would favour relativism, unrefined relativism would in all probability run counter to the convergence theory. In short, any attempt to synthesise holus-bolus relativism with the convergence thesis is in danger of being flawed.

This being the case, relativism is *not* incompatible with the convergence thesis (and consequently not incompatible with the socio-legal factor of implementation), as long as relativism in its manifestation is not unreasonable and unrefined. In fact, as long as extra-national jurisprudence, albeit of 'universal aspiration', adapts the law to local conditions, then there is a powerful presumption that this societal creation in the form of a legal system *will not* reject the 'transplant', since 'the law would be used

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[129] Hozumi, a leading Japanese figure on comparative law and drafter of the current Japanese Civil Code once characterised this Code as 'a connecting link between the Past and the Present, between the East and the West': H. Aoki, 'Nobushige Hozumi: A Skillful Transplanter of Western Legal Thought into Japanese Soil' in A. Riles, *Rethinking the Masters of Comparative Law*, Oxford/Portland, Oregon: Hart Publishing, 2001, p. 130.

[130] S. Anderson-Gold, *Cosmopolitanism and Human Rights*, Cardiff: University of Wales Press, 2001, p. 12.

[and] a strong public demand for institutions to enforce this law would follow'[131]. If this statement is valid, then one could argue that certain states could, in principle, be given a margin of appreciation in the actual implementation of international law,[132] e.g. in the implementation of the Universal Declaration, as this occurs e.g. most successfully (if not exclusively) in the European model of human rights[133]. However, this margin should be a margin not to deviate from the purpose of the law; not a margin to obliterate the latter's effect, irrespective of the idea that international human rights are not the ends but the means to ends[134].

In the area of international human rights and in particular within the remit of the Universal Declaration 1948, one may have to question whether for the convergence theorist relativism acts detrimentally to a convergence of expectations[135] between the nations. Obviously, if someone asked whether the Universal Declaration is of western provenance more than of any other provenance, the answer would point to the prevailing Western character[136] of the instrument.[137] The criticisms against this

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[131] D. Berkowitz, K. Pistor and Jean-Francois Richard, 'The Transplant Effect', (2003) 51:1 *American Journal of Comparative Law* 163, p. 168.

[132] Cf. J.C.M. Willens, 'The Children's Law of Nations in the Trias Pedagogica' in J.C.M. Willens (ed.), *Developmental and Autonomy Rights of Children: Empowering Children, Caregivers and Communities*, Antwerp/Oxford/New York: Intersentia, 2002, pp. 71-72 (para. 2.2.: The Children's Law of Nations binds all states, both rich and poor).

[133] A. Woodiwiss, *Making Human Rights Work Globally*, London/ Portland, Oregon/Sydney: Glasshouse Press, 2003, p. 5. K. Hastrup, 'Accomodating Diversity in a Global Culture of rights: An Introduction' in K. Hastrup (ed.), *Legal Cultures and Human Rights: The Challenge of Diversity*, Houndmills, The Hague: Kluwer Law International, 2001, pp. 16-17. Also, on the paramount influence of the European of model of human rights as a model for the Inter-American Court of Human Rights, see M.A. Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights*, New York/Toronto: Random House, 2001, pp. 217-218.

[134] A. Woodiwiss, *op. cit.*, fn. 133, p. 1.

[135] 'This *convergence of expectations* is the essence of the idea of a [global] 'human rights regime' facilitating intercultural communication and the exchanges definitive of cosmopolitanism'. See S. Anderson-Gold, *op. cit.*, fn. 130, p. 88.

[136] K. Mills, *Human Rights in the Emerging Global Order: A New Sovereignty?*, London: Macmillan Press, 1998, p. 38; A. Dundes Renteln, *International Human Rights: Universalism Versus Relativism*, Newbury Park/California, London, New Delhi: Sage Publications, 1990, p. 30; A. Woodiwiss, *op. cit.*, fn. 133, p. vii. Brems argues that 'The idea of the UHDR as somehow rooted in all cultures is nothing more than a myth. Historically, human rights are in the first place a Western creation.' See E. Brems, *Human Rights: Universality and Diversity*, The Hague/Boston/London: Martinus Nijhoff, 2001, pp. 7-8, 17. Brems states that precursors of contemporary human rights are: the English Magna Carta (1215), the Petition of Rights (1628), the Habeas Corpus Act (1679), and the Bill of Rights (1689). Other texts include: the Virginian declaration of Rights and similar constitutional enactments of Pennsylvania, Maryland, Delaware, New Jersey, and North and South Carolina 1776, the American Declaration of Independence in the same year, the constitutions of New York and of New Georgia of 1777 and that of Massachusetts of 1780 and the Bill of Rights of the United States of America in 1791. Other human rights instruments which have affected international human rights law are the French Declaration of the Rights of Man and of the Citizen of 1789, the Declaration of the Rights of Man and of the Citizen of the Year I of 1793 and the 1795 Declaration of the Rights and Duties of Man and the Citizen.

'Western universalism' are concerned with the apparently different perception of rights in the African[138], the Asian[139] and the Muslim[140] world. There is consequently some sort of discrepancy between the otherwise universalist approach in the lawmaking of the Declaration and (a) *what* individual rights *mean* (interpretation of rights) and (b) *how may* these rights *be restricted* (if at all) in implementation practice (justification for the restriction of rights). Furthermore, even though the Declaration names its list of rights as 'universal', it would not be an exaggeration for one to state that human rights law, like international family law, relates to a much more heterogeneous set of social relations than e.g. international private law[141]. This is true, as, even though the internationalist or the convergence theorist would applaud the 'universal tag' of the Declaration, one cannot reasonably expect that all legal systems implement and enforce the Universal Declaration in exactly the same fashion.

For example, let it be remembered that even in countries belonging to the same cultural circle, such as Ireland and the USA, one cannot fail to detect great differences in such delicate matters as abortion[142] or the death penalty. In fact, not even the more regional European human rights system is applied in exactly the same fashion in more homogenous Europe; how could this ever be expected in our more heterogeneous world, given the Western provenance of the Declaration and the fragmentation of peoples and legal cultures in our world? Consequently, from the viewpoint of implementation, even though the Universal Declaration has succeeded in inspiring[143], it is clear that it has failed to be universally enforced. Effectively, Brems

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[137] Glendon argues that this is a true statement, because e.g. sub-Saharan peoples were not represented in the drafting of the Declaration and because most of the Declaration's rights first appeared in the European and North or South American documents on which John Humphrey based the original draft of the Declaration. Cf. the opinion of Malik, one of the drafters of the Universal Declaration, who once argued that 'the Declaration as a "composite synthesis" of all existing rights traditions, and of much Asian and Latin American wisdom'. See M.A. Glendon, *op. cit.*, fn. 133, pp. 222-223 and 164 respectively. Cf. also the opinion of Cassese, who has called the Declaration 'the meeting point of diverse conceptions of man and society': A. Cassese, *Human Rights in a Changing World*, Cambridge: Polity, 1990, p. 46.

[138] E.g. E. Brems, *op. cit.*, fn. 136, p. 162.

[139] E.g. H.T. Hussein, 'Human Rights – The Asian Perspective' in R.G. Patman (ed.), *Universal Human Rights?*, Houndmills, Basingstoke, Hampshire: Macmillan, 2000, p. 76.

[140] E.g. A.E. Mayer, *Islam and Human Rights: Tradition and Politics*, Boulder, Colorado/Oxford: Westview Press, 3rd Edition, 1999, p. 41.

[141] A. Woodiwiss, *op. cit.*, fn. 133, p. 18 and M.A. Glendon, *op. cit.*, fn. 133, p. 221.

[142] N. Cox, 'Judicial Activism, Constitutional Interpretation and the Problem of Abortion. *Roe v. Wade* (1973) *And X v. A.G.* (1992)' in E. O'Dell (ed.), *Leading Cases of the Twentieth Century*, Dublin: Round Hall Sweet Maxwell, 2000, pp. 237-254.

[143] Glendon suggests that at least the recent Constitutions of Germany, Japan and Italy have been influenced by the Declaration, whereas the Declaration's principles have also affected the world's legal

is correct in noting that 'If the universality of human rights is interpreted as universal realisation or implementation, it is unfortunately all too clear that it is far from being achieved'[144]. Thus, it is noted in the bibliography that in countries such as Iran, there is a very low level of commitment to the international human rights system.[145]

Conversely, one can readily argue that the Declaration *per se* is of universal remit, because it applies to all human beings (all-inclusiveness principle)[146]; because it is fundamental in essence and because all human beings in all parts of the world, of all backgrounds, cultures, religions and ideologies, experience a need for the protection they offer (functional acceptance of human rights)[147].

However, the main problem with relativism unrefined in human rights law is that the notion may be used for the perpetration of abuses; also, as this is explained in the first paragraph of this section, had the convergence theorist to choose between relativism and universalism, the preference for the second would in all probability be obvious. Hence, as in comparative law, the stress nowadays (as well as in the recent history of comparative law) is in the search of unifying principles; [148] in the appreciation of similarities rather than differences. Consequently, Douzinas argues that at the 'end of history' the universality of human rights is 'the only regulative principle of state organisation which unites every country, race and creed in the world... [and] ideology'.[149]

As in our socio-legal factor of implementation, relativism is open to refinement. Our factor in this chapter suggests *inter alia* that even though a legal system may bring into play overriding socio-legal considerations, this cannot go against the whole character of the convergent instrument in question, whereas at a more abstract level a system should not abuse the socio-legal factor to distort

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systems, as the members of the first Human Rights Commission had hoped. See M.A. Glendon, *op. cit.*, fn. 133, pp. xvi, 218 respectively. See also S. Anderson-Gold, *op. cit.*, fn. 130, p. 3.

[144] E. Brems, *op. cit.*, fn. 136, p. 12. Glendon seems to be of the same opinion, as the organic unity of the Declaration seems to be lost nowadays. See M.A. Glendon, *op. cit.*, fn. 133, p. xviii.

[145] C. Heyns and F. Viljoen, *The Impact of United Nations Human Rights Treaties on the Domestic Level*, The Hague/London/New York: Kluwer Law International, 2002, p. 336. This is the case not only with Iran but also with the Muslim world in general, which tends to reject the universality of human rights. See E. Brems, *op. cit.*, fn. 136, pp. 201-202.

[146] E. Brems, *op. cit.*, fn. 136, p. 4.

[147] E. Brems, *op. cit.*, fn. 136, p. 10.

[148] R. Cotterrell, 'Seeking Similarity, Appreciating Difference: Comparative Law and Communities' in A. Harding & E. Örücü (eds.), *Comparative Law in the 21st Century*, The Hague: Kluwer Law International, 2002, p. 39.

[149] C. Douzinas, 'Justice and Human Rights in Postmodernity' in C. Gearty and A. Tomkins (eds.), *Understanding Human Rights*, London: Pinter, 1996, p. 115.

implementation. Bearing these two points in mind the extreme relativist position is in conflict with the socio-legal factor of our chapter. Here is why:

> 'The cultural relativist argument goes as follows: First, the so-called "universal" declaration in fact contains Western values. Second, anthropological science teaches that values are culturally relative. Conclusion: therefore the Declaration cannot be valid all over the world'.[150]

Contrariwise, even though Glendon poses to us the intriguing question of whether 'the circumstance that several key principles in the Declaration were first described as "rights" in early modern Europe endow them with a genetic taint that prevents them from being "universal"'[151], one may have to argue in favour of relativism. The more watered-down thesis of cultural relativism is as follows:

> 'For the ethical relativist, moral rightness for a culture or society is determined by that society's accepted moral standards'. [152]

Given however the fact that Asian and African legal systems tend to perceive law (and hence human rights law) as a culture-specific construct,[153] one may have to ask where the boundary is set, i.e. when the minimum universal threshold (if any) of human rights law is violated. The answer, of course, is assessed on a case-by-case basis. However, the Western world is not free from relativism and thus the USA takes a relativist approach in many matters from the European point of view.

Let us now consider the above with an example. The example is that of the death penalty in the USA[154], an American legal anachronism, as Europe, Canada and Australia (and thus the vast majority of the legal systems in the Western world) have now abolished this. The analysis will ask whether the US is falling foul of the letter

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[150] E. Brems, *op. cit.*, fn. 136, p. 27.
[151] M.A. Glendon, *op. cit.*, fn. 133, p. 226.
[152] C. Jones, *Global Justice: Defending Cosmopolitanism*, Oxford: Oxford University Press, 2001, p. 174. See also R.G. Patman, 'International Human Rights after the Cold War' in R.G. Patman (ed.), *op. cit.*, fn. 139, pp. 14-15; A. Dundes Renteln, *op. cit.*, fn. 136, p. 9.
[153] W.F. Menski, *Comparative law in a global context: The legal systems of Asia and Africa*, London: Platinium, 2000, p. 533.
[154] The death penalty is not applicable in all American states. However, it is the law for certain punishable acts in 38 out of the 50 American states. It is also the law under Federal Acts as well as for the U.S. Military. The 1000th execution took place on December 2 2005 and was carried out in North Carolina, after the death penalty was reinstated in the USA in 1976.

of international human rights law, i.e. Articles 3 (Right to life) and 5 (Inhumane punishment) of the Declaration.

The thesis here is that, even though the death penalty is now an anachronistic and relativist approach for most criminal laws in the Western world, one may well argue that at least for the American people, such an approach serves a legal purpose in a democratic society; the 'American deviation', therefore, from the rest of the Western world is a justifiable position in the face of international law. The following seem to be the most important reasons as to why the death penalty in the US is not running counter e.g. Article 3 (Right to life etc) of the Universal Declaration (irrespective of the fact that Article 6 (2) of the International Covenant for Civil and Political Rights 1966 makes allowance for the deprivation of life):

- The American people through the ever-guiding principle of democracy have introduced this to their law. The death penalty in America is the intellectual child of democracy; not a device of an authoritarian and absolute ruler.
- The right to life, even though of the utmost importance for *all* the people of the world is not necessarily a rule without exceptions, as long as the exceptions are justified under the law of democratic states and satisfy the procedural rules of due process, natural justice etc.
- Due to the character of the Declaration, the right to life is declaratory, a statement of principle[155]; it is a right of a 'should be so' kind; not necessarily of a 'must be so' kind. [156]
- Even under Article 29 (2) of the Universal Declaration the US could argue that the death penalty is not only 'determined by law' but it also serves 'the just requirements of morality, public order and the general welfare in a democratic society'.

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[155] T. Risse and K. Sikkink, 'The socialization of international human rights norms into domestic practices: introduction' in T. Risse, S.C. Ropp and K. Sikkink, *The Power of Human Rights: International Norms and Domestic Change*, Boulder, Cambridge: Cambridge University Press, 1999, p. 1.

[156] That is not to say that the Universal Declaration lacks 'legal significance'. See e.g. S. Anderson-Gold, *op. cit.*, fn. 130, p. 52.

With regard to Article 5 of the Universal Declaration, the US could well argue that as the death penalty is carried out in a matter of seconds (via electrocution or by lethal injection), then such punishment could not be seen as 'inhumane', notwithstanding the fact that the US could further claim that this 'inhumane' penalty is exercised in other parts of the world without the same 'degree of care' as in the execution of the convicted in the US. So, for instance, the death penalty takes place by stoning in Iran or by beheading in Saudi Arabia. Besides, the USA could well argue that almost all of the European countries *had* the death penalty in one way or another until very recently in their criminal laws; were they too violators of the Universal Declaration, as one might accuse the US nowadays? Despite the change of policy, it would be very difficult for one to argue this. Thus, as these countries were not in breach of the Declaration, the US relativist position vis-à-vis the rest of the Western world is justifiable; it is, therefore, not in conflict[157] with the Declaration either, for otherwise one would have to argue that all European states were violators of the Declaration as well.

Thus, 'universal' it would seem means that it *seeks* to apply to all people of the world; not that it should apply in exactly the same fashion throughout the world. Besides, how could it apply in such a fashion throughout the world? The Declaration for all its enormous impact in the legal mentality of peoples and systems is what its name suggests: a declaration; it is a start; not the final word on human rights.

In conclusion, if a relativist mode is chosen for the application of 'universal' human rights under the socio-legal factor of this chapter, as this seems to be the natural option, relativism cannot be justified if this amounts to abuse of the factor, i.e. when this goes against legal principle in the sense that relativism may act as a device to serve purposes which disregard human rights widely accepted by the civilised nations of our world. Thus, relativism can be justifiable and compatible with our factor, if it *genuinely* addresses the particularities of a legal system as a societal creature, these particularities[158] not interfering with the core of the right in question.

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[157] Cf. the clear conflict occurring between Article 6 (5) of the Covenant on Civil and Political Rights and the US reservation in relation to this provision, which seems to run counter to the purpose and the object of the Covenant and is thus unacceptable. See e.g. M.G. Schmidt, 'Reservations to United Nations Human Rights Treaties – The Case of the Covenants' in J.P. Gardner (ed.), *Human Rights as General Norms and a State's Right to Opt Out*, London: British Institute of International and Comparative Law, 1997, p. 25.

[158] Cf. the distorting effect of reservations in international law. See e.g. L. Lijnzaad, *Reservations to UN-human Rights Treaties*, Dordrecht/Boston/London: Martinus Nijhoff, 1995, p. 398.

6.4. Conclusion

To summarise the chapter, it was the aim of this chapter that a factor based upon socio-legal considerations be introduced and that by the use of such a factor a legal system can in principle adapt (or ultimately reject) implementation of convergent law, as long as this is extra-nationally affirmed. The factor was systematised, exemplified and thereafter critically analysed.

PART IV

Chapter 7

ACADEMIC INPUT THROUGH INTERVIEWS WITH EXPERTS

7. ACADEMIC INPUT THROUGH INTERVIEWS WITH EXPERTS

7.1. Introduction

This is the penultimate chapter and deals with the academic input from interviews with experts, that is, in a qualitative fashion.

7.2. Thirty-three experts from all the corners of Europe and the world interviewed

Thirty-three law academics, who, at least to the belief of the author of this thesis, are either experts or potential experts in their field from Europe and other parts of the world, have been interviewed via structured questionnaire [1] in the years 2003, 2004 and in the summer of 2005 in relation to the subject matter of this thesis. These are (in chronological order of the time in which the interview with each one of them was conducted): Professor Hugh Collins (London School of Economics/ University of London)[2], Professor Michael Bridge (University College London/ University of London)[3], Professor Tuomas Ojanen (University of Helsinki)[4],

[1] For the questionnaire in English and its translations in Catalan, Finnish, French, German, Greek, Italian, Portuguese, Spanish and Turkish see Appendix 2 of this thesis.
[2] As interviewed on the 31st of January 2003 at the London School of Economics/ University of London.
[3] As interviewed on the 5th of February 2003 at University College London/ University of London.
[4] As interviewed on the 25th of March 2003 at the University of Helsinki.

Dr. Mehmet Helvacı (University of Istanbul) [5], Nicholas Squires (Coventry University)[6], Professor Bruno de Witte (European University Institute Florence)[7], Professor Anna Maria De Vita (University of Florence)[8], Dr. Eoin O'Dell (Trinity College/ University of Dublin)[9], Professor Eckart Klein (University of Potsdam)[10], Professor John Bell (University of Cambridge)[11], Dr. Benjamin Karakostanoglou (Aristotle University of Thessaloniki)[12], Dr. Ruth Sefton-Green (University of Paris I/ Pantheon)[13], Professor Dr. Dário Moura Vicente (University of Lisbon)[14], Dr. Angel José Rodrigo Hérnandez (Pompeu Fabra University of Barcelona) [15], Emeritus Professor Hein Kötz (University of Hamburg)[16], Professor Esin Örücü (University of Glasgow and Erasmus University of Rotterdam) [17], Professor Olivier Moréteau (University of Lyon 3)[18], Professor Joachim Michael Bonell (University of Rome I, 'La Sapienza') [19], Dr. Carmen Otero García-Castrillón (University of Madrid, 'Complutense') [20], Emeritus Professor Konstantinos Kerameus (National and Kapodistrian University of Athens)[21], Jabeur Fathally (University of Ottawa)[22], Dr. Alberto Ricardo Dalla Via (University of Buenos Aires)[23], Professor Jawahar Lal Kaul (University of Delhi) [24], Professor Cheryl Anne Saunders (University of Melbourne) [25], Professor María Elena Mansilla y Mejía (National Autonomous University of Mexico) [26], Professor Jiro Yamaguchi (Hokkaido University) [27],

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[5] As interviewed on the 15th of April 2003 at the University of Istanbul.
[6] As interviewed on the 30th of May 2003 at Coventry University.
[7] As interviewed on the 26th of June 2003 at the European University Institute Florence.
[8] As interviewed on the 24th of September 2003 at the University of Florence.
[9] As interviewed on the 10th of October 2003 at Trinity College/ University of Dublin.
[10] As interviewed on the 18th of November 2003 at the University of Potsdam.
[11] As interviewed on the 11th of December 2003 at the University of Cambridge.
[12] As interviewed on the 22nd of December 2003 at the Aristotle University of Thessaloniki.
[13] As interviewed on the 24th of February 2004 at the University of Paris 1, Pantheon.
[14] As interviewed on the 27th of April 2004 at the University of Lisbon.
[15] As interviewed on the 1st of July 2004 at the Pompeu Fabra University of Barcelona.
[16] As interviewed on the 12th of October 2004 at the Max Planck Institute for Foreign and International Private Law Hamburg.
[17] As interviewed on the 14th of October 2004 at the University of Glasgow.
[18] As interviewed on the 8th of November 2004 at the Edouard Lambert Institute of Comparative Law Lyon.
[19] As interviewed on the 10th of November 2004 at the Centre for Foreign and Comparative Law Studies Rome.
[20] As interviewed on the 10th of December 2004 at the University of Madrid, 'Complutense'.
[21] As interviewed on the 21st of December 2004 at the Hellenic Institute of International and Foreign Law Athens.
[22] As interviewed by electronic mail on the 20th of July 2005.
[23] As interviewed by electronic mail on the 26th of July 2005.
[24] As interviewed by electronic mail on the 28th of July 2005.
[25] As interviewed by electronic mail on the 2nd of August 2005.
[26] As interviewed by electronic mail on the 12th of August 2005.
[27] As interviewed by electronic mail on the 16th of August 2005.

Professors Gardiol Johan van Niekerk and Christa Roodt (University of South Africa)[28], Professor John Murphy (Villanova University)[29], Emeritus Professor Stephen Goldstein (Hebrew University of Jerusalem)[30], Professor Assaf Likhovski (Tel Aviv University)[31], Professor Richard Kay (University of Connecticut)[32] and Dr. Petra Butler (Victoria University of Wellington)[33].[34]

7.2.1. Methodology: Interview format and qualitative methodology

Conventionally, one should at this point of the analysis justify the interview format as well as the qualitative methodology in the assessment of the interview findings.

7.2.1.1. Interview format in general

With regard to the methodology of the interviews conducted, one could initially say that the formal focus interview technique by structured questionnaire was used. This was chosen, because the structured interview technique remains the most rigorous, albeit the least flexible, technique in its set up within the theoretical disciplines.[35] The opinions of academic experts or potential experts in their field of enquiry were the focus of the interviews. The interviews were conducted face-to-face, with note-taking or via email. The general purpose of the focus group was not so much to interview *per se* but for the author to act as a 'moderator or facilitator, and

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[28] As interviewed by electronic mail on the 22nd of August 2005.
[29] As interviewed by electronic mail on the 22nd of August 2005.
[30] As interviewed by electronic mail on the 26th of August 2005.
[31] As interviewed by electronic mail on the 26th of August 2005.
[32] As interviewed by electronic mail on the 30th of August 2005.
[33] As interviewed by electronic mail on the 3rd of November 2005.
[34] The professional and academic titles of the interviewees normally refer to their academic/professional title *at the time* in which the interview with each and one of them has taken place. For the certificates in relation to the interviews taken see Appendix 1 herein. For the actual questions that the academics have given to the author, as these have been transcribed, see Appendix 3 herein.
[35] J. Grix, *The Foundations of Research*, Houndmills, Basingstoke/New York: Palgrave Macmillan, 2004, p. 127.

less of an interviewer'.[36] 'Cold calling' by email or by telephone was used in the majority of the cases for contacting and arranging the particulars of the interview with most of the academics, who were chosen to be interviewed but the obvious advantage of the focus interview method, the 'snowball' technique[37], according to which one expert can name another expert to be contacted for an interview, has been used at least on two occasions.[38]

The first thing to be noted is that seven questions on law convergence were asked but fourteen answers were given by the academics asked. This occurred, as every academic interviewed was asked both to answer the seven questions within the questionnaire and also to provide a short justification of each answer given. However, it is noted that only the feedback of three out of the seven questions asked that is incorporated in the main body of the thesis. This is the case, as the feedback related to these questions is directly relevant to the rest of the chapters in this thesis.[39]

With regard to the questionnaire for the interviews, it was of multiple choice format, comprising seven questions with some forty three possible answers. This gives an average of about six options or variables to be chosen from when answering each question posed during the interview.[40] The main compass for the drafting of the questions and answers of the questionnaire has been clarity, non-ambiguity and easiness to understand.[41] Particular difficulties were presented by the fact that the written element of the interviews (questionnaire) in Europe has been posed in the mother tongue of those interviewed, even if the interview itself has been conducted in the English language. Along with the fact that academics are deemed to be (and in most cases are) particularly intelligent creatures, thankfully the careful translation of the English questionnaire in Catalan, Finnish, French, German, Greek, Italian, Portuguese, Spanish and Turkish by native speakers of these languages did not

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[36] K.F. Punch, *Developing Effective Research Proposals*, London/Thousand Oaks, CA/New Delhi: Sage, 2000, p. 177 as quoted in J. Grix, *op. cit.*, fn. 35, p. 128.

[37] W. Grant, 'Elite Interviewing: A Practical Guide', Institute for German Studies, Birmingham university, Discussion Paper No. 11 as quoted in J. Grix, *op. cit.*, fn. 35, p. 128.

[38] Professor Örücü has been kind enough to suggest at the end of the author's interview with her that it would be a good idea that the one of the experts in Greece to be interviewed should be Professor Kerameus. Her advice was subsequently followed, whereas the author wishes to express his gratitude for this. On another occasion, the academic who was initially called from the University of South Africa, Professor Schlemmer, pointed out to Professor Van Niekerk, who in turn answered the questionnaire with another academic, Professor Roodt.

[39] For the full transcription of all seven answers, see Appendix 3 of this thesis.

[40] For the actual questionnaires, see Appendix 2 of this thesis.

[41] R. Kumar, *Research Methodology: A Step-By-Step Guide for Beginners*, London/Thousand Oaks, CA/New Delhi: Sage, 1999, p. 110.

present any problems worth mentioning herein and it was applauded by those interviewed. Non-European academics all spoke English and therefore they were all interviewed under the English version of the questionnaire. Thus, no particular problems of comprehension were presented. Opinions in a very limited number of questions varied considerably but this has largely been a matter of interpretation - not comprehension of the translated material *per se*. Where ambiguities occurred in the European versions of the questionnaire, the English original was forwarded, as all the interviewees answered the questions of the interview orally in English, whilst their ability to speak English ranged from fluent to native.

As far as the structured questionnaire technique is concerned, one is commended to use it, as this is set 'to achieve a high degree of standardisation or uniformity, and hence ease of comparability, in the format of answers.'[42]

7.2.1.2. Interview format in particular and aims

The interviews conducted can be epitomised by the following: twenty academic interviews were conducted face-to-face, being an average duration of thirty to sixty minutes, with the exception of some interviews, in which this time limit was exceeded[43], whilst an additional twelve interviews were conducted via email with academics who were not European. Most interviews took place outside Dublin or with international academics with the exception of one interview[44]. This was the case, as otherwise the international character of this thesis would be greatly compromised for obvious reasons. As the face-to-face interviews were on a pan-European basis, one-day flight trips were normally used.[45]

With particular regard to the questionnaire the seven questions posed to the academics were:

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[42] J. Grix, *op. cit.*, fn. 35, p. 127.

[43] In particular, Dr. Mehmet Helvacı in Istanbul, Dr. Eoin O'Dell in Dublin, Professor Moura Vicente in Lisbon, Professor Hein Kötz in Hamburg and Professor Esin Örücü have dedicated some more minutes of their precious time. The author is particularly grateful to them for this.

[44] *Supra*, fn. 9.

[45] Exceptions to this were the first research trip in London, where it was not possible for the author to arrange the interviews with Professor Bridge and Collins on the same day and during the Christmas seasons of 2003 and 2004, when the author arranged to interview Dr. B. Karakostanoglou and Emeritus Professor K. Kerameus respectively in conjunction with visiting his parents for some days.

- Whether and why they are in favour of law convergence in principle,
- Whether and why they are in favour of their legal system converging into a supranational legal order,
- Which model of implementation out of four models they would prefer and why,
- Whether the national legislator of the country in which the experts teach would acquire more discretion by the usage of the models in question three and why, [46]
- Whether the national legislator of the country in which they teach would normally require more discretion in the implementation of EU regulation and why,[47]
- Whether and why convergent law (European and international) normally compromises the incentives of the national legislator,[48]
- Which regional model of convergence they prefer out of four models and why.[49]

Finally, to the credit of the academics interviewed, they have all provided the author of this thesis with a certificate of attendance for the interviews conducted.[50] The author seizes the opportunity to express at this point (as well as of course in the acknowledgements) his greatest gratitude for this.

7.2.1.3. Justification of interview and interview format

The first thing that has to be submitted is *why* the interviews were conducted. There are three reasons in the main. First, it is submitted that the interview technique by structured questionnaire satisfies the need of the enquirer for specific answers to specific questions. Second, it is believed that the interview technique acts as a direct form of dialectics between the researcher and the interviewee. Third, the qualitative

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[46] As the analysis on this is omitted from the main body of the thesis, see Appendix 3 for the transcription of the answers to this question.
[47] *Ibid.*
[48] *Ibid.*
[49] *Ibid.*
[50] See Appendix 1.

assessment of the academics' input acts as an additional layer of analysis with regard to the background chapter and the methodical parts of the analysis.

Thus, as there is no evidence that the interview technique falls within the established research methods of law, one has to justify the usage of the interview technique as a whole, and in particular its constituent characteristics.

Initially, one could say that it is more than acceptable within the social disciplines for the collection, analysis and evaluation of empirical data to be at the heart of their research. One also finds it difficult nowadays to reject the interview technique altogether for the law discipline as a form of law research and dialectics. This is true, first, because the method has been used in other law theses[51] and second, because otherwise no interviewee, who took part in this thesis research, would have taken part in it. Of course, it is admitted that the interview method is a rather novel method of empirical research for the old-fashioned branch of law academia but even this last point can be rebutted, as one would be able to claim that even old-fashion law academia would find it an excellent dialectic exercise, as the author sought particular answers for particular questions.

With regard as to why the interview technique was followed, one could initially mention that interviews are not exactly the norm in legal research. In fact, law research is so conservative in its methods that one would probably have to defend the partial deployment of interviews in his research. Thus, interviews are mainly used because they enhance the qualitative extent of the findings in this thesis; second, one has it on good authority that interviewing people (in our case academic experts) should be equal to dialectics, dialectics being, according to Fichte and Hegel, the process of arriving at the truth by stating a thesis, developing a contradictory antithesis, then combining and resolving them into a coherent synthesis[52]. Third, the particular questions posed through questionnaires are answered only through particular answers. It is believed that this has been achieved through the one-on-one interviews by questionnaire. Besides, the élite interview technique, popular as this may be throughout the disciplines, is only partially used in this thesis, as this should

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[51] E.g. M.Kiikeri, *Comparative Legal Reasoning and European Law*, Dordrecht/ Boston/ London: Kluwer Academic Publishers, 2001, pp. xi, 329.

[52] See e.g. P. Heath and J. Lachs (eds.), *J.G. Fichte Science of Knowledge*, Cambridge: Cambridge University Press, 1982, pp. 17, 111-113.

be the case.[53] This limitation is used to enable the reader of this thesis to form a more balanced view on the findings.[54]

Also, one must justify why only academics have been interviewed. The question to be asked then is why not bus drivers? Why not shoe sellers? Why not ask every Tom, Dick and Harry in a random street of Rome what they believe about law convergence? There are three reasons in the main for *not* asking the above categories of people: i) These people might not be able to comprehend the law convergence thesis, even if this is defined for them, for these people might not have such expertise to comprehend the convergence thesis, ii) These people might not be willing to answer such a question,[55] iii) These people might be biased, 'democratic' as such an enquiry would be. Posing a question on law convergence to a random person e.g. Luigi in a random street of Rome, is like posing the question of a constitutional text of 448 articles to a people who might use their answer thereto for 'punishing' their President, 'democratic' as this may be. Of course, constitutional texts may be put to popular vote *as long as* people are aware of what they are voting for. Luigi in Rome, and as the French people vis-à-vis the European Constitution might want, as the French and the Dutch people did recently, might use their answers to pass a political message, to 'punish' through giving the wrong political answer to the right legal question in the wrong political time. For instance, the rejection of the European Constitution in the spring of 2005 occurred not necessarily, because the French and the Dutch people are against the idea of Europe but because the French and the Dutch might have not been 'sold' the idea of the European Constitution in the right fashion. Likewise asking the wrong persons, persons who are not experts on the law convergence thesis, might bring about results which are clearly wrong.

The next matter to be asked is why it has been only lawyers that have been interviewed. As the definition of the law convergence thesis dictates, law academics are the most relevant people to address any question on law convergence.

As regards the limited number of academics interviewed, one notes that perhaps the time and resources of the author have been limited for holding more than twenty interviews face-to-face in countries other than the country in which the main

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[53] J. Grix, *op. cit.*, fn. 35, p. 126.
[54] J. Grix, *op. cit.*, fn. 35, p. 127.
[55] Notwithstanding that even experts may not be willing for their own reasons to answer a questionnaire on law convergence. In fact, to the disappointment of the author there have been some academics who were asked to be interviewed for the purposes of this thesis and refused to be interviewed.

research has been conducted. The same is true in relation to the twelve interviews by email.[56]

Perhaps one should justify why it has been that those particular academics that have been interviewed. First, one could say that the choice of academics has been based on a subjective assessment of the author. In some cases, certain academics were known to the author prior to the commencement of his research; in most cases the academics were unknown to him; at least in person. Secondly, the choice of these academics has been based on the fact that they should be representative of world law academia inasmuch as this has been possible, of course. Thirdly, for some academics there is no need to justify why it has been that they and not someone else who has been interviewed.

Also, one should justify why most interviews were conducted in person. This has been the choice as this is the norm in the conduct of interviews.[57]

One may also question why it has not been only academics with expertise in comparative and European law who were chosen to be interviewed. First of all, comparative law and indeed the convergence thesis are not only relevant to comparative or European lawyers, even though one may equally argue that comparative law is mostly studied by comparative lawyers.[58] Second, one should have no doubt at all that *all* interviewees have had no particular objection whatsoever to the fact that the interview was conducted for the purposes of a comparative law thesis; nor has there been a single academic out of the thirty-three who has claimed inappropriateness to answer a question by way of his affiliation to a particular field of law. Thirdly, as all law subjects are engaged with comparative law, one would be unfair to the academics who are not comparatists *per se* by ignoring their views on the comparative subject.

A final thing that may have to be addressed is why tape-recording has not been the case for face-to-face interviews and why they have been conducted by note-taking. First, it is not necessary that tape-recording be used. Second, even though recording could have been used, this would mean that the interviewees might have been less open and specific when being recorded.[59] It was felt that a more open

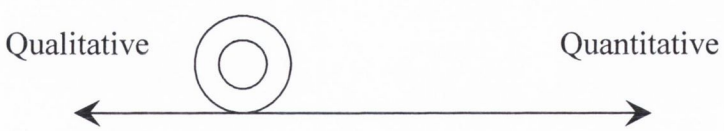
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[56] For thirteen academics to be interviewed by electronic mail some two hundred emails were sent.
[57] J. Grix, *op. cit.*, fn. 35, p. 127.
[58] See generally B.S. Markesinis, 'Comparative Law – A Subject in Search of an Audience', 53 *Modern Law Review* (1990) 1.
[59] J. Grix, *op. cit.*, fn. 35, p. 126.

conversation, albeit by structured questionnaire, would be the case, as this has been the case with most law experts, if tape-recording could be avoided. That is why the note-taking by subsequent transcription was followed.

7.2.1.4. Methodology in relation to the qualitative analysis of the interviews

This chapter employs the qualitative method of research. Additionally, one notes that the sharp dichotomy between the qualitative and quantitative modes of research is often a false one,[60] because, most importantly, the interview technique by structured questionnaire is *objectively* an amalgam of the qualitative and the quantitative method, as it mixes the pure questionnaire technique (normally associated with the quantitative method) with the interview technique (normally associated with the qualitative method). In other words the qualitative part of the interview technique by questionnaire contains in it some quantitative elements. However, what has to be noted at this point is that the qualitative element is considered a much more crucial tool of legal analysis rather than the quantitative element for reasons, which will be explained in detail below. Thus, the author places his research, in relation to the interviews conducted, closer to the end of the qualitative method; this should be taken to apply, following McQueen and Knussen, if, of course, they are right in suggesting that there is informational continuum of the same dimension (research) with merely different ends (that is qualitative and quantitative ends)[61]:



Item 10

In particular, as regards the qualitative element of the empirical data, contrary to popular academic opinion *in the social sciences* (not in humanities *per se*), which

[60] T. Landman, *Issues and Methods in Comparative Politics: An Introduction*, London/ New York: Routledge, p. 19, D. Silverman, *Doing Qualitative Research: A Practical Handbook*, London/ Thousand Oaks, CA/ New Delhi: Sage, 2000, p. 11, R. McQueen and C. Knussen, *Research Methods for Social Science: An Introduction*, Harlow, England: Pearson Education, 2002, p. 27.
[61] R. McQueen and C. Knussen, *op. cit.*, fn. 60, p. 27.

dictates that interviews must be accommodated in empirical research without referral to the identity of the interviewed, this thesis rejects this pattern *ab initio*. Onymous rather than anonymous referral to the answers of the interviewed has been the case herein for a number of reasons: i) First and foremost this has been the understanding with them except in one case [62] and has been explained to them at the very introduction of the interviews[63] conducted that their opinions will be referred to in an onymous fashion,[64] ii) all opinions are judged in good faith, iii) this thesis deals with the rather 'safe' and not so secret question of legal convergence; likewise the answers given in the interviewing process would not amount e.g. to the revealing of a great trade secret in bio-genetics about to be patented for commercial exploitation or the manufacturing secrets of multi-core Cell processors, even though the specificity of the questions posed (and hence answers received) greatly enhance most of the findings of this thesis and iv) experts in the theoretical disciplines are not normally anxious to conceal their identity or opinion; *on the contrary*, one would expect that they reveal their name *as well as* their opinion: is this not what theoretical Academia in humanities is all about and stands for? v) It would be an anathema, if some of the finest law academics from Europe and from other parts of the world would be required to state their opinion but stop short of being referred to in an onymous fashion, simply because bibliography in social sciences has it that anonymity must be preserved in certain cases. However, even there anonymity *is not always the case*, as anonymity of opinion is to be preserved *only* in cases where people have had traumatic experiences in the past. In the bibliography one finds cases of patients in hospitals, children, and a journalist that has used undercover tactics to enter a gang and so on.[65] Clearly, academic experts do not fall within these categories. Thus, for this reason and the reasons stated above the opinion of the academics interviewed is referred to in an onymous fashion, as should be the case.

As far as the quantitative element is concerned quantitative research uses the strategy of inference, as qualitative research does,[66] but the application thereof is omitted in this thesis, for it would be unfair and rather inappropriate to represent the

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[62] The interviewed person asked for the written element of the qualitative analysis. This has been provided subsequently.
[63] The same was the case for interviewees by electronic mail.
[64] J. Grix, *op. cit.*, fn. 35, p. 145.
[65] J. Grix, *op. cit.*, fn. 35, pp. 144-145, R. McQueen and C. Knussen, *Research Methods for Social Science: An Introduction*, Harlow, England: Pearson Education, 2002, p. 99.
[66] J. Grix, *op. cit.*, fn. 35, p. 127.

view of the academia as a whole, even if e.g. the pro-convergence views of the experts interviewed tends to form a strikingly uniform block. There would not be much purpose for drawing inferences from the opinions of thirty-three law experts on a quantitative basis, as numerical inferences offer very little at least for a legal thesis. That is why the quantitative analysis is omitted and the qualitative analysis is used herein. That is not to say that this thesis does not see the qualitative and quantitative elements as equal and complimentary, only that qualitative research is of explanatory nature, whilst quantitative research is of descriptive nature. Besides, the interview technique is not normally recommended for quantitative approaches, though it could in certain cases.[67]

Also, one notes that qualitative research clearly adheres to the interviewing technique. A second point to be noted is that qualitative research embodies the inherent inability of generalising.[68] Thus, the qualitative analysis herein is only a small fraction of the law academia; however, even if this is true the inability to generalise does not mean that the opinions of thirty-three law experts can be disregarded. In fact the opposite is true: Though one cannot go as far as generalising, one can at the very least see trends. This thesis thus in this chapter recognises and analyses trends if anything. It does not generalise but it does recognise trends.

7.2.1.5. On interpreting the interviews: interpretivism and critical realism

Hamlet: Do you see yonder cloud that's almost in shape of a camel?
Polonius: By the mass, and 'tis like a camel, indeed.
Hamlet: Methink it is like a weasel.
Polonius: It is backed like a weasel.
Hamlet: Or like a whale?
Polonius: Very like a whale.[69]

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[67] L. Blaxter, C. Hughes and M. Tight, *How to Research*, Buckingham: Open University Press, 1997, p. 610.
[68] J. Grix, *op. cit.*, fn. 35, pp. 119, 121.
[69] W. Shakespeare, *Hamlet*, act 3, scene 2 as quoted in A. Fontana and J.H. Frey, 'The Interview: From Structured Questions to Negotiated Text' in N.K. Denzin and Y.S. Lincoln (eds.), *Collecting and Interpreting Qualitative Materials*, London/ Thousand Oaks, CA/ New Delhi: Sage, 2nd Edition, 2003, p. 61.

'Tell me the number of people, I will tell you the number of opinions' was what the ancients used to say.[70] Anyone could interpret the opinions of anyone in a different fashion. Bearing this in mind, one needs to stress that the qualitative interpretation of the opinions of people, in our case the interpretation of the opinions of experts, especially when conducted by a single person, the author of this thesis, is in great danger of being a rather subjective exercise. Add to this that judging the opinions of theoreticians in a theoretical discipline such as law remains is an exercise of the interpretivist school of thought according to which ''objective' – or value-free – analysis is impossible, because knowledge is theoretically and discursively laden and a researcher is necessarily the sum total of his or her own personal – and subjective – opinions, attitudes and values.'[71]

Still, one has to take into account certain objectifying paragons, which would make the qualitative analysis as much an objective exposition as possible. Interpretivist as the qualitative analysis may be, one must also be critically realist, since one does not only have to understand and highlight the position of thirty-three law-experts but also *explain* their opinion.[72] Therefore, the following were complied as a matter of deontology in the qualitative analysis of the persons interviewed:

- Opinions are judged in good faith and good faith only as a matter of deontology
- Finally, the *Good Research Guide* of Trinity College Dublin and in particular sections 2 (Ethics) and 3 (Integrity) thereof are complied with.[73]

7.2.2. Qualitative assessment

The analysis will now turn to the qualitative assessment of the interviews.

