ARTICLE

COMPARATIVE LAW IN DEVELOPING COURT PRACTICE IN SMALL JURISDICTIONS – MISSION POSSIBLE

by Irene KULL*

Le but de cette contribution est d'aborder le rôle transformatif du droit comparé dans le développement de petits États dotés d'une tradition juridique récente, forcés d'avoir recours à des idées, concepts et règles empruntés d'autres systèmes pour créer leur propre culture et réalité juridique. L'Estonie, étant un petit pays, n'a ni l'expertise juridique ni la pratique judiciaire nécessaires dans plusieurs domaines particuliers. Dès lors, le droit comparé dans ses deux fonctions – la recherche concernant les règles ou leur contexte d'application – s'avère particulièrement utile. Le texte explique d'abord comment le droit comparé a été utilisé pour l'encadrement du système civiliste et des lois particulières de l'Estonie. Lors du processus de codification, la méthode comparative a permis d'offrir aux codificateurs des options stratégiques provenant d'un grand nombre de systèmes juridiques, codes et dispositions législatives. La notion de « legal transplant » est utilisée et expliquée, mais dans les petits États, utiliser des « transplants » peut s'avérer la seule voie possible pour construire un système juridique national. Le texte analyse également l'emploi de la méthode comparative comme base légale de développement du droit civil. Enfin, il s'attarde à l'utilisation du droit comparé dans la pratique judiciaire pour démontrer les limites de la méthode comparative. Des modèles issus de pays dits « principaux » (ou « core countries ») peuvent se révéler incompatibles, en raison de différences dans la capacité d'absorber avec succès les « legal transplants » ou d'un niveau de développement insuffisant de la société dans son ensemble pour contribuer à la réception des « transplants ».

The purpose of this article is to discuss the transformative role of comparative law in the development of small nations with short legal histories, compelled to rely on borrowed ideas, concepts and regulations to create their own legal culture and reality. As a small country Estonia does not possess the necessary legal expertise or court practice in many specific areas. Here, comparative law in both of its functions – rules-based and context-based research – provides great help. The article explains how comparative law has been used in the framing of the Estonian system of civil law as well as of specific statutes. In the drafting process, a comparative law method was used to provide drafters with strategic options drawn from an array of legal systems, codes and provisions. The notion of legal transplants is widely used and explained, but in small countries, using transplants may be the only technique for building up a national legal system. The article also focuses on analysing whether the courts may use comparative law as a legal basis for developing private law. The last part of the article is dedicated to the use of comparative law in Estonian court practice, in order to illustrate that there are limits to using comparative law methods. Models of core countries may differ in their suitability because of the differences in ability to successfully absorb legal transplants or because the level of development of the society as a whole does not support the reception of transplants.

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Introduction

The multilayered functionality of comparative law lies in the ability to study foreign legal systems from a purely academic perspective or in its practical applications to explore[1] the similarities and dissimilarities of different phenomena. There are many methods used in contemporary international and intercultural research, but the predominant method consists of describing transplants and analyzing legal reception, with subsequent comparisons.[2] Especially attractive is functional comparative law, which offers well-grounded "better" solutions for identical problems in different legal systems. Comparative law today is interested not only in solutions and rules as outcomes of legal transformation, but also in historical context, functions of the rules within one legal system and interrelations with specific cultures or politics.[3] The trend of moving away from a "law as rules" concept means that the understanding of law is something more than merely reading legal acts, comparing rules and searching for sources where the same technique of regulating common concepts

1. About the different functions of comparative law, see K. ZWEIGERT & H. KÖTZ, *Introduction to Comparative Law*, 63 ff. (3rd ed. trans. T. Weir, 1998), p. 13.
2. N. JANSEN, "Comparative law and comparative knowledge", in M. REIMANN, R. ZIMMERMANN (eds), *The Oxford Handbook of Comparative Law*, Oxford University Press, p. 306 (2006).
3. R. ZIMMERMANN, *The Law of Obligations: Roman Foundations of the Civilian Traditions*, Oxford University Press (1996), explores the historical roots of transplants using the functional method of comparative law and is still widely used in Estonian legal science and also as obligatory source for all legal research papers of the students. A. Watson's idea of impossibility to compare and to transplant from legal systems without understanding the historical, cultural and internal perspectives of legal systems was not always followed by Estonian comparatists, if we take a closer look at publications and especially comments to legal acts. See M. REIMANN, "The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century", 50 Am. J. Comp. L. 671 (2002); C. VON BAR, "From Principles to Codification: Prospects for European Private Law", 8 Col. J. Eur. L. 379 (2002).