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[70] The original quote is: 'As many men, so many opinions and everyone has his own fancy' (Quot homines, tot sententiae; suus cuique mos), Terence, *Phormio* (II, 3, 14). The same quote is also found in modern France, Germany, Denmark, Greece etc.

[71] J. Grix, *The Foundations of Research*, Houndmills, Basingstoke/New York: Palgrave Macmillan, 2004, p. 84.

[72] J. Grix, *op. cit.*, fn. 71, p. 86.

[73] See http://www.tcd.ie/research_innovation/htm/r_i_local/ethics/grp5.rtf

7.2.2.1. Question 1: Convergence in principle

The first question posed to the law experts interviewed dealt with their opinion on whether law convergence should be pursued in principle or not. Three groups can be construed for the purposes of our analysis: i) The pro-convergence group, ii) The anti-convergence group and iii) The conditional convergence group.

From the experts who answered 'yes' or possibly 'yes to convergence', the following points can be noted[74]:

- Practicality lies at the core of the convergence thesis.
- Practicality has many manifestations.
- Convergence does not exclude modifications of application.
- Convergence evolves the legal system as well as legal education
- Convergence exists in any case, as all legal systems borrow from each other.
- Certainty.
- Convergence may lead to competition of legal systems as occurs in economics.
- Convergence may hinder nationalism.

In particular, as regards the first point Professor Collins[75] and Professor Bridge[76] favoured the idea of law convergence, because they have stressed that the convergence projects in Europe, to take an example, create considerable practical advantages for people, lawyers and legal systems. Professor Ojanen[77], in relation to this point stressed, for instance, that law convergence in the same geographical area has resulted in clear advantages within many areas of law and particularly in environmental law. However, despite his support for the convergence thesis as a whole, he stressed that the application of convergent law is not always uniform. This, it was noted as one of the inherent disadvantages of the law convergence thesis.

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[74] Cf. 2.3.1.3. herein.
[75] *Supra*, fn. 2.
[76] *Supra*, fn. 3.
[77] *Supra*, fn. 4.

Professors Van Niekerk and Roodt[78] argued along the same lines (practicality) from the African perspective noting e.g. that convergence could facilitate the enforcement of foreign judgements or that there could be a furthering of a human-rights culture in Africa. The practical remit of convergence was stressed by Professor Kay[79] as in the facilitation of international transactions and the transfer of legal skills *inter alia* and Dr. Dalla Via[80], who argued in favour of convergence as a matter of globalisation and internationalisation of law

In relation to this last point another academic, who has favoured convergence during the interview process, Docent Helvacı[81], stressed the fact that, if his country was to join the European Union one day, a modified application of European law should come about, at least at an initial stage of society and law adapting to the *acquis communautaire*. From synthesising the views of Ojanen and Helvacı, one can perhaps reach the initial conclusion that, even though the convergence projects think in uniform or approximating terms, legal systems may perhaps be given flexible adaptation periods or the right to resist full blown implementation patterns as the sociological factor in this thesis proposes, especially where their socio-legal background of theirs is *sui generis*. However, Helvacı made it clear that this should not always be the case, that is, not in all areas of law, as e.g. commercial law in the legal system in which he teaches is EU compliant already.

With respect to Professor De Vita's [82] views, another advantage of law convergence came to the fore. De Vita stressed that law convergence does not only make national laws better but it also evolves legal education and makes it less insular an exercise for future lawyers. She went further than this by stating that *inter alia* law convergence enhances the advancement of relations amongst the people from different legal systems: it is a basis of mutual understanding. Professor Bell[83] was of a similar opinion to De Vita. In fact, he and Dr. Butler[84] made De Vita's view even more concrete by referring to the practical advantage that lay people acquire, as similar laws are to be found in a convergence environment, even when people cross their national frontiers. Additionally, they stressed that people in a convergent legal

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[78] *Supra*, fn. 28.
[79] *Supra*, fn. 32.
[80] *Supra*, fn. 23.
[81] *Supra*, fn. 5.
[82] *Supra*, fn. 8.
[83] *Supra*, fn. 11.
[84] *Supra*, fn. 33.

system should see and feel this similarity of legal solutions. Bell went on to say that to a great extent systems converge in a number of ways without the necessary interference of a specific law machinery: for instance, all legal systems borrow laws from other legal systems. France, which he noted, is a good example of a civilian legal system, which has studied much *inter alia* the Australian Torrence land registration system, when it was discussing the direction of its land registration system at the end of the nineteenth century, whereas it is a historical fact that France introduced versions of the Torrence system into a number of its colonies.[85]

Furthermore, legal certainty was the theme that Professor Moura Vicente[86] forwarded during the interview, when he replied that he is in favour of the convergence thesis.[87] He referred to the 'unity in diversity' motto, which acts as the motto of the European Union and suggested that through the convergence thesis the European integration can be significantly furthered. He also based his opinion on the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968 in clarifying the basis of his preference to the convergence thesis. He said enforcement of foreign awards has become a much easier task than before. However, he stopped short, when asked for the necessity of a hypothetical supranational instrument of family law; he opposed the alignment of Portuguese family law to an extra-national family instrument, as such an instrument would penetrate the substratum of Portuguese society - not just its laws. When asked what the criteria of law convergence should be, he said that for European standards the four freedoms of the European Union should be a good starting point as to how convergence should come about and where it should be directed to.

Professor Kötz[88] also favoured the convergence thesis. In relation to this, his argument revolved around four themes: i) The law and economics theme, ii) The possibility of harmonising the different laws of obligations of the European nations, iii) The gradual development of ideal or 'best' solutions and iv) The freedom of choosing rules (the principle of autonomy of the parties) with referral to the 'default rules' argument. As regards the law and economics theme, convergence of the legal systems should come about through the constant competition of legal systems

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[85] J. Bell, 'Property and Legal Culture in France', in P. Birks and A. Pretto, *Themes in Comparative Law: In Honour of Bernard Rudden*, Oxford: Oxford University Press, 2002, pp. 88-89, 95.
[86] *Supra*, fn. 14.
[87] For a definition of this see 2.3.1. herein.
[88] *Supra*, fn. 16.

(*Kompetition der Rechtsordnungen*),[89] the litmus test of which should be efficiency, pertaining to the comparative nature of efficiency.[90] On the harmonisation of the laws of obligation in Europe, this should be done – he stressed – on a default rules basis. Finally, in relation to the graduality[91] element of the law convergence thesis, he suggested that it requires time for convergence to come about and for the best solutions to arise. It should be noted that Kötz and Dr. Otero[92] rejected *ab initio* the convergence of family laws in Europe.

Professor Moréteau [93] and Professor Örücü [94] referred to the reality of convergence. Thus, they referred to the fact that convergence occurs and should occur more often than not for a number of reasons. First of all, in the case of Europe it has been estimated that a significant amount of Europeans now live and work away from their country of origin and in another European country. Örücü was of the opinion that it is in the interest of lawyers and people alike that convergence should continue as a law project. She stressed that on a global basis human rights should prevail as the *lingua franca* of legal convergence but this should be done in a programmatic/directive fashion. She stressed that convergence can proceed further as legal systems are not that different after all: methods vary amongst them, not legal results or conclusions. Hence, law convergence mainly addresses the alignment of different technicalities. Finally, when asked, Moréteau and Dr. Otero distinguished the law convergence thesis as between a process and a result to be achieved but favoured the continuance of both appearances of an otherwise unitary phenomenon.

Hérnandez[95] favoured convergence in principle through the harmonising of laws. His approach is particularly interesting as he divided his analysis in two stages. Consequently, he argued that at an initial phase legal systems should converge through common legal principles, whilst at a second phase legal systems should attempt to converge legal rules *per se*.

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[89] Cf. the position in relation to competition of legal systems as in a non-convergence pattern of Professors Saunders and Kay.
[90] See also generally U. Mattei, *Comparative Law and Economics*, Ann Arbor: The University of Michigan Press, 1998 and in particular pp. 1-2, 3-11, 125-126, 141-144, 147-177, 179-199 therein.
[91] See generally B.S. Markesinis, *The Gradual Convergence,* Oxford: Clarendon Press, 1994.
[92] *Supra*, fn. 20.
[93] *Supra*, fn. 18.
[94] *Supra*, fn. 17.
[95] *Supra*, fn. 15.

Professor Kerameus[96] agreed in principle with the convergence thesis as a whole. However, when asked about his field of expertise, procedural law, he rejected, the introduction of a pan-European code of civil procedure. Procedural law, he stated, has a particularly national character and may, if a pan-European code of civil procedure is introduced, go against well-established methods as well as professional traditions. Moreover, he added that in the field of the law of obligations it would not be so onerous to introduce a pan-European code of principles on the basis that this acts on a 'default rules' basis. Furthermore, when Kerameus was asked whether the main *raison d'être* of the convergence was the quality enhancement of national laws or the practical necessity of extra-national laws, his answer was that both are some of the *raisons d'être* of the convergence movement.

Of great interest to this thesis have been the views of the academics who have dissented with the convergence thesis as a matter of principle; the following can be noted:

- Convergence cannot abolish well-established ideas and traditions.
- Convergence projects are not always a great success.
- The more participants in a convergent law project, the greater the likelihood for it to fail.
- Systemic differences are many and they are significant.
- Top-down convergence is questionable.
- Culturalism should be a viable alternative to universalism in law.
- There is value in the diversity, experimentation and competition between ideas.

Squires[97], in particular, when asked as to whether he would favour convergence in principle or not, disagreed with it by questioning whether Anglo-Americans and other common law systems should abandon judge-made law. He said that, even though one should favour some of the convergence of law elements, the convergence thesis as a whole may crush established judicial styles and methods.

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[96] *Supra*, fn. 21.
[97] *Supra*, fn. 6.

Dr. O'Dell[98] gave a 'possibly no' reply to the question of whether or not he would favour convergence of the legal systems. However, he was quick to note that his reply was 'not with a very strong negativity' to the convergence ideal as a whole. That said, one notes that Dr. O'Dell is in fact a member of a law convergence group, the Trento group a.k.a. the Common Core of European Private Law group[99]. Therefore, his words come with some additional value, as he has objected to the question of principle in relation to the convergence movement, even though he is a member of the Trento group. Thus, he stated that in a Europe of twenty-five member states, national laws and interests create centrifugal dynamics rather than the opposite, that is, centripetal or convergent dynamics. When he compared the Trento group with the Osnabrück group a.k.a. the Study Group on a European Civil Code[100], the other main convergent law group in Europe, he referred to the differences between these two groups by explaining that the former is a more traditional school of thought and tactics, whilst the latter takes a more forceful approach on the convergence of civil law in Europe by creating drafts of law, when the Trento movement suggests principles of law. Dr. O'Dell stressed that the systemic differences in Europe create great obstacles to the alignment of European private laws. Finally, one notes that, even though he expressed his disappointment with the convergence movement in Europe, he disagreed with Legrand's scepticism as to the viability of the convergence thesis as a whole.

Additionally, Dr. Sefton-Green[101] expressed her strong scepticism to the convergence thesis as a whole. Her scepticism revolved around two main themes: i) That even if convergence could happen, this should not be on a top-down basis, as is today and that this should be on a minimal basis, ii) Convergence is virtually impossible on a global basis notwithstanding the fact that there are great difficulties on a regional basis already (European Union). As regards the first point of Sefton-Green, she noted that a top-down convergence surely has by definition a great deal of drawbacks. Additionally, in relation to her second point, she referred to the *Product Liability Directive Cases of April 25 2002*[102]. In these cases involving three different member states (France, Greece and Spain) there have been different degrees of

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[98] *Supra*, fn. 9.
[99] See generally http://www.jus.unitn.it/dsg/common-core/
[100] See generally http://www.sgecc.net/
[101] *Supra*, fn. 13.
[102] *Commission v France Case C-52/00 ECR* [2002] Page I-3827, *Commission v Greece* [2002] *ECR* I-3879, *Case C-183/00 González Sánchez* [2002] ECR I-3901.

compliance or rather non-compliance with the EEC Directive 85/374/EC on Product Liability[103]. In particular, the ECJ found that the French government had wrongly implemented the particular directive, even though the French implementing legislation afforded consumers greater rights and therefore greater protection than the directive itself. On the other hand Greece, it was held, failed to reach the minimum threshold of the directive altogether, whereas Spain's parallel strict liability regime (which also afforded greater protection than the directive) was found not to cover the products which the directive sought to cover. According to Dr. Sefton-Green the approach that the member states took shows that there can never be true convergence, while she questioned the ECJ's approach in relation to the position of France, which clearly afforded *more* rights to consumers than the directive itself.

Professors Saunders[104] and Murphy[105] had a similar approach as to why they would not favour convergence of laws in principle. Thus, they both argued that there is value in the diversity, experimentation and competition between ideas of different legal systems, even though cross-fertilisation of legal ideas should be paid attention to.

From the academics who did not favour the idea of favouring legal convergence, Professor Likhovski[106] put the stress on legal sociology. He argued that, as legal and social norms are related, legal convergence cannot occur before there is convergence in social and cultural norms and values. He noted that such convergence is not desirable, as cultural diversity is a good thing and that global cultural uniformity is not desirable.

There was a third group of academics (Professor De Witte[107], Professor Klein[108], Dr. Karakostanoglou[109], Professor Bonell[110], Fathally[111], Professor Lal Kaul[112], Professor Mansilla y Mejía[113], Professor Yamaguchi[114] and Professor

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[103] *Official Journal L 210 , 07/08/1985*, pp. 0029 – 0033.
[104] *Supra*, fn. 25.
[105] *Supra*, fn. 29.
[106] *Supra*, fn. 31.
[107] *Supra*, fn. 7.
[108] *Supra*, fn. 10.
[109] *Supra*, fn. 12.
[110] *Supra*, fn. 19.
[111] *Supra*, fn. 22.
[112] *Supra*, fn. 24.
[113] *Supra*, fn. 26.
[114] *Supra*, fn. 27.

Goldstein[115]) who, even though they seemed to agree with the convergence thesis as a whole, have been reluctant to give a positive answer *per se* to it. Thus, they would accept convergent projects of law on a conditional basis. In particular, De Witte argued that one should follow a subject-by-subject approach, as this is optimal for one to qualify which areas of law are suitable for convergence projects and which are not. On this particular matter he stated that there is not too much to be changed in Europe. Professor Klein, Professor Bonnell and Dr. Karakostanoglou were of a similar approach and they too, as De Witte, rejected the convergence of European family laws. Bonell added that only where there is a strong hint of practical necessity should convergence projects in law proceed. Fathally distinguished between a uniform model of convergence and a *rapprochement* model thereof by favouring the latter. Lal Kaul argued that there are many factors which would delimit convergence of legal systems, whilst Mansilla y Mejía would favour convergence, as long as the exact legal effects of convergent projects are defined. Goldstein noted that convergence is acceptable as long as it does not touch upon culturally determined laws or constitutional arrangements *inter alia*.

The qualitative synthesis of the above opinions does present some difficulties but not insurmountable difficulties. For one thing, it would seem that academics tend to favour convergence as a whole and in principle; some favour it more and others favour it less. Some, for instance, qualify their opinion, even if they answer positively or rather, positively to the question which has been posed to them. In this sense, the pro-convergence group of academics and the conditional group of academics do not *per se* conflict with each other; only that the former stresses the need for the principle of convergence, whereas the latter group, even though in favour of convergence, stresses the conditional nature which convergence projects have and should have. Finally, a word must be said for the group that opposes *prima facie* convergence. It would seem that they too have a very strong basis for their arguments and perhaps they seem to express the fact that much may not have been done in the right direction – at least with regard to convergent projects in Europe. However, at least in the cases of Dr. O'Dell and Squires, there is some doubt as to whether their answers are genuinely negative or whether they are the result of disappointment as to how things are done in various convergence efforts within Europe (O'Dell) and of the reluctance

[115] *Supra*, fn. 30.

for a wider than European mode of convergence (Squires). It would seem, however, that the clear reluctance of Dr. O'Dell to denounce the convergence thesis altogether and the positive response of Squires in the second question (convergence of your national legal system to a supranational order of law – see below) should lead us to think that their *prima facie* negativity to the convergence thesis is not as negatively pre-disposed to the convergence thesis, as one might think initially from their responses to the first question of the questionnaire. A similar approach should be taken in relation to the responses of Professor Saunders, who, even though rejecting the idea of convergence for the reasons explained above, reveals in her second answer that at least to a certain degree she would favour convergence, if convergence in the second question would imply that some matters might more appropriately be handled at a supranational level or even an international level.

7.2.2.2. Question 2: Convergence of your national legal system

The second question posed to the thirty-three experts dealt with whether they favour convergence of the legal system *in which they teach* with a supranational legal order.[116] Strikingly, responses here, even though of similar qualitative nature to question one of the interview, were slightly more positive than the responses in the first question.

It is important at this point to recognise that the supranational machinery in the EU (from which machinery the question is inspired) is greatly affected by the concept of subsidiarity. The principle of subsidiarity is particularly indeterminate for the lawyer; in fact it is capable of no less than 30 different meanings.[117] Steiner provides an acceptable explanation of the term by identifying 3 situations only where the Community should act:

(a) where the objective cannot be achieved by regulation at national level;

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[116] There were two exceptions to this. De Witte declared during the interview that his opinion in answering this question for the purposes of the interview should be taken in relation to the Dutch legal system, as he teaches in an international academic institution outside the Netherlands. Additionally, Professor Goldstein, even though he was at the time of the interview a visiting scholar at Cornell University, noted that his answers must be based on his perspective as an Israeli professor of law.

[117] J. Steiner, 'Subsidiarity under the Maastricht Treaty' in O'Keefe, D. and Twomey, PM. (eds), *Legal Issues of the Maastricht Treaty*, 1994, London: Chancery.

(b) where the objective can be better, or more effectively, achieved by action at Community level (the 'efficiency by better results' criterion); or
(c) where the matter in question can be more effectively regulated at Community level (the 'administrative efficiency' criterion).[118]

In any case, what is essential for the reader to grasp here is that even though supranationalism has won the day in Europe (at least in Pillar I of the EU, as Pillars II and III operate under intergovernmentalism), this state of affairs is now escorted from the concept of subsidiarity.[119]

Turning to the responses received for this question, it would seem that most academics presented the same or similar justification patterns in their responses to question one, whilst others[120] presented different or slightly different justification patterns. From the academics who gave the same or similar responses in their answers to the first question, one notes that Bridge would like to see a greater competition of the legal systems[121] in the European Union. Klein adds a preference to a supranational model of convergence on a conditional basis but he noted that this is something almost inevitable as Europe's national laws are 50% EU proof or should be EU proof in any case, as Jacques Delors once noted. Furthermore, Kötz stressed that, even though the European Union is a desirable legal and political phenomenon, it should not go too far. In fact, he added that rules in many cases should not be mandatory and that convergence in Europe should be gradual. Moréteau argued that the convergence of the legal system in which he teaches (France) to a supranational union is a highly desirable phenomenon. In particular, he was of the opinion that the European Union as a law machinery creates practicalities for European lawyers and people, which would otherwise be very difficult to attain. Yamaguchi and Butler wished to distinguish their preference by noting that there should be a distinction of rules to which the universal and common character of such a supranational order would apply and of rules to which should be governed domestically. Murphy noted that a supranational legal order would directly conflict with the constitutional

[118] *Ibid.*
[119] For more on subsidiarity as well as on the surrounding notions of conferral of competences and primacy of EU law see 3.2.3.
[120] Helvacı, Squires, De Witte, O'Dell, Bell, Moura Vicente, Otero, Fathally, Lal Kaul, Saunders, Mansilla y Mejía, Goldstein, Likhovski, Van Niekerk and Roodt.
[121] As in the law and economics argument. Cf. the response of Professor Kötz in question 1 of the interview.

structures of the US, because the concentration of power involved would be impossible to be accountable to the people of the US. Yet Kay took a considerably different approach to Murphy; he noted that, even if convergence would denote unification of legal systems, he would favour the idea in principle but *subject* to significant qualifications.

On the other hand, Helvacı distinguished his answer on the question of convergence of the national legal system in which he teaches by suggesting that the relationship between the national and the supranational in law should be divided into two phases: i) the preparatory phase of convergence (in which the likely member state addresses the matters or difficulties of convergence) and ii) a phase of convergence circle *per se* (in which the supra-nation addresses the matters or difficulties of convergence by dictating the agenda and the measures to be taken on the part of the national legal system).

Additionally, Squires, even though he earlier rejected convergence in principle and on a global basis, answered differently to this question, because he acknowledged that the European Union comes with considerable advantages for UK lawyers.

A more positive response was also received from De Witte in relation to this question as opposed to his answer for the general question of convergence. He stated that the supranational law machinery of the European Union has been a great success, something which should benefit his legal system. Moreover, he added that as the integration agenda in Europe proceeds, convergence in the European legal space grows stronger and proceeds farther.

O'Dell based his answer to this question on a similar pattern; he stated the strong tendency in favour of convergence which the supranational arm (Pillar 1) of the European Union creates for the national legal system in which he teaches and believed that this should be the case in the years to come.

Bell was quite reluctant to give an answer along the pattern that he gave in the first question. He based his answer by distinguishing heavily between local practice and multinational practice in law. Where the former is appropriate one should not pursue convergence with a supranational system of law. Likewise, where multinational practice (and necessity) are the case, then obviously the answer would be that the convergence pattern of a national legal system to a supranational legal order should be pursued.

Moura Vicente followed a similar analysis; however, he distinguished his answer by areas of law and the division between political and legal convergence. According to him, one should pursue convergence of the various legal systems in the areas of private international law and let the systems retain the national character of their civil laws. To justify his argument, he referred to the 'United in Diversity' motto of the European Union[122]. Even though Moura Vicente did not denounce the legal project, that is, pillar I of the European Union as a whole, he stated his preference to the political convergence amongst the European states rather than the legal convergence, unless necessary (e.g. in the recognition of civil awards) and practicable. Furthermore, he stated that the alignment of different civil laws and codes in Europe presents other insurmountable difficulties such as the alignment of family laws, which are, of course, addressed as a separate but integrated chapter in most of the civil codes of Europe's national legal systems. He explained this by referring to how, for instance, the 'Concordat' arrangements between the Vatican and a sovereign state, in this case the Portuguese Republic, may affect the legal arrangements of the latter, simply because the people of such a state are affiliated in the Catholic dogma. This, he said, should not be interfered with by extra-national interference of law simply for the sake of aligning the civil laws of Europe and through this such constituent elements of civil codes as family law.

Finally, Otero regarded this question with a more positive approach, as this question refers to something extra-national, a supranational formation, as a legal denominator rather than as in question one of the interview, which may lead us to think that legal systems should converge mainly towards each other.

Fathally rejected the idea of Canada joining a supranational union, as supranational law may hide in it elements of hegemonic or even tyrannical nature. Lal Kaul pointed to the possibility of the Indian legal system being able to assimilate certain features of supranational law. Saunders, as stated above, would favour Australia joining a supranational law union only on the basis that certain matters would be more appropriately handled in the sphere of extra-national law. Also, Mansilla y Mejía pointed to this and stressed the practical utility for people when solving legal matters. Goldstein rejected the idea that Israel should join a supranational legal order by stressing the value of diversity and that systems cannot

[122] Article I-8 of the Constitution for Europe, *Official Journal of the European Union C 310, 16 December 2004.*

be brought together by reason of their systemic, cultural and constitutional aspects. Likhovski echoed the ideas of Goldstein but would not object to the idea of Israel joining a supranational legal order where convergence of laws would occur in non-culturally determined areas e.g. intellectual property. Finally, Van Niekerk and Roodt would not favour convergence of their legal system into a supranational order in Africa, because, from the pragmatist point of view, the fragmentation of influences on African laws makes the birth of such a constellation of systems unlikely.

One should at this point attempt to synthesise the above, variant as these opinions may have been. First of all, one must state that the question was constructed in a particular fashion so that the experts interviewed recognise what 'supranational legal order' stands for. The European example is helpful in this respect. Most of the academics recognised this by acknowledging that this referred to pillar 1[123] of the European Union[124], which is the clearest example of supranational law in Europe and the world. This, perhaps, may explain why the responses received have been more positive than in the first question of the interview. Again, the variation of academics is existent but it is not worlds apart. One notes the objections of Bell and Sefton-Green, Fathally, Murphy and Goldstein to give a positive reply to the convergence of their national legal system to a supranational legal formation. Sefton-Green's rationale on this is similar to the rationale which she gave in the first question of the questionnaire. Bell's response, however, is open to interpretation. His response, though 'possibly no' to convergence to a supranational legal formation is highly qualified by the elaboration and the justification of his response. This should lead us to think that, even though he retains a number of objections to the convergence project in Europe under pillar 1 of the European Union, this should not make him an anti-convergence theorist, as he himself declared in his response to question one that he favours the idea of convergence of legal systems. Bell, it would seem, favours the idea of Europe and its law machinery but his objections are perhaps not relevant to the convergence ideal that this machinery comes with but rather with its methods and

[123] Pillar 1 of the European Union is the European Communities Pillar and its decision-making is based on supranationalism (as opposed to the intergovernemental decision-making in Pillars 2 and 3 of the EU). It should be noted that this Pillar has a particularly broad base of competences which are mainly concerned with economic, environmental and social policies (as opposed to Pillars 2 and 3 which are concerned with Common and Foreign Security Policy and Police and Judicial Co-Operation in Criminal Matters respectively).

[124] P. Craig and G. De Búrca, *EU Law: Text, Cases, and Materials*, Oxford: Oxford University Press, 3rd Edition, 2003, pp. 3-4.

areas of engagement. Of course, this remains a subjective analysis of his ideas but it is an analysis which must be shared by many academics, who may not share the legal expertise of Professor Bell.

The common denominator of all three groups (pro-convergence group, the anti-convergence group and the conditional *per se* convergence group) is that they all raised some objections but in most cases these are expressions which may not *stricto sensu* oppose the convergence thesis. This, of course, cannot apply to all experts interviewed but one would think that the convergence thesis should explore further its methods for communication of its laws and policies, as this thesis attempts to do to a certain degree and perhaps point to the convergence of laws in non-culturally determined areas of law.[125] Thus, most of the thirty-three experts interviewed seemed to be saying that convergence is a good thing in the supranational dimension of it but that the areas of engagement for law convergence and its methods may be open to exploration and improvement.

7.2.2.3. Question 3: Which model from the ones proposed?

The third matter raised in the questionnaire reaches the core of this thesis. The question posed during the interview was clearly hypothetical. In effect, the thirty-three academics were asked which means of implementation of convergent law, which tactics of implementation the national legal system should follow. For the ones who may have disagreed with the merits of law convergence in Europe and the world the question was drafted according to the 'if' structure. Thus, academics were asked to give a spontaneous reply as to the methods which the convergence thesis should follow to achieve its goals, whether law convergence indeed occurs or if it will occur in the future. By and large the first four responses of the questionnaire correspond to the models and factors proposed in this thesis. The rest of the responses were combinations of the models and factors in the first four, whilst the last response was the usual 'I do not know/ I do not want to answer' response, which – it should be noted – was preferred by none, despite the complicated character of the question.

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[125] Cf. the distinction of Ogus into 'facilitative' and 'interventionist' areas of law in A. Ogus, 'Competition between National Legal Systems: A Contribution of Economic Analysis to Comparative Law', (1999) 48 *International and Comparative Law Quarterly* 405.

Of course, one could not have reasonably expected from the academics interviewed that they should fully foresee the models and factors proposed in this thesis, especially without actually having a chance to look at these, but one would, at the very least, expect to see from their replies which of the models or factors was preferred and why. Also, one could explore whether a combination of the methods was preferable and why.

There were by and large three groups of academics. This is not an assessment which follows the four models and factors division (as in the theoretical part of this thesis) but the eight options of the third question posed.

There were three groups: i) the 'focus on one method' of implementation group[126], ii) the 'use all of the models and factors provided but qualify' group[127] and iii) the 'use some of the models and factors provided' group[128].

The first group is the most unproblematic in its analysis. The comparative law implementation option attracted two instant responses and that is fairly remarkable, because the academics who answered in this particular way put the *focus on* comparative implementation tactics. That is not to say that they have excluded the parallel operation of any other models but the preference was clear. Neither could one say that the other academics have been reluctant in expressing their preference to comparative law, as their responses choosing the 'combination of the methods above' or the 'combination of some the methods above' in most cases also signified a preference to comparative implementation tactics. This will be further addressed below.

Bell and Hérnandez justified their views of preference to comparative implementation tactics by rather similar approaches. Bell noted that as the focus should be on the comparative method of implementation, one needs to define the standards of comparing. Only then can comparative implementation exercises be successful. He stopped short when asked on whether the focus on a comparative implementation model should be made for the sake of it. A good example, he noted, is that of the various EC Public Procurement Directives[129]. He stated that their

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[126] Bell, Hérnandez, Dalla Via, Yamaguchi, Murphy, Saunders and Likhovski.

[127] De Vita, Kötz, Moréteau, Bonell, Otero, Kerameus, Lal Kaul, Kay, Van Niekerk, Roodt, Goldstein and Butler.

[128] Collins, Bridge, Ojanen, Helvacı, Squires, De Witte, O'Dell, Klein, Karakostanoglou, Sefton-Green, Moura Vicente, Örücü, Fathally and Mansilla y Mejía.

[129] Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public

application throughout the Union is not exactly uniform and that where their application has been correct and accurate, then this should perhaps be followed by other member states. Hérnandez also maintained that good solutions, which have worked in other legal systems, should be compared vis-à-vis domestic needs and specificities and thereafter be followed, if at all possible. He referred to the international law distinction between 'self-executing' international instruments and 'non self-executing' international instruments. The former become automatically applicable upon ratification, whilst the latter require implementing legislation. He said that in both categories the national legal system may refer to comparative implementation models, as in the former case (self-executing treaties) their application must be uniform, whilst in the latter case (non-self executing treaties) such need is even greater, as the implementing legislation may vary significantly from legal system to legal system; something which is not desirable for obvious reasons. For instance, he referred to the Convention on Biodiversity and was of the opinion that, as this law instrument of convergent policy is not on the face of international law a self-executing instrument, then it is perhaps a good example whereupon comparative implementation tactics may have to be applied in practice by the contracting parties to the treaty.

The choice of Dalla Via, Yamaguchi and Murphy has also been clear: they all showed a clear preference to the approximating model or what is called the 'general

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supply and public works contracts, *Official Journal L 395 , 30/12/1989*, pp. 0033 – 0035; Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, *Official Journal L 076 , 23/03/1992*, pp. 0014 – 0020; Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, *Official Journal L 209 , 24/07/1992*, pp. 0001 – 0024; Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts, *Official Journal L 199 , 09/08/1993*, pp. 0054 – 0083; Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts, *Official Journal L 199 , 09/08/1993*, pp. 0001 – 0053; European Parliament and Council Directive 97/52/EC of 13 October 1997 amending Directives 92/50/EEC, 93/36/EEC and 93/37/EEC concerning the coordination of procedures for the award of public service contracts, public supply contracts and public works contracts respectively, *Official Journal L 328 , 28/11/199,* pp. 0001 – 0059; Directive 98/4/EC of the European Parliament and of the Council of 16 February 1998 amending Directive 93/38/EEC coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, *Official Journal L 101 , 01/04/1998*, pp. 0001 – 0016; Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, *Official Journal L 134 , 30/04/2004*, pp. 0001 – 0113; Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, *Official Journal L 134 , 30/04/2004*, pp. 0114 – 0240.

model' herein. Both Dalla Via and Murphy argued that within the possible means a system must, in a circle of convergence, generally approximate as much as possible to extra-national law. However, Murphy stressed that it would be desirable that the US Congress had the power to deviate from the international or supranational model. Yamaguchi in his remarks noted that legal systems overcome pre-modern or unfair traditions acting as a pretext to avoid implementation of universal law. Likhovski showed a clear preference to the sociological model, as he argued that socio-legal research is the preferable way to find to what extent convergent law is relevant and applicable to a specific national context. The restructuring model *per se* was preferred by Saunders, who noted that this should act as a remedy to lack of transparency in implementing supranational and international law arrangements. Also, she argued that it would be desirable that in a concrete case her answer would depend on the nature of the supranational arrangements by noting that it would be desirable that some degree of discretion should be the case in relation to the [convergent] laws which were in fact implemented.

The second group of academics applauded all four models proposed in the questionnaire. De Vita and Butler accepted that in principle all models could apply and that all models, upon certain identifiable conditions, should apply - not necessarily always in a combination of all of them concurrently, though this could theoretically occur. But this would require great time and effort on the part of the national legislator. De Vita noted in relation to the reformist/restructuring or *anacatataxic* model (when this was briefly explained to her) that one should engage oneself with many different layers of analysis to achieve such 'law restructuring'. Thus, she noted that one has to examine the technical, the institutional, the political as well as the psychological layer of a national legal system to restructure it, if a convergent instrument requires some sort of reshuffling within the legal system itself. Kötz agreed with the theoretical possibility that all the models could occur in various implementation scenarios. His analysis revolved around the question of discretion when implementing. It would be easier for all the models and factors to be applied theoretically, if the national legal systems have some sort of discretion to implement, as then they would be able to negotiate implementation. The answer will always depend on the force that the convergent law comes with, he stated. Moréteau's analysis was not very much different to Kötz's. He too made it clear that in reality all things which can be done will be done according to the nature of the convergent

instrument of law and the discretion that this comes with. In relation to the 'restructuring' model, he said this should not only pertain to the restructuring of laws and institutions but also to restructuring of legal mentalities or 'legal thinking', to put it in his own words. This compares well with De Vita's point of view, who referred *inter alia* to a psychological layer, which may have to change or be adapted for restructuring to take place in a legal system, after a convergent instrument of law reaches it and requires such restructuring. Bonell's analysis followed similar patterns to Moréteau and Kötz and he maintained that the application of any or all of the models depends on the merits of each implementation case. Otero, finally, justified law restructuring in a limited number of cases ('where necessary'), whilst she agreed that the *Affinitatis Formula* should, even if widely interpreted, be able to make comparative implementation an easier task than merely comparing different implementations without distinction. As regards law approximating, this can be done in a number of ways, she stated; on the question of the sociological investigation into the implementation of convergent law, this is well connected with one of the main considerations in implementing or applying international law within the legal system in which she teaches, *ordre public*/ public policy. Lal Kaul, Kay and Goldstein generally pointed out that the availability of many different methods is preferable, whilst one notes the interesting approach taken by Van Niekerk and Roodt, who argued that the proposed models should be seen as necessary phases in a single process[130].

The third group comprised academics who seemingly chose the same answer on the questionnaire ('some of the methods above'); on closer inspection there were in fact variations, as most of the interviewees specified which 'some' they seemed to have preferred.

Thus, when the interviewees in this group were asked to further clarify their responses, a great deal of them showed a clear preference to comparative implementation tactics of convergent law. Thus, Collins saw no reason why comparative law should be excluded from law implementation analysis. So did Bridge and Moura Vicente. Helvacı, Squires and Fathally also saw comparative implementation of convergent law as a strong probability. De Witte did not disagree with comparative implementation tactics either. Klein, on the other hand, stressed the

[130] Cf. with 8.1.2.3. and 8.1.2.4. below.

possibility, when asked, that there should be no reason to withhold legal systems from using comparative implementation tactics before *and* after the relevant implementation date. Karakostanoglou followed a similar pattern of analysis as academics such as Collins and Bridge but stressed the fact that comparative implementation tactics may require time and particular expertise. Sefton-Green argued, as Collins and Bridge did, that comparative implementation of supranational or international law is very much possible, as long as this is made with certain specific considerations of the legal systems involved in mind. Finally, Örücü applauded the option of the comparative implementation approach but qualified her answer by suggesting that there has to be a three step approach; first, she argued, one must refer to the 'law in the books', then to the 'law in action' and then to the question as to how one can internalise convergent law. Counterbalancing all three should, according to Örücü, bring good, if not ideal results of implementation. For instance, she argued that the British have had relatively good results in the acceptance of continental proportionality. She argued that, because the British have internalised the notion, they have made a success in accepting the concept of proportionality. She stated that the law 'tuning' has been right.[131]

On law bridging or rather approximating as the question was posed in the questionnaire, Bridge, Collins, Moura Vicente, Ojanen and Örücü argued that, as things stand in the international and European legal order, approximation of laws is the question that a legal system should pursue. Helvacı and Squires did not present any variation with regard to their preference to law approximation as one of the models of implementation of convergent law. De Witte, like Collins and Bridge, argued that law approximating is part and parcel of any implementation of the current European legal architecture as well as international law. O'Dell argued that indeed general law approximation is inherent in convergent projects but he further qualified, stating that e.g. legal transplantation has inherent problems in it too. Law approximation should be qualified. Of course, one may surpass – he argued – the problematic nature of law transplanting with regard to law approximation, if one makes use or rather, does not irritate the two trajectories (legal and social) of the

[131] On law tuning see e.g. E. Örücü, *The Enigma of Comparative Law: Variations on a Theme for the Twenty-First Century*, Leiden/Boston: Martin Nijhoff Publishers, 2004, Chapter 8 (Comparative Law and the Tuners of the Law), pp. 79-91.

'parallel evolution' theory (the so called co-evolving trajectories theory, as Teubner put it[132]).

This thesis argued in chapter four that a legal system's restructuring may be deemed necessary in certain cases of implementation of convergent law. Ojanen and Klein argued that restructuring is possible and preferable where the convergent instrument of law requires such restructuring. This has been the view of De Witte, only that he noted that restructuring might be seen as a subcategory of the law approximating tactics. Karakostanoglou argued that restructuring should be the case as long as some of the essential specificities of the legal system are retained and respected post such restructuring. Moura Vicente attempted quite successfully to explain how restructuring can occur in a legal system; thus, he argued that the Portuguese Constitution, prior to the amendment of Article 8 (International law) on April 23 2004, saw international treaties and E.C. law as a subordinate system of law to the Constitution, as they were subordinate to the Constitution. After the amendment of Article 8 of the Portuguese Constitution came into force, Portuguese law positioned international law and E.C. law on a higher basis than the Constitution itself. However, Moura Vicente was quick to note that as this restructuring within the legal system of Portugal took place through the sovereign power of the Portuguese parliament, then the parliament could effectively take such power back, if it so judged in the future. However, that – he argued – does not change the fact that a law restructuring took place in Portugal through the amendment of Article 8 of the Constitution, albeit this restructuring did not come about under a particular convergent instrument of law.

The socio-legal approach was preferred by Collins, Ojanen, Helvacı, Squires, Karakostanoglou and Fathally, because it has been argued by many of them that systems are also sociological creatures and implementation of otherwise foreign law such as convergent law should be on the basis of careful sociological studies. O'Dell also argued that sociological studies, perhaps in conjunction with comparing implementations, should be respectful of local sensitivities. Implementation of convergent law thus, he argued, on a sociological basis should ideally allow a legal system 'to take as much as it can' from an *acquis* of convergent law. Sefton-Green showed a preference to the socio-legal approach, as this would in effect be the most

[132] G. Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences', (1998) 61 *Modern Law Review* 11, pp. 27-32.

realistic (together with comparative implementation tactics) for implementation of convergent law to be the case.

The synthesis of the above opinions is by definition almost inevitably a very difficult task, as approaches varied significantly. But approaches were not all that different. It would seem, therefore, that a first conclusion is that the comparative implementation approach is an approach which has been much praised. In fact, judging from Bell and Hérnandez, who distinguished the comparative approach of implementation from the others immediately, one may well argue that the approach may be a good starting basis as to how implementation of convergent law should be alluded to. So did Kerameus, when he was asked on the matter, as long as a *via media* is preserved between comparing implementations and law sociology. The approximating *per se* or general model was preferred by the academic experts, as this model was 'connected' to a current reality as well as legal orthodoxy, which sets as a primary purpose the law approximation by all means and at all costs, as much as this is possible. With regard to the restructuring method, it may seem that, even though it was met with some reluctance by certain academics, it was also preferred by others; but this is not so, at least not because they disagreed with the fact that legal systems may have to 're-orientate' but perhaps because one might not reasonably have expected that the academics could have been acquainted with the specificities of the *anacatataxic* model, as described in this thesis. However, given the fact that there have been academics who recognised such restructurings in their respective legal system, one might be able to argue that such restructurings are not only a reality but also a desirable reality, such as the new Article 8 of the Portuguese Constitution. Finally, with regard to the sociological approach academics seemed to have expressed their preference to it, as this might be a more legally 'sensitive' approach, or to use Teubner's terminology, less 'irritating'.

PART V

Chapter 8

CONCLUSIONS

8. CONCLUSIONS

8.1. Conclusions of this thesis

This is the final chapter of the thesis, where the conclusions drawn are expounded.

8.1.1. General conclusions on the four models and factors

In the third chapter discussion was made on the general model. This model, as its name suggests, aims at converging through the bridging of general legal differences. Through this model, which seeks to fuse the international law and the European law experience, two sub-models are provided: the uniformist sub-model and the instructive sub-model. The second model of this thesis, as found in chapter four, argued that with certain cases of implementation, convergence can only come about through the recognition of an *anacatataxis* and relevant implementation measures being taken by the national legal system. The fifth chapter presented the comparative factor in the implementation of convergent law. It has been suggested that systems can (and on some instances should) compare implementation of convergent law in other legal systems; preferably in other relevant legal systems. The fourth model (the socio-legal factor), as found in the sixth chapter, takes into account the socio-legal

structures of the legal system vis-à-vis convergent law under a stringent set of considerations.

8.1.2. Particular conclusions

It is clearly essential that some more specific conclusions should be given at this point.

8.1.2.1. Conclusion No. 1: A full and effective pattern of implementation methodology – the limitations of a theoretical and idealistic thesis

Initially, the first conclusion to be reached is that this thesis is of an idealistic nature. It describes a theoretical world of legal possibilities, even though, it has to be stressed, it deals with the otherwise practical matter of implementation. Certainly, the author wishes to emphasise that this is a thesis whereby a bona fide implementer is assumed and political realities in implementation matters are ignored. The former is the position in international law and it has been explained as such throughout this thesis; the latter, however, is forwarded by reason of the fact that the author is of the firm belief that even though politics play a great deal in the convergence of laws, e.g. in law-making, politics in law-implementing may well distort what has been agreed (through politics) in the first place.

Also, one could argue that, as this thesis offers an extensive pattern of implementation models and factors (general and restructuring models in addition to the comparative law and socio-legal factors), the factors and models proposed herein offer a full and effective pattern of methodology. Yet, it is to be noted that, *even though the author perceives the models and factors of the analysis as full, the author does not wish to maintain that the factors and models which he analysed are all inevitable factors and models in all convergences.* Presenting a full typology of models and factors of implementation is one thing and presenting a full typology of models and factors of implementation for the totality of possible implementation scenarios is quite another. This is particularly true, as it would be particularly onerous

for one to predict, in a theoretical thesis (even though practice-oriented) such as this, all the intricacies and possible implementation scenarios which may arise in reality.

8.1.2.2. Conclusion No. 2: The models and factors are mostly discretionary

Another point which should be made is that in most cases the models proposed are by-and-large discretionary. Except for the general model, which has been presented in chapter four as a fusion of the European and international implementation experience, the other models and factors are largely based on the mere discretion of the national legal system.

8.1.2.3. Conclusion No. 3: The models and factors, as presented, are pure – Combination of models and factors preferable, if possible

If 'pure' is defined as the affiliation of each model and factor to a particular branch of knowledge, then the models and factors proposed are, on the whole, pure models and factors. The purity sought in this thesis in relation to the models and the factors herein is drawn from the field of arts. The fathers of purism, Ozenfant and Le Corbusier wanted a return to more basic forms in the world of forms of art.[1] Their call, still strong nowadays, is an appeal to reason and order. Likewise, the author believes that in his forms of law (the models and factors herein), should – in the first instance – be a preservation of this ideal. Thus, the comparative factor of implementation refers to comparative law more than any other model and factor herein; the general model refers to the international and European law implementation experience more than any other model or factor herein; the restructuring model pertains to law reform practice due to extra-national law more than any other model or factor herein, whilst the socio-legal factor clearly pertains to law sociology more than any other model and factor from the ones proposed.

Despite the fact, however, that the models and factors herein seem 'pure' in the first instance to the author, in the second instance, in their application in the real

[1] The *locus classicus* here is Ozenfant's work. See A. Ozenfant (trans. by E.A. Ashburn), *The Foundations of Modern Art*, London: John Rodker, 1931.

world, these may be not be as pure as they would seem in the first place. Thus, it would seem that the models and factors herein not only can but also should be combined in certain cases.[2] For instance, if one considers how the European Convention of Human Rights has been applied in Europe, one notes that a legal bridging has taken place, as European human rights laws have converged into each other (proximity to the general model) but when it comes e.g. to the interpretation of Article 10 (freedom of expression) thereof, one notes that legal systems have been conferred a margin of appreciation in the application of this provision in certain cases (proximity to the socio-legal factor).

Likewise, the UN Convention on Contracts for the International Sale of Goods must be applied in a uniform way (through the general model)[3]; however, as this would cause a significant legal reform for which particular care would have to be taken in implementing such a treaty (through the restructuring model)[4] e.g. in the UK and the Republic of Ireland; therefore it would be wise *inter alia* for these legal systems to take into account the comparative method of implementation (through the means of the comparative factor of implementation). Consequently, a combination of models should be pursued, when this is desirable, as well as possible.

Nor would it be right to suggest that only one method can work to the exclusion of all others. This can occur, of course, for instance, in the case of *anacatataxes* but even in that case one cannot exclude, for instance, the theoretical possibility that legal systems may also refer to the comparative factor so that the implementation experience in relation to an *anacatataxis* in other relevant legal systems is brought to light. Therefore, it is not necessary that any one method automatically excludes the operation of all others.

8.1.2.4. Conclusion No. 4: The operation of one model or factor does not exclude the parallel operation of another

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[2] Cf. the response of Professors van Niekerk and Roodt to question III of the questionnaire, who argued that the four models forwarded in the question should be seen 'as phases in a single process'. See transcription of responses, 'Responses to Question III' at the relevant section of Appendix 3.
[3] See 3.3.2.
[4] See 4.3.5.

However, the 'purity' of the four models and factors proposed is watered down by the fact that one is free (unless otherwise provided in the convergent instrument of law) to use any other model and factor, as one model or factor does not in principle exclude the operation of another.

8.1.2.5. Conclusion No. 5: The national legal system at the centre of the analysis

Furthermore, in conjunction with the largely discretionary character of the methods, one should note that, at least in theory, national legal systems can choose their means of implementation, as long as they have not conferred such authority to an extra-national body of law. Thus, as the systems hold the ultimate choice of implementation methods, the national legal system has been placed at the core of this analysis.

8.1.2.6. Conclusion No. 6: Modification of models and factors likely on a case-by-case basis

Lastly, all models and factors are susceptible to modification and adjustment. This is the case for many reasons but the most important seem to be that: i) the models and factors are a presentation of pure models and factors *per se*, as explained above; thus, one may wish to modify them and subject them to other relevant considerations of implementation practice,[5] ii) the number of convergent instruments of law that the models and factors could be applied upon is great; thus, one cannot reasonably expect that these models and factors are always applied, as they are presented herein[6], and iii) as always, all theoretical constructs have a tendency to imperfection, they are largely subjective and are susceptible to argument; thus, by definition, these models and factors are also open to improvement and adjustment.

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[5] *Supra*, 2.4.
[6] *Supra*, 8.1.2.1.

LIST OF SOURCES

BIBLIOGRAPHY

-Aggelikopoulou, A., *Paradosiakes Syntages: Elliniki Kouzina*, Athens: Ekdoseis Stelios Kontaratos, 1999, p. 168.

-Alexiadou, V., *Elliniki Kouzina: Mageiriki*, Thessaloniki: Ekdoseis Vefa Alexiadou, 1988, p. 26.

-Anderson-Gold, S., *Cosmopolitanism and Human Rights*, Cardiff: University of Wales Press, 2001, pp. 3, 12, 41, 52, 88.

-Anzillotti, *Corso*, I, pp. 71-76.

-Aristotle, *Nichomachean Ethics,* V, x.

-Arminjon/Nolde/Wolff, *Traité de droit comparé I*, 1950, pp. 42-53.

-Austin, J., *The Province of Jurisprudence Determined* (Ed. H.L.A. Hart), London: Weidenfeld & Nicholson, 1954, pp. 134-142.

-Barnett, H., *Constitutional & Administrative Law*, 3rd Edition, 2000, London: Cavendish Publishing, pp. 27, 342-343, 879-880, 926.

-Berman, H.J., *Law and Revolution: The Formation of the Western Legal Tradition*, Cambridge, Massachusetts, Harvard University Press, 1983.

-Bentham, J., *A Fragment on Government and an Introduction to the Principles of Morals and* Legislation in Harrison, W., (ed.), Oxford: Basil Blackwell, 1967, Ch IV fn. to para. 23.

-Bianca, C.M. & Bonell, M.J., (eds.), *Commentary on the International Sales Law: The 1980 Vienna Convention*, 1987, Milan: Giuffrè, p. 74.

-Blaxter, L., Hughes, C., and Tight, M., *How to Research*, Buckingham: Open University Press, 1997, p. 610.

-Bogdan, M., *Comparative Law*, 1994, Kluwer/Stockholm: Borstedts Juridik/Oslo: TANO, p. 57ff.

-Brems, E., *Human Rights: Universality and Diversity*, The Hague/Boston/London: Martinus Nijhoff, 2001, pp. 4, 7-8, 10, 12, 17, 27, 162, 201-202.

-Bridge, M.G., *The International Sale of Goods: Law and Practice*, Oxford: Oxford University Press, 1999, pp. 80 (para. 3.14), 84 (para. 3.21), 89 (para. 3.29), 91-92 (para. 3.32), 93 (para. 3.34), 101-102 (paras. 3.48-3.50), 106 (para. 3.57), 197-201.

-Brownlie, I., *Principles of Public International Law,* 5th Edition, 1998, Oxford: Clarendon Press, p. 616.

-Buchler, J. (ed.), *The Philosophy of Peirce: Selected Writings*, London: Routledge, reprinted in 2000 (originally published in 1940), pp. 150, 151, 315-323, 318.

-Burks, A.W. (ed.), *Collected Papers of Charles Sanders Peirce* (Vol. 7: Science and Philosophy), Bristol: Thoemmes Press, 1998, pp. 61, 67.

-Cassese, A., *Human Rights in a Changing World*, Cambridge: Polity, 1990, p. 46.

-Cassese, A., *International Law*, 2001, Oxford: Oxford University Press, pp. 136, 241.

-Cappelletti, M. (ed.), *New Perspectives for a Common Law of Europe*, Sijtoff, Leyden, 1978, p. 195.

-Casey, J., *Constitutional Law in Ireland*, Dublin: Round Hall Sweet Maxwell, 3rd Edition, 2000, pp. 198-199, 204.

-Cavinet, G., Andenas, M., and Fairgrieve, D., *Comparative Law Before the Courts*, London: British Institute of Comparative Law, 2004.

-Chapman, C., *Islam and the West*, Carlisle, Cumbria: Peternoster Press, 1998, pp. 118-119, 119, 119-121.

-Cicero, *De Republica*, III, xxii, 33.

-Clark, R., *Contract Law in Ireland*, Dublin: Thomson Round Hall, 2004, pp. 176, 178-179, 211, 261-262.

-Coates, K., *Human Rights in the World: A Report to the European Parliament*, Nottingham: Spokesman, 1992, pp. 15, 43.

-Constantinesco, L.J., *Traité de droit comparé, vol. II : La méthode comparative*, Paris: Ed. LGDJ, 1974, pp.48ff, 135ff.

-Coppel, J., *The Human Rights Act 1998: Enforcing the European Convention in the Domestic Courts*, Chichester: John Wiley & Sons, 1999, pp. xix, 3, 4, 148ff.

-Cotterrell, R., *The Sociology of Law: An Introduction*, London/Dublin/Edinburgh: Butterworths, 2nd Edition, 1992, p. 49.

-Cox, N. & Schuster, A., *Sport and the Law*, Dublin: First Law, 2004, pp. 87, 107, 152.

-Cox, N.R., *Irish Blasphemy law: past, present and possible future, and the theories of John Stuart Mill and Sir Patrick Devlin*, PhD Thesis, Trinity College Dublin, 1998, p. 59.

-Craig, P. & De Búrca, G., *EU Law: Text, Cases and Materials*, 3rd Edition, 2003, Oxford: Oxford University Press, pp. 3-4, 114, 115, 372, 372-373, 402f, 483ff, 825-841, 826.

-Cryan, D., Shatil, S. and Mayblin, B., *Introducing Logic*, Royston: Icon Books, 2004, pp. 8, 19, 116.

-Crystal, D., *The Cambridge Encyclopedia of the English Language*, 2nd Edition, 2003, Cambridge: Cambridge University Press, p. 328.

-Curzon, L.B., *Dictionary of Law,* Harlow: Longman, 6th Edition, pp. 62, 426.

-David, R., *Les grands systèmes de droit contemporains*, 9th Edition by Jauffret-Spinosi, 1988, p. 19ff.

-David, R., *Traité élémentaire de droit civil comparé*, 1950, pp. 222-226.

-Degan, V.D., *Sources of International Law*, 1997, The Hague/London: Martinus Nijhoff Publishers, pp. 31, 32, 356.

-Deligianni-Dimitrakou, C., *Eisagogi sto Syncritico Dikaio*, Thessaloniki: Sakkoulas Publications, 1997, pp. 3, 35, 40-42, 42, 51-52.

-Delmas-Marty, M., *Towards a Truly Common Law*, Cambridge: Cambridge University Press, 2002, pp. 168, 171.

-DiMatteo, L.A., *et. al.*, *International Sales Law: A Critical Analysis of CISG Jurisprudence*, Cambridge: Cambridge University Press, 2005, pp. 11-13, 174-177.

-Dinan, D., *The Encyclopedia of the European Union*, London: Macmillan Press Ltd., 2000, pp. 137, 441.

-Doolan, B., *Principles of Irish Law*, Dublin: Gill and Macmillan, 6th Edition, 2003, p. 5.

-Drobnig, U., and Van Erp, S., (eds.), *The Use of Comparative Law by Courts: XIVth International Congress of Comparative Law, Athens 1997*, The Hague: Kluwer, 1999.

-Dundes Renteln, A., *International Human Rights: Universalism Versus Relativism*, Newbury Park/California, London, New Delhi: Sage Publications, 1990, pp. 9, 30.

-Falkner, G., Treib, O., Hartlapp, M., and Leiber, S., *Complying With Europe: EU Harmonisation and Soft Law in the Member States*, Cambridge: Cambridge University Press, 2005, pp. 6, 11-14.

-Fletcher, I., Mistelis L. and Cremona M. (eds.), *Foundations and Perspectives of International Trade* Law, Sweet & Maxwell, 2001.

-Forde, M., *Commercial Law*, Dublin: Butterworths, 2nd Edition, 1997, pp. 70-71 (paras. 2.094-2.101).

-Foster, Nigel & Sule, S., *German Legal System and* Laws, Oxford: oxford University Press, 3rd Edition, 2002, pp. 388-390, 406.

-Foster, Nigel, *Blackstone's EC Legislation 2003-2004*, Oxford: Oxford University Press 14th Edition, 2003.

-Foster, S., *Citizenship in Focus: Human Rights*, London: Harper Collins Publishers, 2nd Edition, 2003, p. 1.

-Frantzeskaki, Eurugeni, Simeonidi, *Syncritico Dikaio*, Athens, 1978, p. 141ff.

-Fujikura, K., (ed.), *Japanese Law and Legal Theory*, Aldershot: Dartmouth, 1996, p. xvi.

-Gardner, J.P. (ed.), *Human Rights as General Norms and a State's Right to Opt Out*, London: British Institute of International and Comparative Law, 1997, pp. 4, 11-12.

-Giddens, A., *The Consequences of Modernity*, Cambridge: Polity in association with Blackwell, 1990, p. 64.

-Giddens, A., *The Runaway World: How Globalisation Is Reshaping Our Lives*, London: Profile Books Ltd, 1999, reprinted in 1999, 2000, p. 7.

-Glendon, M.A., *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights*, New York/Toronto: Random House, 2001, pp. xvi, xviii, 164, 217-218, 218, 221, 222-223, 226.

-Goethe, Zahme Xenien v, in *Sämtliche Werke*, Berliner Ausgabe, Bournal, 2: Teil, Poetiische Werke, 687.

-Goode, R.. *Commercial Law*, Harmondsworth: Penguin Books, 2nd Edition, 1995, p. 117.

-Grant, W., 'Elite Interviewing: A Practical Guide', Institute for German Studies, Birmingham university, Discussion Paper No. 11 as quoted in Grix, J., *The Foundations of Research*, Houndmills, Basingstoke/New York: Palgrave Macmillan, 2004, p. 128.

-Graveson, R.H., *One Law: On Jurisprudence and the Unification of Law: Selected Essays Volume II*, North-Holland, Amsterdam, 1977.

-Grix, J., *The Foundations of Research*, Houndmills, Basingstoke/New York: Palgrave Macmillan, 2004, pp. 84, 86, 126, 127, 144-145, 145.

-Grossfeld, B., *The Strength and Weakness of Comparative Law*, Oxford: Clarendon Press, 1990, p. 33.

-Guest, A.G., (ed.), *Benjamin's Sale of Goods*, London: Sweet & Maxwell, 4th Edition, 1992, p. ix.

-Gutteridge, H.C., *Comparative Law: An Introduction to the Comparative Method of Legal Study and Research*, Cambridge: Cambridge University Press, 1946.

-Gutteridge, H.C., *Comparative Law,* 2nd Edition, Wildy reprint, London, 1971, particularly chapters 11 and 12.

-Hamacher, W., 'One 2 Many Multiculturalisms', in De Vries and Weber, S., (eds.), *Violence, Identity, and Self-Determination*, Stanford: Stanford: Stanford University Press, 1997, pp. 295-296.

-Harding, A. & Örücü, E., *Comparative Law in the 21st Century*, The Hague: Kluwer Law International, 2002.

-Hartley, T.C., *European Union Law in a Global Context: Text, Cases and Materials*, Cambridge: Cambridge University Press, 2004, p. 3, 5, 44.

-Hartley, T.C., *The Foundations of European Community Law: An Introduction to the Constitutional and Administrative Law of the European Community*, 5th Edition, 2003, Oxford University Press, pp. 151-152, 211-220.

-Heath, P., and Lachs, J., (eds.), *J.G. Fichte Science of Knowledge*, Cambridge: Cambridge University Press, 1982, pp. 17, 111-113.

-Heyns, C., and Viljoen, F., *The Impact of United Nations Human Rights Treaties on the Domestic Level*, The Hague/London/New York: Kluwer Law International, 2002, p. 336.

-Hogan, G., and Whyte, G., *The Irish Constitution*, Dublin: Butterworths, 4th edition, 2003.

-Holbraad, C., *Internationalism and Nationalism in European Political Thought*, 2003, New York/Basingstoke: Palgrave MacMillan, p. 1.

-Howells, G., and Wilhelmson, T., *EC Consumer Law*, Brookfield USA: Ashgate/Aldershot: Dartmouth, 1997, pp. 88, 89.

-Hunt, A., *The Sociological Movement in Law*, London: Macmillan, 1978, p. 53.

-Ismael, J.S., and Ismael, T.Y., *Civil Society and the Oppressive State in the Arab World*, London: Frank Cass, 2001, pp. 20-48.

-Janis, M., Kay, R., and Bradley, A., *European Human Rights Law: Texts and Materials*, Oxford: Oxford University Press, 2nd Edition, 2000, pp. 146, 282.

-Jones, C., *Global Justice: Defending Cosmopolitanism*, Oxford: Oxford University Press, 2001, pp. 50-84, 174.

-Kerr, C., *Industrialism and Industrial Man*, Cambridge, Massachusetts: Harvard University Press, 1960.

-Kiikeri, M., *Comparative Legal Reasoning and European Law*, Dordrecht/Boston/London: Kluwer Academic Publishers, 2001, pp. xi, 23, 196, 201, 329.

-Koller, I., Roth, H., Zimmermann, R., *Schuldrechtsmodernisierungsgesetz 2002*, 2002, Munich: C.H. Beck.

-Kumar, R., *Research Methodology: A Step-By-Step Guide for Beginners*, London/Thousand Oaks, CA/New Delhi: Sage, 1999, p. 110.

-Kötz, H., *Sonderdrucke aus 50 jahre Bundesgerichtshof Festgabe aus der Wissenschaft*, Munich: Verlag C.H. Beck, 2000.

-Landman, T., *Issues and Methods in Comparative Politics: An Introduction*, London/ New York: Routledge, p. 19.

-Legrand, P., *Fragments on Law-as-Culture*, Deventer: W. E. J. Tjeenk Willink, 1999, pp. 1-13.

-Lenaerts, K. and Van Nuffel, P. (ed. R. Bray), *Constitutional Law of the European Union*, London: Thomson/Sweet & Maxwell, 2nd Edition, 2005, pp. 23-26, 41-65, 678-700.

-Lijnzaad, L., *Reservations to UN-human Rights Treaties*, Dordrecht/Boston/London: Martinus Nijhoff, 1995, p. 398.

-MacCormick, N., *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth*, Oxford: Oxford University Press, 1999, pp. 88, 94, 117.

-MacMaoláin, C., *EU Food Law: Protecting Consumers and Health in a Common Market*, Oxford: Hart Publishing, 2007.

-Maduagwu, M.O., *Ethical Relativism Versus Human Rights*, Vienna/London: International Progress Organization/Third World Centre for Research and Publishing, 1987, pp. 10, 13-14, 130, 136, 176.

-Markesinis, B.S., *Comparative Law in the Courtroom and Classroom: The Story of the Last Thirty-Five Years*, Oxford/Portland, Oregon: Hart Publishing, 2004, pp. xi, 36, 157-182.

-Markesinis, B.S., *Foreign Law and Comparative Methodology: A Subject and a Thesis*, Oxford: Hart Publishing, 1997, p. 194.

-Markesinis, B.S., *The Clifford Chance Millennium Lectures: The Coming Together of the Common Law and the Civil Law*, Oxford: Hart Publishing, 2000.

-Markesinis, B.S., *The Gradual Convergence,* Oxford, Clarendon Press, 1994, pp. 1, 21.

-Mattei, U., *Comparative Law and Economics*, Ann Arbor: University of Michigan Press, 1998, reprinted in 2004, pp. 1-2, 3-11, 17-19, 125-126, 141-144, 144, 147-177, 179-199.

-Mayer, A.E., *Islam and Human Rights: Tradition and Politics*, Boulder, Colorado/Oxford: Westview Press, 3rd Edition, 1999, pp. 36, 41.

-McNair, Lord, *The Law of Treaties*, Oxford: Clarendon 1961, p. 486.

-McQueen, R., and Knussen, C., *Research Methods for Social Science: An Introduction*, Harlow, England: Pearson Education, 2002, pp. 27, 99.

-Menski, W.F., *Comparative law in a global context: The legal systems of Asia and Africa*, London: Platinium, 2000, p. 533.

-Mills, K., *Human Rights in the Emerging Global Order: A New Sovereignty?*, London: Macmillan Press, 1998, p. 38.

-Montesquieu, Baron de, Charles de Secondat, *The Spirit of Laws* [1748], Book 1, Ch. 3 in Adler, M.J., (ed.), *Great Books of the Western World*, Chicago: The University of Chicago/ Encyclopaedia Britannica, Inc., 2nd Edition, 1990, p. 3.

-Newton, J., *The Uniform Interpretation of the Brussels and Lugano Conventions*, Oxford/Portland, Oregon: Hart Publishing, 2002.

-Noda, Y., (trans. By Angelo, A.H.), *Introduction to Japanese Law*, Tokyo: University of Tokyo Press, 1976 (French original 1966), 10th Printing, 1997, pp. 8, 58.

-O'Dell, E., (ed.), *Leading Cases of the Twentieth Century*, Dublin: Round Hall Sweet Maxwell, 2000, pp. 220-236, 237-254.

-Oda, H., *Japanese Law*, Oxford: Oxford University Press, 2nd Edition, 1999, pp. 9, 60.

-Örücü, E., *The Enigma of Comparative Law: Variations on a Theme for the Twenty-First Century*, Leiden/Boston: Martinus Nijhoff Publishers, 2004, pp. 12, 79-91, 80-81, 84, 87, 99, 102, 123, 161.

-Ovey, C., and White, R., *Jacobs and White, The European Convention on Human Rights*, Oxford: Oxford University Press, 2002, p. 215.

-Ozenfant, A., (trans. by E.A. Ashburn), *The Foundations of Modern Art*, London: John Rodker, 1931.

-Paine, T., *Rights of Man* (1792, Pt II), 1984, reprinted in 1998, H. Collins (ed.), New York: Penguin, p. 93.

-Phelan, D.R., *Revolt or Revolution: The Constitutional Boundaries of the European Community*, Round Hall Sweet & Maxwell, 1997, pp. 333, 335.

-Pippin, R.B., *Hegel's Idealism: The Satisfactions of Self-consciousness*, Cambridge: Cambridge University Press, 1989.

-Plato, *Phaedo* 75b, 78c10-d9, 79a1-5, 79d2, 80a3, 80b1, 100c-d.

-Plato, *The Republic*, 596a.

-Plutarch, *De Exilio* ('On Banishment'), *Thesaurus Linguae Graecae,* {0007.110}, p. 600, section F, lines 9-10.

-Pospesel, H., *Introduction to Logic: Propositional Logic*, Englewood Cliffs, New Jersey: Prentice-Hall, 1974.

-Prechal, S., *Directives in European Community Law: A Study of Directives and Their Enforcement in National Courts,* Oxford: Clarendon Press, 1995, pp. 16-17.

-Punch, K.F., *Developing Effective Research Proposals*, London/Thousand Oaks, CA/New Delhi: Sage, 2000, p. 177 as quoted in Grix, J., *The Foundations of Research*, Houndmills, Basingstoke/New York: Palgrave Macmillan, 2004, p. 128.

-Rhees, R., *Preliminary Studies for the 'Philosophical Investigations'*, 2nd Edition, Oxford: Blackwell, 1964, p. 87.

-Robertson, A.H., *Human Rights In Europe*, Manchester: Manchester University Press, 2nd Edition, 1977.

-Robertson, A.H., and Merrills, J.G., *Human Rights in the World*, Manchester/New York: Manchester University Press, 4th Edition, 1996, pp. 1, 28, 156.

-Rosenne, S., *Breach of Treaty*, Cambridge: Grotius, 1985.

-Rousseau, J.J., *The Social Contract or Principles of Political Right* [1762] in Adler, M.J., (ed.), *Great Books of the Western World*, Chicago: The University of Chicago/ Encyclopaedia

Britannica, Inc., 2nd Edition, 1990, Book I: Ch. 6, pp. 391-392, Ch. 7, pp. 392-393, Book II: Ch. 8, p. 402.

-Samuel, G., *Epistemology and Method in Law*, Aldershot: Dartmouth, 2003, pp. 106, 120.

-Seidman, A., and Seidman, R.B., *State and Law in the Development Process: Problem Solving and Institutional Change in the Third World*, Basingstoke: Macmillan, 1994, pp. 44-46.

-Shakespeare, W., *Hamlet*, act 3, scene 2 as quoted in Fontana, A., and Frey, J.H., 'The Interview: From Structured Questions to Negotiated Text' in Denzin, N.K. and Lincoln, Y.S., (eds.), *Collecting and Interpreting Qualitative Materials*, London/ Thousand Oaks, CA/ New Delhi: Sage, 2nd Edition, 2003, p. 61.

-Shaw, M.N., *International Law*, 5th Edition, 2003, Cambridge: Cambridge University Press, pp. 310, 812, 839, 871.

-Silverman, D., *Doing Qualitative Research: A Practical Handbook*, London/ Thousand Oaks, CA/ New Delhi: Sage, 2000, p. 11.

-Smith, A., *An Inquiry into the Nature and Causes of the Wealth of Nations* [1776], Book 1, Ch. 1, para. 1 in Campbell, R.H., Skinner, A.S., and Todd, W.B., (eds.), *An Inquiry into the Nature and Causes of the Wealth of Nations*, Oxford: Clarendon Press, Inc., 1976, p. 13 (in the original text).

-Steiner, H.J. & Alston, P., *International Human Rights in Context: Law, Politics, Morals*, 2nd Edition, 2000, Oxford: Oxford University Press, pp. 275, 276.

-Steiner, H.J., Vagts, D.F., Koh, H.H., *Transnational Legal Problems: Materials and Text*, 4th Edition, 1994, Westbury, N.Y.: Foundation Press Inc., p. 273.

-Terence, *Phormio* (II, 3, 14)

-Torremans, P.L.C., *Legal Convergence in the Enlarged Europe of the New Millenium*, 2000, The Hague/Boston/London: Kluwer Law International, p. 28.

-Twining, W., *Globalisation & Legal Theory*, London/Edinburgh/Dublin: Butterworths, 2000, pp. 73-74, 175.

-Van Erp, S., 'Different Degrees of Convergence: A Comparison of Tort Law (Example: *Fairchild v. Glenhaven Funeral Services*) and Property Law', (October 2002) *Electronic Journal of*

Comparative Law, Vol. 6.3, p.1; the article is accessible at http://www.ejcl.org/63/art63-4.doc

-Von Jhering, R., *Geist des römischen Rechts*, Part I, 9th Edition, 1955, p. 8f.

-Watson, A., *Law Out of Context*, Athens, Ga.: University of Georgia Press, 2000, p. 1.

-Watson, A., *Legal Transplants*, Edinburgh: Scottish Academic Press Ltd, 1974, p. 21.

-Watson, A., *Roman Law and Comparative Law*, University of Georgia Press, Athens, Georgia, 1991, p. 97.

-Watson, A., *The Evolution of Law*, Oxford: Blackwell, 1985.

-Wheare, K.C., Sir, *Modern Constitutions*, 2nd Edition, 1966, Oxford: Oxford University Press, p. 1.

-White, F., *Commercial Law*, Dublin: Thomson Round Hall, 2002.

-Whitty, N., Murphy, T., and Livingstone, S., *Civil Liberties Law: The Human Rights Act Era*, London: Butterworths, 2001, p. 7.

-Wiener, J., *Globalisation and the Harmonisation of Law*, 1999, London: Pinter, pp. 161, 165.

-Woodiwiss, A., *Making Human Rights Work Globally*, London/ Portland, Oregon/ Sydney: Glasshouse Press, 2003, pp. vii, viii, 1, 5, 18.

-Yourow, H.C., The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence, The Hague/London/Boston: Kluwer Law International, 1996, pp. 13, 46, 113.

-Zimmermann, R., and Whittaker, S., *Good Faith in European Contract Law*, Cambridge: Cambridge University Press, 2000, pp. 18-20.

-Zweigert, K. & Kötz, H., *An Introduction to Comparative Law*, 3rd Edition, 1998, Oxford: Oxford University Press, pp. 2, 3, 6-12, 10, 11, 15, 17, 18, 21, 21-24, 24-28, 24-31, 33, 34, 36-40, 37, 40, 41, 42, 64-65, 90, 91, 100, 114, 117-118, 145, 203-204, 299.

ARTICLES IN THE BIBLIOGRAPHY

-Abdella Doumato, E., 'The Ambiguity of *Shari'a* and the Politics of 'Rights' in Saudi Arabia' in Afkhami, M., (ed.), *Faith & Freedom: Women's Human Rights in the Muslim World*, London: I.B. Tauris Publishers, 1995, p. 155.

-Afkhami, M., 'Introduction' in Afkhami, M., (ed.), *Faith & Freedom: Women's Human Rights in the Muslim World*, London: I.B. Tauris Publishers, 1995, p. 9.

-An-na'im, A., 'The Dichotome between Religious and Secular Discourse in Islamic Societies' in Afkhami, M., (ed.), *Faith & Freedom: Women's Human Rights in the Muslim World*, London: I.B. Tauris Publishers, 1995, pp. 51, 58-59.

-Aoki, H., 'Nobushige Hozumi: A Skillful Transplanter of Western Legal Thought into Japanese Soil' in Riles, A., *Rethinking the Masters of Comparative Law*, Oxford/Portland, Oregon: Hart Publishing, 2001, p. 130.

-Ault, H.J., and Glendon, M.A., 'The Importance of Comparative Law in Legal Education: United States – Goals and Methods of Legal Comparison' in Hazard, J.N., and Wagner, W.J., (eds.), *Law in the USA in Social and Technological Revolution (*Bruylant, Brussels, 1974), p. 69.

-Baasch Andersen, C., 'Uniformity in the CISG in the First Decade of its Application' in Fletcher, I., Mistelis, L., and Cremona, M., (eds.), *Foundations and Perspectives of International Trade Law*, 2001, London: Sweet & Maxwell, p. 289ff.

-Basedow, J., 'The Effects of Globalisation on Private International Law' in Basedow, J., and Kono, T., (eds.), *Legal Aspects of Globalisation*, The Hague/London/Boston: Kluwer Law International, 2000, pp. 4-6.

-Bell, J., 'Comparing Public Law' in Harding, A., & Örücü, E., (eds.), *Comparative Law in the 21st Century*, 2002, The Hague: Kluwer Law International, p. 236.

-Bell, J., 'Property and Legal Culture in France', in Birks, P., and Pretto, A., *Themes in Comparative Law: In Honour of Bernard Rudden*, Oxford: Oxford University Press, 2002, pp. 88-89, 95.

-Bernhardt, R., 'The Convention and Domestic Law' in Macdonald, J., R. St., Matscher, F., and Petzold, H., (eds.), *The European System for the Protection of Human Rights*, Dordrecht/Boston/London: Martinus Nijhoff Publishers, 1993, p. 32.

-Binchy, W., 'Incorporation of European Convention on Human Rights into Irish domestic law' in Sarkin, J., and Binchy, W. (eds.), *The Administration of Justice: Current Themes in Comparative Perspective*, Dublin: Four Courts Press, 2004, pp. 185-186, 187, 191, 195-196, 196, 200-201.

-Bolin Pennegård, A.M., 'Overview over Human Rights – the Regime of the UN', in Alfredsson, G., Grimheden, J., Ramcharan, B.G., and de Zayas, A. (eds.), *International Human Rights Monitoring* Mechanisms, 2001, the Hague/London: Martinus Nijhoff Publishers, p. 20.

-Bonell, M.J., 'General provisions: Article 7', in Bianca, C.M. & Bonell, M.J. (eds.), *Commentary on the International Sales Law: The 1980 Vienna Convention*, 1987, Milan: Giuffrè, p. 73.

-Connors, J., 'An Analysis and Evaluation of the System of State Reporting' in Bayefsky, A.F., *The UN Human Rights Treaty System in the 21st Century*, The Hague/London/Boston: Kluwer Law International, 2000, p. 15.

-Cotterrell, R., 'Comparatists and sociology' in *Comparative Legal Studies: Traditions and Transitions*, edited by Legrand, P., and Munday, R.,.Cambridge: Cambridge University Press, 2003.

-Cotterrell, R., 'Is There a Logic of Legal Transplants?' and Friedman, L., 'Some Comments on Roger Cotterrell and Legal Transplants' in Nelken, D., and Feest, J., (eds.), *Adapting Legal Cultures*, Oxford, Hart Publishing, 2001.

-Cotterrell, R., 'Seeking Similarity, Appreciating Difference: Comparative Law and Communities' in Harding, A., and Örücü, E., (eds.), *Comparative Law in the 21st Century*, The Hague: Kluwer Law International, 2001, pp. 38, 38-39, 39, 42.

-Cox, N., 'Judicial Activism, Constitutional Interpretation and the Problem of Abortion. *Roe v. Wade* (1973) *And X v. A.G.* (1992)' in O'Dell, E., (ed.), *Leading Cases of the Twentieth Century*, Dublin: Round Hall Sweet Maxwell, 2000, pp. 237-254.

-Dacoronia, E., 'The evolution of the Greek civil law: from its Roman-Byzantine origins to its contemporary European orientation' in MacQueen, H.L., Vaquer, A., and Espiau Espiau, S. (eds.), *Regional Private Laws & Codification in Europe*, 2003, Cambridge: Cambridge University Press, p. 299.

-De Witte, B., 'Direct Effect, Supremacy, and the Nature of the Legal Order' in Craig, P., and De Búrca, G., (eds.), *The Evolution of EU Law*, Oxford: Oxford University Press, 1999, pp. 177ff, 189-190.

-Delmas-Marty, M., 'Comparative Law and the Internationalisation of Law in Europe' in Van Hoecke, M. (ed.), *Epistemology and Methodology of Comparative Law*, Oxford/Portland, Oregon: Hart Publishing, 2004, pp. 248, 252.

-Douzinas, C., 'Justice and Human Rights in Postmodernity' in Gearty, C., and Tomkins, A., (eds.), *Understanding Human Rights*, London: Pinter, 1996, p. 115.

-Eisenberg, M.A., 'The Unification of Law' in Bussani, M., and Mattei, U., (eds.), *The Common Core of European Private Law*, The Hague/London/New York: Kluwer Law International, 2003, p. 36ff.

-Farley, J., 'Canada' in Norton Rose, *Norton Rose on Cross-Border Security*, London: Butterworths, 2000, p. 23 and in particular p. 43 *et seq.*

-Fennelly, N., 'The Dangerous Idea of Europe? *Van Gend En Loos* (1963)' in O'Dell, E., (ed.), *Leading Cases of the Twentieth Century*, Dublin: Round Hall Sweet Maxwell, 2000, pp. 220-236.

-Fodor, J., 'Disunity of Science as Working Hypothesis' in (1974) 28 *Synthese* 77, reprinted as 'Special Sciences' in Boyd, R., Gasper, P., and Trout, J.D., *The Philosophy of Science*, Cambridge, Mass./London: MIT Press, 1991, pp. 429-441.

-Foster, Nicholas, 'Transmigration and Transferability of Commercial Law in a Globalised World' in Harding, A. & Örücü, E., (eds.), *Comparative Law in the 21st Century*, 2002, The Hague: Kluwer Law International, pp. 58-60, 66.

-Gessner, V., 'The Transformation of European Legal Cultures' in Gessner, V., Hoeland, A., and Varga, C., (eds.), *European Legal Cultures*, Aldershot: Dartrmouth Publishing Company Limited, 1996, pp. 513, 516.

-Glenn, H.P., 'Legal Cultures and Legal Traditions' in Van Hoecke, M., (Ed.), *Epistemology and Methodology of Comparative Law*, Oxford and Portland, Oregon: Hart Publishing, 2004, p. 7.

-Glenn, H.P., 'North America as a Medieval Legal Construction' in Bussani, M. and Mattei, U., (eds.), *The Common Core of European Private Law*, The Hague/London/New York: Kluwer Law International, 2003, pp. 51, 59.

-Goldberg, D., and Attwooll, E., 'Legal Orders, Systemic Relationships and Cultural Characteristics: Towards Spectral Jurisprudence' in Örücü, E., Attwool, E. & Coyle, S., (eds.), *Studies in Legal Systems: Mixed and Mixing*, The Hague/London/Boston: Kluwer Law International, 1996, p. 318.

-Hamacher, W., 'One 2 Many Multiculturalisms', in De Vries and Weber, S., (eds.), *Violence, Identity, and Self-Determination*, Stanford: Stanford: Stanford University Press, 1997, pp. 295-296.

-Harlow, C., 'Voices of Difference in a Plural Community' in Beaumont, P., Lyons, C., and Walker, N., (eds.), *Convergence and Divergence in European Public Law*, Oxford/Portland, Oregon: Hart Publishing, 2002, pp. 203-205.

-Hastrup, K., 'Accomodating Diversity in a Global Culture of rights: An Introduction' in Hastrup, K., (ed.), *Legal Cultures and Human Rights: The Challenge of Diversity*, Houndmills, The Hague: Kluwer Law International, 2001, pp. 16-17.

-Henkin, L., 'International Law: Politics, Values and Functions' in *216 Collected Courses of the Hague Law Academy of International Law (Vol. IV, 1989)*, p. 215.

-Hogan, G., 'Incorporation of the ECHR: Some Issues of Methodology and Process' in Kilkelly, U., (ed.), *ECHR and Irish Law*, Bristol: Jordans, 2004, pp. 15-17.

-Hussein, H.T., 'Human Rights – The Asian Perspective' in Patman, R.G., (ed.), *Universal Human Rights?*, Houndmills, Basingstoke, Hampshire: Macmillan, 2000, p. 76.

-Hyland, R., 'The American Experience: Restatements, the UCC, Uniform Laws, and Transnational Coordination' in Hartkamp, A., Hesselink, M., Hondius, E., Joustra, C., du Perron, E. & Veldman, M., (eds.), *Towards a European Civil Code*, New York: Kluwer Law International, 3rd Edition, 2004, p. 53ff.

-Kaërdi, M., 'Estonia and the new civil law' in MacQueen, H.L., Vaquer, A., and Espiau Espiau, S. (eds.), *Regional Private Law & Codification in Europe*, 2003, Cambridge: Cambridge University Press, pp. 257, 258, 259.

-Kandiyoti, D., 'Reflections on the Politics of Gender in Muslim Societies: From Nairobi to Beijing' in Afkhami, M., (ed.), *Faith & Freedom: Women's Human Rights in the Muslim World*, London: I.B. Tauris Publishers, 1995, p. 20.

-Katsuta, A., 'Japan: A Grey Legal Culture' in Örücü, E., Attwool, E. & Coyle, S., (eds.), *Studies in Legal Systems: Mixed and Mixing*, The Hague/London/Boston: Kluwer Law International, 1996, pp. 251, 259, 260, 261.

-Kawashima, T., 'Japanese Way of Legal Thinking' (excerpt from the (1979) 7:2 *International Journal of Law Libraries*, pp. 127-131) in Varga, C., (ed.), *Comparative Legal Cultures*, Aldershot: Dartmouth, 1992, p. 395.

-Kötz, H., 'The Trento Project and its Contribution to the Europeanization of Private Law' in Bussani, M., and Mattei, U., (eds.), *The Common Core of European Private Law*, The Hague/London/New York: Kluwer Law International, 2003, p. 212.

-Lansdown, G., 'The Reporting Procedures under the Convention on the Rights of the Child' in Alston, P. and Crawford, J., *The Future of UN Human Rights Treaty Monitoring*, 2000, Cambridge: Cambridge University Press.

-Launay, R., 'Montesquieu: The Specter of Despotism and the Origins of Comparative Law' in Riles, A., (ed.), *Rethinking the Masters of Comparative Law*, Oxford/Portland-Oregon: Hart Publishing, 2001, pp. 23-25.

-Legrand, P., 'Public Law, Europeanisation, and Convergence: Can Comparatists Contribute?' in Beaumont, P., Lyons, C., and Walker, N., (eds.), *Convergence and Divergence in European Public Law*, Oxford/Portland, Oregon: Hart Publishing, 2002, pp. 226.

-Legrand, P., 'The Same and the Different' in Legrand, P. and Munday, R. (eds.), *Comparative Legal Studies: Traditions and Transitions*, Cambridge: Cambridge University Press, 2003, pp. 246, 281, 288, 293, 299, 302, 303.

-Lester, A., 'Freedom of Expression' in Macdonald, R., St. J., Matscher, F., and Petzold, H., (eds.), *The European System for the Protection of Human Rights*, Dordrecht/Boston/London: Martinus Nijhoff Publishers, 1993,pp. 489-490.

-Łazowski, A., 'Approximation of Laws' in Ott, A., and Inglis, K., (eds.), *Handbook on European Enlargement: A Commentary on the Enlargement Process*, The Hague: T·M·C·Asser Press, 2002, pp. 635-637.

-Lyons, C., 'Perspectives on Convergence Within the Theatre of European Integration' in Beaumont, P., Lyons, C., and Walker, N., (eds.), *Convergence and Divergence in European Public Law*, Oxford/Portland, Oregon: Hart Publishing, 2002, pp. 83-88.

-Macdonald, J., R. St., 'The Margin of Appreciation' in Macdonald, J., R. St., Matscher, F., and Petzold, H., (eds.), *The European System for the Protection of Human Rights*, Dordrecht/Boston/London: Martinus Nijhoff Publishers, 1993, pp. 83, 84, 87, 122.

-Mahoney, P., 'Principles of Judicial Review as Developed by the European Court of Human Rights: Their Relevance in a National Context', in Betten, P., (ed.), *The Human Rights Act 1998- What it Means*, The Hague, London: M. Nijhoff Publishers, 1999, p. 82.

-Matscher, F., 'Methods of Interpretation of the Convention' in Macdonald, J., R. St., Matscher, F., and Petzold, H., (eds.), *The European System for the Protection of Human Rights*, Dordrecht/Boston/London: Martinus Nijhoff Publishers, 1993, pp. 75-76.

-Mayer, A.E., 'Rhetorical Strategies and Official Policies on Women's Rights: The Merits and Drawbacks of the New World Hypocrisy' in Afkhami, M., (ed.), *Faith & Freedom: Women's Human Rights in the Muslim World*, London: I.B. Tauris Publishers, 1995, p. 114.

-McCrudden, C., 'The Impact on Freedom of Speech' in Markesinis, B.S., *The Impact of the Human Rights Bill on English Law*, Oxford: Oxford University Press, 1998, pp. 104-109.

-Mernissi, F., 'Arab Women's Rights and the Muslim State in the Twenty-first Century: Reflections on Islam as Religion and State' in Afkhami, M., (ed.), *Faith & Freedom: Women's Human Rights in the Muslim World*, London: I.B. Tauris Publishers, 1995, p. 33.