can be found.[4] It is now a generally accepted view that law cannot be understood without an understanding of broader historical, socio-economic, psychological or ideological contexts.[5] The difficulty lies in the fact that the contextual aspects of a legal system, and the determinants of its development, are prone to subjective assessments. Estonia, as a small country, does not possess the necessary expertise in many areas and still has difficulties with identifying and exploring its legal rules and theories. Here, the comparative law in both its functions – rules-based and context-based research – provides great help.

The purpose of this article is to discuss the transformative role of comparative law in the development of small nations with short legal histories, compelled to rely on borrowed ideas, concepts and regulations to create legal culture and reality. The article starts by explaining how comparative law has been used in the framing of the Estonian system of civil law and specific statutes. In the drafting process, the comparative law method was used to provide drafters with strategic options from an array of legal systems, codes and provisions. Comparative law as a method was used also in finding proper models for drafting laws. In the second part of the article, the role of transplants in the national legal system and possible ways of reception will be discussed. The notion of legal transplants is widely used and explained, but in small countries, the transplants may be the only technique used in building up a national legal system. The third section of the article focuses on an analysis of the courts, legal basis for using comparative law when developing new law. We can only predict what courts can do with comparative law, even if restricted by constitu-

4. M. Van HOECKE, M. WARRINGTON, "Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law", International and Comparative Law Quarterly, Vol. 47, 1998, 495, p. 530.

5. P. LEGRAND, "What 'Legal Transplants'?" in: *Adapting Legal Cultures*, D. Nelken, J. Feest (eds), Hart Publishing, 2001, pp. 57-59; P. LEGRAND, "Against a European Civil Code", The Modern Law Review 1997, 60, pp. 425–428.

tional borders,[6] by taking into account the accelerated influence of foreign law in developing national law.[7]

Comparison is a universal method of interpretation and its use should be distinguished between the areas governed by national law, international uniform law and EU law. The article is limited to comparative private law and comparison on the level of foreign national law. The last part of the article is dedicated to the use of comparative law in Estonian court practice to show that there are limits to using comparative law methods. Models of core countries may differ in their suitability because of the differences in ability to absorb legal transplants successfully[8] or because the level of development of the entire society does not support the reception of transplants. Historical, socio-economic or political conditions of the model country may differ radically and lead to a rules-level comparison only. Here, the limited use of comparative law may cause a totally different interpretation and application of rules which have similar wording or content. Estonia is a good example of a small jurisdiction (1.3 million inhabitants) with a relatively low volume of activity,[9] possessing a relatively young legal system.

1. Legal reforms and borrowings from foreign law in Estonian legal history

It is a well-known position in legal literature that transplanting ideas from a foreign system, especially from a system that

6. A. JANSSEN, R. SCHULZE, *Legal Cultures and Legal Transplants in Germany*, ERPL, 2011, 2, p. 246.
7. R. ZIMMERMANN, "Comparative law and the Europeanization of private law", M. Reimann, R. ZIMMERMANN, *The Oxford Handbook of Comparative Law*, Oxford University Press, 2008, p. 577.
8. D. BERKOWITZ, K. PISTOR, J.-F. RICHARD, "The Transplant Effect", 51 Am. J. Comp. L. 163, 2003 demonstrating empirically the effect of transplants on effectiveness of legal systems.
9. See K. E. DAVIS, "Law-making in small jurisdictions", University of Toronto Law Journal, 2006, 56, p. 154.

belongs to a different legal family, must be done with caution.[10] In small countries, it is not so easy to define which foreign ideas may thrive in your legal system, and even if it is will it, in any way, harm your legal system if it is transplanted and adapted. It is not possible to understand the specific problems of small countries without knowing the historical roots of comparative law traditions in developing private law doctrines and legal scholarship or court practice.