-Merryman, J.H., 'On the Convergence (and Divergence) of the Civil Law and the Common Law', in Merryman, J. H. (ed.), *The Loneliness of the Comparative Lawyer and Other Essays in Foreign and Comparative Law*, The Hague/London/Boston: Kluwer International, 1999, p. 17ff, 27.

-Mistelis, L., 'Is Harmonisation a Necessary Evil? The Future of Harmonisation and New Sources of International Trade Law' in Fletcher, I., Mistelis, L. and Cremona, M. (eds.), *Foundations and Perspectives of International Trade* Law, Sweet & Maxwell, 2001, pp. 4-27 and in particular pp. 20-22.

-Moccia, L., 'Historical Overview on the Origins and Attitudes of Comparative Law' in De Witte, B., and Forder, C., (eds.), *The Common Law of Europe and the Future of Legal Education* (Metro, Kluwer Law International, Deventer, 1992), p. 618.

-Moens, G.A. and Biffot, R., 'Convergence of the Legal Systems in the 21st Century' in Moens, G.A. and Biffot, R. (eds.), *The Convergence of Legal Systems in the 21st Century: An Australian Approach*, Brisbane: Copyright Publishing, 2002, p. 5.

-Münch, R., 'Project Europe' in Gessner, V., Hoeland A., and Varga, C., (eds.), *European Legal Cultures*, Aldershot: Dartrmouth Publishing Company Limited, 1996, pp. 524-525.

-Munday, R., 'Accounting for an Encounter' in Legrand, P. and Munday, R. (eds.), *Comparative Legal Studies: Traditions and Transitions*, Cambridge: Cambridge University Press, 2003, p. 26.

-Nebbia, P., 'Unfair Terms in Consumer Contracts: An Anglo-italian Comparison' in van Hoecke, M., and Ost, F., (eds.), *The Harmonisation of European Private Law*, Oxford/Portland, Oregon: Hart Publishing, 2000, p. 186.

-Nelken, D., 'Legal Transplants and Beyond: Of Disciplines and Metaphors' in Harding, A. & Örücü, E., (eds.), *Comparative Law in the 21st Century*, 2002, The Hague: Kluwer Law International, pp. 21, 26-27.

-O'Boyle, M., 'Reflections on the Effectiveness of the European System for the Protection of Human Rights' in Bayefsky, A.F., *The UN Human Rights Treaty System in the 21st Century*, The Hague/London/Boston: Kluwer Law International, 2000, p. 169ff.

-Oppenheim, P., and Putnam, H., (1958) 2 *Minnesota Studies in the Philosophy of Science*, pp. 3-36 as reprinted in Boyd, R., Gasper, P., and Trout, J.D., *The Philosophy of Science*, Cambridge, Mass./London: MIT Press, 1991, pp. 405-427.

-Örücü, E., in 'Unde Venit, Quo Tendit Comparative Law' in Harding, A. & Örücü, E., *Comparative Law in the 21st Century*, 2002, The Hague: Kluwer Law International, pp. 1, 13.

-Patman, R.G., 'International Human Rights after the Cold War' in Patman, R.G., (ed.), *Universal Human Rights?*, Houndmills, Basingstoke, Hampshire: Macmillan, 2000, pp. 14-15.

-Raz, J., 'On the Authority and Interpretations of Constitutions. Some Preliminaries' in Alexander, L., (ed.), *Constitutionalism. Philosophical Foundations*, Cambridge/New York: Cambridge University Press, 1998, p. 152-193.

-Risse, T., and Sikkink, K., 'The socialization of international human rights norms into domestic practices: introduction' in Risse, T., Ropp, S.C., and Sikkink, K., *The Power of Human*

Rights: International Norms and Domestic Change, Boulder, Cambridge: Cambridge University Press, 1999, p. 1.

-Robertson, R., 'Glocalisation: Time-Space and Homogeneity-Heterogeneity' in Featherstone, M., Lash, S., and Robertson, R., (eds.), *Global Modernities*, London: Sage, 1995, pp. 25-44.

-Samuel, G., 'Epistemology and Comparative Law: Contributions from the Sciences and Social Sciences' in Van Hoecke, M., (ed.), *Epistemology and Methodology of Comparative Law*, Oxford and Portland Oregon: Hart Publishing, 2004, pp. 44, 45-46 and 74.

-Schmidt, M.G., 'Reservations to United Nations Human Rights Treaties – The Case of the Covenants' in Gardner, J.P., (ed.), *Human Rights as General Norms and a State's Right to Opt Out*, London: British Institute of International and Comparative Law, 1997, p. 25.

-Schmitthoff, C.M., 'International business law: a new law merchant', *Current Law and Social Problems*, volume 129, 1961; this was reprinted in Chia-Jui Ceng (ed.), *Clive M. Schimtthoff's Select Essays on International Trade*, London: Martinus Nijhoff Publishers, 1988, pp. 20-37, p. 20.

-Schmitthoff, C.M., 'International business law: a new law merchant' as reprinted in Chia-Jui Ceng (ed.), *Clive M. Schimtthoff's Select Essays on International Trade*, London: Martinus Nijhoff Publishers, 1988, pp. 34-36

-Schmithoff, C.M., 'The Unification of the law of international trade', *Journal of Business Law*, 1968, pp. 105-119; this was reprinted in Chia-Jui Ceng (ed.), *Clive M. Schimtthoff's Select Essays on International Trade*, London: Martinus Nijhoff Publishers, 1988, pp. 105-119.

-Schmitthoff, C.M., 'The Unification of international trade', *The Unification of the Law of International Trade*, Handelshögskolans Skrifter 1964-1965, Gothenburg School of Economics and Business Administration Publication, 1964, pp. 5-28 as reprinted in Chia-Jui Ceng, *Clive M. Schimtthoff's Select Essays on International Trade*, London: Martinus Nijhoff Publishers, 1988, fn. 14, pp. 170-187.

-Shaaban, B., 'The Muted Voices of Women Interpreters' in Afkhami, M., (ed.), *Faith & Freedom: Women's Human Rights in the Muslim World*, London: I.B. Tauris Publishers, 1995, p. 64.

-Shaheed, F., 'Networking for Change: The Role of Women's Groups in Initiating Dialogue on Women's Issues' in Afkhami, M., (ed.), *Faith & Freedom: Women's Human Rights in the Muslim World*, London: I.B. Tauris Publishers, 1995, p. 78.

-Steiner, J., 'Subsidiarity under the Maastricht Treaty' in O'Keefe, D. and Twomey, PM. (eds), *Legal Issues of the Maastricht Treaty*, 1994, London: Chancery.

-Steiner, 'The Problems of Legal Translation' in Banakas, E.K., (ed.), *United Kingdom Law in the 1980's*, London: United Kingdom National Committee of Comparative Law, 1988, p. 239.

-Takahashi, O., 'The Circuits and Physical Design of the Synergistic Processor Element of a CELL Processor' *IEEE Symposium on VLSI Circuits, Digest of Technical Papers*, v 2005, *2005 Symposium on VLSI Circuits - Digest of Technical Papers*, 2005, pp. 20-23.

-Temple Lang, J., 'The Core of the Constitutional Law of the Community – Article 5 EC' in Gormley, L., (ed.), *Current and Future Perspectives on EC Competition Law*, London/The Hague/Boston: Kluwer Law International, 1997, p. 47.

-Tistounet, E., 'The Problem of Overlapping among Different Treaty Bodies' in Alston, P., and Crawford, J., *The Future of UN Human Rights Treaty Monitoring*, 2000, Cambridge: Cambridge University Press.

-Van Hoecke, M., 'The Harmonisation of Private Law in Europe: Some Misunderstandings' in Van Hoecke, M., and Ost, F., (eds.), *The Harmonisation of European Private Law*, Oxford/Portland, Oregon: Hart Publishing, 2000, pp. 8, 9.

-Walsh, B., 'Reflections on the Effects of Membership of the European Communities in Irish Law' in Capotorti *et al.* (eds.), *Du Droit International au Droit d l'integration: Liber Amicorum Pierre Pescatore*, Baden-baden, 1987, p. 805 as quoted in Casey, J., *Constitutional Law in Ireland*, Dublin: Round Hall Sweet & Maxwell, 3rd Edition, 2000, pp. 198-199.

-Werro, F., 'Harmonization of the Rules of Private Law between Civil Law and Common Law Countries' in Gessner, V., Hoeland, A., and Varga, C., (eds.), *European Legal Cultures*, Aldershot: Dartrmouth Publishing Company Limited, 1996, pp. 164-166.

-Wieruszewski, R., 'National Implementation of Human Rights' in Rosas, A., Helgesen, J., and Gomien, D., (eds.), *Human Rights in a Changing East-West Perspective*, London/New York: Pinter Publishers, 1990, p. 264.

-Willens, J.C.M., 'The Children's Law of Nations in the Trias Pedagogica' in Willens, J.C.M., (ed.), *Developmental and Autonomy Rights of Children: Empowering Children, Caregivers and Communities*, Antwerp/Oxford/New York: Intersentia, 2002, pp. 71-72.

-Zimmermann, R., *Roman Law, Contemporary Law, European Law: The Civilian Tradition Today*, Oxford/Portland: Hart Publishing, 2001, p. 129.

-Zweigert, K., 'Different Paths to Identical Solutions: Some Comments on Comparative Law' in Gessner, V., Hoeland, A., and Varga, C., (eds.), *European Legal Cultures*, Aldershot: Dartrmouth Publishing Company Limited, 1996, pp. 160-164.

-'Comments on Applebaum and Nottage' in J. Feest and V. Gessner (eds.), *The Proceedings of the 2nd Onati Workshop on Changing Legal Cultures* (Onati Institute, Spain, 1998), pp. 139-149.

ARTICLES IN SCIENTIFIC JOURNALS & REVIEWS

-Anthony, G., 'Clustered Convergence? European Fundamental Rights Standards in Irish and UK Public Law' (2004) *Public Law* 282, p. 288.

-Benvenisti, E., 'Margin of Appreciation, Consensus, and Universal Standards', (1998-1999) 31 *New York University Journal of International Law and Politics* 843, p. 844.

-Bergsten, E., and Miller, A., 'The Remedy of Reduction in Price' (1979) 27 *American Journal of Comparative Law* 255.

-Berkowitz, D., Pistor, K., and Richard, J., 'The Transplant Effect', (2003) 51:1 *American Journal of Comparative Law* 163, p. 168.

-Bonell, M.J. 'Soft Law and Party Autonomy: The Case of the UNIDROIT Principles', (2005) 51 *Loyola Law Review*, p. 229.

-Bridge, M.G., 'Does Anglo-Canadian Contract Law Need a Doctrine of Good Faith?', (1984) 9 *Canadian Business Law Journal* 385, p. 426.

-Bridge, M.G., 'Uniformity and Diversity in the Law of International Sale', (Spring 2003) 15 *Pace International Law Review* 55, pp. 72-86.

-Bright, S., 'Winning the battle against unfair contract terms', (2000) 20:3 *Legal Studies* 331, pp. 331-332, 332, 333.

-Brookman, F., and Pierpoint, H., 'The Implications of the Human Rights Act for Young Suspects and Remand Prisoners in England and Wales', (2002) 1 *Journal of the Institute of Justice and International Studies* 45, p. 45.

-Cheng, W., and Yang, X., 'Inframarginal Analysis of Division of Labor: A Survey', (2004) 55 *Journal of Economic Behavior & Organization* 137, pp. 143, 148.

-Collins, H., 'European Private Law and the Cultural Identity of States', *European Review of Private Law* 1995, pp. 353-365.

-Collins, H., 'Good Faith in European Contract Law', (1994) 14 *Oxford Journal of Legal Studies* 229, p. 249.

-Collins, H., 'Methods and Aims of Comparative Contract Law', (1991) 11 *Oxford Journal of Legal Studies* 396, p. 398.

-Crawford Lichtenstein, C., 'Hard Law v. Soft Law: Unnecessary Dichotomy?', (2001) *The International Lawyer*, pp. 1434-1435.

-De Moor, A., 'Common and Civil Law Conceptions of Contract and European Law of Contract: The Case of the Directive on Unfair Terms in Consumer Contracts', (1995) 3 *European Review of Private Law* 257.

-De Witte, B., 'The Convergence Debate', (1996) 3 *Maastricht Journal of European and Comparative Law* 105.

-Dean, M., 'Unfair Contract Terms: The European Approach', (1993) 56:4 *Modern Law Review* 581, pp. 581, 582, 584, 585, 589-590.

-Denza, E., 'Two Legal Orders: Divergent or Convergent?', (1999) 48 *International and Comparative Law Quarterly* 257.

-Di Robilant, A. 'Genealogies of Soft Law', (2006) 54 *American Journal of Comparative Law*, p. 499.

-Ebbers, G., and McLeay, S., 'Acccounting and *Volksgeist* – Territorial Claims on Accounting Regulation', (1997) 1 *Journal of Management and Governance* 67, pp. 67, 71.

-Edwards, R.A., 'Reading Down Legislation under the Human Rights Act', (2000) 20 *Legal Studies* 353.

-Egan, S., 'The European Convention on Human Rights Act 2003: A Missed Opportunity for Domestic Human Rights Litigation' (2003) 25 *Dublin University Law Journal* 230, pp. 231, 233, 234-236, 237, 238-239, 245, 247, 248.

-Ewing, K.D., 'The Human Rights Act and Parliamentary Democracy', (1999) 62 *Modern Law Review* 79.

-Feldman, D., 'The Human Rights Act 1998 and Constitutional Principles', (1999) 19 *Legal Studies* 165, pp. 165, 178, 195.

-Ferrari, F., 'Applying the CISG in a Truly Uniform Manner: *Tribunale di Vigevano* (Italy), 12 July 2000', (2001-1) *Uniform Law Review / Revue de Droit Uniforme* (2001-1) 203, pp. 203-209.

-Ferrari, F., 'The Relationship Between the UCC and the CISG and the Construction of Uniform Law', (1996) 29 *Loyola of Los Angeles Law Review* 102, pp. 1024-1028.

-Ferrari, F., 'Uniform Interpretation of The 1980 Uniform Sales Law', (1994-95) 24 *Georgia Journal of International and Comparative Law* 183, pp. 198-206.

-Fischer, D.D., 'Reporting under the Convention on Civil and Political Rights: The First Five Years of the Human Rights Committee', 76 *American Journal of International Law*, 1982, p. 142.

-Flechtner, H.M., 'The Several Texts of the CISG in a Decentralized System: Observations on Translations, Reservations and other Challenges to the Uniformity Principle in Article 7(1)', (1998) 17 *Journal of Law and Commerce* 187, pp. 216-217.

-Fodor, J., 'Special Sciences: Still Autonomous After All These Years?, (1997) 11 *Philosophical Perspectives* 149-163.

-Friedman, L., 'Borders: On the Emerging Sociology of Transnational Law' (1996) 32 *Stanford Journal of International Law* 65.

-Friedman, L., 'Is There a Modern Legal Culture?', 7 *Ratio Juris* (1994), p. 117.

-Gearty, C., 'Reflections on Human Rights and Civil Liberties in Light of the United Kingdom's Human Rights Act 1998', (2001-2002) 35 *University of Richmond Law Review* 1, p. 6.

-Ghandi, P.R., 'The Human Rights Committee and the Right to Communication', 57 *British Year Book of International Law*, 1986, p. 201.

-Goff, Lord, 'The Future of the Common Law' (1997) 46 *International and Comparative Law Quarterly* 745, pp. 747-748.

-Grosswald Curran, V., 'Cultural Immersion, Difference and Categories in U.S. Comparative Law', 46 *American Journal of Comparative Law* (1998), see fn., p. 43.

-Hogan, G., 'The Belfast Agreement and the Future Incorporation of the European Convention on Human Rights in the Republic of Ireland' (1999) (Jan/Feb) *Bar Review* 205.

-Hohmann, H., 'The Nature of the Common Law and the Comparative Study of Legal Reasoning', (1990) 38 *American Journal of Comparative Law* 143.

-Honnold, J., 'The Sales Convention in Action – Uniform International Words: Uniform Application?', (1988) 8 *Journal of Law and Commerce* 207, pp. 211-212.

-Jhabvala, F., 'The Practice of the Covenant's Human Rights Committee, 1976-1982: Review of State Party Reports', 6 *Human Rights Quarterly*, 1984, p. 81.

-Jobin, P.G., 'La Modernité du Droit Commun des Contrats dans le Code Civil du Québec : Quelle Modernité ?' [2000] *Revue Internationale De Droit Compa*ré 49.

-Kahn-Freund, O., 'On Uses and Misuses of Comparative Law' (1974) 37 *Modern Law Review* 1, pp. 3-4, 5-6.

-Kazimierska, A., 'The Remedy of Avoidance', (1999-2000) *Pace Review of the Convention on Contracts for the International Sale of Goods* 79, 175.

-Kokkini-Iatridou, D., 'Some methodological Aspects of Comparative Law, The Third Part of a (Pre-) Paradigm', *Netherlands International Law Review*, 1986, p.158ff.

-Koopmans, T., 'Comparative Law and the Courts' (1996) 45 *International and Comparative Law Quarterly* 545.

-Lambert, E., 'Sources du droit compare ou supranational: législation uniforme et jurisprudence comparative', in *Recueil d'études sur les sources du droit en l'honneuer de François Gény, vol. III*, Paris, Sirey, 1934, p. 502.

-Langrod, G., 'Quelques réflexions méthodologiques sur la comparaison en science juridique', *Revue Internationale de Droit Comparé*, 1957, p. 366ff.

-Legrand, P., 'Against a European Civil Code' (1997) 60 *Modern Law Review* 44.

-Legrand, P., 'European Legal Systems Are Not Converging' (1996) 45 *International and Comparative Law Quarterly* 52, pp. 56, 60, 78.

-Legrand, P., 'John Henry Merryman and Comparative Legal Studies: A Dialogue', (1999) 47 *American Journal of Comparative Law*, pp. 21-2.

-Legrand, P., 'Structuring European Community Law: How tacit Knowledge Matters', (1998) 21 *Hastings International & Comparative Law Review* 871, p. 872.

-Legrand, P., 'The Impossibility of "Legal Transplants"', (1997) 4 *Maastricht Journal of European and Comparative Law*, pp. 111 ff.

-Lockwood, B.B., *et al.*, 'Working Paper for the Committee of Experts on the Limitations Provisions – Symposium: Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights', (1985) 7 *Human Rights Quarterly* 35, p. 67.

-MacDonald, E., 'The Emperor's Old Clauses: Unincorporated Clauses, Misleading Terms and the Unfair Terms in Consumer Contracts Regulations', (1999) 58:2 *Cambridge Law Journal* 413, p. 416.

-Marengo, L., & Dosi, G., 'Division of Labor, Organizational Coordination and Market Mechanisms in Collective Problem-solving', (2005) 58 *Journal of Economic Behavior & Organization* 303, p. 309.

-Markesinis, B. & Fedtke, J., 'The Judge as Comparatist', (2005) 80 *Tulane Law Review* 11.

-Markesinis, B.S., 'Comparative Law – A Subject in Search of an Audience', 53 *Modern Law Review* (1990) 1.

-Markesinis, B.S., 'Judge, Jurist and the Study and Use of Foreign Law', LQR, Vol. 109 [October 1993] 622.

-Markesinis, B.S., 'The Destructive and Constructive Role of the Comparative Lawyer', *Rabels Zeitscrift für ausländisches und internationales Privatrecht*, 1993, p. 443.

-Markesinis, B.S., 'Why a Code is Not the Best Way to Advance the Cause of European Legal Unity', (1997) 5 *European Review of Private Law* 519, p. 520.

-Mattei, U., 'An Opportunity Not to be Missed: The Future of Comparative Law in the United States', (1998) 46 *American Journal of Comparative Law* 709, p. 715.

-McCrudden, C.H., 'A Common Law of Human Rights: Transnational Judicial Conversations on Constitutional Rights', (2000) 20 *Oxford Journal of Legal Studies* 499.

-McGoldrick, D., 'The United Kingdom's Human Rights Act 1998 in Theory and Practice', (2001) 50 *International & Comparative Law Quarterly* 901, pp. 901, 910, 924, 952.

-Miller, A.S., 'Toward a Definition of "the" Constitution', (1983) 8 *University of Dayton Law Review* 633, p. 637.

-Munday, R.J.C., 'The Uniform Interpretation of International Conventions', 27 *International and Comparative Law Quarterly* 450 (1978).

-Myers, M.L., 'Division of Labour as Principle of Social Cohesion', (1967) 33 *The Canadian Journal of Economics and Political Science* 432, p. 434.

-Negishi, T., 'Adam Smith's Division of Labor and Structural Changes', (2000) 11 *Structural Change and Economic Dynamics* 5, p. 6.

-Nottage, L., 'Comment on Civil Law and Common Law: Two Different Paths leading to the Same Goal', (2001) 32 *Victoria University of Wellington Law Review* 843, p. 847.

-Ogus, A., 'Competition between National Legal Systems: A Contribution of Economic Analysis to Comparative Law', (1999) 48 *International and Comparative Law Quarterly* 405.

-Örücü, E., 'Critical Comparative Law: Considering Paradoxes for Legal Systems in Transition' (2000) 4 *Electronic Journal of Comparative Law*, p. 2.

-Örücü, E., 'Law as Transposition', *International and Comparative Law Quarterly* 51 (2002), p. 205.

-Örücü, E., 'Looking at Convergence through the Eyes of a Comparative Lawyer', (July 2005) *Electronic Journal of Comparative Law*, vol. 9.2 http://www.ejcl.org/92/art92-1.html

-Pham, D.C., *et al.*, 'Overview of the Architecture, Circuit Design, and Physical Implementation of a First-generation Cell Processor', (January, 2006) 41:1 *IEEE Journal of Solid-State Circuits* 179.

-Platsas, A., 'Comparative law as the ideal means of convergence of the national financial systems in the world of globalisation', *Coventry Law Journal*, Vol. 7, Issue No.2, 53, December 2002.

-Platsas, A., 'The Potential Impact of the CISG on the Common Laws of England and the Republic of Ireland: A Legal Anacatatasis of a Trivial Matter of Implementation?: The Lessons of Comparative Law', *Denning Law Journal* (2004-2005) 43, pp. 43-62.

-Platsas, A.E., Book Review (*Comparative Legal Studies: Traditions and Transitions* as edited by Legrand, P., and Munday, R.), *International and Comparative Law Quarterly* 2005 54: 1044-1046, p. 1045.

-Remillard, G., 'Présentation du Projet de Code Civil du Québec' (1991) 22 *Revue Générale de Droit* 5.

-Roth, K., 'The Charade of US ratification of International Human Rights Treaties' 1 *Chicago Journal of International Law* 347 (2000).

-Roth, M. and Happ, R., 'Interpretation of the CISG According to Principles of International Law', (1999) 4 *International. Trade & Business Law Annual* 1, pp. 2-3.

-Rott, P., 'German Sales Law Two Years After the Implementation of Directive 1999/44/EC', (2004) 5 *German Law Journal*, pp. 237-256, 245.

-Rozakis, C.L., 'The European Judge as Comparatist', (2005) 80 *Tulane Law Review* 257.

-Schiemann, K., 'A Response to the Judge as a Comparatist', 80 *Tulane Law Review* 281.

-Schlesinger, R.B., 'The Past and Future of Comparative Law' (1995) 43 *American Journal of Comparative Law* 479.

-Schwelb, E., 'The International Measures of Implementation of the International Covenant on Civil and Political Rights and of the Optional Protocol', 12 *Texas International Law Review*, 1977, p. 141.

-Shany, Y., 'Towards a General Margin of Appreciation in International Law?', (2006) 16 *European Journal of International Law* 907, pp. 909, 909-910.

-Spanogle, J.A. Jr., in 'American Attorneys' Use of International And Comparative Legal Analysis in Everyday Legal Practice' (1993) *Wake Forest Law Review* 1.

-Steyn, Lord, 'Contract Law: Fulfilling the Reasonable Expectations of Honest Men' (1997) 113 *Law Quarterly Review* 433, p. 439.

-Teubner, G., 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences', (1998) 61:1 *Modern Law Review* 11, pp. 11ff, 12, 27-32.

-Von Bertalanffy, L., 'An Outline of General System Theory', (1950) 1:2 *British Journal or the Philosophy of* Science 134-165.

-Wahl, L.M., 'Evolving the Division of Labour: Generalists, Specialists and Task Allocation', (2002) 219 *Journal of Theoretical Biology* 371.

-Watson, A., 'Legal Transplants and European Private Law' *Electronic Journal of Comparative Law*, Vol. 4.4, December 2000, p. 8; the article is accessible at http://www.ejcl.org/44/art44-2.doc .

-Watson, A., 'Legal Transplants and Law reform' (1976) 92 *Law Quarterly Review* 79, 80.

-West, E.G., 'Adam Smith's Two Views on the Division of Labour', (February, 1964) 31:121 *Economica*, New Series 23.

-Zaphiriou, G.A., 'Unification and Harmonization of Law Relating to Global and Regional Trading', (1993-1994) 14 *Northern Illinois University Law Review* 407ff.

-Zedner, L., 'In pursuit of the Vernacular: Comparing Law and Order Discourse in Britain and Germany, (1995) 4 *Social and Legal Studies* 517, p. 519 as quoted in Legrand, P., 'The Same and the Different' in P. Legrand and R. Munday (eds.), *Comparative Legal Studies: Traditions and Transitions*, Cambridge: Cambridge University Press, 2003, p. 281.

-Zweigert, K., 'Des solutions identiques par des voies différentes (Quelques observations en matière de droit comparé)', (1966) 18: 1 *Revue internationale de droit comparé* 5.

-'Council Directive 92/ /EEC of 22 September 1992 on unfair terms in Consumer contracts (common position)' (1992) 15 *Journal of Consumer Policy* 473.

-*EU Food Law Monthly: January 1999*, p. 3.

-*EU Food Law Monthly: June 1997*, p. 9.

ARTICLES IN OTHER PERIODICALS

-'Triumph of the Pygmy State', *The Economist*, November 6th 2003.

MATERIAL PRESENTED IN CONFERENCES, WORKSHOPS ETC

-Bradgate, R., 'Some National Experiences: The Experience in the United Kingdom' in *The Integration of Directive 93/13 into the National Legal Systems,* 1-3 July 1999 EU Conference on the Integration of Directive 93/13 into the National Legal Systems, Brussels, pp. 29-30, 37.

-Collins, B.S.J., 'Report on the practical implementation of Directive 93/13/EEC in the United Kingdom and the Republic of Ireland' in *The Integration of Directive 93/13 into the National Legal Systems,* 1-3 July 1999 EU Conference on the Integration of Directive 93/13 into the National Legal Systems, Brussels, pp. 328-329.

-Goode, R., 'The Concept of Good Faith in English Law' in a presentation at the *Centro di studi e ricerche di diritto comparato e straniero*, Rome, (1992), pp. 1, 2.

-Rettner, J., 'Multi-core to the masses', Parallel Architectures and Compilation Techniques, 2005. PACT 2005. 14th International Conference on 17-21 Sept. 2005.

-Zimmermann, R., 'Breach of Contract and Remedies under the New German Law of Obligations' in a presentation at the *Centro di studi e ricerche di diritto comparato e straniero*, Rome, (2002), p. 1.

OFFICIAL PUBLICATIONS

-COM (2001) 398 final, *Official Journal of the European Union*, c 255/1 of 13 September 2000.

-COM (2004) 657 final, 2004 *Regular Report on Bulgaria's progress towards accession.*

-Commission Proposals 1990 (*Official Journal 1990 c 243/2*) and 1992 (*Official Journal 1992 C 73/7)*

-*Committee of Independent Experts First Report on Allegations regarding Fraud, Mismanagement and Nepotism in the European Commission* (15 March 1999), pp. 11-14, 123-134, 137-139.

-British Institute of Comparative Law, *Comparative Implementation of EU Directives (I) – Insider Dealing and Market Abuse* (City Research Series Number 8, December 2005)

-*Economist, the,* 5th of December 2001, 'Some win, some lose'.

-*Enlargement of the European Union Guide to the Negotiations Chapter by Chapter*, December 2004. Accessible online at http://www.europa.eu.int/comm/enlargement/negotiations/chapters/negotiationsguid.pdf

-European Commission *Report* on the monitoring and testing of ruminants for the presence of transmissible spongiform encephalopathy (TSE) in the EU in 2004, including the results of the survey of prion protein genotypes in sheep breeds, (June 2005), p. 1. Accessible on the internet at http://europa.eu.int/comm/food/food/biosafety/bse/annual_report_tse2004_en.pdf.

-*European Commission Report on sheep intestines and natural casings derived therefrom in regard to risks from animal BSE and TSE in particular* (7 May 2002).

-*European Commission Report on the monitoring and testing of ruminants for the presence of Transmissible Spongiform Encephalopathy (TSE) in 2002* (July 2003).

-*European Commission Report on the monitoring and testing of ruminants for the presence of transmissible spongiform encephalopathy (TSE) in the EU in 2003, including the results of the survey of prion protein genotypes in sheep breeds* (May 2004).

-*European Commission Scientific Steering Committee Complecent to the SSC Opinion 4-5 on small ruminant materials April 2002 on safe sourcing (with special reference to the safety with regard to BSE risks of sheep intestines and casings.)* (adopted by the scientific steering committee at its meeting of 12-13 September 2002).

-*Explanatory Note on the draft of Law 3043/2002*, ch. A, pp. 3-4.

-HL Deb vol. 582 cols. 1275-1276 3 November 1997.

-HL Deb vol. 582 col. 1298 3 November 1997.

-*Human Rights World Watch Report 2003 (Iran)*, pp. 441-450.

-*Human Rights World Watch Report 2003 (Iraq and Iraqi Kurdistan)*, pp. 450-459.

-*Human Rights World Watch Report 2003 (Saudi Arabia)*, pp. 472-481.

-*Human Rights World Watch Report 2003 (Syria)*, pp. 482-488.

-*Human Rights World Watch Report 2003 (Tunisia)*, pp. 488-496.

-IP/03/40 (Brussels, 14th January 2003). Accessible at http://www.europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/03/40|0|RAPID&lg=EN&display=

-IP/04/33 (Brussels, 12th January 2004). Accessible at http://www.europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/04/33|0|RAPID&lg=EN

-IP/06/1008 (Brussels, 18th July 2006). Accessible at http://europa.eu/rapid/pressReleasesAction.do?reference=IP/06/1008&format=HTML&aged=0&language=EN&guiLanguage=fr

-Irish Law Reform Commission *Consultation Paper on the Implementation of the Hague Convention on the Protection of Children and Co-operation in respect of Intercountry Adoption* (September 1997), ISSN 1393-3140, pp. 64 72, 74.

-Irish Law Reform Commission 12-1985: *Report on the Hague Convention on Civil Aspects of International Child Abduction and Some Related Matters*, pp. 24, 40, 43.

-Irish Law Reform Commission 16-1985: *Report on the Hague Convention of the Taking Evidence Abroad in Civil and Commercial Matters*, pp. 18, 22, 23, 24, 25, 26, 27, 28, 29-33, 38, 43, 44.

-Irish Law Reform Commission 22-1987: *Report on the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters,* pp. 9, 11, 13.

-Irish Law Reform Commission 29-1989: *Report on the Recognition of Foreign Adoption Decrees*, pp. 3, 4, 8, 19, 21.

-Irish Law Reform Commission, 42-1992: *Report on the United Nations (Vienna) Convention on Contracts for the International Sale of Goods*, pp. 20-22, 23-25, 30, 76-88, 77-78, 78-80, 81, 82.

-Irish Law Reform Commission 48-1995: *Report on the Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents*, pp. 36-37, 37, 37-39, 39, 70, 73-74, 74, 76-77.

-Irish Law Reform Commission 55-1997: *Report on the UNIDROIT Convention on Stolen or Illegally Exported Cultural Goods*, pp. 3, 8, 9, 11, 12, 13, 14, 17, 20-21, 26-27, 27-28, 55, 93, 109, 110, 110-111, 115-116.

-Irish Law Reform Commission 58-1998: *Report on the Implementation of the Hague Convention on the Protection of Children and Co-operation in respect of Intercountry Adoption*, pp. 6-8, 6-14, 8, 8-10, 10-11, 11-13, 13-14, 14.

-Middle East Watch, *Empty Reforms*, p. 2.

-*Office of the United Nations High Commissioner of Human Rights-Status of Ratifications of the Principal International Human Rights Treaties*, 10 April 2006. Accessible on the internet at http://www.ohchr.org/english/bodies/docs/RatificationStatus.pdf

-OECD *Argentine Review of Implementation of the Convention and 1997 Recommendation* (Phase 1-April 2001), pp. 1-2.

-OECD *Australian Review of Implementation of the Convention and 1997 Recommendation* (Phase 1-December 1999), pp. 1-2.

-OECD *Austrian Review of Implementation of the Convention and 1997 Recommendation* (Phase 1-December 1999), pp. 1-3.

-OECD *Belgian Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions* (Phase 2-October 2005).

-OECD *Belgian Review of Implementation of the Convention and 1997 Recommendation* (Phase 1-October 1999), pp. 1, 2-15.

-OECD *Brazilian Review of Implementation of the Convention and 1997 Recommendation* (Phase 1-September 2004), pp. 2-3.

-OECD *Bulgarian Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions* (Phase 2-June 2003).

-OECD *Bulgarian Review of Implementation of the Convention and 1997 Recommendation* (Phase 1-July 1999), p. 1.

-OECD *Canadian Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions* (Phase 2-March 2004).

-OECD *Canadian Review of Implementation of the Convention and 1997 Recommendation* (Phase 1-July 1999), p. 1.

-OECD Chilean Review of Implementation of the Convention and 1997 Recommendation (Phase 1-September 2004), p. 2.

-OECD *Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (DAFFE/IME/BR(97)20), pp. 12, 15.

-OECD *Danish Review of Implementation of the Convention and 1997 Recommendation* (Phase 1-December 2000), p. 1.

-OECD *Dutch Review of Implementation of the Convention and 1997 Recommendation* (Phase 1-February 2001), pp. 1-2.

-OECD *Finnish Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions* (Phase 2-May 2002).

-OECD *Finnish Review of Implementation of the Convention and 1997 Recommendation* (Phase 1-July 1999), pp. 1-2.

-OECD *French Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions* (Phase 2-January 2004).

-OECD *French Review of Implementation of the Convention and 1997 Recommendation* (Phase 1-December 2000), pp. 1-4.

-OECD *Greek Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions* (Phase 2-July 2005).

-OECD *Greek Review of Implementation of the Convention and 1997 Recommendation* (Phase 1-July 1999), p. 1.

-OECD *German Report on the Application of the* Convention *on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions* (Phase 2-June 2003).

-OECD *Hungarian Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions* (Phase 2-May 2005).

-OECD *Hungarian Review of Implementation of the Convention and 1997 Recommendation* (Phase 1-updated March 2003), pp. 1-3.

-OECD *Hungarian Review of Implementation of the Convention and 1997 Recommendation* (Phase 1bis-updated February 2004).

-OECD *Icelandic Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions* (Phase 2-March 2003).

-OECD *Icelandic Review of Implementation of the Convention and 1997 Recommendation* (Phase 1-October 1999), pp. 1-2.

-OECD Irish Review of Implementation of the Convention and 1997 Recommendation (Phase 1-June 2002), pp. 1-2.

-OECD *Italian Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions* (Phase 2-December 2004).

-OECD *Italian Review of Implementation of the Convention and 1997 Recommendation* (Phase 1-April 2001), pp. 2-3.

-OECD *Japanese Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions* (Phase 2-March 2005).

-OECD *Japanese Review of Implementation of the Convention and 1997 Recommendation* (Phase 1-May 2002), pp. 2-3.

-OECD *Korean Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions* (Phase 2-November 2004).

-OECD *Korean Review of Implementation of the Convention and 1997 Recommendation* (Phase 1-July 1999), p. 1.

-OECD *Luxembourgian Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions* (Phase 2-June 2004).

-OECD *Luxembourgian Review of Implementation of the Convention and 1997 Recommendation* (Phase 1-February 2001), pp. 1-3.

-OECD *Mexican Review of Implementation of the Convention and 1997 Recommendation* (Phase 1-February 2000), p. 1.

-OECD *Mexican Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions* (Phase 2-September 2004).

-OECD *New Zealand Review of Implementation of the Convention and 1997 Recommendation* (Phase 1-May 2002), pp. 2-11.

-OECD *Norwegian Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions* (Phase 2-April 2004).

-OECD *Norwegian Review of Implementation of the Convention and 1997 Recommendation* (Phase 1-April 1999), p. 1.

-OECD *Portuguese Review of Implementation of the Convention and 1997 Recommendation* (Phase 1-May 2002), p. 1-4.

-OECD *Report by the Committee on International Investment and Multinational Enterprises: Implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation*, pp. 3, 3-4.

-OECD *Slovak Review of Implementation of the Convention and 1997 Recommendation* (Phase 1-updated February 2003), pp. 1-3.

-OECD *Slovenian Review of Implementation of the Convention and 1997 Recommendation* (Phase 1-March 2005), pp. 2-4.

-OECD *Spanish Review of Implementation of the Convention and 1997 Recommendation* (Phase 1-March 2000), pp. 1-2.

-OECD *Swedish Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions* (Phase 2-September 2005).

-OECD *Swedish Review of Implementation of the Convention and 1997 Recommendation* (Phase 1-October 1999), pp. 1-3.

-OECD *Swiss Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions* (Phase 2-February 2005).

-OECD *Swiss Review of Implementation of the Convention and 1997 Recommendation* (Phase 1-February 2000), pp. 1-2.

-OECD *Turkish Review of Implementation of the Convention and 1997 Recommendation* (Phase 1-November 2004), pp. 2-4.

-OECD *UK Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions* (Phase 2-March 2005).

-OECD *UK Review of Implementation of the Convention and 1997 Recommendation* (Phase 1-December 1999), p. 1.

-OECD *UK Review of Implementation of the Convention and 1997 Recommendation* (Phase 1 bis-released 3 March 2003), pp. 1-16.

-OECD *US Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions* (Phase 2-October 2002).

-OECD US Review of Implementation of the Convention and 1997 Recommendation (Phase 1-April 1999), pp. 1-8.

-*Principles of European Contract Law* 1998/1999. Accessible on the internet at http://www.storme.be/PECL2en.html

-Resolution (76) 47 on unfair contract terms in consumer contracts on appropriate method of control, adopted by the Committee of Ministers of the Council on the 16th of November 1976

-*Report of the Commission on the Implementation of Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts*, Brussels, 27.04.2000 COM (2000) 248 final, pp. 7, 30, 35, 35-36.

-*Submission on the European Convention on Human Rights Bill 2001 to the Joint Oireachtas Committee on Justice, Equality, Defence and Women's Rights* (June 2002), p. 7.

-*The Strategy for Europe's Internal Market: Communication from the Commission to the European Parliament and the Council* (24th November 1999), p. 14.

-*Royal Commission on the Constitution*, Cmnd 5460 (1973), London: HM Stationery Office

-*UNIDROIT Principles of International Commercial Contracts 1994*

INTERVIEWS

-Bell, J., as interviewed on the 11th of December 2003 at the University of Cambridge.

-Bonell, J.M., as interviewed on the 10th of November 2004 at the Centre for Foreign and Comparative Law Studies Rome.

-Bridge, M., as interviewed on the 5th of February 2003 at University College London/ University of London.

-Butler, P., as interviewed by electronic mail on the 3rd of November 2005.

-Collins, H., as interviewed on the 31st of January 2003 at the London School of Economics/ University of London.

-Dalla Via, A.R., as interviewed by electronic mail on the 26th of July 2005.

-De Vita, A.M., as interviewed the 24th of September 2003 at the University of Florence.

-De Witte, B., as interviewed on the 26th of June 2003 at the European University Institute Florence.

-Fathally, J., as interviewed by electronic mail on the 20th of July 2005.

-Goldstein, S., as interviewed by electronic mail on the 26th of August 2005.

-Helvacı, M., as interviewed on the 15th of April 2003 at the University of Istanbul.

-Hérnandez, A.J.R., as interviewed on the 1st of July 2004 at the Pompeu Fabra University of Barcelona.

-Karakostanoglou, B., as interviewed on the 22nd of December 2003 at the Aristotle University of Thessaloniki.

-Kay, R., as interviewed by electronic mail on the 30th of August 2005.

-Kerameus, K., as interviewed on the 21st of December 2004 at the Hellenic Institute of International and Foreign Law Athens.

-Klein, E., as interviewed on the 18th of November 2003 at the University of Potsdam.

-Kötz, H., as interviewed on the 12th of October 2004 at the Max Planck Institute for Foreign and International Private Law Hamburg.

-Lal Kaul, J., as interviewed by electronic mail on the 28th of July 2005.

-Likhovski, A., as interviewed by electronic mail on the 26th of August 2005.

-Mansilla y Mejía, M.E., as interviewed by electronic mail on the 12th of August 2005.

-Moréteau, O., as interviewed on the 8th of November 2004 at the Edouard Lambert Institute of Comparative Law Lyon.

-Moura Vicente, D., as interviewed on the 27th of April 2004 at the University of Lisbon.

-Murphy, J., as interviewed by electronic mail on the 22nd of August 2005.

-O'Dell, E., as interviewed on the 10th of October 2003 at Trinity College/ University of Dublin.

-Ojanen, T., as interviewed on the 25th of March 2003 at the University of Helsinki.

-Örücü, E., as interviewed on the 14th of October 2004 at the University of Glasgow.

-Otero García-Castrillón, C., as interviewed on the 10th of December 2004 at the University of Madrid, 'Complutense'.

-Roodt, C., as interviewed by electronic mail on the 22nd of August 2005.

-Saunders, C.A., as interviewed by electronic mail on the 2nd of August 2005.

-Sefton-Green, R., as interviewed on the 24th of February 2004 at the University of Paris 1, Pantheon.

-Squires, N., as interviewed on the 30th of May 2003 at Coventry University.

-Van Niekerk, G.J., as interviewed by electronic mail on the 22nd of August 2005.

-Yamaguchi, J., as interviewed by electronic mail on the 16th of August 2005.

INTERNET RESOURCES

http://conventions.coe.int/Treaty/EN/CadreListeTraites.htm

http://stephanus.tlg.uci.edu/inst/fontsel

http://web.lexis-nexis.com/professional/

http://www.bailii.org/

http://www.cisg.law.pace.edu/cisg/countries/cntries.html

http://www.cisg.law.pace.edu/cisg/text/casecit.html

http://www.heinonline.org/

http://www.jus.unitn.it/dsg/common-core/

http://www.lawreform.ie/

http://www.oed.com/

http://www.persee.fr/

http://www.westlaw.co.uk/

http://www.westlaw.ie/

http://www.sgecc.net/

Appendix 1: Certificates of Academic Interviews

e London School of Economics and Political Science

Houghton Street
London WC2A 2AE
Telephone: 0171-955 7246
Fax: 0171-955 7366
E-mail: h.collins@lse.ac.uk

DEPARTMENT
enor: Professor Hugh Collins

I, Hugh Collins, professor of English Law at the London School of Economics, University of London, hereby certify that Antonios Platsas has interviewed me on the 31st of January 2003 for the purposes of his research thesis in law at Trinity College, University of Dublin.

Hugh Collins.

The London School of Economics is a School of the University of London. It is a charity and is incorporated in England as a company limited by guarantee under the Companies Acts (Reg. No. 70527)

Faculty of Laws

UNIVERSITY COLLEGE LONDON

BENTHAM HOUSE ENDSLEIGH GARDENS LONDON WC1H 0EG

Direct Tel: 020-7679 1449 Fax: 020-7679 1424 E-mail: m.bridge@ucl.ac.uk

From Professor Michael Bridge
Dean and Professor of Commercial Law

I Michael Bridge, professor of Commercial Law at the University College London, University of London, hereby certify that Antonios Platsas has interviewed me on the 5th of February 2003 for the purposes of his research thesis in law at Trinity College, University of Dublin.



INGIN YLIOPISTO
INGFORS UNIVERSITET
ERSITY OF HELSINKI
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tment of Public Law

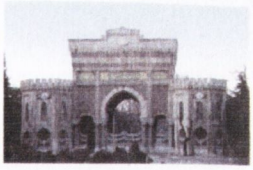
I, Tuomas Ojanen, professor of Public European Law at the University of Helsinki, hereby certify that Antonios Platsas has interviewed me on the 25th of March 2003 for the purposes of his research thesis in law at Trinity College, University of Dublin.



(Yliopistonkatu 3)
0014 HELSINGIN YLIOPISTO
x: (90) 191 23076

PB 4 (Universitetsgatan 3)
FIN-00014 HELSINGFORS UNIVERSITET
Telefax: (358 0) 23076

P.O.Box 4 (Yliopistonkatu 3)
FIN-00014 HELSINGIN YLIOPISTO
Telefax: (358 0) 191 23076



T.C.
İSTANBUL ÜNİVERSİTESİ
HUKUK FAKÜLTESİ
TİCARET HUKUKU ANABİLİM DALI
BAŞKANLIĞI

I, Dr. Mehmet Helvacı, Docent of Commercial Law Faculty of Law at Istanbul University and at Center for Research and Practice in European Law University of Istanbul, hereby certify that Antonios Platsas has interviewed me on the 15th of April 2003 for the purposes of his research thesis in law at Trinity College, University of Dublin.

Doç. Dr. Mehmet HELVACI

Dean of School
David Morris
BA MA PhD CertEd FRSA

Coventry University
Priory Street Coventry CV1 5FB
Telephone 024 7688 7688

Coventry Business School
Direct Line 024 7688 8410
Fax 024 7688 8400

Our reference

Your reference

Date

I, Nick Squires, senior lecturer in Comparative Civil Law at Coventry University, hereby certify that Antonios Platsas has interviewed me on the 30th of May 2003 for the purposes of his research thesis in law at Trinity College, University of Dublin.

Nicholas Squires

European University Institute

Law Department
&
Robert Schuman Centre for Advanced Studies

I, Dr. Bruno de Witte, professor of European Law at the European University Institute Florence, hereby certify that **Antonios Platsas** has interviewed me on the 26th of June 2003 for the purposes of his research thesis in law at Trinity College, University of Dublin.

Florence, 26th June 2003

Via dei Roccettini, 11 □ I-50016 San Domenico di Fiesole □ Tel: +39 055 4685 728 / 744 •
Fax: +39 055 4685 771
e-mail: bruno.dewitte@iue.it

ERSITÀ DEGLI STUDI DI FIRENZE
ARTIMENTO DI DIRITTO
OMPARATO E PENALE

zione di Diritto Comparato

Prof. Anna M. De Vita

I, Dr. Anna Maria De Vita, professor of Comparative Private Law at the University of Florence, hereby certify that Antonios Platsas has interviewed me on the 24th of September 2003 for the purposes of his research thesis in law at Trinity College, University of Dublin.



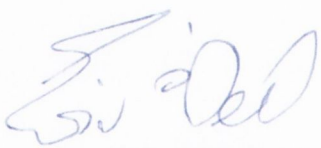
50132 Firenze - Via B. Varchi, 2 - Tel. 0039/55/2460211-200-201-204 - Fax 0039/55/2345865 E-Mail : annav@cesit1.unifi.it

TRINITY COLLEGE DUBLIN
SCHOOL OF LAW
House 39, University of Dublin,
Trinity College, Dublin 2.

Dell
r of the Law School

Tel (01) 608 1178; e-mail: odelle@tcd.ie
Fax (01) 677 0449

I, Eoin O'Dell, Fellow, and Registrar and Director of Research, School of Law, Trinity College, University of Dublin, where I lecture in the Law of Contract, the Law of Restitution and the Law on Freedom of Expression, hereby certify that Antonios Platsas has interviewed me on the 10th of October 2003 for the purposes of his research thesis in law at Trinity College, University of Dublin.



Eoin O'Dell

10th October 2003

Universität Potsdam · Postfach 601553 · 14415 Potsdam

Juristische Fakultät
Lehrstuhl für Staatsrecht, Völkerrecht
und Europarecht

Univ. – Prof. Dr. iur. Eckart Klein

Bearbeiterin: Ullrike Schiller
Telefon: 0331/977-35 16
Telefax: 0331/977-32 24

Potsdam November 18, 2003

I, Dr. Eckart Klein, professor of Constitutional, International and European Law and director of the Human Rights Centre at the University of Potsdam and judge of the Constitutional Court of the Free Hanseatic City of Bremen, hereby certify that Antonios Platsas has interviewed me on the 18th of November 2003 for the purposes of his research thesis in law at Trinity College, University of Dublin.

Prof. Dr. Eckart Klein,

Bankverbindung:
Landeszentralbank
Kontonummer: 160 015 00
BLZ: 160 000 00

Dienstgebäude:
Universitätskomplex III,
Haus 1, Zi. 3.36
August-Bebel-Str. 89
14 482 Potsdam

E-mail: klein@rz.uni-potsdam.de

Internet: http://www.uni-potsdam.de/u/ls_klein/index.htm

John Bell
Professor of Law (1973)
Director of the Centre for European Legal Studies

To whom it may concern



UNIVERSITY OF CAMBRIDGE

Centre for European Legal Studies

11 December 2003

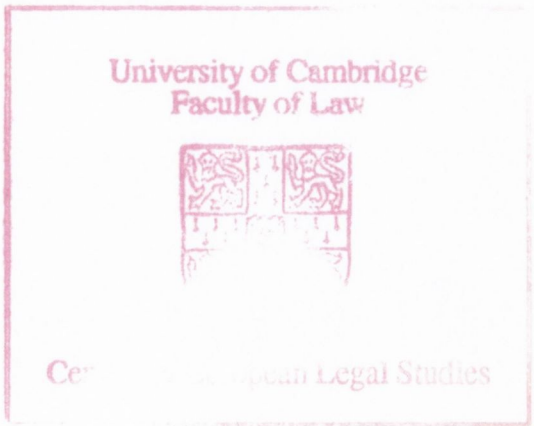
Dear Sir or Madam,

I, Professor John Bell, certify that Antonios Platsas interviewed me on 11 December 2003, for the purposes of his research thesis in law at Trinity College, University of Dublin.

Yours faithfully,

John Bell.

John Bell,
Professor of Law



Centre for European Legal Studies
Faculty of Law
10 West Road
Cambridge CB3 9DZ

Telephone: 01223 330074
Fax: 01223 330055
E-mail: jsb48@cam.ac.uk

ΤΕΛΕΙΟ ΠΑΝΕΠΙΣΤΗΜΙΟ ΘΕΣΣΑΛΟΝΙΚΗΣ | ΤΜΗΜΑ ΝΟΜΙΚΗΣ | ΤΟΜΕΑΣ ΔΙΕΘΝΩΝ ΣΠΟΥΔΩΝ
THE UNIVERSITY OF THESSALONIKI | FACULTY OF LAW | DEPARTMENT OF INTERNATIONAL STUDIES
SITÉ DE THESSALONIQUE | FACULTÉ DE DROIT | DÉPARTEMENT D'ÉTUDES INTERNATIONALES

ΕΣΣΑΛΟΝΙΚΗ
06 THESSALONIKI - GREECE

ΤΗΛ.: 031 99 66 08 ΦΑΧ: 031 99 65 02
TEL: +31 99 66 08 FAX: 031 99 65 02

Thessaloniki, 22nd of December 2003.

I, Dr. Benjamin Karakostanoglou, senior lecturer in International Law at the Aristotle University of Thessaloniki, hereby certify that Antonios Platsas has interviewed me on the 22nd of December 2003 for the purposes of his research thesis in law at Trinity College, University of Dublin.

Dr. Benjamin Karakostanoglou,



NTHÉON - SORBONNE –
ERSITÉ PARIS 1

E MIXTE DE RECHERCHE DE
T COMPARE DE PARIS – UMR 8103

E MALHER
PARIS

01 44 78 33 61
01 44 78 33 50

03@univ-paris1.fr

Paris, 24th February 2004.

I, Dr. Ruth Sefton-Green, reader in Comparative Law at the University of Paris 1, Pantheon, hereby certify that Antonios Platsas has interviewed me on the 24th of February 2004 for the purposes of his research thesis in law at Trinity College, University of Dublin.

Dr. Ruth Sefton-Green,
Maître de conférences.

Lisbon, 27th April 2004.

I, Dr. Dário Moura Vicente, professor in Comparative Law at the University of Lisbon, hereby certify that Antonios Platsas has interviewed me on the 27th of April 2004 for the purposes of his research thesis in law at Trinity College, University of Dublin.

Professor Dr. Dário Moura Vicente,

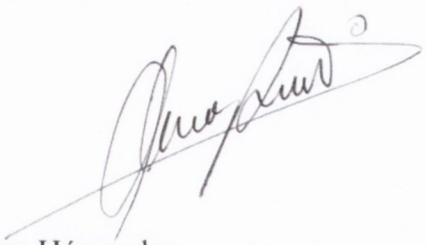
Cidade Universitária, Alameda da Universidade, 1649-014, Lisboa
Tel. 217 984 600 – Fax. 217 950 303 – *Email.* webmaster@mail.fd.ul.pt
www.fd.ul.pt

UNIVERSITAT POMPEU FABRA

DEPARTAMENT DE DRET

Barcelona, 1st July 2004.

I, Dr. Angel José Rodrigo Hérnandez, Senior Lecturer of Public International Law at the Pompeu Fabra University of Barcelona, hereby certify that Antonios Platsas has interviewed me on the 1st of July 2004 for the purposes of his research thesis in law at Trinity College, University of Dublin.



Dr. Angel José Rodrigo Hérnandez,
Senior Lecturer in Public International Law
Pompeu Fabra University

MAX-PLANCK-INSTITUT
FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT

DIREKTOREN: PROF. DR. DR. H.C. J. BASEDOW · PROF. DR. DR. DR. H.C. MULT. K.J. HOPT
PROF. DR. DR. H.C. DR. H.C. R. ZIMMERMANN FBA FRSE

MAX-PLANCK-GESELLSCHAFT

MAX-PLANCK-INSTITUT · MITTELWEG 187 · D-20148 HAMBURG

Prof. Dr. Hein Kötz

Tel.: +49-(0)40-41 900-0
Durchwahl: +49-(0)40-41 900-295
Fax :+49-(0)40-41 900-277
koetz@mpipriv-hh.mpg.de (e-mail)

12th October 2004

I, Dr. Dr. h.c. mult. Hein Kötz, Emeritus Professor of Comparative Law of the University of Hamburg and sometime Director of the Max Planck Institute for Foreign and International Private Law and sometime Judge of the Higher Regional Court of Karlsruhe and Fellow of the British Academy and former President of the International Association of Legal Science and former President of the Bucerius Law School, hereby certify that Antonios Platsas has interviewed me on the 12th of October 2004 for the purposes of his research thesis in law at Trinity college, University of Dublin.

Emeritus Professor Dr. Dr. h.c. mult. Hein Kötz

Professor Esin Örücü
Professor of Comparative Law



UNIVERSITY
of
GLASGOW

Glasgow, 14th October 2004.

I, Dr. Esin Örücü, Professor of Comparative Law at the University of Glasgow and Professor of Comparative Law at the Erasmus University of Rotterdam, hereby certify that Antonios Platsas has interviewed me on the 14th of October 2004 for the purposes of his research thesis in law at Trinity College, University of Dublin.

Professor Dr. Esin Örücü,

SCHOOL OF LAW
Stair Building, University of Glasgow, Glasgow G12 8QQ
Telephone: 041-339 8855 *Ext* 4175/4910 *Fax:* 041-330 5140

FACULTE DE DROIT

UNIVERSITE JEAN MOULIN
LYON 3

TITUT DE DROIT COMPARÉ
Edouard Lambert

Lyon, 8th November 2004.

I, Dr. Olivier Moréteau, Professor of Comparative Law at the University of Lyon 3 and Director of the Edouard Lambert Institute of Comparative Law and Director of the *Campus numérique Multidroit*, hereby certify that Antonios Platsas has interviewed me on the 8th of November 2004 for the purposes of his research thesis in law at Trinity College, University of Dublin.

UNIVERSITÉ JEAN MOULIN INSTITUT DE DROIT COMPARÉ LYON III

Professor Dr. Olivier Moréteau,

Secrétariat : 6, cours Albert Thomas - BP 8242 - 69355 Lyon cedex 08 - Tél +33 (0)4 78 78 70 58 - Fax : +33 (0)4 78 78 75 00 - idc@univ-lyon3.fr
bliothèque : 15, quai Claude Bernard - B.P. 0638 - 69239 Lyon Cedex 02 - Tél +33 (0)4 78 78 71 94 - Fax : +33 (0)4 78 78 79 79 - idc@univ-lyon3.fr
rique Multidroit : 15, quai Claude Bernard - B.P. 0638 - 69239 Lyon Cedex 02 - Tél +33 (0)4 78 78 71 39 - Fax : +33 (0)4 78 78 71 31 - multidroit@univ-lyon3.fr

stituto di Diritto Comparato
NIVERSITÀ DEGLI STUDI DI ROMA «LA SAPIENZA» - FACOLTÀ DI GIURISPRUDENZA
ZZALE ALDO MORO, 5 - 00185 ROMA - tel. (+39.6) 4991.0661 - fax (+39.6) 4991.0109

DIRETTORE

Rome, 10th November 2004.

I, Dr. Joachim Michael Bonell, Professor of Comparative Law and former Director of the Institute of Comparative Law at the University of Rome I, 'La Sapienza' and Director of the Centre for Foreign and Comparative Law Studies in Rome, hereby certify that Antonios Platsas has interviewed me on the 10th of November 2004 for the purposes of his research thesis in law at Trinity College, University of Dublin.

Professor Dr. Joachim Michael Bonell

NIVERSIDAD COMPLUTENSE DE MADRID
FACULTAD DE DERECHO

Madrid, 10th December 2004.

I, Dr. Carmen Otero García-Castrillón, Senior Lecturer in Private International Law at the University of Madrid, 'Complutense', hereby certify that Antonios Platsas has interviewed me on the 10th of December 2004 for the purposes of his research thesis in law at Trinity College, University of Dublin.

Dr. Carmen Otero García-Castrillón,
Senior Lecturer (*Profesora Contratada Doctora*) in Private International Law,

INSTITUT HELLENIQUE DE DROIT INTERNATIONAL ET ÉTRANGER
HELLENIC INSTITUTE OF INTERNATIONAL AND FOREIGN LAW

Solonos 73, GR-106 79 Athens, ✆ +30 2103615646, fax +30 2103619777,
e-mail: hiifl@ath.forthnet.gr, VAT: EL 090 14 57 20

Athens, 21st December 2004.

I, Dr., Dr. h.c. mult Konstantinos D. Kerameus, Professor (emer.) of Civil Procedure at the National and Kapodistrian University of Athens, Director of the Hellenic Institute of International and Foreign Law, President of the International Academy of Comparative Law, hereby certify that Antonios Platsas has interviewed me on the 21st of December 2004 for the purposes of his research thesis in law at Trinity College, University of Dublin.

Professor Dr. Dr. h.c. mult. Konstantinos D. Kerameus

Université d'Ottawa · University of Ottawa

Faculté de droit
Section de droit civil

Faculty of Law
Civil Law Section

Ottawa, 20th July 2005.

I, Jabeur Fathally, Lecturer in Major Contemporary Legal Systems at the University of Ottawa(Canada),hereby certify that Antonios Platsas has interviewed me on the 20th of July 2005 for the purposes of his research thesis in law at Trinity College, University of Dublin.

Lecturer Jabeur Fathally,

ACULTÉ DE DROIT
ECTION DE DROIT CIVIL
7, RUE LOUIS PASTEUR
NIVERSITÉ D'OTTAWA
TTAWA, ONTARIO
1N 6N5

57, rue Louis-Pasteur
Ottawa (Ontario) K1N 6N5 Canada

57 Louis Pasteur Street
Ottawa, Ontario K1N 6N5 Canada

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I, Dr. Alberto Ricardo Dalla Via, Reader in Constitutional Law at the University of Buenos Aires, Director of the Institute of Political and Constitucional Science of the Argentinian Scientific Society, President of the Argentinian Association of Comparative Law and Judge, herebry certify that Antonios Platsas has interviewed me on the 26 th of July 2005 for the purposes of his research thesis in law at Trinity College, University of Dublin.

Alberto Ricardo Dalla Via
Presidente

Tel. : (Off.) 27667895
27667725/1515. 1512
(M) 09350560966
CAMPUS LAW CENTRE
FACULTY OF LAW
UNIVERSITY OF DELHI
DELHI - 110007 (INDIA)

*. CLC

Dated.....
28 July 2005

CERTIFICATE

I, Dr. Jawahar Lal Kaul, Professor of Law (teaching International Economic Law and Human Rights) at Campus Law Center, University of Delhi, do hereby certify that Antonios Platsas has interviewed me on 28 July 2005 for the purposes of his research thesis in Law at Trinity College, University of Dublin.

Professor (Dr.) Jawahar Lal Kaul

Melbourne, 2nd August 2005

THE UNIVERSITY OF
MELBOURNE

I, Dr. Cheryl Anne Saunders, Professor of Constitutional Law and Comparative Constitutional Law and Fellow of the Academy of the Social Sciences in Australia, hereby certify that Antonios Platsas has interviewed me on the 2nd of August 2005 for the purposes of his research thesis in law at Trinity College, University of Dublin.

Professor Dr. Cheryl Anne Saunders,

Law School
The University of Melbourne, Victoria 3010 Australia
Telephone: +61 3 8344 6164 Fax: +61 3 9347 2392
Email: post@law.unimelb.edu.au http://www.law.unimelb.edu.au

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UNIVERSIDAD NACIONAL AUTÓNOMA DE MÉXICO

FACULTAD DE DERECHO

CIUDAD UNIVERSITARIA

Ciudad Universitaria, México Distrito Federal
E-mail: **seminter@themis.derecho.unam.mx**

From PhD. María Elena Mansilla y Mejía
Chair of International Private Law
Professor of International Private Law.

FACULTAD DE DERECHO
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DE
DERECHO INTERNACIONAL

I, María Elena Mansilla y Mejía, Professor of International Law at the National Autonomous University of Mexico, hereby certify that Antonios Platsas has interviewed me on the 12th of August 2005 for the purposes of his research thesis in law at Trinity College, University of Dublin.

PhD María Elena Mansilla y Mejía.

School of Law, Hokkaido University

KITA 9, NISHI 7, KITA-KU
SAPPORO 060-0809, JAPAN

Sapporo, 16th August 2005.

I, Jiro Yamaguchi, Professor of Public Administration and Director of the Advanced Institute for Law and Politics at Hokkaido University, hereby certify that Antonios Platsas has interviewed me on the 16th of August 2005 for the purposes of his research thesis in law at Trinity College, University of Dublin.

Professor Jiro Yamaguchi,

UNISA university of south africa

College of Law

School of Law, Department of Jurisprudence

Tel : (012) 429-8361
Fax : (012) 429-3442
e-mail:vniekgj@unisa.ac.za

22nd August 2005.

We, Dr. Gardiol van Niekerk and Dr Christa Roodt, Professors of Jurisprudence at the University of South Africa, hereby certify that Antonios Platsas has interviewed us on the 22nd of August 2005 for the purposes of his research thesis in law at Trinity College, University of Dublin.

Professor Dr. Gardiol van Niekerk

Professor Dr Christa Roodt

University of South Africa
Preller Street, Muckleneuk Ridge, City of Tshwane
PO Box 392 UNISA 0003 South Africa
Telephone: +27 12 429 3111 Facsimile: +27 12 429 4150
www.unisa.ac.za



VILLANOVA UNIVERSITY SCHOOL OF LAW

JOHN F. MURPHY
PROFESSOR OF INTERNATIONAL LAW AND BUSINESS

PHONE 610-519-7065
FAX 610-519-5672
E-MAIL murphy@law.villanova.edu

August 22, 2005

I, John F. Murphy, Professor of Law, at Villanova University, hereby certify that Antonios Platsas has interviewed me on the 22nd of August, 2005, for the purposes of his research thesis in law at Trinity College, University of Dublin.

Professor John F. Murphy

Cornell University
Law School

Myron Taylor Hall
Ithaca, New York 14853-4901
f: 607.255.7193

Ithaca, NY, 15th September 2005.

I, Stephen Goldstein, Edward S. Silver Professor of Procedural Law at the Hebrew University of Jerusalem (emeritus), formerly Dean of the Law Faculty and Director of the Harry Sacher Institute of Legislative Research and Comparative Law, Member of the International Academy of Comparative Law and currently visiting Professor of Law at Cornell University, hereby certify that Antonios Platsas has interviewed me on the 26th of August 2005 for the purposes of his research thesis in law at Trinity College, University of Dublin.

Professor Stephen Goldstein,

Cornell University is an equal opportunity, affirmative action educator and employer.

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THE BUCHMANN FACULTY OF LAW הפקולטה למשפטים ע"ש בוכמן

Tel Aviv, 1 November 2005.

I, Professor Assaf Likhovski, Professor of Taxation, Legal History, Comparative Law and Jurisprudence at Tel Aviv University, hereby certify that Antonios Platsas has interviewed me on the 26th of August 2005 for the purposes of his research thesis in law at Trinity College, University of Dublin.

Assaf Likhovski

Professor Dr. Assaf Likhovski

קרית האוניברסיטה, רמת אביב, תל אביב 69978, טל' 03-6408164, פקס' 03-6407259
UNIVERSITY CAMPUS, RAMAT AVIV, TEL AVIV 69978, ISRAEL. TEL. 972-3-6408164, FAX. 972-3-6407259

University of Connecticut
School of Law

hard S. Kay
nd Helen England
fessor of Law

30th August 2005.

I, Richard S. Kay, George and Helen England Professor of Law at the University of Connecticut, Member of the American Comparative Law Society and Member of the International Academy of Comparative Law, hereby certify that Antonios Platsas has interviewed me on the 30th of August 2005 for the purposes of his research thesis in law at Trinity College, University of Dublin.

Professor Richard S. Kay,

l Opportunity Employer
l Opportunity Employer
eth Street
, Connecticut 06105-2290
e: (860) 570-5262
: (860) 570-5242
ay@law.uconn.edu

TE WHARE WĀNANGA O TE ŪPOKO O TE IKA A MĀUI
VICTORIA
UNIVERSITY OF WELLINGTON

Wellington, 3rd November 2005

I, Dr. Petra Butler, Senior Lecturer in Restitution and International Commercial Contract at Victoria University of Wellington and Member of the New Zealand Association of Comparative Law, hereby certify that Antonios Platsas has interviewed me on the 3rd of November 2005 for the purposes of his research thesis in law at Trinity College, University of Dublin.

Dr. Petra Butler

FACULTY OF LAW Te Kauhanganui Tatai Ture
PO Box 600, Wellington, New Zealand
Phone +64-4-463 6366 Fax +64-4-463 6365
Website www.lawschool.vuw.ac.nz

Appendix 2: Questionnaires

QUESTIONNAIRE IN ENGLISH ('ORIGINAL')

I. Are you in favour of convergence of national legal systems? [Please one tick only per question]

1. Yes
2. Possibly yes
3. Possibly no
4. No
5. It depends
6. I do not know/ I do not want to answer

II. Are you in favour of convergence of the national legal system in which you are teaching into a supranational legal order? [One tick only]

1. Yes
2. Possibly yes
3. Possibly no
4. No
5. It depends
6. I do not know/ I do not want to answer

III. If legal convergence will occur or occurs already, how should the national legislator of the country in which you are teaching implement supranational or international forms of law into his national legal system? By [One tick only]

1. Comparing the implementation of such forms of law in other countries?
2. Approximating generally his legal system as much as possible to such forms of law?
3. Restructuring his legal system to implement such forms of law?
4. Conducting a sociological kind of research before implementing such forms of law?
5. A combination of all the above?
6. A combination of some of the above?
7. None of the above?
8. I do not know/ I do not want to answer

IV. If the national legislator of the country in which you are teaching would be allowed to use or would actually use any of the methods provided in question III (see choices 1, 2, 3, 4, 5 & 6), would this legislator then have more discretion? [One tick only]

1. Yes
2. Possibly yes
3. Possibly no
4. No
5. I do not know/ I do not want to answer

V. Since the country in which you are teaching is a member state of the European Union, do you think that its national legislature should have more discretion in the implementation of E.U. regulation? [One tick only] ('European version')

or

If the country in which you are teaching would be a member state of a similar union to the European Union, in Aftrica/ in the Americas/ in Asia / in Oceania, do you think that its national legislature should have more discretion in the implementation of regulation than the discretion, which the E.U. states enjoy currently? [One answer only] ('World version')

1. Yes
2. Possibly yes
3. Possibly no
4. No
5. It depends
6. I do not know/ I do not want to answer

VI. Do you generally think that supranational and/or international forms of law destroy the incentives of a national legislator? [One tick only]

1. Yes
2. Possibly yes
3. Possibly no
4. No
5. It depends
6. I do not know/ I do not want to answer

VII. Do you want: [One tick only]

1. A federal Africa / America/ Asia / Europe / Oceania with a narrow margin of appreciation for the national legislator of the country in which you are teaching?
2. A federal Africa / America/ Asia / Europe / Oceania with a wide margin of appreciation for the national legislator of the country in which you are teaching?
3. A(n) Africa / America/ Asia / Europe / Oceania of the peoples with a narrow margin of appreciation for the national legislator of the country in which you are teaching?
4. A(n) Africa / America/ Asia / Europe / Oceania of the peoples with a wide margin of appreciation for the national legislator of the country in which you are teaching?
5. None of the above (none of choices 1, 2, 3, 4)
6. I do not know/ I do not want to answer

QUESTIONNAIRE IN CASTILIAN

I. ¿Está a favor de la convergencia entre los sistemas legales nacionales? [Por favor, marque *una* sola respuesta]

1. Sí.
2. Posiblemente sí.
3. Posiblemente no.
4. No.
5. Depende.
6. No sabe/ No contesta.

II. ¿Está a favor de la convergencia del sistema legal nacional en el cual usted enseña hacia un orden legal supranacional? [Por favor, marque *una* sola respuesta]

1. Sí.
2. Posiblemente sí.
3. Posiblemente no.
4. No.
5. Depende.
6. No sabe/ No contesta.

III. Si tal convergencia se llegara alguna vez a producir (o bien ya se hubiera producido): ¿de qué modo el legislador nacional del país en le que usted enseña debería implementar formas de ley supranacionales/internacionales dentro de su sistema legal nacional? [Por favor, marque *una* sola respuesta]

1. ¿Comparando la implementación de tales formas de ley supranacionales/internacionales en otros países?
2. ¿Aproximando su sistema legal lo máximo posible a tales formas de ley supranacionales/internacionales?
3. ¿Reestructurnado su sistema legal para implementar tales formas de ley supranacionales/internacionales?
4. ¿Llevando a cabo una investigación de tipo sociológico antes de implementar tales formas de ley supranacionales/internacionales?
5. ¿Una combinación de todas las anteriores?
6. ¿Una combinación de algunas de las anteriores?
7. ¿Ninguna de las anteriores?
8. No sabe/ No contesta.

IV. Si al legislador nacional del país en el que enseña se le permitiera usar cualquiera de los métodos descritos en la pregunta III (ver opciones 1, 2, 3, 4, 5 y 6), ¿debería tener una mayor libertad de actuación de la que tiene ahora? [Por favor, marque *una* sola respuesta]

1. Sí.
2. Posiblemente sí.
3. Posiblemente no.
4. No.
5. No sabe/ No contesta.

V. El Estado en el que usted enseña es miembro de la Unión Europea: ¿piensa usted que su legislador nacional debería tener una mayor libertad de acción en la implementación de las leyes de la UE? [Por favor, marque *una* sola respuesta]

1. Sí.
2. Posiblemente sí.
3. Posiblemente no.
4. No.
5. Depende.
6. No sabe/ No contesta.

VI. ¿Piensa que, en general, la ley supranacional/internacional destruye la iniciativa del legislador nacional? [Por favor, marque *una* sola respuesta]

1. Sí.
2. Posiblemente sí.
3. Posiblemente no.
4. No.
5. Depende.
6. No sabe/ No contesta.

VII. ¿Qué prefiere? [Por favor, marque *una* sola respuesta]

1. ¿Una Europa federal con un margen *reducido* de decisión para el legislador nacional del país en el que usted enseña?
2. ¿Una Europa federal con un margen *amplio* de decisión para el legislador nacional del país en el que usted enseña?
3. ¿Una Europa de los pueblos con un margen *reducido* de decisión para el legislador nacional del país en el que usted enseña?
4. ¿Una Europa de los pueblos con un margen *amplio* de decisión para el legislador nacional del país en el que usted enseña?

5. ¿Ninguna de las anteriores? (ninguna de las opciones 1, 2, 3 ó 4)
6. No sabe/ No contesta.

QUESTIONNAIRE IN CATALAN

I. ¿Esteu a favor de la convergència dels sistemes légals nacionals? [Si us plau, marqueu només *una* resposta]

1. Sí
2. Probablement sí
3. Probablement no
4. No
5. Depende
6. No sap/ No contesta

II. ¿Esteu a favor de la convergència del sistema légal nacional en el qual professeu cap a un ordre legal supranacional? [Si us plau, marqueu només *una* resposta]

1. Sí
2. Probablement sí
3. Probablement no
4. No
5. Depende
6. No sap/ No contesta

III. Si tal convergència légal s'arribés mai a produir, o bé ja s'hagués produït, ¿de quina manera el legislador nacional del país en le qual professeu hauria d'implementar formes de llei supranacionals dins del seu sistema légal nacional? [Si us plau, marqueu només *una* resposta]

1. ¿Comparant la implementació de tals formes de llei supranacionals en d'altres països?
2. ¿Aproximant, al màxim possible, el seu sistema légal a tals formes de llei supranacionals?
3. ¿Reestrucutrant el seu sistema légal per implementar tals formes de llei supranacionals?
4. ¿Conduïnt una recerca de caire sociologic abans d'implementar tals formes de llei supranacionals?
5. ¿Una combinació de totes les anteriors?
6. ¿Una combinació d'algunes de les anteriors?
7. ¿Cap de les anteriors?
8. No sap/ No contesta

IV. Si al legislador nacional del país en el qual professeu li fos permès de fer servir qualsevol dels mètodes descrits a la pregunta III (1, 2, 3, 4, 5 i 6), ¿hauria de tenir una major llibertat d'actuació de la que gaudeix ara? [Si us plau, marqueu només *una* resposta]

1. Sí
2. Probablement sí
3. Probablement no
4. No
5. No sap/ No contesta

V. L'Estat en el qual professeu és member de la Unió Europea: ¿penseu que el seu legislador nacional hauria de tenir una major llibertat d'acció en la implementació de les les lleis de la UE? [Si us plau, marqueu només *una* resposta]

1. Sí
2. Probablement sí
3. Probablement no
4. No
5. Depende
6. No sap/ No contesta

VI. ¿Penseu que, en general, la llei supranacional destrueix la iniciativa del legislador nacional? [Si us plau, marqueu només *una* resposta]

1. Sí
2. Probablement sí
3. Probablement no
4. No
5. Depende
6. No sap/ No contesta

VII. ¿Que preferiu? [Si us plau, marqueu només *una* resposta]

1. ¿Una Europa federal amb un marge *reduit* de decisió per al legislador nacional del país en el qual professeu?
2. ¿Una Europa federal amb un marge *ampli* de decisió per al legislador nacional del país en el qual professeu?
3. ¿Una Europa dels pobles amb un marge *reduit* de decisió per al legislador nacional del país en el qual professeu?
4. ¿Una Europa dels pobles amb un marge *ampli* de decisió per al legislador nacional del país en el qual professeu?
5. ¿Cap de les anteriors? (cap de les opcions 1, 2, 3 ó 4)

6. No sap/ No contesta

QUESTIONNAIRE IN FINNISH

I. Kannatatko kansallisten oikeusjärjestelmien lähentymistä? (Merkitse vain yksi vaihtoehto, kiitos)

1. Kyllä
2. Mahdollisesti kyllä
3. Mahdollisesti en
4. En
5. Se riippuu
6. En tiedä/En halua vastata

II. Kannatatko työskentelymaasi oikeusjärjestelmän yhdentymistä ylikansalliseen lainsäädäntöjärjestelmään? (Merkitse vain yksi vaihtoehto, kiitos)

1. Kyllä
2. Mahdollisesti kyllä
3. Mahdollisesti en
4. En
5. Se riippuu
6. En tiedä/En halua vastata

III. Jos oikeudellinen yhdentyminen tapahtuu tai on jo tapahtumassa, kuinka työskentelymaasi lainsäätäjän tulisi toimeenpanna ylikansallista oikeutta kansallisessa oikeusjärjestelmässään? (Merkitse vain yksi vaihtoehto, kiitos)

1. Vertailemalla ylikansallisen oikeuden toimeenpanoa muissa maissa?
2. Lähentämällä mahdollisimman paljon oikeusjärjestelmäänsä ylikansalliseen oikeusjärjestelmään?
3. Järjestämällä oman oikeusjärjestelmänsä uudelleen toteuttaakseen ylikansallista oikeutta?
4. Tekemällä sosiologisen tutkimuksen ennen ylikansallisen oikeuden toimeenpanoa?
5. Yhdistelmä kaikista yllä mainituista vaihtoehdoista?
6. Yhdistelmä joistakin yllä mainituista vaihtoehdoista?
7. Ei mikään yllä mainituista vaihtoehdoista?
8. En tiedä/En halua vastata.

IV. Jos työskentelymaasi lainsäätäjä saisi käyttää mitä tahansa kysymyksessä III mainittua menetelmää (kts. vaihtoehdot 1,2,3,4,5 & 6), olisiko lainsäätäjällä silloin enemmän harkintavaltaa (Merkitse vain yksi vaihtoehto, kiitos)

1. Kyllä
2. Mahdollisesti kyllä
3. Mahdollisesti ei
4. Ei
5. En tiedä/En halua vastata

V. Koska työskentelymaasi on EU:n jäsenvaltio, pitäisikö mielestäsi sen eduskunnalla olla enemmän harkintavaltaa EU-lainsäädännön toimeenpanossa? (Merkitse vain yksi vaihtoehto, kiitos)

1. Kyllä
2. Mahdollisesti kyllä
3. Mahdollisesti ei
4. Ei
5. Se riippuu
6. En tiedä/En halua vastata

VI. Oletko sitä mieltä, että ylikansallinen oikeus tuhoaa kansallisen lainsäätäjän aloitteellisuuden? (Merkitse vain yksi vaihtoehto, kiitos)

1. Kyllä
2. Mahdollisesti kyllä
3. Mahdollisesti ei
4. Ei
5. Se riippuu
6. En tiedä/En halua vastata

VII. Haluatko (Merkitse vain yksi vaihtoehto, kiitos):

1. Eurooppalaisen liittovaltion, jossa opiskelumaasi lainsäätäjällä on kapea harkintamarginaali?
2. Eurooppalaisen liittovaltion, jossa opiskelumaasi lainsäätäjällä on laaja harkintamarginaali?
3. Kansojen Euroopan, jossa opiskelumaasi lainsäätäjällä on kapea harkintamarginaali?
4. Kansojen Euroopan, jossa opiskelumaasi lainsäätäjällä on laaja harkintamarginaali?
5. En mitään yllämainituista.
6. En tiedä/En halua vastata.

QUESTIONNAIRE IN FRENCH

I. Etes–vous favorable à la convergence des ordres juridiques nationaux? [S'il vous plaît, cochez une seule case par question]

1. Oui
2. Plutôt oui
3. Plutôt non
4. Non
5. Cela dépend
6. Je ne sais pas/ Je ne veux pas répondre

II. Etes–vous favorable à la convergence de l'ordre juridique de l'Etat dans lequel vous enseignez à l'intérieur d'un ordre juridique supranational? [S'il vous plaît, cochez une seule case par question]

1. Oui
2. Plutôt oui
3. Plutôt non
4. Non
5. Cela dépend
6. Je ne sais pas/ Je ne veux pas répondre

III. Si cette convergence était mise en œuvre, ou bien si celle–ci était déjà effective, comment le législateur du pays dans lequel vous enseignez devrait–il transposer les formes de droit international ou supranational au système juridique national? [S'il vous plaît, cochez une seule case par question]

1. En comparant la transposition de ces formes de droit dans d'autres Etats?
2. En rapprochant autant que possible son système juridique national à de telles formes de droit?
3. En restructurant le système juridique national afin de transposer de telles formes de droit?
4. En conduisant une étude sociologique avant la transposition de telles formes de droit?
5. En combinant toutes ces méthodes?
6. En combinant certaines de ces méthodes?
7. Aucune de ces méthodes?
8. Je ne sais pas/ Je ne veux pas répondre.

IV. Dans l' hypothèse où le législateur au pays dans lequel vous enseignez serait autorisé à utiliser une ou plusieurs des méthodes énoncées à la question III, celui–ci disposerait–il d'un pouvoir discrétionnaire? [S'il vous plaît, cochez une seule case par question]

1. Oui
2. Plutôt oui
3. Plutôt non
4. Non
5. Je ne sais pas/ Je ne veux pas répondre

V. Depuis que le pays dans lequel vous enseignez est un Etat membre de l'UE, pensez–vous que le législateur aurait du avoir plus de pouvoir discrétionnaire quant à la transposition du droit de l'UE? [S'il vous plaît, cochez une seule case par question]

1. Oui
2. Plutôt oui
3. Plutôt non
4. Non
5. Cela dépend
6. Je ne sais pas/ Je ne veux pas répondre

VI. Pensez–vous qu'en règle générale, l'ordre juridique international ou supranational limite l'initiative du législateur national? [S'il vous plaît, cochez une seule case par question]

1. Oui
2. Plutôt oui
3. Plutôt non
4. Non
5. Cela dépend
6. Je ne sais pas/ Je ne veux pas répondre

VII. Préférez–vous [S'il vous plaît, cochez une seule case par question]:

1. Une Europe fédérale avec une marge d'appréciation restrictive pour le législateur national du pays dans lequel vous enseignez?
2. Une Europe fédérale avec une marge d'appréciation large pour le législateur national du pays dans lequel vous enseignez?
3. Une Europe des Nations/ peuples avec une marge d'appréciation restrictive pour le législateur national du pays dans lequel vous enseignez?

4. Une Europe des Nations/ peuples avec une marge d'appréciation large pour le législateur national du pays dans lequel vous enseignez?
5. Aucune de ces réponses (1, 2, 3, 4)
6. Je ne sais pas/ Je ne veux pas répondre

QUESTIONNAIRE IN GERMAN

I. Sind Sie für eine Angleichung der nationalen Rechtssysteme? [Entscheiden Sie sich nur für eine der folgenden Optionen.]

1. Ja
2. Eher ja
3. Eher nein
4. Nein
5. Es hängt von ab
6. Ich weiss nicht/ Ich möchte nicht antworten

II. Sind Sie für eine Angleichung des nationalen Rechtssystems des Landes, in dem Sie lehren, an ein supranationales Rechtssystem? [Entscheiden Sie sich nur für eine der folgenden Optionen.]

1. Ja
2. Eher ja
3. Eher nein
4. Nein
5. Es hängt von ab
6. Ich weiss nicht/ Ich möchte nicht antworten

III. Wenn eine rechtliche Angleichung stattfinden würde oder vielleicht schon stattfindet, wie sollte der nationale Gesetzgeber des Landes, in dem Sie lehren, supranationale oder internationale Rechtsformen in das nationale Rechtssystem einführen? [Entscheiden Sie sich nur für eine der folgenden Optionen.]

1. Indem er die Umsetzung solcher Rechtsformen in anderen Ländern miteinander vergleicht?
2. Indem er sein Rechtssystem so weit wie möglich an supranationale oder internationale Rechtsformen annähert?
3. Indem er sein Rechtssystem erneuert, um so supranationale oder internationale Rechtsformen einführen zu können?
4. Indem er eine soziologische Untersuchung durchführen lässt, bevor er das supranationale oder internationale Recht einführt?
5. Mit einer Kombination der oben genannten Methoden?
6. Mit einer Kombination von einigen der oben genannten Methoden?
7. Mit keiner der oben genannten Methoden?
8. Ich weiss nicht/ Ich möchte nicht antworten

IV. Wenn der nationale Gesetzgeber des Landes, in dem Sie lehren, berechtigt wäre alle die in Frage III angegebenen Methoden zu verwenden oder tatsächlich verwenden würde, hätte dieser Gesetzgeber dann mehr Entscheidungsfreiheit als vorher? [Entscheiden Sie sich nur für eine der folgenden Optionen.]

1. Ja
2. Wahrscheinlich
3. Unwahrscheinlich
4. Nein
5. Ich weiss nicht/ Ich möchte nicht antworten

V. Da ja das Land, in dem Sie lehren, ein Mitgliedsstaat der EU ist, sind Sie der Meinung, dass das Parlament in diesem Land mehr Entscheidungsfreiheit bei der Umsetzung von EU-Rechtsnormen haben sollte? [Entscheiden Sie sich nur für eine der folgenden Optionen.]

1. Ja
2. Eher ja
3. Eher nein
4. Nein
5. Es hängt von ab
6. Ich weiss nicht/ Ich möchte nicht antworten

VI. Zerstört supranationales und/oder internationales Recht den Anreiz des nationalen Gesetzgebers zur nationalen Gesetzgebung? [Entscheiden Sie sich nur für eine der folgenden Optionen.]