In 1998 Estonian legal historian M. Luts-Sootak wrote:

> It is unthinkable to perform an extensive legal reform that would really aim to change legal life, utilizing solely the amendment of legislation. A legal reform built on the idea of reception demands primarily great efforts in the field of jurisprudence. In an era of reforms, even dogmatic jurisprudence cannot lag behind legislation and confine itself to commenting upon and interpreting laws… it is not possible to limit oneself merely to a comparison of legislative solutions.[11]

Much more is needed to use foreign law as a model for drafting legal acts and developing legal concepts. In Estonian legal history, three legal reforms have influenced private law system, establishing the tradition of legal borrowing and the use of comparative method in drafting national laws. The first private law reform on the territory of Estonia started in the second half of the 19th century and finished with the implementation of the first codification in 1865 – the Baltic Private Law Code.[12] The Baltic Private Law Code was the pandect civil code, stemming from the Germanic legal family.

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10. B. MARKESINIS, J. FEDTKE, "The Judge as Comparatist", 80 Tul. L. Rev. 11, 2005, p. 55.
11. M. LUTS, "Integration as Reception: University of Tartu Faculty of Law Case in 19th Century", (1998) 3, *Juridica International*, 130-141.
12. T. ANEPAIO. 19. "sajandi õigusreform (Legal reform in 19th century)", 10, *Juridica,* 1997, 10, 490.

The modernization process of civil law resumed during the first independence, gained in 1918, and was nearly completed before the Soviet takeover in 1940. During the first independence, the draft Civil Code was prepared and finished in 1939 but never adopted. The first draft of Estonia's own Civil Code was based on comparative research and legal transplants, again mainly from the Germanic legal family. In the period of the Socialist legal system, which was established in 1940, the private law codes were drafted following the Soviet Bases of Civil Code,[13] using no comparative law method.

The third civil law reform in Estonia started in 1991, after regaining independence. In 1992, the Estonian Parliament passed a resolution concerning the continuity of legislation.[14] In practice, this meant that legal acts from the first period of independence were to be studied and, if possible, followed.[15] The extensive legal reform at the legislative level began with great intensity; in nine years, all five parts of the Civil Code were adopted.[16] For the court system this period was the most difficult, as practitioners were not supplied with commentaries, textbooks or studies on urgent problems. The first commentary on the Law of Obligations Act was published only in 2006.[17] That period was characterized by 'revolutionary fever' as if the country wanted to compete with the constitutional legislator of the young French Republic of the late 18th

13. See J. PAJU, "Basic features of Estonian Property Law", (2000) 4, *ZeuP*, 87.
14. Resolution of the *Riigikogu* (Estonian Parliament) concerning the continuity of legislation. Riigi Teataja (State Gazette) 1992, 52, 651 (in Estonian).
15. I. KULL, "Reform of Contract Law in Estonia: Influences of Harmonisation of European Private Law", (2008) 14, *Juridica International*, 122.
16. By now three of them – General Part of Civil Code Act, Family Law Act and Succession Law Act – have new redactions.
17. P. VARUL *et al.* (eds), *Võlaõigusseadus. I, Üldosa: kommenteeritud väljaanne (Law of Obligations Act. I, General Part: Commented edition)*, Tallinn, Juura, 2006 (in Estonian).

century. Estonia became an experimental field in Europe, becoming known as the "Estonians [who] experiment with themselves".[18]

It was clear to legal scholars in Estonia from the beginning that the goal should not be the creation of an original private law, but instead, a transplant from large jurisdictions.[19] Small jurisdictions have a limit in economic and labour resources when developing their own theories and concepts. The timing for transplanting legal ideas and concepts was quite fortunate due to the fact that it coincided with the movements and events which we can now refer to as the harmonization of European private law: the Principles of European Contract Law (PECL) and UNIDROIT Principles of International Commercial Contracts were published;[20] the adoption of the new Dutch Civil Code,[21] the final stage of the law of obligations reform in Germany.[22] In addition, society was ready and willing to accept concepts and principles that originated from the "West".[23] The concept of transplants – cultural as well as legal – became for Estonian lawyers an everyday reality.[24]

Lawmakers in small countries are also heavily dependent on international trade, to attract firms from other jurisdictions