1. Ja
2. Wahrscheinlich
3. Unwahrscheinlich
4. Nein
5. Es hängt von ab
6. Ich weiss nicht/ Ich möchte nicht antworten

VII. Wollen Sie: [Entscheiden Sie sich nur für eine der folgenden Optionen.]

1. Ein gemeinsames Europa mit weniger Handlungsfreiheit für den nationalen Gesetzgeber des Landes, in dem Sie lehren?
2. Ein gemeinsames Europa mit mehr Handlungsfreiheit für den nationalen Gesetzgeber des Landes, in dem Sie lehren?
3. Ein Europa der Völker mit weniger Handlungsfreiheit für den nationalen Gesetzgeber des Landes, in dem Sie lehren?
4. Ein Europa der Völker mit mehr Handlungsfreiheit für den nationalen Gesetzgeber des Landes, in dem Sie lehren?
5. Keines der oben genannten?
6. Ich weiss nicht/ Ich möchte nicht antworten

QUESTIONNAIRE IN GREEK

I. Είστε υπέρ της συγκλίσεως των εθνικών νομικών συστημάτων; [Επιλέξτε μόνον ένα από τα παρακάτω]

1. Ναι
2. Μάλλον ναι
3. Μάλλον όχι
4. Όχι
5. Εξαρτάται
6. Δε γνωρίζω/ δεν απαντώ

II. Είστε υπέρ της συγκλίσεως του νομικού συστήματος στο οποίο διδάσκετε με ένα υπερεθνικό σύστημα δικαίου; [Επιλέξτε μόνον ένα από τα παρακάτω]

1. Ναι
2. Μάλλον ναι
3. Μάλλον όχι
4. Όχι
5. Εξαρτάται
6. Δε γνωρίζω/ δεν απαντώ

III. Εάν η νομική σύγκλιση των συστημάτων συμβαίνει ήδη ή θα συμβεί, πώς θα έπρεπε ο εθνικός νομοθέτης της χώρας στην οποία διδάσκετε να ενσωματώσει στο νομικό σύστημα του υπερεθνικές μορφές δικαίου; [Επιλέξτε μόνον ένα από τα παρακάτω]

1. Συγκρίνοντας την ενσωμάτωση τέτοιων μορφών δικαίου σε άλλες χώρες;
2. Προσεγγίζοντας το νομικό του σύστημα κατά το δυνατό περισσότερο σε τέτοιες μορφές δικαίου;
3. Αναδομώντας το νομικό του σύστημα για να ενσωματώσει τέτοιες μορφές δικαίου;
4. Εκπονώντας μια κοινωνιολογική έρευνα προτού ενσωματώσει τέτοιες μορφές δικαίου;
5. Με συνδυασμό όλων των παραπάνω;
6. Με συνδυασμό κάποιων από τα παραπάνω;
7. Με κανένα από τα παραπάνω;
8. Δε γνωρίζω/ δεν απαντώ

IV. Εάν επιτρεπόταν στον εθνικό νομοθέτη της χώρας στην οποία διδάσκετε να χρησιμοποιήσει ή εάν πράγματι χρησιμοποιεί κάποια από τις μεθόδους που προτείνονται στην ερώτηση III (βλέπε επιλογές 1, 2, 3, 4, 5, 6), πιστεύετε ότι αυτός ο νομοθέτης θα αποκτούσε μία κάποια διακριτική ευχέρεια στην ενσωμάτωση υπερεθνικών μορφών δικαίου, όταν θα νομοθετούσε; [Επιλέξτε μόνον ένα από τα παρακάτω]

1. Ναι
2. Μάλλον ναι
3. Μάλλον όχι
4. Όχι
5. Δε γνωρίζω/ δεν απαντώ

V. Καθώς η χώρα στην οποία διδάσκετε είναι κράτος-μέλος της Ευρωπαϊκής Ενώσεως, πιστεύετε ότι το νομοθετικό σώμα της χώρας σας θα έπρεπε να έχει μεγαλύτερη διακριτική ευχέρεια στην ενσωμάτωση του Ευρωπαϊκού Δικαίου; [Επιλέξτε μόνον ένα από τα παρακάτω]

1. Ναι
2. Μάλλον ναι
3. Μάλλον όχι
4. Όχι
5. Εξαρτάται
6. Δε γνωρίζω/ δεν απαντώ

VI. Πιστεύετε εν γένει πως οι υπερεθνικές μορφές δικαίου καταστρέφουν τις πρωτοβουλίες του εθνικού νομοθέτη; [Επιλέξτε μόνον ένα από τα παρακάτω]

1. Ναι
2. Μάλλον ναι
3. Μάλλον όχι
4. Όχι
5. Εξαρτάται
6. Δε γνωρίζω/ δεν απαντώ

VII. Θέλετε: [Επιλέξτε μόνον ένα από τα παρακάτω]

1. Μία Ευρώπη ομοσπονδιακού τύπου με μικρή διακριτική ευχέρεια για τον εθνικό νομοθέτη της χώρας στην οποία σπουδάζετε;
2. Μία Ευρώπη ομοσπονδιακού τύπου με μεγάλη διακριτική ευχέρεια για τον εθνικό νομοθέτη της χώρας στην οποία σπουδάζετε;
3. Μία Ευρώπη των λαών με μικρή διακριτική ευχέρεια για τον εθνικό νομοθέτη της χώρας στην οποία σπουδάζετε;
4. Μία Ευρώπη των λαών με μεγάλη ευχέρεια για τον εθνικό νομοθέτη της χώρας στην οποία σπουδάζετε;
5. Με κανένα από τα παραπάνω
6. Δε γνωρίζω/ δεν απαντώ

QUESTIONNAIRE IN ITALIAN

I. E' favorevole alla convergenza dei sistemi giuridici nazionali? (scelga solo una risposta)

1. Si
2. Forse si
3. Forse no
4. No
5. Dipende
6. Non so / Non voglio rispondere

II. E' favorevole alla convergenza del sistema giuridico nazionale del paese in cui insegna con un ordine giuridico sovranazionale? (scelga solo una risposta)

1. Si
2. Forse si
3. Forse no
4. No
5. Dipende
6. Non so / Non voglio rispondere

III. Se la convergenza verrà attuata o é già stata attuata, la legislazione del paese in cui insegna, come dovrebbe applicare forme di legge sovrannazionali o forme di legge internazionali nel suo sistema legale? (scelga solo una risposta)

1. Paragonando l'applicazione di tali forme di legge in altri paesi
2. Avvicinando il più possibile il proprio sistema legale a tali forme di legge
3. Riformando il proprio sistema legale al fine di applicare tali forme di legge
4. Conducendo una ricerca di tipo sociologico prima dell'applicazione di tali forme di legge
5. Una combinazione di tutte le risposte 1, 2, 3 e 4
6. Una combinazione di alcune delle risposte 1, 2, 3 e 4
7. Nessuna delle risposte 1, 2, 3 e 4
8. Non so / Non voglio rispondere

IV. Se il legislatore nazionale del paese in cui lei insegna avesse a disposizione i metodi suggeriti nella terza domanda (risposte 1, 2, 3, 4, 5, e 6) avrebbe egli maggiore libertà di agire? (scelga solo una risposta)

1. Si
2. Forse si
3. Forse no
4. No
5. Non so / Non voglio rispondere

V. Poichè il paese in cui insegna è un membro dell'Unione Europea, ritiene che la sua legislatura nazionale debba avere maggiore libertà nell'applicazione delle leggi europee? (scelga solo una risposta)

1. Si
2. Forse si
3. Forse no
4. No
5. Dipende
6. Non so / Non voglio rispondere

VI. Ritiene che le forme di legge sovrannazionali e/o internazionali annientino le iniziative del legislatore nazionale? (scelga solo una risposta)

1. Si
2. Forse si
3. Forse no
4. No
5. Dipende
6. Non so / Non voglio rispondere

VII. Vorrebbe: (scelga solo una risposta)

1. Un' Europa federale con un limitato margine di valutazione per la legislazione nazionale del paese in cui lei insegna
2. Un' Europa federale con un ampio margine di valutazione per la legislazione nazionale del paese in cui lei insegna
3. Un' Europa dei popoli europei con un limitato margine di valutazione per la legislazione nazionale del pease in cui lei insegna
4. Un' Europa dei popoli europei con un ampio margine di valutazione per la legislazione nazionale del paese in cui lei insegna
5. Nessuna delle risposte 1, 2, 3, 4
6. Non so / Non voglio rispondere

QUESTIONNAIRE IN PORTUGUESE

I. É a favor da convergência de sistemas juridicos nacionais? [É favor escolher apenas una opção]

1. Sim
2. Possivelmente sim
3. Possivelmente não
4. Não
5. Depende
6. Não sei/ Não quero responder

II. É a favor da convergência do sistema juridico en que se encontra, num sistema juridico supranacional? [É favor escolher apenas una opção]

1. Sim
2. Possivelmente sim
3. Possivelmente não
4. Não
5. Depende
6. Não sei/ Não quero responder

III. No caso de convergência juridica ocopper, ou já per ocorrido, no sistema juridico en que se encontra, qual o método adoptado pelo legislador, de forma a implementar legislação, supranacional ou internacional, no sistema juridico en que se encontra? [É favor escolher apenas una opção]

1. Comparação de métodos de implementação dessa mesma legislação en outros paises?
2. Approximação do seu sistema juridico, tanto quanto possivel, dessa legislação?
3. Restruturação do seu sistema juridico de forma a implementar essa legislação?
4. Conduzindo una pesquisa do tipo sociologico antes de implementer essa legislação?
5. Una combinação de todas as opções acima referidas?
6. Una combinação de algunas das opções acima referidas?
7. Nenhuna das opções acima referidas?
8. Não sei/ Não quero responder

IV. No caso de o legislador do pais onde se encontra, estar autorizado a utilizar, ou efectivamente já utilizar, algun dos métodos referidos na pergunta III, considera que esse mesmo legislador pem mais poder de escolha? [É favor escolher apenas una opção]

1. Sim
2. Possivelmente sim
3. Possivelmente não
4. Não
5. Não sei/ Não quero responder

V. Tendo en consideração que o pais onde se encontra é membro da União Europeia, considera que o legislador nacional deveria ter mais escolha relativamente do método de implementação de regulamentos comunitários? [É favor escolher apenas una opção]

1. Sim
2. Possivelmente sim
3. Possivelmente não
4. Não
5. Depende
6. Não sei/ Não quero responder

VI. En termos gerais, considera que a legislação supranacional e/ou internacional destroi a motivação do legislador nacional? [É favor escolher apenas una opção]

1. Sim
2. Possivelmente sim
3. Possivelmente não
4. Não

5. Depende
6. Não sei/ Não quero responder

VII. Quer: [É favor escolher apenas una opção]

1. Europa federal com apenas una pequena margem de manobra deixada do legislador nacional do seu pais?
2. Europa federal com apenas una grande margem de manobra deixada do legislador nacional do seu pais?
3. Europa de pessoas (nações) com apenas una pequena margem de manobra deixada do legislador nacional do seu pais?
4. Europa de pessoas (nações) com apenas una grande margem de manobra deixada do legislador nacional do seu pais?
5. Nenhuna das opções acima referidas?
6. Não sei/ Não quero responder

QUESTIONNAIRE IN TURKISH

I. Ulusal Hukuk Sistemlerinin birbiriyle uyumundan yana mısınız? [Tek şık işaretleyiniz]

1. Evet
2. Olabilir
3. Olmayabilir
4. Hayır
5. Bağli olmak
6. Bilmiyorum/ Cevap vermek istemiyorum

II. Öğretim üyeliği yaptığınız ülkenin ulusal hukuk sisteminin, bir Supranational (UlusalÜstü) Hukuk Düzenine uyumunu savunuyor musunuz? [Tek şık işaretleyiniz]

1. Evet
2. Olabilir
3. Olmayabilir
4. Hayır
5. Bağli olmak
6. Bilmiyorum/ Cevap vermek istemiyorum

III. Sizce bu hukuki uyum sağlanacak ise veya sağlanmakta ise, öğretim üyeliği yaptığınız ülkenin yasa koyucuları Supranational Hukuk biçimlerini kendi ulusal hukuk sistemine nasıl uygulayabilir? [Tek şık işaretleyiniz]

1. Diğer ülkelerdeki Ulusal Üstü Hukuk biçimlerinin iç hukuklara uygulanışını karşılaştırarak
2. Kendi ulusal hukuk sisteminin, Ulusal Üstü Hukuk biçimlerine uyumunu sağlamaya çalışarak
3. Kendi ulusal hukuk sistemlerini, Ulusal Üstü Hukuk kurallarına göre yeniden yapılandırarak
4. Bu hukuk kurallarını uygulamaya başlamadan önce, sosyolojik araştırma yaparak
5. Yukarıdaki şıkların hepsi gerçekleştirilerek
6. Yukarıdaki şıklardan bazıları gerçekleştirilerek
7. Hiçbiri
8. Bilmiyorum/ Cevap vermek istemiyorum

IV. Sizce öğretim üyeliği yaptığınız ülkenin yasa koyucusuna yukarıdaki şıklarda belirtilen metotlardan (bakınız 1, 2, 3, 4, 5 & 6) herhangi birini uygulama hakkı tanınsa, ulusal yasa koyucunun yetki ve inisiyatifleri artar mıydı? [Tek şık işaretleyiniz]

1. Evet
2. Olabilir
3. Olmayabilir
4. Hayır
5. Bilmiyorum/ Cevap vermek istemiyorum

V. Öğretim üyeliği yaptığınız ülke gelecekte Avrupa Birliği üyesi olursa, sizce ulusal yasa koyucu Avrupa Birliği Hukukunu uygularken, halen üye olan ülkelere Avrupa Birliği tarafından tanınandan daha fazla seçme hakkına mı sahip olmalı? [Tek şık işaretleyiniz]

1. Evet
2. Olabilir
3. Olmayabilir
4. Hayır
5. Bağli olmak
6. Bilmiyorum/ Cevap vermek istemiyorum

VI. Supranational Hukukun, yasa koyucunun motivasyonunu yok ettiğini düşünüyor musunuz? [Tek şık işaretleyiniz]

1. Evet
2. Olabilir
3. Olmayabilir
4. Hayır
5. Bağli olmak

6. Bilmiyorum/ Cevap vermek istemiyorum

VII. Öğretim üyeliği yaptığınız ülkenin yasa koyucusuna: [Tek şık işaretleyiniz]

1. Sınırlı ulusal takdir alanı sağlayan bir federal Avrupa mı istersiniz?
2. Geniş ulusal takdir alanı sağlayan bir federal Avrupa mı istersiniz?
3. Sınırlı ulusal takdir alanı sağlayan ulusların Avrupa'sını mı istersiniz?
4. Geniş ulusal takdir alanı sağlayan ulusların Avrupa'sını mı istersiniz?
5. Yukarıdakilerden hiçbiri (şıklar 1, 2, 3, 4)
6. Bilmiyorum/ Cevap vermek istemiyorum

Appendix 3: Transcription of Academic Interviews

I. Are you in favour of convergence of national legal systems? / Why?

Responses to Question I: Professor Hugh Collins: Possibly yes / As a matter of practicality and where practicable. Professor Michael Bridge: Possibly yes / As a matter of practicality - referred to the idea of competition between legal systems *inter alia*. Professor Tuomas Ojanen: Possibly yes / Referred to the plethora of advantages arising from the convergence thesis - pointed to the lack of uniform implementation of environmental law in Europe. Dr. Mehmet Helvacı: Yes / In principle answered affirmatively - distinguished his favourable position in relation to certain areas of law e.g. commercial law. Nicholas Squires: Possibly no / Argued in favour of the preservation of current judicial styles in the various jurisdictions. Professor Bruno de Witte: It depends / Argued that convergence is acceptable, if it is examined on a subject-by-subject basis e.g. convergence of European family laws is unacceptable - noted that the current state of affairs in Europe quite acceptable. Professor Anna Maria De Vita: Yes / In principle - referred to advantages of the convergence thesis e.g. evolution of the national legal systems, advancement of legal culture and education, evolution of a basis of mutual understanding in law. Dr. Eoin O'Dell: Possibly no / Noted that his position is not strongly negative - with regard to European law convergence he pointed *inter alia* to the Trento and Osnabrück groups, the Principles of European Contract Law and the UNIDROIT Principles - pointed to the systemic differences of the legal systems - distinguished his position from that of Legrand as to the general viability of the convergence thesis. Professor Eckart Klein: It depends / Noted that convergence is acceptable in certain areas - stressed that convergence of European family laws is unacceptable. Professor John Bell: Possibly yes / Referred to the practical advantages for lay people in an environment of legal convergence - pointed to the systemic differences argument - recognised that all legal systems borrow law from other legal systems. Dr. Benjamin Karakostanoglou: It depends / Favoured a subject-by-subject approach - argued that convergence of laws should not touch upon nationally determined characteristics of legal systems-rejected the idea of convergence of family laws in Europe. Dr. Ruth Sefton-Green: No / Expressed her scepticism to the idea of law convergence - noted that law convergence in Europe occurs mainly on a top-down basis but this should not be the case - pointed out that convergence of legal systems is impossible on a global basis, considering the problematic nature of law convergence in Europe - the last point was justified under the *Product Liability Directive Cases of April 25 2002*. Professor Dr. Dário Moura Vicente: Yes / Justified his preference in relation to the pursuit of a unified Europe - pointed out that the convergence thesis promotes the idea of an integrated Europe - stressed the advantage of certainty - referred to the Brussels and Lugano Conventions on Jurisdiction and Enforcement in Civil and Commercial Matters - referred to the 'Unity in Diversity' principle of the EU - distinguished his position on a subject-by-subject basis - stressed that the idea of convergence of European family laws is neither required nor necessarily possible. Dr. Angel José Rodrigo Hérnandez: Possibly yes / Pointed to objective necessities in favour of convergence - argued in favour of convergence of principles at an initial stage and convergence of rules *per se* at a secondary stage. Emeritus Professor Hein Kötz: Yes / In principle - distinguished his position on a case-by-case basis - rejected the idea of convergence of family laws in Europe - stressed the idea of law and economics in relation to the convergence thesis - agreed with the graduality character idea of convergence projects - argued in favour of the possibility of law convergence on the law of obligations - distinguished this last point on the basis of 'default rules'. Professor Esin Örücü: Yes / Argued that practicality lies at the heart of convergence thesis e.g. practical advantages for the lay people such as freedom of persons - stressed that it is also in the interest of lawyers that convergence of laws is promoted - pointed out that convergence of principle is required beyond Europe e.g. in the area of international human rights - stressed that international human rights instruments should be of programmatic/directive nature, as different regions of the world tend, or at least tended until recently, to perceive human rights in a different way - argued that legal systems are ultimately not so different - pointed to the fact that methods rather than legal results vary. Professor Olivier Moréteau: Yes / Argued that law convergence is a reality which occurs more often than not and that policy considerations favour

convergence - agreed with the distinction of convergence as a process and convergence as a result to be achieved. Professor Joachim Michael Bonell: It depends / Only as a matter of practicality - favoured convergence with particular regard to international trade - rejected *ab initio* the idea of convergence of family laws. Dr. Carmen Otero García-Castrillón: Possibly yes / In principle - rejected *ab initio* the idea of convergence of family laws - a greed with the distinction of convergence as a process and convergence as a result to be achieved. Emeritus Professor Konstantinos Kerameus: Yes / In principle - noted that legal convergence should be of limited extent - disagreed with the idea of a European Code of Civil Procedure, as civil procedural laws have a national character and are an inherent part of a system's legal tradition - agreed with the idea of convergence in other areas e.g. the law of obligations - favoured to a certain degree the idea of 'default rules'. Jabeur Fathally: It depends / Distinguished between two models of convergence: the uniform model thereof and the *rapprochement* model thereof, which *mutatis mutandis* should be equated with a harmonisation/approximation model - stressed that the he objects to the former model but favours the latter one. Dr. Alberto Ricardo Dalla Via: Yes / As a matter of globalisation and internationalisation of law. Professor Jawahar Lal Kaul: It depends / Noted that there are many factors which could delimit the possibility of convergence of national legal systems. Professor Cheryl Anne Saunders: No / Argued that there is value in diversity, experimentation and competition between ideas. Professor María Elena Mansilla y Mejía: It depends / Justified her preference by referring to the impossibility of accepting any kind of convergence without knowing its exact legal effects. Professor Jiro Yamaguchi: It depends / Noted that there are already many universal rules about such basic institutions as democracy and human rights - favoured the idea that regulations on socio-economic lives can differ from country to country. Professor Gardiol Johan van Niekerk & Professor Christa Roodt: Yes / From the African perspective - argued in favour of convergence in as far as it can facilitate economic development and integration, transnational advancement, the recognition of foreign judgements, furthering of human rights, social upliftment and environmental protection. Professor John Murphy: No / Noted that despite his answer, he is in favour of cross-fertilisation of ideas between legal systems - argued that he is not in favour of convergence, as this would have a stultifying effect and prevent local experimentation. Emeritus Professor Stephen Goldstein: It depends / Noted that convergence involves aspects of the legal systems which are not unique to the given jurisdiction involved, such as systemic differences between systems, constitutional norms or culturally based norms. Professor Richard Kay: Yes / Noted that *in general* the convergence of legal systems facilitates transnational transactions, transfer of legal skills and more broadly applicable criticism and commentary - stressed that his perception of legal convergence refers to increasing similarities with respect to both substantive rules and legal procedures. Professor Assaf Likhovski: No / Noted that legal and social norms are related - argued that legal convergence cannot occur before there is convergence in social and cultural norms and values - questioned whether such convergence is desirable - concluded that cultural diversity is a good thing and that global cultural uniformity is not desirable - argued that as a consequence legal convergence is not a desirable outcome. Dr. Petra Butler: Possibly yes / Pointed that often differences are not that great and human beings all over the world share the same desires/problems - consequently, it can be very informative to know how another system has managed a particular problem.

II. Are you in favour of convergence of the national legal system in which you are teaching into a supranational legal order? / Why?

Responses to Question II: Professor Hugh Collins: Possibly yes / (Rationale analogous to response in question I). Professor Michael Bridge: Possibly yes / (Rationale analogous to response in question I). Professor Tuomas Ojanen: Possibly yes / (Rationale analogous to response in question I). Dr. Mehmet Helvacı: Possibly yes / Distinguished his position by promoting the idea that there should be a preparatory phase of convergence and a phase of convergence circle *per se*. Nicholas Squires: Possibly yes / Argued that the European Union

presents a significant number of advantages for United Kingdom lawyers. Professor Bruno de Witte: Yes / From the Dutch point of view - argued that the European Union presents many advantages - noted that it is European integration which makes convergence come out in Europe. Professor Anna Maria De Vita: Yes / (Rationale analogous to response in question I). Dr. Eoin O'Dell: Yes / Noted that supranational European law is a positive state of affairs. Professor Eckart Klein: It depends / Argued that a great deal of national law in the European Union is affected by supranational law referring to Jacques Delors - exemplified the influence of European Union law through the 2002 reform of the German Civil Code - suggested that Directives aim at approximation of laws, whereas Regulations aim at uniformity - favoured the subsidiarity principle, upon which his answer depended. Professor John Bell: Possibly no / Distinguished between national practice and multinational practice - argued that where multinational practice (and necessity) are the case, then obviously the answer would be that the convergence pattern of a national legal system to a supranational legal order should be pursued. Dr. Benjamin Karakostanoglou: It depends / (Rationale analogous to response in question I). Dr. Ruth Sefton-Green: No / (Rationale analogous to response in question I). Professor Dr. Dário Moura Vicente: It depends / Distinguished his response between different areas of law - argued that private international law is an area where there can be convergence - noted that convergence of the European Civil Codes is not necessarily desirable - stressed that there would not be a necessity for a Pan-European Civil Code, even if such Code would draw on the Germanistic/Romanistic legal tradition - justified this last point via the operation of Concordat within the Civil law of Portugal e.g. under this agreement an annulled marriage under both civil and ecclesiastical justice has the same legal effect - argued consequently that the civil law of Portugal is closely connected to inherent characteristics of the Portuguese society. Dr. Angel José Rodrigo Hérnandez: Possibly yes / (Rationale analogous to response in question I). Emeritus Professor Hein Kötz: Yes / Suggested that the European Union should present convergent patterns but to a limited degree - referred to 'default rules' - suggested that the plethora of mandatory rules e.g. in consumer protection should not be as penetrating on the national legal systems. Professor Esin Örücü: Yes / (Rationale analogous to response in question I). Professor Olivier Moréteau: Yes / (Rationale analogous to response in question I). Professor Joachim Michael Bonell: It depends / (Rationale analogous to response in question I). Dr. Carmen Otero García-Castrillón: Yes / Distinguished her answer vis-à-vis her previous response - justified this on the basis that the previous question pertained to a response of convergence of legal systems towards each other, whereas this question pertained to a response of convergence of legal systems towards a supranational formation. Emeritus Professor Konstantinos Kerameus: Yes / (Rationale analogous to response in question I). Jabeur Fathally: No / Argued that, if supranational law is not of utopian nature, it is of hegemonic and tyrannical nature. Dr. Alberto Ricardo Dalla Via: Yes / Noted that supranational law provides for a more globalised system. Professor Jawahar Lal Kaul: Possibly yes / Noted that the Indian legal system could in principle assimilate some subjects of an supranational legal order. Professor Cheryl Anne Saunders: It depends / Noted that if convergence in this question implies that some matters might more appropriately be handled at a supranational level or even an international level, she would support the proposition, as long as the institutional arrangements were suitable. Professor María Elena Mansilla y Mejía: Yes / Referred to the advantages of convergence in private international matters - suggested that convergence of the legal system in which she teaches can provide a level of security to the people when solving their conflicts. Professor Jiro Yamaguchi: It depends / Noted that there should be a differentiation between areas where common and universal rules can be applied and areas where national rules should govern. Professor Gardiol Johan van Niekerk & Professor Christa Roodt: Possibly no / From the African perspective - referred to the impossibility of a single supranational legal system developing or being created in Africa - noted the fragmentation of influences in the legal systems of Africa (French law, Roman-Dutch law, Portuguese law, Common law) and the existence of hybrid legal systems - suggested consequently that this fragmentation would make it impossible to effect a supranational African private law - argued that true convergence of legal systems requires much more than to sign a treaty setting out objectives. Professor John Murphy: No /

Stressed his opposition to the convergence of the US national legal system into a supranational order because of the concentration of power which would result - justified his position further by maintaining that it would be impossible to hold such a supranational legal order accountable to the people of the US. Emeritus Professor Stephen Goldstein: No / Stressed the value of diversity and that it is not possible to bring together aspects of legal systems which are unique in their system, constitutional or cultural aspects. Professor Richard Kay: Yes / Agreed with the convergence of the legal system in which he teaches given the definition of convergence as per his previous response - elaborated that even if the question referred to unification/subordination of legal systems, his answer would still be in the affirmative - distinguished his last point by stressing that his affirmation would have to be subject to significant qualifications. Professor Assaf Likhovski: It depends / Noted that he is in favour of partial convergence only in specific, non-culturally-determined legal areas e.g. intellectual property. Dr. Petra Butler: It depends / Noted that this depends on the area of law e.g. convergence would be very useful for e-commerce and human rights but not for family and succession law.

III. If legal convergence will occur or occurs already, how should the national legislator of the country in which you are teaching implement supranational or international forms of law into his national legal system? / Why?

Responses to Question III: Professor Hugh Collins: Some / Noted *inter alia* that there is no reason for the comparative implementation method to be excluded from law implementation analysis. Professor Michael Bridge: Some / Concretised his preference by referring to the comparative and the bridging models. Professor Tuomas Ojanen: Some / Concretised his preference by referring to the bridging, the restructuring and the sociological model. Dr. Mehmet Helvacı: Some / Concretised his preference by referring to the comparative, the bridging and the sociological models. Nicholas Squires: Some / Concretised his preference by referring to the comparative, the bridging and the sociological model. Professor Bruno de Witte: Some / Concretised his preference by referring to the comparative, the approximating and the restructuring models - noted that the restructuring model could be seen as a sub-category of the bridging model. Professor Anna Maria De Vita: Some / Concretised her preference by referring to the comparative, the bridging and the sociological models - noted that even though she does not disagree with a reform/restructuring approach, it is always questionable what technical, psychological, institutional and political considerations must be taken into account for such an approach. Dr. Eoin O'Dell: Some / Concretised his preference by referring to the bridging and the sociological models - noted that legal transplantation, though possible, is very difficult to always work - argued that a 'parallel evolution of solutions' is more favourable in relation to the approximation of laws - noted, with regard to a sociological model of implementation, that this should take into account 'domestic sensitivities' of legal systems. Professor Eckart Klein: Some / Concretised his preference by referring to the comparative, the bridging and the restructuring models of implementation - noted that the comparative method could operate both before and after an implementation deadline or that it could operate so that the legal systems is up to date with parallel developments elsewhere. Professor John Bell: Comparative / Stressed his preference to the comparative model - noted that it is the *standard* which is of greatest significance in relation to comparative implementation – noted questions of who can achieve this and how this can be achieved in a legal system - referred to public procurement directives in Europe. Dr. Benjamin Karakostanoglou: Some / Concretised his preference by referring to the bridging, the restructuring and the sociological models - noted with regard to the bridging and the restructuring models that they should respect some pre-existing domestic conditions in the legal system. Dr. Ruth Sefton-Green: Some / Concretised her preference by referring to the comparative and the sociological models - argued, by referring to Teubner, that transplants tend to create inconsistencies and irritations within the legal system. Professor Dr. Dário Moura Vicente: Some / Concretised his preference by referring to the comparative, the

bridging and the restructuring model - noted that there is a plethora of different regulatory regimes of convergence e.g. directives and regulations in the EU, international conventions - referred to Article 8 (as amended) of the Portuguese Constitution and argued that a restructuring has taken place in Portugal in relation to the hierarchy of norms. Dr. Angel José Rodrigo Hérnandez: Comparative / Referred *inter alia* to the international law distinction between 'self-executing' and 'non self-executing' instruments of law and the Convention on Biodiversity. Emeritus Professor Hein Kötz: All / Stressed the question of the existence of discretion as to how to implement - noted that the question in relation to the models would be whether there is a need to make use of them. Professor Esin Örücü: Some / Concretised her preference by referring to the comparative and the bridging models - referred to the good record of the UK in the implementation of EU law - argued that there should be a three stage approach in analysis for the implementation of convergent law (law in the books, law in action and internalisation of the convergent norm) - with regard to the last point, she referred to the example of proportionality in UK law - referred to the 'tuning' metaphor. Professor Olivier Moréteau: All / Distinguished his point of view by noting that his response depends on the context - noted that with regard to the restructuring model there should also be a restructuring of legal thinking in certain cases. Professor Joachim Michael Bonell: All / Argued that there are no reasons of principle as to why any model cannot apply - noted that the parallel application of any or all of the models is contingent on the merits of each implementation case. Dr. Carmen Otero García-Castrillón: All / Agreed that the *Affinitatis Formula*, when this was explained to her, could in principle make comparative implementation tactics easier - noted that with regard to the restructuring model this is not always necessary - noted with regard to the sociological model that its application should be depend on the subject area of law - referred to the *ordre public* argument. Emeritus Professor Konstantinos Kerameus: All / Distinguished his approach by noting that legal traditions should be taken into account - noted that his response would depend *inter alia* on the subject area of law and the subject matter of the law to be implemented. Jabeur Fathally: Some / Concretised his answer by referring to the comparative and the sociological models. Dr. Alberto Ricardo Dalla Via: Bridging / Noted that this should be the case in the possible means. Professor Jawahar Lal Kaul: All / Argued that no one method is foolproof enough to result into desired changes - noted that the availability of different options is desirable. Professor Cheryl Anne Saunders: Restructuring / Justified her opinion, as lack of transparency is a problem in implementing supranational and international arrangements - distinguished her justification by noting that her answer would also depend on the nature of the supranational arrangements - noted that it would be desirable that some degree of discretion should exist in relation to the laws which were implemented in fact. Professor María Elena Mansilla y Mejía: Some / Noted the necessity and usefulness of convergence of legal systems. Professor Jiro Yamaguchi: Bridging / Noted that cultural and historical uniqueness is often used as a pretext to avoid applying universal rules - stressed the need for legal systems to overcome pre-modern or unfair traditions in some areas - noted with regard to the last point that this is a matter of time. Professor Gardiol Johan van Niekerk & Professor Christa Roodt: All / Noted that the proposed models (options 1, 2, 3 & 4) should be regarded as phases in a single process - argued that to a certain degree the methods proposed are already employed in current law reform processes - noted that if the objective is to bring some coherence to the interacting legal systems, all these phases (models) are necessary. Professor John Murphy: Bridging / Noted that in the hypothetical scenario, the US would be in a circle of convergence, the US Congress would have to make every effort to implement US international legal obligations - stressed the fact that the US Congress must retain the power to deviate from the supranational or international model where national considerations require. Emeritus Professor Stephen Goldstein: All / Argued that the legislator should use all available tools to him - noted the inherent difficulties of convergence of legal systems. Professor Richard Kay: All / Noted that intelligent and informed convergence is better than ignorant and thoughtless convergence. Professor Assaf Likhovski: Sociological / Noted that the best way to reform law should be based on socio-legal research to find out to what extend supranational or international forms of law are relevant and applicable to a specific national

context. Dr. Petra Butler: All / Argued that this depends on the area of law, whilst there should be an assessment whether a country is ready for these changes - pointed that, even though New Zealand has implemented the CISG, the law firms normally exclude it and little is known about it in the legal system.

IV. If the national legislator of the country in which you are teaching would be allowed to use or would actually use any of the methods provided in question III (see choices 1, 2, 3, 4, 5 & 6), would this legislator then have more discretion? / Why?

Responses to Question IV: Professor Hugh Collins: Possibly yes / With regard to the choice of methods of implementation. Professor Michael Bridge: No / Argued that legal systems may already be using certain of the proposed models of implementation - referred *inter alia* to the UK approach of implementation of EU directives. Professor Tuomas Ojanen: Possibly no / Argued that the national legal systems are offered a choice through the methods but not necessarily a discretion as to what to implement *per se*. Dr. Mehmet Helvacı: Possibly yes / Noted that a greater discretion would be offered as long as these methods can be followed in practice, that is, if appropriate for the particular cases of implementation. Nicholas Squires: Did not wish to address this question. Professor Bruno de Witte: Did not wish to address this question. Professor Anna Maria De Vita: Possibly yes / Argued that the models provide some sort of discretion or rather an awareness of new implementation models - referred to the sovereignty of legal systems argument. Dr. Eoin O'Dell: No / Noted that his answer was on a technical level - referred *inter alia* to the Irish Copyright and Related Rights Act 2000. Professor Eckart Klein: Possibly yes / Suggested that the models provide a discretion of legal means to choose from in implementation - noted that in case of EU directives one can apply a variant methodology only within the framework of the directives themselves. Professor John Bell: Yes / A discretion of implementing tools. Dr. Benjamin Karakostanoglou: Possibly yes / A choice of implementing tools. Dr. Ruth Sefton-Green: Did not wish to address this question. Professor Dr. Dário Moura Vicente: Possibly yes / Argued that the methods may provide discretion, not only as a matter of legal tools to be used - referred to the distinction between EU regulations and directives - suggested that it would probably be easier to use some of the proposed models in the case of EU directives. Dr. Angel José Rodrigo Hérnandez: Possibly yes / Noted that the Spanish legislator does not actively use the proposed models in the question. Emeritus Professor Hein Kötz: No / Pointed to the parliamentary sovereignty argument. Professor Esin Örücü: Possibly yes / Distinguished her answer by arguing that the approximating / bridging model would normally provide more discretion than the rest of the models - noted *inter alia* the developments in the EU with regard to the changes in the nature of certain of its pillars. Professor Olivier Moréteau: No / Argued that to a certain degree the French legislator already uses some of the proposed models. Professor Joachim Michael Bonell: Yes / Noted that the Italian legislator does not actively use the proposed models in the question. Dr. Carmen Otero García-Castrillón: No / Noted that the Spanish legislature would not in principle have to use these methods - argued that, as the legislature holds ultimate sovereignty in such matters, the usage of these methods does not create discretion *per se*. Emeritus Professor Konstantinos Kerameus: Possibly yes / With regard to the choice of methods of implementation. Jabeur Fathally: Possibly yes / Noted *inter alia* that the discretion of the national legislator is a question of democracy. Dr. Alberto Ricardo Dalla Via: Possibly yes. Professor Jawahar Lal Kaul: Yes / Noted that the autonomy of legal systems thrives on discretions, which could be utilised by the proposed methods. Professor Cheryl Anne Saunders: Did not wish to address this question. Professor María Elena Mansilla y Mejía: Yes / Argued that, as legal convergence by definition prevents or solves conflicts, then all factors which affect people should be taken into account - noted that one of these factors, which the models imply, is the discretion of methods. Professor Jiro Yamaguchi: Possibly yes / Justified his point of view by noting that national sovereignty is still very strong. Professor Gardiol Johan van Niekerk & Professor Christa Roodt: No / Referred to the wide ambit of the South African parliament - noted that contents must be in

accordance with the Bills of Rights (Chapter 2 of the South African Constitution) - referred to s. 44 (4) of the South African Constitution 1996, which states that the national legislative authority 'is bound only by the Constitution, and must act in accordance with, and within the limits of the Constitution'. Professor John Murphy: Yes / Noted that currently there would be constitutional and other restraints on Congress restructuring the US legal system to implement supranational or international law. Emeritus Professor Stephen Goldstein: No / Noted that subject to the limitations of certain Basic Laws, the Israeli legislator has today almost complete discretion. Professor Richard Kay: No / Noted that the question of discretion is a question of national constitutional law and would be unaffected by the prior inquiries of the legislator. Professor Assaf Likhovski: No / Noted that the national legislator in Israel is already using some of the methods mentioned in the previous question and currently has unlimited discretion. Dr. Petra Butler: No/ By reason of the fact that New Zealand has parliamentary sovereignty.

V. Since (or if) the country in which you are teaching is (or would be) a member state of the European Union, do you think that its national legislature should have more discretion in the implementation of E.U. regulation (than the discretion which the E.U. Member States currently enjoy)? / Why?

Responses to Question V: Professor Hugh Collins: No / Argued that a higher level of discretion for the implementation of EU directives in Europe would create greater divergences than at present. Professor Michael Bridge: No / Argued that a higher level of discretion for the implementation of EU directives in Europe would create greater divergences than at present. Professor Tuomas Ojanen: Yes / As in a margin of appreciation for implementation matters - justified his opinion by referring to the reluctance of the Scandinavian people to accept the interference of EU law with pre-established social rights in the Scandinavian legal systems - referred *inter alia* to the right to good administration and the right of access to public documents within the legal system in which he teaches. Dr. Mehmet Helvacı: Possibly yes / Noted that this is a question for the future - referred *inter alia* to the willingness of the Turkish society to integrate into Europe - argued that certain structures of the society may hinder this movement to integration - referred to his proposed two-stages approach of integration, as in his response to question II (a preparatory phase of convergence and a phase of convergence circle *per se*). Nicholas Squires: Possibly no / Argued that directives in Europe already provide a certain amount of discretion with regard to the methods of transposition. Professor Bruno de Witte: Possibly no / From the Dutch point of view - noted that this question involves *inter alia* two sub-questions, the question of competences and the question of whether further discretion should exist - argued that a higher level of discretion might lead to divergences. Professor Anna Maria De Vita: It depends / Pointed to the discretion already provided in the implementation of directives - a question of competences and compliance to the current *status quo* (*pacta sunt servanda*) in Europe. Dr. Eoin O'Dell: It depends / Distinguished between implementation discretion *per se* and discretion in other practical surrounding matters of implementation - referred to the reform of the Irish Senate - compared the Irish approach to the Italian approach. Professor Eckart Klein: It depends / Pointed to the discretion already provided in the implementation of directives - noted consequently that discretion should in any case be within the framework of the directives. Professor John Bell: It depends / Pointed to the division of directives and regulations in Europe - noted that some discretion (as to means of implementation) is already provided in the case of directives. Dr. Benjamin Karakostanoglou: Possibly no / Argued that the current level of discretion in relation to EU directives is quite acceptable - noted the move of European law from intergovernmentalism to federalism. Dr. Ruth Sefton-Green: Yes / Justified her preference by referring to EEC Directive 85/374/EC on Product Liability, as France for instance, even though it had a more protective regime than what the directive in question had to offer, was found to fall foul of the directive and had thus to lower its regime of product liability standards - argued consequently that the EU should not lower the

standards of law in the various member states but allow the member states to comply only with some minimum standards (convergence by the lowest common denominator principle) and allow a margin for member states to go beyond such a threshold. Professor Dr. Dário Moura Vicente: No / Argued that further discretion could lead to considerable divergences - noted that in some subjects it is preferable to have uniform rules throughout - referred to the opt-in and opt-out principle in the EU - argued in favour of a subject matter approach - noted that in relation to highly technical instruments uniformity should be the case - noted *inter alia* that, even though he saw uniform instruments of law in the area of international private law as desirable, even in this area of law states choose to opt-out. Dr. Angel José Rodrigo Hérnandez: Possibly yes / A slighter wider level of appreciation in EU law matters is not only a question of legal sensibility but also a question of political sensibility - noted that it is not very often the case that the national legislator finds implementation an onerous task, as it is presumed that the instrument to be implemented has been negotiated - pointed to the competences argument by noting that in relation to Spain there are three levels (International/supranational, national/federal, regional/local) - noted with regard to international human rights the exclusive competence of federal law in Spain - referred with regard to this last point to the approach taken in Germany. Emeritus Professor Hein Kötz: It depends / Noted that some sort of discretion occurs in relation to directives - argued that in some areas uniformity should not be the case, though in other areas uniformity is right e.g. transportation matters - questioned the need for uniform labour laws throughout Europe by referring to Portugal and Greece - argued in favour of discretion in this subject area. Professor Esin Örücü: It depends / Pointed to the danger of further divergences in case more discretion would occur. Professor Olivier Moréteau: Possibly yes / Argued that sometimes there should exist a certain level of discretion - noted that EU directives are more specific nowadays but some of them leave a certain discretion to the national legislator - noted that directives are an acceptable instrument of convergent law, with the qualification that where language is vague the definitions and terminologies therein should be clearer - discussed and generally disagreed when asked about the quote on directives: *'Instrument hybride, et de statut ambigu'* (Snyder, 1993, p. 41, n. 127 quoting the Commission). Professor Joachim Michael Bonell: It depends / Distinguished between implementation discretion *per se* and discretion in other practical surrounding matters of implementation - noted that the question of further discretion in Europe might raise the question of consistency/coherence in EU law application. Dr. Carmen Otero García-Castrillón: No / Argued that there is already an inherent discretion of methods in the implementation of EU directives - referred to subsidiarity - noted the opt-in opt-out principle of EU law. Jabeur Fathally: Yes / With regard to potential membership of the country in which the interviewee teaches to a hypothetical union, similar to the EU, in the Americas - pointed to the cultural, juridical and linguistic characteristics of Canada. Dr. Alberto Ricardo Dalla Via: Possibly no / With regard to potential membership of the country in which the interviewee teaches to a hypothetical union, similar to the EU, in the Americas - noted the concentrated nature of federalism in Argentina. Professor Jawahar Lal Kaul: It depends / With regard to potential membership of the country in which the interviewee teaches to a hypothetical union, similar to the EU, in Asia - argued that the greater the degree of commonality between legal systems, the lesser the likelihood of allowing more discretion to these systems. Professor Cheryl Anne Saunders: Possibly yes / With regard to potential membership of the country in which the interviewee teaches to a hypothetical union, similar to the EU, in Oceania - noted that in Oceania there is much greater diversity between countries legally, culturally, socially and economically than in Europe - noted that a more precise answer would depend on the exact nature and scope of the supranational arrangements. Professor María Elena Mansilla y Mejía: No / With regard to potential membership of the country in which the interviewee teaches to a hypothetical union, similar to the EU, in the Americas - argued that discretion should be carefully used by the national legislature, as in any other case the legislature may commit mistakes during the implementation stage. Professor Jiro Yamaguchi: Possibly yes / With regard to potential membership of the country in which the interviewee teaches to a hypothetical union, similar to the EU, in Asia - noted that legal systems should share basic values but political and social

contexts in Asia are much more diversified than in Europe - stressed that too much regulation by a federal body would reduce the incentive for regional integration. Professor Gardiol Johan van Niekerk & Professor Christa Roodt: Yes / With regard to potential membership of the country in which the interviewees teach to a hypothetical union, similar to the EU, in Africa - noted that the EU is a very specific model of integration and that European integration is characterised by a combination of various different integration paradigms - pointed conversely to the fact that African integration takes an intergovernmentalist approach which recognises the independence of African states and which defends their sovereignty. Professor John Murphy: With regard to potential membership of the country in which the interviewee teaches to a hypothetical union, similar to the EU, in the Americas - noted that in such a hypothetical scenario, the complexity of the US legal system and its federal nature would require that Congress have more discretion than EU states have currently in the implementation of EU law. Emeritus Professor Stephen Goldstein: Possibly yes / From the Israeli point of view, with regard to potential membership of the country in which the interviewee teaches to a hypothetical union, similar to the EU, either in Asia or potential membership of Israel to the EU - argued that, in the case that Israel were to become a member of the EU, the unique history of Israel and its status as a Jewish and democratic state would probably require greater discretion than exists in the EU - noted that if he were to speak of an 'Asian Union', there would certainly have to be greater discretion given to the State of Israel than is given today to the States of the EU. Professor Richard Kay: It depends / With regard to potential membership of the country in which the interviewee teaches to a hypothetical union, similar to the EU, in the Americas - pointed to the difficulties of the question being answered in the abstract - argued that his answer would depend on the subject matter and on the historical stage in which the union found itself. Professor Assaf Likhovski: Yes / With regard to potential membership of the country in which the interviewee teaches to a hypothetical union, similar to the EU, either in Asia or potential membership of Israel to the EU - argued that decentralised local bodies are generally more efficient than centralised ones - referred to the success of the decentralised internet distribution systems - noted that his preference to decentralised bodies vis-à-vis centralised bodies is also true of norm creating bodies - consequently argued in favour of giving local/national bodies as much discretion as possible. Dr. Petra Butler: Possibly no / Argued that there is a right balance struck out in the EU example, as the Union concentrates on commercial law (in the widest sense). Suggested that family and succession law are culture-specific and should therefore stay more or less state-specific.