18. M. LUTS, "The certainty/stronghold of law, the world of yesterday and today's weather", speech on the celebration of 90 years of the Supreme Court of Estonia, 14.01.2010. Available online: http://www.riigikohus.ee/vfs/927/Marju _Luts-Sootak_ENG.pdf.
19. P. VARUL, "Legal Policy Decisions and Choices in the Creation of New Private Law in Estonia", Juridica International 2000, 15, p. 105.
20. Part I of the PECL was published in 1995, which was revised in 2000 when Parts I and II were published and Part III was published in 2003. UNIDROIT Principles of International Commercial Contracts (UNIDROIT Principles) were first published in 1994 and the United Nations Convention on Contracts for the International Sale of Goods (CISG) had already been in operation for a decade.
21. *Burgerlijk Wetboek* (New Dutch Civil Code) was largely reformed in 1992.
22. Gesetz zur Modernisierung des Schuldrechts, which was adopted in November 26, 2001 and in force as of January 1, 2002.
23. For possible arguments related to the acceptance of the foreign law, see MARKESINIS, FEDTKE, *supra* note 10, pp. 11-166.
24. A. BATRIĆEVITĆ, *Legal transplants and the Code of Serbian Tsar Stephan Dushan: a Comparative Study*, Belgrade, 2007, pp. 5-6.

and multinational corporations.[25] Contextual arguments and quality of the source were, however, not the only decisive factors in choosing models from other legal systems. Personal and subjective factors were present in the reasoning and policy decisions behind the legislative processes. For example, the Law of Obligations Act (LOA)[26] and the General Part of the Civil Code Act (GPCCA)[27] were drafted after careful study of the civil codes of Germany, Austria, Switzerland, Italy, Netherlands, Quebec, Louisiana and the relevant *acquis communautaire*.[28] The choice was made in favour of the Germanic legal system because, among other reasons, the members of the drafting group had studied in Germany and were, therefore, more familiar with the legal system.

The preparation for the draft of the Law of Obligations Act was based on three civil codes: the German BGB (taking into consideration the reform proposals made by the Commission for the Revision of the Law of Obligations, BGB-KE),[29] the Swiss OR[30] and the Dutch *Burgelijk Wetboek*. These legal acts were chosen because they were already being used as the foundation for the reform of other legal acts in private law, and because these were "probably the closest to our legal system and its traditions".[31] Besides this, the German Commercial Code and Insurance Contract Act played important roles, as well as other German laws regulat-

25. N. M. GAROUPA, A. I. OGUS, *A Strategic Interpretation of Legal Transplants*, CEPR Discussion Paper No. 4123, 2003, pp. 3-4.
26. Võlaõigusseadus (Law of Obligations Act), adopted in September 26, 2001, in force as of July 1, 2002. In English see: www.legaltext.ee.
27. Tsiviilseadustiku üldosa seadus (General Part of Civil Code Act), adopted in March 27, 2002 and in force as of July 1, 2002. Available in English: https://www.riigiteataja.ee/tutvustus.html?m=3.
28. VARUL *et al.* (eds), *supra* note 17, §§ 1-207; VARUL, *supra* note 19, p. 110.
29. Abschlussbericht der Kommission zur Überarbeitung des Schuldrechts, 1992.
30. Bundesgesetz vom 30. März 1911 betreffend die Ergänzung des Schweizerischen Zivilgesetzbuches (Fünfter Teil: Obligationenrecht).
31. See V. KÕVE, "Applicable Law in the Light of Modern Law of Obligations and Bases for the Preparation of the Law of Obligations Act", Juridica International 2001, 6, p. 36.

ing issues surrounding the law of obligations. Other models examined in the course of drafting include the Italian *Codice Civile*, the new Russian Civil Code (1995), legal acts of the American state of Louisiana, the Canadian province of Quebec, the Scandinavian countries (Sweden, Finland and Denmark, especially concerning contracts for the sale of goods and compensation for damage), the Czech Commercial Code and the Japanese Civil Code.[32] All these sources were studied and used mainly on the basis of comparison of rules, but also by taking into account contextual aspects of legal regulation. Due to the urgent need to adapt new laws supporting the development of the Estonian socio-economic system, all the model countries had to be studied and analyzed within a very short time (1996-2001[33]). To prepare the market, and the entire society, for adapting foreign ideas, the translations of German textbooks and legal acts were provided and used from the beginning of the drafting process. Foreign professors were also used as experts.

Today we may say that the result is comparable to cherry-picking, in that the Estonian private law system comprises the best solutions hand selected from different national, international and model laws, grouping together various restructured and modified concepts.[34] Although some feared that this technique might cause problems in determining the main features of legal system[35] or in identifying the principles behind the rule interpretation and application, the process itself was quite successful. As of now,

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32. *Id.*, p. 36.
33. About the period of preparation of the law, see VARUL, *supra* note 19, pp. 104-118; P. VARUL, *The Creation of New Estonian Private Law. European Review of Private Law*, 2008, pp. 97–111.
34. About the borrowing and transplanting from other legal systems in preparing civil laws of Estonia see: M. KÄERDI, "Estonia and the New Civil Law", in: H. L. Mac Queen *et al.* (eds.), *Regional Private Laws and Codification in Europe*, 2003, pp. 250-251.
35. Borrowing from many sources may also create certain ambiguities in regulations and may cause misunderstanding in attempts to apply Estonian law. See for example, S. M. KIERKEGAARD, "Declaration of Intent: A Legal Conundrum?", Review of Central and East European Law 2004, 29, No. 4, pp. 457-473.

three parts of the Civil Code have been rewritten (General Part of the Civil Code Act in 2001, Family Law Act in 2009,[36] Law of Succession Act in 2008[37]), as well as the Law of Obligations Act (from 2001, in force from 2002). The Law of Property Act (1993[38]) was amended in 2002 due to the adoption of the Law of Obligations Act, but main concepts and regulations were not changed.

2. Interrelation between legal transplants and borrowing and a small country's national law

Comparative law can be used in many ways and for many purposes. The role of comparative knowledge in small countries is determined by the fact that most of its legislation, legal theories and concepts are borrowed from foreign legal systems. Here the difference between reception and transplantation must be acknowledged. Transplantation can be described as a process whereby a legal phenomenon is transferred to another geographic area or culture. A more generally accepted description is a situation where a norm of a legal culture or legal theory is taken to another geographical area by enacting legislation regardless of its original implementation background. Reception is the outcome or result of the transfer of a legal norm or a body of norms, legal concepts and legal theory from foreign countries.[39]

A mere transfer of a norm may mean its successful transformation, but may not result in the proposed effect that a reception of the whole normative construct would have caused. The transfer of a norm must be accompanied by the transfer of the corresponding method, system and conceptual basis. However, the

36. Family Law Act, in force from 01.07.2010. Available in English: https://www.riigiteataja.ee/tutvustus.html?m=3.
37. Law of Succession Act, in force from 01.01.2009. Available in English: https://www.riigiteataja.ee/tutvustus.html?m=3.
38. Law of Property Act, in force from 01.12.1993. Available in English: https://www.riigiteataja.ee/tutvustus.html?m=3.
39. LUTS, *supra* note 11, pp. 130-133.

opinion that legal transplantation will open the gate for foreign legal theories and legal thinking is still disputable. Alan Watson, who coined the term "legal transplant",[40] has become influential for many other scholars who found the concept debatable and argued that the term "legal transplant" may oversimplify the real meaning of the process of transplanting of foreign law. Gunther Teubner[41] proposed the term "legal irritant" instead of "legal transplant", explaining that borrowing is also irritating, and transplants do not conserve the same original content because of the strong influence by new legal environment and legal culture. In contemporary legal literature, the term "legal transplants" is mostly used in the context of legislative "borrowing" from other legal systems but can be used also in a broader sense than merely borrowing legal rules.[42] Concepts from foreign legal systems influence not only legislators but also drafters of private contracts. This is inevitable in small countries where cross-border trade constitutes a bigger part of commercial activities.[43]

Today, the argument that foreign law may influence national law in the process of borrowing and communication between societies is widely recognized. Legal concepts can also be transferred effectively without a simultaneous and complementary

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40. A. WATSON, *Legal Transplants. An Approach to Comparative Law*, 2nd ed. 1993; H. FLEISCHER, "Legal Transplants in European Company Law – The Case of Fiduciary Duties", 2 (2006) 3, *ECFR*, 378.
41. Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences, 61 Modern L. Rev. 11, p. 12: "But 'transplant' creates the wrong impression that after a difficult surgical operation the transferred material will remain identical with itself playing its old role in the new organism. Accordingly, it comes down to the narrow alternative: repulsion or integration.... 'Legal irritants' cannot be domesticated; they are not transformed from something alien into something familiar, not adapted to a new cultural context, rather they will unleash an evolutionary dynamic in which the external rule's meaning will be reconstructed and the internal context will undergo fundamental change."
42. About the borrowing in the contract-drafting field see H. SCHWEITZER, "Private Legal Transplants in Negotiated Deals", (2007) 1, *ECFR*, 84.
43. In 2011, the exports of Estonian goods and services rose 25% year-on-year. The total exports of goods and services amounted to EUR 14.8 billion.