VI. Do you generally think that supranational and/or international forms of law destroy the incentives of a national legislator? / Why?

Responses to Question VI: Professor Hugh Collins: Possibly yes / Argued that this can be the case, as the national legislator may find himself in a position which he had not originally contemplated. Professor Michael Bridge: Possibly yes / Referred to *Erie Railroad Co. v. Tompkins* to explain his position - referred to subsidiarity in Europe and federalism in the US - concluded that, to a certain degree, convergent law in Europe compromises the initiatives of national legislatures. Professor Tuomas Ojanen: Possibly yes / Noted that domestic law has to be partially EU-proof nowadays - noted that this is not necessarily the case in the area of national family laws. Dr. Mehmet Helvacı: No / Argued that not only does integration in Europe *not* compromise the national legislator but it also acts as a positive motivator for new domestic legislation. Nicholas Squires: Possibly yes / Noted that national legislatures cannot always contemplate exactly the results from certain supranational/international instruments of law. Professor Bruno de Witte: No / As a matter of choice on the part of the national legislator. Professor Anna Maria De Vita: Possibly no / As a matter of choice on the part of the national legislator generally - argued that in specific cases the national legislator may be bound to compromise its initiatives. Dr. Eoin O'Dell: No / Argued that despite the interference of extra-national law in certain cases, there will always be local and national

issues where the national legislator will have the exclusive say - added that in Europe subsidiarity is needed and is particularly strong despite the supremacy of EU law in certain areas of law. Professor Eckart Klein: No / Argued that the conferment of legislative powers is not absolute; it is limited - consequently argued that there is partial interference between national law matters and supranational law matters - argued that in the case where only EU regulations existed in Europe, then it could be possible that the initiatives of the national legislator would be compromised - noted that this is a question of competences *inter alia* - stressed that it is the national legislators in Europe who have conferred powers to extra-national authorities of law - concluded that for the reason in the last point there is no compromise of national law incentives. Professor John Bell: No / Noted that European law is a changing process - consequently argued that as EU law processes are not a static reality, one cannot automatically conclude that the incentives of member states are compromised. Dr. Benjamin Karakostanoglou: It depends / Argued that his answer would depend on the general assessment of powers conferred from the national to the supranational/international legislator and the particular instrument in question which may signify a compromise of the national legislature's incentives or not. Dr. Ruth Sefton-Green: It depends / Argued that the answer depends on the instrument in question which may signify a compromise of the national legislature's incentives or not. Professor Dr. Dário Moura Vicente: No / As a matter of choice on the part of the national legislator - argued additionally that one must not necessarily infer an automatic presumption that supranational or international law means that the national legislator is left with no 'space' in which to act. Dr. Angel José Rodrigo Hérnandez: No / As a matter of choice on the part of the national legislator. Emeritus Professor Hein Kötz: It depends / A question of foreseeability - the question with regard to Europe would be whether the member states of the EU with the Treaty of Rome 1958 foresaw the powers that they conferred at that time to the then European Economic Community. Professor Esin Örücü: Possibly yes / Argued that where a great deal of powers are conferred from the national level to the extra-national level, as in the case of Europe, then truly one could argue that the national legislatures have reached the stage where they are not so much legislatures but rather a mix of legislatures and law-implementing machineries - argued that law innovation and creativity disappear, as standardisation of law becomes the norm - also noted that the good national legislator seeks to influence this standardisation at the international or supranational law level. Professor Olivier Moréteau: Yes / Noted that the conferment of legislative authority to extra-national bodies is a self-inflicted choice. Professor Joachim Michael Bonell: No / As a matter of choice on the part of the national legislator. Dr. Carmen Otero García-Castrillón: No / Argued that the national legislator lies in the centre of the process - noted that this is an ethnocentric approach based on the national sovereignty argument - pointed to the fact that transnational institutions attract their powers from national legal systems - with respect to this question, distinguished between a consequential approach (incentives of national legislator destroyed/compromised) and a descriptive approach (incentives of national legislator not destroyed/compromised). Jabeur Fathally: It depends / Noted that the Canadian experience shows that the Quebecois legislator is present and particularly active in the areas of his competence. Dr. Alberto Ricardo Dalla Via: Possibly no / On the basis of the distinct competences of the national and extra-national legislator. Professor Jawahar Lal Kaul: Possibly no / Argued that despite the existence of international forms of law, the national legislator continues to be the key player in fomenting changes in the national legal order. Professor Cheryl Anne Saunders: Possibly yes / Argued that incentives will be affected, if a national legislator does not adjust its procedures to the new arrangements, which typically is the case. Professor María Elena Mansilla y Mejía: No / Argued that peoples and national legal systems keep their own traditions and costumes. Professor Jiro Yamaguchi: Possibly no / Noted that even if international laws are established, there will inevitably remain room for interpretation or supplementary rule making - noted that national legislations will still have some role to play. Professor Gardiol Johan van Niekerk & Professor Christa Roodt: No / Noted that, if laws become more uniform, then these forms of law would destroy legislative competition - referred to the possibility of a certain national legislator to 'contract-out' and to render another law applicable instead. Professor John

Murphy: No / Justified his opinion by pointing to the fact that, in most cases, national legislators have the discretion to accept or reject supranational or international law in the consensual system which currently pertains. Emeritus Professor Stephen Goldstein: Possibly no / Argued that, even though such law may adversely effect the incentives of national legislators, there is doubt that such law would destroy *per se* their incentives. Professor Richard Kay: Possibly yes / Noted that the removal of subject matter from legislative control may denigrate the legislative position and remove an intangible incentive to defend the public welfare. Professor Assaf Likhovski: It depends / Questioned the definition of 'incentives' - distinguished his opinion by noting that, if by 'incentives' what is meant is the existence of supranational or international forms of law preventing national legislators from conducting detailed micro-research on the applicability of these norms to specific national contexts, then the statement (of the question) would be only partially correct - noted that in certain cases, such as international taxation, the existence of regional or international model tax treaties provides an easy alternative to detailed context-specific national legislation - stressed that in other fields, such as human rights, the existence of international does not destroy the incentive of national legislatures to enact context-specific laws. Dr. Petra Butler: No / Suggested that New Zealand presents a good example where Parliament has been very active in areas of supranational law.

VII. Which regional model of convergence would you prefer, if any? / Why?

Responses to Question VII: Professor Hugh Collins: Europe of the peoples + narrow margin of appreciation / Argued that this model would tend to be in the interest of the European peoples. Professor Michael Bridge: Europe of the peoples + wide margin of appreciation / Argued that this approach would favour the European peoples and provide the legal systems with a flexible margin of appreciation in implementation matters. Professor Tuomas Ojanen: Europe of the peoples + wide margin of appreciation / Argued that this model would be in the interest of the European peoples. Dr. Mehmet Helvacı: Europe of the peoples + wide margin of appreciation / Argued that this would be good today for the European peoples and legislatures - noted that with further integration in Europe there might be movement from a Europe of the peoples with a wide margin of appreciation to form a Europe of the peoples with a narrow margin of appreciation, later a federal Europe with a wide margin of appreciation and thereafter a federal Europe with a narrow margin of appreciation (In turn options (4), (3), (2) and ultimately (1) of question VII). Nicholas Squires: Europe of the peoples + wide margin of appreciation / Argued that this would be in the interest of the peoples and the legislatures. Professor Bruno de Witte: Federal Europe + wide margin of appreciation / Noted that his preference might be realised in the future. Professor Anna Maria De Vita: Europe of the peoples + narrow margin of appreciation / Argued that a wide margin would be in the interest of the peoples but the narrow margin would also benefit them, as the integration which would occur under this model would make allowance for fewer divergences. Dr. Eoin O'Dell: Federal Europe + wide margin of appreciation / Argued that this would be the best balance for the future - stressed the need for strong subsidiarity in Europe even under this model. Professor Eckart Klein: None of the above / Argued in favour of a Europe of the peoples but did not wish to make an exact choice between a wide and a narrow margin of appreciation - argued that Europe does not require a federal order of law but rather, it needs elements of federalism only - also argued that Europe should not become a supra-state - suggested that pillars 2 and 3 of the EU are not federal; at best, he regarded these as semi-federal only - concluded that a Europe of the peoples with varying degrees of margins of appreciation on a case-by-case basis is the preferable model of law convergence. Professor John Bell: Europe of the peoples + wide margin of appreciation / Pointed to the a loose confederation of Europe model - based his argument on the fact that European nation states are divided by many objective factors such as the linguistic barrier, the legal barrier and the cultural barrier. Dr. Benjamin Karakostanoglou: Europe of the peoples + wide margin of appreciation / Argued that this would protect the non ill-defined national interests of the legal

systems. Dr. Ruth Sefton-Green: Europe of the peoples + wide margin of appreciation / Argued that this would primarily be in the interest of the European peoples. Professor Dr. Dário Moura Vicente: Europe of the peoples + wide margin of appreciation / Noted that his choice comes in accordance with the 'unity in diversity' principle. Dr. Angel José Rodrigo Hérnandez: Federal Europe + wide margin of appreciation / Qualified his answer by explaining that one should take a law subject by law subject analysis approach e.g. there should normally be some margin of appreciation in human rights - argued that this is ultimately a question of balancing between the national and the extra-national. Emeritus Professor Hein Kötz: Federal Europe + wide margin of appreciation / Elaborated, when asked on the German federal model and explained its advantages - argued that federalism could, in principle, work in Europe. Professor Esin Örücü: Europe of the peoples + narrow margin of appreciation / Argued that this would a workable model - referred *inter alia* to the privileges of the Swiss confederative model. Professor Olivier Moréteau: None of the above / Argued in favour of an approach on a case-by-case basis - noted that his preference was for a federal law convergence model with varying degrees of margins of appreciation - stated that effectiveness is the main reason for his preference to federalism - noted that member states *per se* should have a say on the lawmaking process - referred *inter alia* to the Swiss and the US models - argued that subsidiarity in Europe is not free from definition problems and that there is not always a clear delimitation of competences between states and the EU. Professor Joachim Michael Bonell: None of the above / Argued in favour of a federal model for Europe in the future but did not wish to make an exact choice between a wide and a narrow margin of appreciation. Dr. Carmen Otero García-Castrillón: None of the above / Argued that a margin of appreciation for the national legislator is necessary but this should also be assessed on a subject matter basis - also argued in favour of a federal model for Europe, as Europe seems to become more integrated by the day - stressed the need for strong subsidiarity under a federal model. Emeritus Professor Konstantinos Kerameus: None of the above / Argued in favour of a federal model for Europe - noted that in the beginning this should be one conferring a wide margin of appreciation to the national legislator and at a later stage a federal model conferring a narrow margin of appreciation - noted that he would not expect sudden changes in the subject area of the question. Jabeur Fathally: Federal America + wide margin of appreciation / Noted that this choice would preserve the characteristics and identity of the various different peoples in the Americas - noted that the Canadian model serves as a good example in relation to the concretisation of his choice - referred to the '*plus d'État*' theory, which he preferred. Dr. Alberto Ricardo Dalla Via: Did not wish to address this question. Professor Jawahar Lal Kaul: Asia of the peoples + wide margin of appreciation / Argued that the national legislator would continue to have a pivotal role in whatever the desired changes are planned. Professor Cheryl Anne Saunders: Did not wish to address this question. Professor María Elena Mansilla y Mejía: Did not wish to address this question. Professor Jiro Yamaguchi: Federal Asia + wide margin of appreciation / Argued in favour of EU style regional integration in Asia in the 21st century - noted that, if such a model takes place, the legal systems in Asia will need a common legal framework for such basic values as democracy and human rights. Professor Gardiol Johan van Niekerk & Professor Christa Roodt: Africa of the peoples + wide margin of appreciation / Argued in favour of autonomy on the part of the state and the individual - noted that with regard to international recognition and enforcement of human rights, it may become important to have a narrow margin of appreciation - noted that incentives for economic development may also be more effective, if there is co-ordination. Professor John Murphy: None of the above / Noted that the models of the question would raise serious issues if implemented in practice. Emeritus Professor Stephen Goldstein: None of the above / Noted that at this stage of her history it would not be good for Israel to be part of a federal union, as distinguished, perhaps, from a more loosely knit 'confederation' or 'common market'. Professor Richard Kay: Did not wish to address this question / Noted that ultimate unification of systems depends on the social and political conditions in existence at any time - argued that this is certainly a very distant possibility in 2005. Professor Assaf Likhovski: Either Europe or Asia of the peoples + wide margin of appreciation / (Rationale analogous to response in question V). Dr. Petra Butler: Federal Oceania + wide margin of

appreciation / Justified the choice for a wide margin of appreciation by reason of the fact that custom plays a major role in Oceania.

Appendix 4: Comparative Chart of the Models and Factors Proposed in this Thesis

COMPARATIVE CHART OF THE MODELS AND FACTORS PROPOSED IN THIS THESIS

	THE GENERAL MODEL OF IMPLEMENTATION	THE RESTRUCTURING MODEL OF IMPLEMENTATION	THE COMPARATIVE FACTOR IN IMPLEMENTATION	THE SOCIO-LEGAL FACTOR IN IMPLEMENTATION
arative d able the /factor:	PARTIALLY	YES	YES	PARTIALLY
Affinitatis ula is lly ed:	NO	NO	IN THE MAJORITY OF CASES	NO
mentation literal:	DEPENDS	DEPENDS	DEPENDS	DEPENDS
mentation be ogical	POSSIBLY	POSSIBLY	POSSIBLY	YES
nt tion to e means mentation:	ONLY IF THIS IS PROVIDED FOR	DEPENDS	DEPENDS	DEPENDS
n of ciation:	TECHNICALLY NO - ONLY BY WAY OF CONSTRUCTION	NO	DEPENDS	YES
res a g rgent ment of	NORMALLY YES	NO	NO	NO
rmist in :	POSSIBLY	POSSIBLY	POSSIBLY	NO
ctive/ ive in :	DEPENDS	DEPENDS	DEPENDS	YES
tions the /factor le:	UP TO THE POINT THIS IS PERMISSIBLE	NO	DEPENDS	YES
apeutic' in ce:	NO	NO	DEPENDS	DEPENDS
l/factor lly es a n of ons:	YES	DEPENDS	NO	DEPENDS
ntataxic in :	TECHNICALLY NO	YES	NO	NO

xtual in :	NO, UNLESS OTHERWISE PROVIDED FOR	NO	PARTIALLY SO - DEPENDS	YES
cation of /factor to mentation ne:	YES	YES	YES	YES

Appendix 5: Published Material

Comparative law as the ideal means of convergence of the national financial systems in the world of globalisation.

Antonios Platsas*

Introduction

The world in which we are living is clearly one of division. There are hundreds of languages, a number of different religions and some two hundred jurisdictions on the planet. A world as such seems to resemble the Tower of Babel. Consequently, it could be argued until recently that the only tool unifying the separating worlds of finance is globalisation. Yet it would seem that globalisation *per se* is destined to fail[1]. Director Giddens of the London School of Economics[2] defines "Globalisation as the intensification of world-wide social relationships which link distant localities in such a way that local happenings are shaped by distant events and, in turn, distant events are shaped by local happenings. It is a process which has led to the reduction of geographical, spatial, and temporal factors as constraints to the development of society." In this article it is suggested, however, that globalisation can only be achieved through the medium of Comparative Law.

Globalisation on a purely financial basis is destined to fail. There is no chimera vainer than the belief of globalisation on a purely financial basis. But how do the mainstream globalisation supporters really support their case? Their argument is largely based on a neo-liberal wild-west approach, which in principle, and in principle only, is not necessarily an unsound approach, for example "let the markets work out their own methods of regulation". Additionally, the supporters thereof presuppose that the markets are mature entities, these markets being composed by mature businessmen and individuals. Can this be a good case? Should one be as naïve to suggest that firstly markets are mature, secondly individuals therein are mature too, and thirdly that under the *laissez faire laissez passer* doctrine the markets are destined to be the prime promulgators of regulation as to their own matters? The short answer for the first two questions is no, whereas the answer for the latter is perhaps. The following lines provide the justification for these answers.

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* LL.B. in European Law (Coventry University & University of Potsdam), LL.M. in International Business Law (L.S.E./ University of London), Ph.D. candidate in Comparative Law and Legal Methodology (Trinity College/ University of Dublin).

1 It is now quite clear that globalisation is not what one would expect for the poorer countries of the world. It does seem that it has had an uneven impact on the world's poor countries, a new study from the World Bank reports. Some developing countries have been able to exploit globalisation to reduce poverty, but the poorest countries do remain marginalized. See ''some win, some lose,'' *The Economist*, December 5 2001."

2 http://www.lse.ac.uk/collections/meetthedirector/faqs.htm#Globalisation

It is true that self-regulation of the markets is not by and large objectionable[3]. What is objectionable is no regulation whatsoever. And if this is so, that is if some sort of global regulation has to be the case then basically comparative law is the way for this to be achieved. Consequently, it is not for the markets to globalise the law, it is for the comparative lawyers to globalise the markets. In any case the law also needs to be globalised. One should take into account for instance the United Nation's (UN) Convention on Contracts for the International Sale of Goods 1980[4], which is indeed one of the pioneers of "legal globalization". Thus with approximately 60 signatories, most of which represent 70-75 per cent of the world's gross domestic product, one can see a successful application of globalised law, be it in the sphere of private law only. Additionally, despite the fact that globalisation mainly pre-exists global law, no real global financial law exists. This does not mean that constructive globalisation will ever be achieved without a sound basis in global financial law. However, one would not have to suggest that the jurists, engaging themselves with convergence, should not listen very carefully to the voices of both the markets and the nations.

Reasons for unifying the financial laws of the nations

But why should the financial laws unify via comparative law in the first place? Apart from leading academic opinion[5] on the issue there seem to be a number of practical advantages. First of all there will be uniformity and clarity. Secondly, political values will be asserted on a global scale. Thirdly, financial laws will improve. Fourthly, fewer laws would make the laws not expensive instruments of the big players of the market, but rather affordable instruments of all the players of the market. Fifthly, there will be denationalization of the laws as the means for true global businesses[6]. All these advantages are seen as the true reasons of a unified state of law at least in respect of the laws of finance.

The subject matter of Comparative Law and its mechanics: an overview

The main question to be answered now is why comparative law *per se* should be the unifying tool of the financial markets. First of all, comparative law has to be defined. Comparative law is that branch of legal studies which is based upon a comparison of the world's different legal systems. The roots of it can be traced back to the writings of Plato and Aristotle, whereas modern comparative law starts conventionally in 1900 in Paris. Law itself is the subject matter of comparative law, whereas comparison is its process[7]. The strongest argument as to whether comparative law can be the unifying tool, would be that it is only comparative law that would provide us with a true investigative tool in the pursuit of solutions. The question now is what is the best

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3 The two leading systems of self-regulatory bodies in Europe are Sweden and the U.K. In Sweden the Finanspektionen was established in July 1991, whereas the British Financial Services Authority (*The* FSA) came into existence in December 2001. See "Sweden offers role model for U.K.'s financial watchdog", *The Financial Times*, December 4, 2001 page 6,

4 This Convention is perhaps one of the most successful instruments of international private law. However, its universality is questioned when one sees its minimal effect on C.I.F. and F.O.B. contracts, which to a great extent are still covered by English commercial law.

5 B.S. Markesinis, *The Clifford Chance: Millenium Lectures*: *The Coming Together of the Common Law and the Civil Law* (Oxford-Portland Oregon), chapter 14 – 'Coming Together – the Future'.

6 http://www.law.cam.ac.uk/unify/core.htm

7 Zweigert and Kötz, *An Introduction to Comparative Law* (1998 Oxford) 3rd ed.

financial law or rather the most efficient financial law. How one would assess this and most importantly who would make the assessment? The most efficient law is the law that the people consider to be law. This is clearly a subjective approach, but indeed the most effective law is also the law that clearly makes provisions for the advance of society. The best factor in financial law is the development in financial expansion[8]. This is clearly an objective test and it is preferable to the subjective one. In any case, however, comparative law has to avoid the trap of nationalizing its starting points but it should most definitely have to indicate the best application of specific areas of financial law in particular legal systems. In essence, on the other hand, if solution X is better applied in country Z, then comparative law should upgrade this on a global approach basis.

Effectiveness of law: the main criterion of new financial laws

How is the effectiveness of law to be assessed? That is truly an arduous task, but in any case it is far better than what many of the globalisation supporters suggest. It is better to assess something on a global basis rather than merely leave the markets to make their own rules. This would be naïve since it is understandable that there are thriving markets but there are also weakly constituted markets, whose laws are either unsophisticated or primitive. Markets are also liquid, and being liquid they tend to be fragile. The combination of a liquid and largely unregulated market may well have disastrous effects for the well being of this market. But since it is a world of globalisation, the disastrous effects to market X may well bring similar phenomena to markets A, B and others by way of the domino effect.[9] A globalised system of financial rules will not only protect the not so mature market X, but also the mature markets A, B and C, since the latter are nowadays considered to a certain extent to be ''interdependent'' with the former.

In the European Union for instance deregulation is achieved via regulation. The most obvious examples are Directive 96/92/EC[10] and Regulation 2887/2000[11] on the liberalization of the energy markets and telecommunications in Europe. Unfortunately this may be deregulation via regulation. It is a way of redrafting the well-complicated pre-existent national regulation, via comparative law for example. through the medium of *Ius Europaeum Commune*.[12] However, a market is by definition a creature of its own, peculiar to itself, which does have to be tamed, at least to a certain extent. This is not to suggest that new laws need not be liberal. Laws should be liberal but they should also be reactionary, at least to a minimum extent, if this is for the sake of the global coherence of the financial markets. Freedom of the market should be the case, but this has to be done through global regulation. As the constitutional lawyers in the United States would use the concept of "checks and balances," so should comparative jurists create a global financial

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8 Economists make technical distinctions between different types of efficiency; see B.R. Cheffins *Company Law: Theory, Structure and Operation* (OUP, 1997) at pages 14-16.

9 For example the Asian Crisis back 1997, the subsequent financial crisis in Brazil, and the recent financial crisis in Argentina.

10 www.europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=en&numdoc=31996L0092&model=guichett

11 www.europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=en&numdoc=32000R2887&model=guichett

12 Common European Law - a core of legal ideas, principles and concepts that are common and intelligible amongst lawyers throughout Europe.

framework of "checks and balances." They should create an environment of global stability without oppressing the markets. Markets should be left to themselves, but there should be at least some controlling mechanisms to prevent financial crises when this would more easily arise.

In a world of global law, international business would flourish. However, it is questionable when comparative law will "proceed" in the greatest perhaps legal project of all: the convergence of financial laws. The answer is self-evident: when there will be true political will on behalf of the nations. Effectively, if this were the case then a unified financial legal framework would reduce the legal risks involved in global fluctuations of capital. Hence, a legal nexus of global proportions would enhance not only predictability but also security. Indeed, there is nothing such as true global financial regulation at the moment. One would be able to refer to a modern kind of *lex mercatoria*, but this is not true regulation. There are also a number of international treaties,[13] but they never really achieved the accession of all the states in the world. Despite the pessimistic message of the aforementioned, it would seem that financial regulation on a continental basis gains ground. Additionally, it would not be imperative for this global financial law to arise by the convergence of the very component elements of general business law. This can be seen as a valid argument if one would consider the different corporate governance systems between the United States and United Kingdom on the one hand and the Continent and Japan on the other. Despite these systems being different, one would have only to see for instance that many European companies seek listings in the United States. The most obvious example is the German company of Daimler-Chrysler, which was listed in the New York Stock Exchange (NYSE) in 1993.[14] Furthermore, in Europe the Euro-project will test the national financial systems. It seems that it is more than likely that the twelve states of the Eurozone will eventually fuse their financial laws[15] In the meantime in the American Continent the Panamerican movement is gathering pace. President G.W. Bush would like to see this as a reality by the year 2005: the reality of a free trade zone from the southernmost point of the American continent, the so-called Land of Fire, to Northern Canada. Additionally, China joined both the Association of Eastern Asian Nations (ASEAN) as well as the World Trade Organisation (WTO) in November 2001.

The developments in relation to comparative projects

Although this is the situation, one would have to ask who should assess the ideal options. Arguably, panels of comparative lawyers need to be made. Panels, as such, do exist already. Comparative jurists were the driving force behind the Treaty of Rome in 1957, the cornerstone of the European Union or the more modern North American Free Trade Agreement (NAFTA) in 1990. Unfortunately, the greatest comparative projects have yet to reach a truly global basis. For instance the United States Uniform Commercial Code and the widely anticipated European Civil Code

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13 For example, the U.N. Convention on Contracts for the International Sale of Goods 1980. However, even this convention has only acquired sixty (60) ratifications hitherto, even though the respective signatories represent 70-75% of the world's GDP

14 Peppet, *Company Law* (Longman 2001), page 59. C. Global convergence in corporate governance.

15 "The Euro as a catalyst of Legal Convergence in Europe", by Dr. W.F. Duisenberg. See http://www.ecb.int/key/00/sp000917.htm

Project are lacking true global financial audience. They are semi-global or continental in nature; one would not describe them as truly financial law corpuses, but they are still a good indicative start for a global financial law to emerge. Unfortunately, world wars have weakened if not destroyed, "faith in world law" as Zweigert and Kötz suggest [16] Despite this, there are dozens of comparative law institutes throughout the world: the British Comparative Law Institute, the Max Planck Institut in Germany, the Swiss Institute of Comparative Law, the Institute for Foreign and Comparative Law in South Africa, the American Law Institute in the United States, the Netherlands Comparative Law Association[17], the Institute for the Unification of Private Law (UNIDROIT) and many more.[18] In their orders truly financial experts can be found. However, since these committees are mostly national in nature they have unfortunately concentrated themselves on comparing, acquiring and transplanting foreign laws.

Conclusion

In conclusion, one has to remember the words of Lord Goff of Chieveley when in 1996 he stressed that "We can truly be said to live in the age of comparative law[19]"; whereas it is now well contemplated that the "era of comparative law" has commenced.[20] If this is true, then a common pool of financial rules has to be the basis for a world blueprint of financial law. Harmony of world financial law can only be achieved via harmonization, which amounts to approximation rather than uniformity of financial laws throughout. This will achieve a state of harmony in a global legal framework of finance. Although contemporary legal trend is for national laws to converge, there will always be a degree of divergence in the financial systems as harmony of differents is more fruitful and beneficial than efforts to standardize.[21]

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16 Zweigert and Kötz, *An Introduction to Comparative Law*, as translated by Tony Weir. (1998 Oxford) 3rd ed.

17 http://www.law.kub.nl/ejcl/41/art41-1.html

18 http://www.unidroit.org

19 See (1988) 2 Denning Law Journal 79, at page 92.

20 T.Koopmans, "Comparative Law and the Courts" (1996) 45 ICLQ 545.

21 www.law.kub.nl/ejcl/41/art41-1.html#par22 for some very interesting ideas as to "Harmonisation or Harmony."

THE POTENTIAL IMPACT OF THE CISG ON THE COMMON LAWS OF ENGLAND AND THE REPUBLIC OF IRELAND: A LEGAL ANACTATAXIS OR A TRIVIAL MATTER OF IMPLEMENTATION? THE LESSONS OF COMPARATIVE LAW

Antonios Platsas[*]

INTRODUCTION

This article is based on the speculative hypothesis that the United Kingdom ("UK") as well as the Republic of Ireland ("Ireland") will eventually implement the United Nations Convention on Contracts for the International Sale of Goods 1980 ("CISG 1980") into their legal systems.

Out of the 25 member states of the European Union[1] only 5 have yet to accede to the CISG 1980: Cyprus, the Republic of Ireland, Malta, Portugal and the United Kingdom; all of them are by and large common law systems with the exception of Portugal. However, the article will focus on the British and Irish "non-compliance" with the CISG 1980 and the potential modifications that their trade law systems would have to face to come up to terms with a potential implementation of the CISG 1980.

The analysis is by way of a comparison between the current common trade laws of England and Ireland with the CISG 1980 (and to a certain extent with the CISG compliant nations).[2] This is followed by an analysis as to why the implementation of the CISG 1980 will amount to a legal anacatataxis[3] rather than a mere triviality of implementation in these countries.

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* LLB Coventry University & University of Potsdam, LLM International Business Law, London School of Economics, University of London, Researcher in Comparative Law and Legal Methodology Trinity College, University of Dublin.

[1] On the basis that all 10 candidate states will join the European Union by May 2004.

[2] There are now 62 contracting states to the CISG from all regions of the world. These also include significant non-European trade partners of the UK and the Ireland such as the USA, Canada and Australia.

[3] Whole reshuffling or restructuring.

A PLETHORA OF DIFFERENCES BETWEEN COMMON TRADE LAW AND THE CISG 1980: A PLETHORA OF COMPARISONS

Make no mistake, the CISG 1980 and the common law rules of the respective trade laws of England and Ireland are worlds apart. The legal comparatist identifies approximately ten grounds of comparison[4] between the CISG 1980 and Anglo-Irish commercial law ("common law"). On the face of it, the differences appear insurmountable. However, it will be suggested herein that even if this is so, the Anglo-Irish legal system could embrace the notions and mechanics of the Convention.

(a) The concept of "good faith" under CISG 1980

The first major difference relates to the concept of "good faith" recognised under Article 7 (1) CISG 1980. It is questionable as to what extent the notion of good faith applies in international sale of goods under the Convention. A significant point to note is that the US legal system has generally accepted this notion in the formation of international contracts for the sales of goods bringing the CISG into force since 1988.[5]

On the other hand and on a macro-comparative basis, one notes the rather explicit absence of "good faith" between traders in Anglo-Irish law, with the exception of consumer contracts due to the influence of European Union Law ("EU Law").[6] The case remains, however, that English Law does not generally recognise good faith in commercial contracts at the stage of performance and enforceability of the contracts. In *Re Moore & Co v Landauer & Co* the plaintiff agreed to sell to the defendant canned fruit in cases of thirty.[7] However, upon delivery the fruit was packed in cases of twenty-four. It was held that the buyer was entitled to reject the goods since the description of the goods had not been complied with. This case illustrates that "good faith" may not intervene to the

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[4] Although comparative law is mainly engaged with comparisons of differences, it could be used to highlight similarities too. Thus, a ground of comparison may well be either a difference or a similarity; though as it is apparent, it is differences mainly that one meets in a comparison of the CISG 1980 and Anglo-Irish trade law.

[5] The United States of America signed the CISG on the 31of August 1981, ratified it on the 11of December 1986 and brought into effect on the 1 of January 1988.

[6] Prior to Council Directive 93/13/EEC there was an almost complete absence of good faith in consumer contracts of sale in the UK and the Ireland. A good analysis on the impact of this directive remains the text of Professor Hugh Collins. *See* Hugh Collins, "Good Faith in European Contract Law", *Oxford Journal of Legal Studies* (1994). The latter text remains the most authoritative text on the effect of good faith in European Law in general and the British law of consumer contracts in particular.

[7] [1921] 2 KB 519.

rescue of the plaintiff seller, if he has failed to comply either with the description or the packaging of the goods in question. This case remains a good example of the very limited application of the concept of "good faith" in common law. In *Arcos v Ronaasen*[8] the buyers were entitled to repudiate the contract for mere breach of condition, but really in order to take advantage of the falling market price of timber. This was allowed by way of the court's construction. The position in Irish law is analogous. The position of the American trade law[9] is closer to the CISG 1980 model.

(b) Conformity of goods

The second major difference between the trade laws of England and Ireland and the CISG 1980 relates to the conformity of the goods of the contract in question. In particular, misrepresentation under Article 25 CISG 1980 occurs only if the breach has been "fundamental". A fundamental breach occurs when the party in breach has caused detriment to the innocent party and the party in breach did not foresee this.[10] It is generally accepted that common law courts are far more generous than the CISG 1980 on misrepresentation, whilst rescission is not allowed, if the goods have been accepted as in *Leaf v International Galleries.*[11] Additionally, when it comes to conformity of goods, the meaning of the word "particular" presents difficulties between the common law and the CISG 1980; thus, under Article 35 (2) (b) CISG 1980 fit for any "particular purpose" has been taken to mean a "special purpose", whilst under *Preist v Last*[12]

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[8] [1933] AC 470.

[9] For this a mere reference to article 2-103 (1) (b) of the Uniform Commercial Code 1952 (as amended) should suffice. Article 2-103 (1) (b) (May 1, 1998, Draft) defines good faith as follows: "Good faith" in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.

[10] In order for the buyer to claim this, he must make a declaration of avoidance by notice to the party in breach as in article 26 CISG 1980. If this succeeds then "avoidance" under article 49 CISG 1980 is the case. The seller too, if he is the innocent party can claim avoidance under article 64 CISG 1980. Obviously the provisions on damages (articles 74-77 CISG) may also be triggered.

[11] [1950] 2 KB 86. The main issue was that of a mistake discovered after many years by the plaintiff in relation to a sale of painting; it was said *inter alia* that an action could not have been based on mistake, since there was no error in what was handed over. The picture sold was a specific one. The parties were agreed in the same terms on the same subject matter and that has been sufficient to make a contract. Acceptance of the specific good in question had already occurred.

[12] [1903] 2 KB 148.

"particular purpose" has to be taken to mean a "commonplace purpose".[13] Furthermore, a point to be made is that Article 35 CISG does not make allowance for automatic rejection of the goods. Common law takes a significantly different approach on this and therefore in *Arcos v Ronaasen*[14] it was held *inter alia* that the description of the goods amounts to a condition. A breach of condition such as misrepresentation for instance is accordingly a genuine basis for rejection rights to arise in common law. Further, whilst under article 38 CISG 1980 there is an obligatory duty to examine the goods upon delivery, it would seem that no such duty exists under common law (unless it is expressly prescribed in the terms of the contract). Consequently, if common law *per se* does not recognise any such duty, the inspection of the goods by the purchaser must be seen at best as a right of the latter only rather than a duty as in the CISG 1980.

(c) Anticipatory breach

Thirdly, the attitudes of the CISG 1980 and common law towards the notion of anticipatory breach vary. Thus, under article 71 (1) CISG 1980 "a party may suspend the performance of his obligations if, after to the conclusion of the contract, it becomes apparent that the other party will not perform a substantial part of his obligations..."[15] As the notice requirement is very usual in the CISG 1980, the party intending to suspend performance after the conclusion of the contract must give reasonable notice to the other party.[16] Accordingly, even though the notion of anticipatory breach is recognised to a certain extent in common law, it does not successfully tackle cases in a systematic and organised manner of the CISG.[17] This is surely due to the fact that suspension or anticipatory breach is seen not as a matter of course but rather as a matter of

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[13] See Michael Bridge *The International Sale of Goods: Law and Practice, (Oxford OUP* 1999) at p 80 (para. 3.14). Additionally, the statutory expression of *Preist v Last* can be found in s 14 (1) of the British Sale of Goods Act 1979 (as amended) [hereinafter SOGSA 1979] and s 10 of the Irish Sale of Goods and Supply of Services Act 1980 (old s.14 (1) SOGSA 1893) [hereinafter SOGSASOSA 1980].

[14] [1933] AC 470.

[15] That is if the party in that cannot perform (a) is seriously deficient in his ability to perform or non-creditworthy; or (b) his conduct in preparing to perform or in performing the contract is makes it apparent that he will not perform a substantial part of his obligations as in Article 71 (1) (a) and (b).

[16] As in article 72 (2) CISG.

[17] See *Universal Cargo Carriers Corporation v Citati* [1957] 2 QB 401. The case provides us with the criteria for anticipatory breach to arise in English law; these were stated by Devlin J.

exception in common law.[18] Bearing this in mind, it would seem that the traditional perception of common law does not give formal recognition to anticipatory breach *per se* and that is why the approach of the CISG 1980 towards anticipatory breach is seen as a major point of departure from common law,[19] even if statute law may have made some indirect allowance for this in common law systems.[20]

(d) Termination

Fourthly, the CISG 1980 treats avoidance or termination of the contracts very differently from common law. [21] As already noted the CISG 1980 requires a "fundamental breach" for the termination of the contract to take effect. Nevertheless, it is particularly onerous for the innocent party to prove this or rather to override the requirements for this.[22] One has to override the relevant legal requirements of Article 25 CISG 1980 and then serve notice of this to the party in fundamental breach under Article 26. This is the only way that an innocent party can successfully disengage himself from his obligations under the CISG 1980 for termination of contract to arise. This attitude, however, would characterise the CISG 1980 as a "pro-contractual" legal instrument, for the CISG 1980 takes such a stance that the contracts are to be upheld, unless things "go terribly wrong" as in the case of fundamental breach. Common law, on the other, takes a significantly stricter stance on this; it seems to be "less pro-contractual". For instance, in the case of a common law contract the test is whether the term breached is a condition, even if the breach is only minor.[23] And this for good reason, namely, legal certainty. Even if common law contracts such as the ones

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[18] Suspension in common law arises only in the rather rare instances where the buyer's duty to make payment is not essential, whilst the seller's concurrent duty to make delivery is. In this case, the seller declines to perform so long as the buyer fails to do so. See *Total Gas Marketing Ltd v Arco British Ltd* [1988] 2 Lloyd's Rep 209 (HL).

[19] See Michael Bridge *The International Sale of Goods: Law and Practice,* OUP, 1999 at p 89 (para 3.29).

[20] See s 28 of the British SOGSA 1979 (as amended) and s 28 of the Irish SOGSA 1893 (as amended).

[21] Avoidance is the term that the CISG uses of what one would refer to for termination of contract in common law. The common law terminology refers to termination of contract as rescission of contract also.

[22] See above on the analysis on the paragraph in relation to conformity of the goods.

[23] As in *Arcos Ltd v Ronaasen* [1933] AC 470. In British Law this is subject to s 15A SOGSA 1979 (as amended), which stipulates that "where the breach is so slight that it would be unreasonable for him (the buyer) to reject the goods, then the breach is not to be treated as a breach of condition, but may be treated as a breach of condition.

on fob[24] and cif[25] terms require utmost strictness in their performance, this is mainly done for the pursuit of certainty. Moreover, no onerous requirement of notice is required when the contract is terminated. Thus the buyer - in the case of common law contracts of an international sale - will be entitled to terminate where the goods are shipped in time, that is outside the shipment period, as in *Bowes v Shand,*[26] where it was held that "time is of the essence". Peculiarly, what the CISG 1980 calls a fundamental breach is also found in another form in common law, on what the common lawyer would refer to it as a breach of intermediate (aka innominate) term as in *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd,*[27] where it was said that the contract is discharged, if the other party's breach of an intermediate term deprives the innocent party of "substantially the whole benefit which it was the intention of the parties as expressed in the contract that he should obtain as the consideration for performing these undertakings."[28] Another option for a termination of contract to arise in common law is where the seller refuses to perform or is not in position to fulfil his obligations. Alternatively, one could add that a contract is simply terminated where the buyer may reject the goods. In either case the innocent party may be entitled to damages. To sum up, termination under the CISG 1980 is the case where fundamental breach arises, whilst termination of contract in common law is the case when a breach of term or intermediate term has arisen. Article 35 CISG 1980, on the other hand, does not allow the buyer to reject the goods or documents unless the breach has been fundamental, except perhaps in the case where such a buyer is entitled to anticipatory breach. In common law, however, the parties are free to withdraw unilaterally from their obligations to each other, with damages to arise in favour of the innocent party.

In relation to termination of contract, an "invention" of German inspiration is found in the CISG 1980, an invention that is not found in common law, unless of course the contracting parties expressly incorporate this in a contract under the common law; this German device is the so-called *Nachfrist.* Even though the CISG 1980 does not use the German term for obvious reasons, it has dramatically

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[24] Fob is the abbreviated form of a "free on board" contract for the international sale of goods. In a contract as such it is the seller that pays the shipping costs (and usually the insurance costs) from the point of manufacture to a specified destination, at which point the buyer assumes responsibility.

[25] Cif is the abbreviated form of a "cost, insurance and freight" contract for the international sale of goods. All these costs (cost, insurance, freight) are normally paid by the seller and are included in the price of the contract. In a contract as such the seller owns the goods until they are loaded on vessel. From that point of time the seller does not normally hold any further responsibility in relation to the goods.

[26] (1877) 2 App. Cas. 455.

[27] [1962] 2 Q.B. 26 at 66, *per* Lord Diplock L J.

[28] That is the innocent party.

introduced the notion into its articles.[29] In articles 47 (1) and 63 (1) CISG 1980 its application becomes apparent. The problem of late delivery may be successfully circumvented without the need for the whole contract to collapse as is the case in common law. *Nachfrist* provides some additional period for performance to the party in default, where the defaulting party has served notice of the default to the innocent party. In practical terms this means that the seller that has delayed delivery of goods or the buyer that has failed to pay the price may take advantage of some additional period that must be notified to the innocent party. The contract cannot be avoided in this case, though the innocent party is not deprived of his right to claim damages for delay in performance as Articles 47 (2) and 63 (2) CISG 1980 provide. Obviously, since time is of the essence in common law, the perception of the matter for the common lawyer is significantly different.[30] It would seem that where *Nachfrist* is almost essential for the CISG lawyer by reason of preservation of the *contractus,*[31] the denial of *Nachfrist* by the common lawyer[32] is the case by reason that time is of the essence. In CISG contracts it would seem that they have to be upheld by reason of *Nachfrist*, whilst in common law, international contracts will only be upheld when they are respectful of the significance of the most important commodity in the international commodities markets: time.

(e) Cure of contractual defects

The fifth major incompatibility between the CISG 1980 and Anglo-Irish common law treat cure of contractual defects differently. Thus, the CISG 1980 recognises the cure of both documents and goods, whilst common law allows at most cure of documents, only where time allows.[33] Under the CISG 1980 the seller may cure performance under articles 37 and 48. What would be simply intolerable in common law, would be the fact that the seller cannot cure any defect in the goods and/or the documents after delivery has taken place, for time has to be taken to be a condition. Remarkably, under Article 48 CISG the seller may cure even after delivery has taken place.[34] What is the legal result, however,

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[29] In the English text of the Convention the term is translated as "additional period of time for performance of obligations."

[30] *Bowes v Shand* (1877) 2 App Cas 455.

[31] Latin for contract or agreement.

[32] By "common lawyer" here British and Irish lawyers are meant. However, that is not to say that American lawyers are not common lawyers. The main difference of the latter, however, with the lawyers in the UK and Ireland is that when it comes to international trade law, the American legal system has embraced the CISG 1980, whilst the Anglo-Irish legal system has not.

[33] Supra 30.

[34] That is remarkably from the British and Irish common lawyer's point of view.

if the seller insists on repair rather than substitution of the goods? Professor Bridge suggests that under Article 46 (2) CISG 1980 the buyer can require the substitution of the goods, only in the case that the breach on the part of the seller has been fundamental. Otherwise than that, one has to construe a pro-seller stance by way of application of the good faith notion under article 7 (1) of the CISG 1980 and indeed one wonders why that should be the case from the common law point of view. It should be noted that in this latter case, if the breach is not fundamental, it is the seller who chooses either to repair faulty goods or to substitute them.[35] Moreover, another complication as far as a common lawyer is concerned, is what would happen if the buyer avoids the contract by reason of fundamental breach under article 49 CISG 1980, before the seller serves a notice of attempt to cure a defect? Whilst logic would suggest that the buyer is perfectly able to do so, the CISG 1980 does not seem to follow the path of logic. Consequently, since one has to take into account that the CISG 1980 exists to uphold international contracts, a willing seller that serves notice of cure after the notice of termination on the part of the buyer may still be able to replace the goods in question and *prima facie* preserve the contractual arrangement. This is for two reasons: firstly the CISG must be interpreted in the light of good faith and secondly, as Honnold suggests, one has to weigh up the fundamental breach in the light of the declared or possible willingness of the seller to cure.[36] At common law, apart of course from the fact that there is no such requirement of notice for an additional time fixed for the performance of obligations, there is no such onerous requirement as a notice to cure, unless the parties have agreed prior to the conclusion of their contract of sale.

(f) Buyer's right to reject

The sixth incompatibility between Anglo-Irish trade law on the one hand and the CISG 1980 on the other is the fact that a buyer in an international contract of sale under the CISG 1980 would exercise his rejection rights in a substantially different way from the common law version of international sales. Simply put the CISG 1980 does not *per se* recognise the "inconsistent act doctrine", since the buyer may unilaterally sell the goods in question without any negative legal consequences. The Convention, therefore, allows restitution notwithstanding resale, consumption or transformation of the goods by virtue of article 82 (2) CISG 1980, that provides for a right as such. This latter provision must be one of the most diametrically opposed provisions of the CISG 1980 towards common

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[35] See Michael Bridge *The International Sale of Goods: Law and Practice,* OUP, 1999 at p 93 (para 3.34).

[36] JO Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention,* Kluwer, 2nd Edition, 1991 at p 376.

law. For instance, the English lawyer would have good grounds of principle to not even contemplate this; this because he would surmise that under s. 35 (1) (b) of the British SOGSA 1979 (as amended) and s. 35 of the Irish SOGSA 1893 (as amended)[37] a buyer cannot simply reject the goods, if he has received them and thereafter "does any act in relation to them which is inconsistent with the ownership of the seller" (inconsistent act doctrine). Even more peculiarly, a buyer under article 82 (2) CISG 1980 must at least make a partial restitution of the goods, if it is impossible to make full restitution of the goods. Whereas under s. 35A of the British SOGSA 1979 (as amended) a buyer may make partial restitution only as of right. The buyer has the right to retain the remaining goods. A final difference in relation to the rejection rights is that the CISG 1980 imposes a positive obligation on the buyer under article 86 to preserve the goods in question, be it at the final expense of the seller. However, both British and Irish law by way of s.36 SOGSA 1979 (as amended) and s.36 SOGSA 1893 (as amended), clearly suggest that unless otherwise agreed, the buyer is not bound to return the goods in question to the seller. Consequently, any such buyer would have no duty to preserve the goods either, for a buyer that does not have to return goods that refused to accept them, cannot be construed as being under an obligation to preserve them.

(g) Calculating damages

The seventh great difference between the CISG 1980 and the British SOGSA 1979 (as amended) and the Irish SOGSA 1893 (as amended by SOGSASOSA 1980) the differing techniques used to quantify damages technique. For the purpose of this analysis it should suffice to say that the Anglo-Irish method of calculating damages is simpler than the *action quanti minoris*[38] of the CISG 1980, which is a legal device of Roman law origins. By way of example, let us assume that an international contract for the sale of a cargo of maize has been concluded. The contract price for this is £ 100,000. By the date of delivery the goods are and s.53 (5) of the Irish SOGSA 1893 (as amended) the damages that the buyer may receive in a falling market, should be calculated as follows: non-conforming, whilst the market price of maize happens to have fallen to £70,000. In perfect condition the cargo maize would have been worth £85,000; since, however, some of the maize cargo is non-conforming the maize cargo and the

[37] As amended by the SOGSASOSA 1980.

[38] *Actio quanti minoris* stands for that system of calculation of damages, whereby the quantification of damages occurs by way of a reduction in price. A good analysis on this is provided by E. Bergsten and A.Miller "The Remedy of Reduction in Price" (1979) 27 *American Journal of Comparative Law* 255.

market price thereof has fallen; its value is on delivery only £59,500. Under s. 53 (3) of the British SOGSA 1979 (as amended)

> £70,000 - £59,500 = £ 11,500 (damages owed to the buyer if the sale of the contract for the international sales of goods is governed either by the laws of the UK or the Ireland).

Under article 50 CISG (*action quanti minoris*) the damages that the buyer may receive in a falling market, should be calculated as follows:

> £70,000 - £59,500 = £11,500 (this amounts to 16.42% of the market price of £70, 000)

then this relevant ratio (16.42% in our case) is applied to the initial contract price (£100,000). 16.42% of £100,000 = £16,420 (damages owed to the buyer if the contract for the international sales of goods is governed by the CISG 1980).

Alternatively, let us assume that the contract price is again £100,000, and that by the date of delivery the goods are again non-conforming, whilst the market price of maize happens to have increased to £150,000. In perfect condition the cargo maize would have been worth £120,000; since, however, some of the maize cargo is not conforming the maize cargo and the market price thereof has fallen, its value is only £85,000 upon delivery. Under s. 53 (3) of the British SOGSA 1979 (as amended) and s. 53 (5) of the Irish SOGSA 1893 (as amended) the damages that the buyer may receive in a falling market, should be calculated as follows:

> £150,000 - 120,000 = £30,000 (damages owed to the buyer if the sale of the contract for the international sales of goods is governed either by the laws of England or the Ireland).

Under article 50 CISG (*action quanti minoris*) the damages that the buyer may receive in a falling market, should be calculated as follows:

> £150,000 - £120,000 = £30,000 (this amounts to 20% of the market price of £150, 000)

then this relevant ratio (20% in our case) is applied to the initial contract price (£100, 000). 20% of £100,000 = £20,000 (damages owed to the buyer if the contract for the international sales of goods is governed by the CISG 1980).

(h) Frustration

The eighth and final difference between the CISG 1980 and common law trade rules is that they have a variant approach on frustration of the contract of sale. This time the CISG 1980 clearly departs from the Anglo-Irish law perspective rather than the American law view.[39] According to *Hirji Mulji v Cheong Yue Steamship Co Ltd* when a contract becomes frustrated common law dictates that this contract be prospectively discharged.[40] Bridge suggests that this position is a rather inflexible attitude of common law, since this approach simply does not address matters such as partial or temporary frustration. [41] Article 79 CISG 1980 takes a rather closer look to the American legal technique on frustration; consequently, this article broadly justifies a party's impossibility "due to an impediment beyond [this party's] control". However, this proviso neither stipulates, nor implies that the parties are discharged from their contractual obligations. In effect, if a seller cannot perform due to *force majeure* for instance, the buyer may well find himself paying the price of the goods that he may never have been delivered. However, that is not say that he cannot later avoid such a contract. This may be achievable through three different legal paths:

(1) either the buyer holds that the non-performance on the part of the seller is a fundamental breach as in Article 25 CISG; or
(2) he perceives the matter as one of non-performance as in article 72 CISG and the contract is repudiated; or
(3) the buyer allows the seller an extension of time to perform his duties but the seller has still not performed. In this latter case the buyer can claim restitution of money that he has already paid to the seller under article 81 (2) CISG 1980.

AN INSIGNIFICANT NUMBER OF SIMILARITIES BETWEEN COMMON TRADE LAW AND THE CISG OR CONCESSIONS THAT THE CISG MAKES TO COMMON LAW SYSTEMS

(a) Specific performance

Specific performance is recognised in the CISG 1980, though the common lawyers of the US, Canada and Australia have always felt that their fora will not

[39] See Michael Bridge *The International Sale of Goods: Law and Practice*, OUP, 1999 at p 106 (para 3.57).
[40] [1926] AC 497.
[41] Supra at n.43.

grant it as much as the Continental courts would. Farnsworth, an American academic, referred to specific performance as a remedial provision that is foreign to the common law tradition.[42] Obviously, he did not mean that an American or a Canadian judge may not order the remedy of specific performance in particular, though quite rare cases, but rather he meant that the common law judges would use it less frequently than the civilian judges would. Articles 46 and 62 1980 expressly refer to specific performance though it is article 28 CISG 1980, which makes a significant concession to common law judges:

> "If...one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgement for specific performance..."

Therefore, it is the forum of the judgement that would most probably signify the remedy pursued, not the substantive law of the contract *per se.*

(b) Mitigation of loss

Another similarity between Anglo-Irish trade law and the CISG 1980 occurs in the sphere of mitigation of loss cases. By and large article 77 CISG 1980 draws a parallel line to the attitude of Anglo-Irish trade law, since under this provision the plaintiff must (after the defendant's breach of contract) take all reasonable steps to minimise losses due to this breach, in order for the plaintiff to recover damages from the defendant. In accordance with the civilian law tradition, the CISG 1980 does not pedantically stipulate the facts of the cases where mitigation of loss may occur. It merely sets out guiding principles. However, one has to take into account the diversity of legal systems that have acceded to the CISG 1980. The fora from different countries does not always present identical legal results when the mitigation of loss doctrine is applied.

THE IMPACT OF THE CISG 1980: AN ANACATATAXIS RATHER THAN A TRIVIAL MATTER OF IMPLEMENTATION DUE TO THE PLETHORA OF DIFFERENCES TO BE OVERRIDDEN

To draw an analogy, the implementation of the CISG 1980 in Anglo-Irish law would be as decisive as the full implementation of the European Convention

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[42] E Allan Farnsworth Discussion, in A E von Overbeck présidence, *Wiener Übereinkommen von 1980, Colloquium Lausanne 19/20 November 184*, (Zürich: Schulthess 1985) p 105.

on Human Rights 1950 ("ECHR") by the UK Human Rights Act 1998. The differences between the CISG 1980 and ECHR are obvious: the former is an international instrument of law, whilst the latter is a regional instrument of law; secondly, the former will alter the way by which a national legal system (the United Kingdom and/or Ireland) will "see itself" towards other legal systems in the formation of international contracts, whilst the latter has altered the way by which the British legal system "sees itself" towards its own nationals in the pursuit of civil liberties justice. Thirdly, whilst the ECHR brought a cataclysmic change in the sphere of public law in the UK, the CISG 1980 has the potential to bring an equivalent legal *anacatataxis* in the sphere of British and Irish private law.

The CISG 1980 has never been welcomed in the U.K. and Ireland. Despite the fact that most of the developed world has willingly embraced the CISG 1980, including the great trading powers such as the USA, Australia, Canada, Germany, France, the Russian Federation and China, the voices for the preservation of the current *status quo* of trade law in the UK and Ireland well exceed those in favour of the adoption of the CISG 1980. At the preface to *Benjamin's Sale of Goods*, Professor Guest has made his case for the non-adoption of the CISG 1980 quite clear:

> "...the Convention is not well adapted to sales on cif, fob and other terms common in overseas sales, and its often vague or open-textured terminology would, if it were to displace the present relatively settled English judge-made rules governing contracts on such terms, be a source of considerable (and regrettable) uncertainty."[43]

On the other hand, one should refer to Farnsworth, an American scholar, to understand the fears of the common lawyers, when the CISG 1980 would have to be implemented in the UK and Ireland. Farnsworth, commenting on the remedial provisions of the CISG 1980 that were in principle "foreign" to US law, once said quite colourfully:

> "*Fundamental breach* -- OK, but strange; *Nachfrist* – We don't understand it, we never heard of it, but we like it; *Price reduction*[44] -- We don't understand it, and we don't like it;

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[43] *Benjamin's Sale of Goods,* (Sweet & Maxwell, 4th Edition), at [ix] [Hereinafter Benjamin].

[44] Farnsworth refers here to what the civilian lawyers would most probably know and refer to as *action quanti minoris.*

> *Specific Performance* – We hope your courts[45] will not resort to it as much as the may."[46]

The most dismissive view on the adoption of the CISG 1980, however, has come from Professor Treitel:

> "...the Convention...does not specifically deal with standard types of overseas sales (such as cif or fob contracts) while at the same time [it lays] down general rules which if applied to such contracts, would produce one of two effects. They would *either* produce results significantly different from those produced by the present English rules governing such sales, *or* (because of the lack of precision with which the Convention is drafted) cause considerable uncertainty in areas in which the present rules of English law lead to clear and easily predictable results."[47]

However, there have been also voices in favour of the adoption of the CISG 1980 mainly for reasons of practicability and world uniformity in the area of the international sales of goods; the leading scholars on this have been Professors Reynolds and Nicholas. Nicholas represented the UK in the drafting of the Convention. After many years, he commented that the reception by legal and commercial circles in the UK was at best mixed.[48] Reynolds too has been of the opinion as one of the editors of *Benjamin* that the UK should adopt the CISG "as soon as possible".[49]

In clearly practical matters of implementation, both the UK and Ireland would not have to be concerned with whether the CISG 1980 would override the current *status quo* of their international trade rules. This should be the case for a good reason: under article 6 CISG 1980 the contracting parties from different states may well exclude the application of the CISG or derogate or vary its

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[45] That is the civilian courts when applying the CISG.

[46] Supra at n 46.

[47] Benjamin at 18-004.

[48] Nicholas B, "The United Kingdom and the Vienna Sales Convention: Another Case of Splendid Isolation" (March 1993) Centro di Studi e ricerche di diritto comparato e straniero *diretto da MJ Bonell.*

[49] Professor Reynolds expressed this view in "A Note of Caution" in *The Frontiers of Liability,* Vol 2, (P Birks ed, OUP, 1994). Reynolds signified a number of concerns about certain aspects of the Convention, however, his final point of view was that the UK should ratify the Convention.

effect.[50] In effect, article 6 CISG 1980 empowers the parties to use the CISG 1980 *à la carte.* Even more importantly, the Convention makes allowance for considerable derogations, since for instance the contracting states may exclude considerable parts of it such as Part II (formation of an international contract of sale) or Part III (substantive rules) of the Convention as in Article 92 (1) CISG 1980.

However, if the UK and Ireland were ever to attempt to implement the "full-package" of the CISG 1980 then this would amount to a clear legal *anacatataxis*, for the international trade lawyers of these two countries would have to think of international contracts for the sale of goods in a fundamentally different way than at present, that is in CISG 1980 terms. Further, there are additional reasons for such a legal *anacatataxis*.

First of all, the fact that there is such reluctance to ratify the Convention should be a reason that proves the point of *anacatataxis.* International trade law in the UK and Ireland would never be the same. Furthermore, if the trade law of a country is divided into three: domestic trade transactions rules; domestic trade transactions vis-à-vis consumers rules and international trade transactions rules, then it would not be an exaggeration to say that good faith is now fully introduced in the Anglo-Irish legal system in trade transactions vis-à-vis consumers. Thus, even if pure common law is abortive of notions of good faith, it would seem that the reluctance of the Anglo-Irish legal system to the notion of good faith is clearly on the retreat in relation to consumer contracts *post* Council Directive 93/13/EEC. In connection with this and for the purposes of the CISG 1980 implementation to the international trade law branch of the Anglo-Irish legal system it would be essential that a limited notion of good faith be introduced. This, of course, would have to be the case only where a trader from the UK for instance would accept the effect of the CISG for a contract for the sale of goods with an overseas trader, e.g. one from France. Additionally, it would not be necessary for the two legal systems that would ratify the CISG 1980 to alter the domestic character of their trade laws; this would mean that it would be "business as usual" for trade transactions within the UK and Ireland. Therefore, if the traders, academics[51] and judges[52] from the UK and Ireland do

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[50] Article 6 CISG 1980 stipulates as follows: "The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions."

[51] Professor Bridge in "Does Anglo-Canadian Law Need A Doctrine of Good Faith?", *Canadian Business Law Journal* (1984) referred to the American legal system, which has recognised the notion of good faith to the performance and enforcement of the trade transaction as in Article 2-205 Uniform Commercial Code. Still he underlined that it would be "an abuse of the comparative method", if a principle of good faith would be introduced in the English and the Canadian legal system. Teubner too in "Legal Irritants:

not want by reason of legal certainty the concept of good faith to be introduced in their domestic trade transactions within their legal systems, this should be respected. However, even this last point is arguable by operation of ss. 15A and 30 (2A) of the British SOGSA 1979 (as amended) which deal with the notion of "unreasonableness". One would be able to present this as the closest statutory approach of British trade law to a creeping form of good faith in the international trade laws of the UK. Unreasonableness could be the Trojan horse of good faith, in order for the latter to enter the international trade law branch of the British and Irish legal systems. Accordingly, article 7 (1) could be accepted by the common lawyers in Ireland and the UK. In any such case the creeping character of good faith as in the form of unreasonableness, would become a clearcut introduction of good faith, be it in the international branches of the trade laws of the UK and Ireland. This too should arguably amount to an *anacatataxis*.

(a) Breach of term of conformity of goods

Another point relating to the potential implementation of CISG 1980 is breach of the term of conformity of goods. Since the meaning of "particular purpose" would have to be aligned with that of the CISG 1980, then the interpretation of the common law would be confined to trade transactions either within the respective legal systems or where the parties have so agreed in international contracts. The domestic interpretation of "particular purpose" could still remain as it is in *Preist v Last.*[53] Once again the new meaning would be applied on a "voluntary" basis to international contracts, whilst the traditional interpretation of the common law would at least operate within the domestic trade transactions of the UK and the Irish legal system. [54]

(b) Anticipatory breach

A further reason why the CISG 1980 would result in a legal *anacatataxis* is that it would bring a substantially different approach on the question of anticipatory breach, which would have to be fully recognised. The partial

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Good Faith in British Law", *Modern Law Review* (1998) has recently expressed his objections on the full introduction of good faith in British law. His conclusion has been that such an introduction would cause many problems.

[52] For instance, in *Walform v Miles* [1992] 2 AC 128 at 138 Lord Ackner has famously said that: "...the concept of a duty to carry on negotiations in good faith is inherently repugnant...[and] unworkable in practice as it is inherently inconsistent with the position of a negotiating party."

[53] [1903] 2 KB 148.

[54] That is when the parties have so intended.

recognition of the notion in s.28 of the British SOGSA 1979 (as amended) and s.28 of the Irish SOGSA 1893 (as amended) should be extended to give full recognition to cases of anticipatory breach and in particular to such cases of anticipatory breach that are not currently recognised by the above Acts. The Anglo-Irish legislator could either choose to extend the current provisions on anticipatory breach of their sale of goods Acts or allow for a parallel system of law under a potential CISG Act that would recognise an extended version on anticipatory breach for international contracts under the CISG 1980.

(c) Fundamental breach

Moreover, an additional reason for which an *anacatataxis* would be a strong possibility with the implementation of the CISG 1980, would be the fact that international trade lawyers from the UK and Ireland would have to come to terms with the rather peculiar and onerous notion of "fundamental breach". Indeed, this would be one of the most difficult occurrences of alignment of any potential CISG 1980 implementation in the UK and Ireland. However, since the CISG 1980 upholds the notion of the "autonomy of the parties" the parties may well exclude its application altogether. If they include it in the contractual arrangement, then the common lawyers of the UK and the Ireland would most probably have to consult their counterparts over in the USA, for the USA is the best example of a common law system, in which the CISG 1980 has operated well. As already mentioned, "unreasonableness" is the notion that could well be the starting point not only for the partial introduction of good faith in the international trade law aspects of the common laws of the UK and Ireland but also for the comprehension of the notion of fundamental breach in the CISG 1980. This would be particularly helpful, since common lawyers would see the rationale behind the existence of this notion in the CISG 1980 and this would most importantly help their understanding on practical matters too, when they would have to comprehend and tackle cases on good faith matters in every day practice. In conjunction with fundamental breach, common lawyers in the UK and Ireland would have to come to terms with the novel legal device of *Nachfrist,*[55] a mechanism that -if properly utilised- may give a new lease of life to the international transaction in question. In any case, it would be more than helpful for common lawyers in these countries to have a closer look at how their counterparts in other common law jurisdictions that have ratified the Convention and accepted this notion such as the USA, Canada and Australia. Additionally, it would also be advisable that the German commercial law be looked at from British and Irish business lawyers, for them to have information from the very

[55] That is novel for the CISG itself but not so novel for the German trade law system, from which it derives.

"birthplace" of the notion, since *Nachfrist* remains undeniably a German legal "invention".

(d) Cure of defective goods and documents

As regards cure of defective goods and documents, the CISG 1980 is clearly more "pro-contractual" than the common law rules, as this has already been suggested above. This *per se* should amount to an *anacatataxis,* if the CISG 1980 would be ever introduced in the UK and Ireland. Common law, on the other hand, remains strict to the extreme in relation to the legal results expected and in this way the *contractus*[56] under it remains ascertained to the extreme too. Common law is, therefore, a rather more predictable legal species, when it comes to international trade law. Otherwise, than that, in the case where the CISG 1980 would be chosen to operate in a international contract, then the traders in Ireland and the UK would have to appreciate that the CISG 1980 is more lenient than the current common law rules and that it makes considerable allowances for the cure of defective goods as well as of documents. In this case an *anacatataxis* would be a matter of adjustment of legal mentality; that is, common lawyers would find themselves in a substantially different environment of legal technique. Further relevant sale of goods acts of both countries in question should perhaps be susceptible to slight amendments or rather to provisions that would make it clear that in case the CISG 1980 would be adopted for the conclusion of an international sale, this would allow the parties to use the full machinery of the CISG 1980 (if they so intend) and therefore be able to cure both defective goods and documents.

(e) Inconsistent Act doctrine

As regards the inconsistent act doctrine, which is explicitly recognised under s. 35 (1) (b) of the British SOGSA 1979 (as amended) and s. 35[57] of the Irish SOGSA 1893 (as amended), there are three possibilities on how this characteristic would have to be "watered down" for the CISG 1980 to be successfully implemented. An *anacatataxis* in such a case would occur either if the national legislators of the UK and Ireland would omit the above sections and thus render this doctrine obsolete or even more interestingly if they would allow these sections to continue to operate as well as recognising the mechanics of the CISG 1980 by statutory amendment on the matter or allow the preservation of the above sections but give a sufficient margin of choice to the traders to choose the mechanics of their contract by recognising their autonomy to choose the

[56] Supra n 35.
[57] As amended by the SOGSASOSA 1980.

appropriate legal environment for their international contracts. In this latter case the national legislator of either country would save himself from legislating anew on his Sale of Goods Act,[58] whereas it would seem that such a legislator would provide a better, less regulated environment for the traders to have the final say on the way they wish to conduct their business. This of course would be a partial revival of *lex mercatoria* in one sense, because it is the traders that should know trade best and it is they, who should be able freely to decide the legal tactics of conducting it.

(f) Quantification of damages

A similar pattern of law reform could be followed in relation to the quantification of damages. Again there are three paths that could be followed in relation s. 53 (3) of the British SOGSA 1979 (as amended) and s.53 (5) of the Irish SOGSA 1893; either repeal these clauses altogether, which is not suggested, however, since they have served well so far or draw a parallel provision to the existing sections or simply incorporate a freedom of choice of law clause in a potential CISG Act. The latter possibility is again seen as the least detrimental to the well-functioning of the legal system. This is so, because even though a legal *anacatataxis* would still be the legal result of such an Act, this would not bring disorder to the existing practices.

(g) Frustration

On the question of frustration as Professor Bridge suggests[59] British law and most probably Irish law too would necessitate changes to face questions of partial or temporary frustration. This would have to be the case whether or not the CISG 1980 would be implemented. However, it would be a good starting point for the legislator to take into account the CISG 1980 solutions on this as well as the American legal techniques on the matter, from which the CISG 1980 is

[58] However, one would be able to speculate that the introduction of the CISG 1980 in the international subject areas of British and Irish trade laws would be introduced with a new piece of legislation in the exoteric form of the Human Rights Act 1998. This would mean that new legislation would be brought about; however, this would take a significant amount of time to be fully enforced, since for example the alignment of the whole British legislation with the European Convention on Human Rights 1950 took a period of two years until October 2, when the Human Rights Act 1998 came into force. Similarly, the partial alignment of British and Irish trade laws with the CISG would take a significant amount of time, even if the traders themselves would not be bound to choose any particular law by way of autonomy of the parties: that is CISG or non-CISG (fob, cif and their variables).

[59] Supra at n 43.

largely inspired. An additional point is that in any case the legislators of the UK and Ireland would have to examine carefully the application of the CISG 1980 in their "close relative" systems such as the Australian, the Canadian and the American one.

CONCLUSIONS

Firstly, the CISG 1980 remains a dynamic international trade law instrument with all its drawbacks.[60] It should be able to accommodate the peculiar features of the British and the Irish legal systems and be accommodated within them.[61] Secondly, these two legal systems have the potential to fully implement the CISG 1980 without significant practical difficulties as long as very careful statutory drafting in relation to the CISG 1980 is carried out. Thirdly, any such implementation would bring a major legal *anacatataxis* to the current *status quo* of the international branches of the trade laws of the UK and Ireland. Fourthly, the traders themselves would be free to choose between the application of the CISG 1980 or the "old traditional" rules of the common law of Ireland and the UK. Whether they would choose the more than a century well established precedents on fob and cif contracts or the rather more globalised and internationally accepted CISG 1980, the ultimate choice would obviously be theirs.

Whether the CISG 1980 is a *lingua franca* or merely an *Esperanto* of international trade law, this instrument of law remains the closest solution to a common set of principles for a globalised commercial law. The rather insular attitude of the United Kingdom and Ireland to the harmonization phenomenon is regrettable, whilst the *anacacataxis* that these systems should face in a potential case of implementation of the CISG 1980 should not be a reason that holds these systems back from ratifying the CISG 1980.

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[60] On a balanced view in relation to the objections to the CISG one should read the article by Steyn "A Kind of Esperanto?" in P Birks (ed) *The Frontiers of Liability* (Oxford OUP, 1994).

[61] See the Law Commission's (UK) memorandum submitted to the Department of Trade and Industry on 30 October 1989.

The book is well balanced between an analysis of legal developments and their implications and a more general analysis of the theory behind transnational litigation. Of particular relevance to the theoretical debate are the notions of group liability and the weakening of the doctrines of separate legal personality and limited liability for individual companies. Joseph considers the intersection of these company law doctrines with tortious human rights litigation in Chapter 7 of the book and outlines the key arguments involved. Joseph herself appears not to take a strong position on the desirability or otherwise of group or parental liability for human rights abuses, noting simply that this is an issue which will need to be confronted by the courts in the future (none of the cases against corporations has yet progressed to a full hearing on the merits of the human rights claims).

One of the outstanding features of the book is a table of selected cases appended to the main text. This table includes the case name and reference, current status, jurisdiction and a brief synopsis. The list is comprehensive, making it an extremely useful tool and a unique resource.

A difficulty with writing any book in a rapidly changing area of law is the danger that it will become outdated quickly. This danger was intensified for this particular book as, when the book went to print, the US Supreme Court was about to rule for the first time on the application of the ATCA to human rights claims. That decision was released in June 2004 (*Sosa v Alvarez-Machain*) and the Supreme Court rejected the argument that the ATCA did not encompass human rights claims. Joseph overcomes this difficulty by including reference to the imminent decision and providing information on where to access the decision once released. This not only alerts the reader to this particular development but also raises awareness that this is an area where one must be constantly aware of new updates and must not rely on books or articles without ensuring up-to-date information is obtained.

Overall this book provides a comprehensive summary of the current status of transnational human rights litigation against corporations and many of the theoretical issues and difficulties which pervade this area of law. Although it does not attempt to analyse every issue in depth, its lucid summaries and complete footnotes make it an ideal starting point for anyone interested in corporate social responsibility and/or human rights litigation.

Comparative Legal Studies: Traditions and Transitions By PIERRE LEGRAND and RODERICK MUNDAY (eds) [CUP Cambridge 2003 vii + 520pp ISBN 0–521–81811–7 £70.00 (H/bk)]

The discipline of the comparative method of law is still in pursuit of satisfactory answers to the questions that it seeks to address. Such questions include the legacies, the boundaries, the theories, and the future of the discipline. The collection of essays found in this book seeks to provide some answers to these questions.

The collection as edited by Legrand and Munday is a significant step in the right direction in relation to the debate for the future of comparative law, notwithstanding the fact that the approach taken by a number of contributors in this collection of essays is antithetic to many of the established theses in comparative law. The collection is the result of a closed seminar in Downing College Cambridge, in July 2000, almost a century after the *Société française de législation comparée* has held its landmark Congress in Paris.

The first part of the work (comparative legal studies and its legacies) addresses the theoretical roots of comparative law. The first division here is that of the universalist heritage, according to which comparative law prior to the movement of positivism was seen as a branch of law that sought those common principles which underlie all legal systems. The second division deals with the colonialist heritage according to which comparative law was used to transform the law of the colonizer into colonial law (positivist genre), to mark a transition of non-modern law to modern law in the former colonies (instrumentalist genre), to analyse the differences between the societal structures of the legal systems of the colonized and the colonist (sociological genre), and to iden-

doi:10.1093/iclq/lei058

tify the reasons why certain legal-ideological traditions spread more than others (critical genre). The third division of the first part of this book deals with the nationalist heritage of comparative law according to which comparative law may be circumvented, when nation-oriented considerations arise as in *Printz v United States* (1997) 521 US 898 at 935, where it was said that 'comparative analysis is inappropriate to the task of interpreting a constitution'. The functionalist heritage is dealt with at the end of this part of the book by HP Glenn. He is of the opinion that comparative law may have two meanings for two different purposes. Thus comparative law may be seen as functionalist, when it acts as a matter of methodology under the principle of functionality (see K Zweigert and H Kötz *An Introduction to Comparative Law* (Clarendon Press Oxford 1998) 34 f) or it may be seen as functionalist, when it acts as a branch of the legal science whose main function is to serve the legal needs of a given society.

The second section of the work (comparative legal studies and its boundaries) is dedicated to a discussion in relation to the not so obvious limits of comparative law. Primarily, the historical overlap between comparative law and sociology is given and it is concluded that the two disciplines are ultimately interdependent. Moreover, an interesting discussion is made here in relation to the uses (and misuses) of legal language in comparative law analysis and in relation to how the danger of linguistic pitfalls should be avoided in it.

In the third part of the work one finds contributions on the pure theory of comparative law (comparative legal studies and its theories). Here one notices an all-out attack by Pierre Legrand not only to the theory but also to the reality of legal convergence. Legrand endeavours to convince us in a manner that mostly resembles the intellectual devices of ancient Greek sophists that not only comparative law is on the wrong track but also that one of its most crucial *raisons d'être*—the theory of convergence of laws—is flawed. Objectively, Legrand essentially offers us four theses: (i) that all linguistic, social and cultural activity is grounded on differential thinking; (ii) that homogeneity of legal cultures is only a virtual phenomenon; (iii) that the idea of 'immersion' or 'from within' strategy in comparative law is essentially wrong; and (iv) that the comparative lawyer is never merely describing laws but is rather prescribing them. Of particular interest in this part of the collection is the treatise of J Whitman. He too sees the anti-convergence thesis with sympathy but, on the face of it, he is only in favour of this 'neo-romantic' turn, as he calls it, with a great number of qualifications. A word must be said for D Kennedy's detailed article, which calls on the comparative lawyers to return to the political-legal scope of their modern forefathers of the 1900 Paris Congress. His conclusion is that comparative law should be concerned with politics, since it 'would translate [its] knowledge into vocabularies of political contestation'.

Finally, a discussion on the futurology of comparative law is found in the last and fourth part of the book (comparative legal studies and its futures). In particular, D Nelken argues that the right terminology in relation to 'legal transplants' should move to the term of 'legal transfers' and he seems to agree with the opinion of those who suggest that ultimately there must be distinguishing in relation to transfers between: (i) borrowing of laws; (ii) diffusion of laws; (iii) imposition of laws; (iv) ad hoc contacts of law; (v) systemic linkages of law; and (vi) co-evolution of laws. This part of the book finishes with E Örücü, who enquires into the systems in transition and argues in a well-presented manner that the more the 'extraordinary' the places, as she names the systems in transition, the more important the comparative legal studies become.

For all the well-presented arguments of the contributors to this book, there are, however, some sources of weakness in it. For instance, the book is not for the beginner or even the comparatist that finds himself at the intermediate level. This work is clearly destined for the experts in the area of comparative law and perhaps the editors of the book were aware of this in the preparation of this treatise. The work, therefore, is more abstract than specific. Perhaps this is the case for, as the editors of the book acknowledge, this 'is the most ambitious intellectual project to date within the field'. Arguably, its wide-ranging and ambitious character, its highly opaque language at certain instances and its more than pedantic analysis on other instances make the work clearly theoretical. One must also admit for instance that this collection of essays is in fact material that requires an understanding of jurisprudential knowledge to a significant level. The editors may well have neglected the fact that comparative lawyers *stricto sensu* lack jurisprudential skills, whilst whether

or not this should be the case is a different matter altogether. What is a reality is that indeed not all comparatists hold such interdisciplinary knowledge and yet the editors seem to assume through the collection of essays found in the book that they actually do. Therefore, one must additionally state that the excessive plethora of information found in the book, the complexity of ideas and the pedantic analysis found therein, will distance the beginner in comparative legal studies from the findings of this work, albeit that this book offers us a number of very good and strong theses. Comparative law works must be simpler for, as Markesinis warns us, 'comparative law is in search of an audience' (see BS Markesinis 'Comparative Law in Search of an Audience' (1990) 53 MLR 1). The time has not yet come for the comparative law audience to be so immense that works such as the collection of essays in question become readily comprehensible to the average audience at which they are probably aimed.

All in all, this book marks a step forward in comparative law analysis for a number of reasons. These are first of all that the book is wide-ranging in its fields of enquiry; second, that most of the analyses therein succeed in reaching coherent conclusions; and third, that the links between comparative law on the one hand and sociology and jurisprudence on the other hand are brought to light. This is a good book, as long as one holds considerable knowledge beyond the field of comparative law per se, in areas such as sociology of law and jurisprudence.

ANTONIOS EMMANUEL PLATSAS

Concurrent Proceedings in Competition Law—Procedure, Evidence and Remedies By R NAZZINI [OUP Oxford 2004 560pp £145 ISBN 0-19-927379-0 (H/bk)]

It is a great pleasure for me to review Renato Nazzini's book on Concurrent Proceedings, which has just been published by Oxford University Press.

It is a well-known—if controversial—fact that procedure is more important than substantive law. It is an uncontroversial fact that procedural law has been rather neglected by academics in this country, with notable expectations including Neil Andrews in Cambridge, whom Renato Nazzini thanks in the preface of his book, along with Adrian Zuckerman in Oxford. Renato Nazzini's book makes a significant further contribution to remedying the academic deficiency. Reading Renato Nazzini's book also brought home to me that there remains an element of truth in Maine's dictum about primitive legal systems, namely that substantive law is to be found in the interstices of procedure.

The uninformed might suppose that in discussing concurrent proceedings, Renato Nazzini has chosen a narrow topic. If so, they would be completely wrong. Almost all proceedings in competition law are actually, or potentially, concurrent in one way or another. Public law administrative proceedings for infringements of the prohibitions of anti-competitive agreements or abuse of dominant position are very frequently accompanied or followed by private law proceedings for civil remedies such as damages or an injunction. Serious infringements of the prohibition of anti-competitive agreements may also give rise to criminal prosecutions. Even mergers, if they are large enough to attract the attention of competition authorities, may well do so concurrently in more than one country; and infringements of the prohibitions frequently straddle national frontiers.

Renato Nazzini's book is published at a moment when it will be especially useful to anyone interested in competition law because of the huge changes that have been implemented within the past five years both in the United Kingdom and at the level of the European Union. Much of what has been familiar has been swept away. Renato Nazzini's book brings one up to date; but, this must have made the task of bringing the book to the point of publication even more difficult than usual. Over thirty of the decisions cited in the Table of Cases are dated 2003 or 2004 and many more are dated 2000, 2001, and 2002, though I note that a 1694 decision also appears in the Table.

This book is also a pleasure to read because of its clarity which puts to shame the sloppier drafting of many lawyers whose first language is English. We have every reason to be grateful that

doi:10.1093/iclq/lei059

INDEX

Anacatataxis, 70, 71, 73
  Civil law systems, 75
  Common law systems, 75
  Customary law systems, 78
  Macroconstitutions, 74
  Microconstitution, 74
  Religious law systems, 76
Choice of methods, 34
Comparative Law Factor, 131
  Affinitatis Formula, 140
  Applicability litmus, 153
  Definition, 133
  Directly/Indirectly relevant systems, 152
  Legal transplants, 135
  Requisites/considerations, 139
Conclusions, 255
  Discretionary nature of models and factors, 257
  Effectiveness, 256
  Idealism, 256
  Modification of models and factors on a case-by-case basis, 259
  National legal system at the centre of the analysis, 259
  Non-exclusion of other models and factors, 258
  Preference for the combination of models and factors, 257
  Purity of models and factors, 257
Convergence, 4
  Avoidance of law proliferation, 21
  Bottom-up convergence, 22
  Convergent purposes, 20
  Cosmopolitanism, 20
  Definition, 4
  Disadvantages, 21
  Ephemerality of rules, 22
  Globalisation, 20
  Hegelian Idealism, 19
  Legal definition analysis, 16
  Legal-cultural fusionism, 21
  Legrand, 21, 23
  Literal definition, 16
  Markesinis, 16
  Models of convergence outside of Europe, 16
  Neglect for national practices, 22
  Overlapping fibres metaphor, 21
  Platonic One, 19
  Politics, 24
  Possibility of, 22
  Procrustean bed of sameness, 21
  Production of neutral law, 21
  Relativity of convergent rules, 22
  Sophistication of domestic law, 21
  Top-down convergence, 21
  Unity from the within the families of law, 20
  Unity of thought in the human race, 19
  Vehicles of convergence nowadays, 17
  Yearning for simplicity, 21
Convergent instruments of law, 25
  EU Directive, 25
  EU Regulation, 25
  Federal Laws, 27
  International Treaties/ Other International Instruments of Non-Treaty Form, 28
  Model Laws, 28
  Uniform Laws, 28
Correspondence principle, 30
  Samuel, 30
Division of labour. *See Effectiveness*
Dualism, 29
Effectiveness, 9
European and international experience, 13
European models of convergence, 14
Factors, 7
  Preface, 131
Functionalist approach. *See Effectiveness*
General Model, 35
  Binding obligation, 44
  Definition, 35
  Directive/instructive sub-model, 37, 48
  Mode of implementation, 48
  Pacta sunt servanda, 45
  Positivism/ judicial scrutiny, 41
  Requisites/ possibilities, 40
  Sanctions, 49
  Uniformist sub-model, 37, 48
Global model, 13
Interviews, 221
  Academic experts interviewed, 221
  Choice in relation to models and factors, 247
  Convergence of one's national legal system, 242
  In principle convergence, 234
  Interpretivism and critical realism, 232
  Interview format, 223
  Methodology, 230
  Qualitative analysis, 230
Margin of appreciation, 176, 189, 191
Models, 6
Monism, 29
Propositional logic, 31
  Abduction, 32
  Deduction, 32
  Induction, 32
Regional model, 13
Socio-Legal Factor, 172
  Affirmation on the part of the extra-national, 189
  Apprehension to political and nationalist considerations, 187
  Definition, 173
  Discerning the need for the application of the factor, 174
  Margin of appreciation, 176, 189
  No excuse for abuses under the factor, 186
  Occasions of justifiable insularity, 176
  Sustainability of deviations, 187
  Theoretical Possibilities, 177
  Three hypotheses for the factor, 178
Specialist approach. *See Effectiveness*
Specific/Restructuring Model, 69
  Anacatataxis, 70
  Anacatataxis variants, 72
  Definition, 70
  Discerning of an anacatataxis, 73
  Identification of anacatataxis, 78
  Initial exemplification of anacatataxes, 76
  Requisites, 77
  Special arrangements, 81
  Susceptibility to anacatataxis, 81

Swiss Constitution, 15
Thesis, 2
  Chronology, 3
  Objectives, 2
  Proposed model, geographical scope and legal parameters, 12
  Subject Matter, 4
Unifying hypothesis, 8
US and Swiss models of internal alignment, 13