change in other social fields.[44] Countries in transformation may even face the problem that the legal system has to be developed before changes in society take place. The Estonian experience in reforming civil law was arguably a reverse process – there was no adoption of law in response to changes in social relations; rather, changes to the law triggered societal change. Of course, the Estonian experience could be proof that there is no direct relationship between statutory law and society or culture, or it can be interpreted as proof that these interrelations are weaker than one may expect. Success in building up the national legal system from different pieces is based mainly on the decision to choose one basic legal system for an entire private law codification. Here again, Estonia's specific socio-economic, historical, cultural and even linguistic conditions may be decisive elements of the final model of national legal system and its successful functioning. Finally, the importance of the influences from the donor country should not be overestimated. Lawmakers regard foreign systems as very valuable tools for changing their own system. The main value of comparative law is the insights it gives into legal change and into the relationship of law and society. External factors may become important in the development of a legal system, in understanding its peculiarities. It is important to analyze the history of a specific norm in the context of the whole legal system – how it interacts with other rules, what are the consequences of the transplant, and how it should be interpreted in compliance with other legal institutions. There is always a risk that importation of legal concepts does not guarantee their functioning in the receiving country and that their meaning may simply be misconstrued.

B. Markesinis and J. Fedtke present the major pragmatic argument that foreign law offers a distinct justification for a legal result in that foreign law contains useful lessons for domestic law.[45] J. Bell[46] distinguishes between the process of discovery (how

44. TEUBNER, *supra* note 41, p. 22.
45. See MARKESINIS, FEDTKE, supra note 10, p. 14 ff.

we should go about making a decision) and the process of justifying the decision (why anyone should accept our decision as correct in law). One cannot disagree that the examination of foreign legal arguments as part of the process of discovering what the law is does not mean that these arguments provide a justification for a decision by a judge. Discussion about the possibility of using foreign law in interpreting national law and the methods of justification give rise to the question of the legal grounds for using foreign law.

3. Legal grounds for use of comparative law by the courts

The traditional classification of legal systems based on source has been criticized in legal literature for decades, but no other possible grounds have since been proposed. Following the traditional division of national legal systems we may say that Estonia belongs to the Germanic legal family. The sources of civil law in Estonia are legal acts and custom (Article 1 (1) of the GPCLA). Custom arises from the continuing use of certain rules of behaviour if the people involved consider it legally binding (Article 1 (2) of the GPCCA). In the case of annulment of a judgment by the Supreme Court and referral of the matter for a new hearing, the positions set out in a judgment of the Supreme Court on the interpretation and application of a provision of law are mandatory for the court conducting a new hearing of the same matter. However, interpretations given to legal rules or filling the gaps in the law by the Supreme Court may become part of the legal system if it is generally followed also in subsequent judgments as customary law. Thus, the meaning of "the law of precedent" is not entirely unfamiliar to Estonian lawyers.

Courts have limited possibilities to use comparative methods. First of all, it is not easy to find and access foreign law. The comparative method also involves uncovering differences between actual solutions. The question is whether the courts should be

46. J. BELL, "The relevance of foreign examples to legal development", (2001) 21, *Duke Journal of Comparative and International Law*, 431 à la p. 432.

free from conceptual context and national doctrine, seeing solutions only in the light of their ability to satisfy a particular legal need.[47] Bell defines three situations where foreign law can be used by national courts. The first occasion arises when the state is a member of a treaty, and by citing a decision from another national court of a state party to the treaty, the court will justify its decision. The second situation arises from the fact that European Union law uses the concept of "principles common to the constitutional traditions of Member States" and this, under Article 308 of the European Community Treaty, serves as a basis for the creation of European Community law. This concept suggests that there might be some principles of law that are shared between states.[48] The third situation arises when the relevancy of foreign law is evident, but the legal bases for using it as one of the domestic legal system's sources are missing. Here, the Estonian example might be interesting as a solution for finding proper legal ground for using foreign law.

The position of the Estonian Supreme Court has always been very liberal-minded in forming its rules regarding how and when to use foreign law in solving domestic cases. Foreign law can be used by Estonian courts if: (i) in Estonian law the provision has never been applied, (ii) there is a parallel or analogous provision in other legal systems, (iii) there is a relevant court practice in other legal systems and (iv) the state's legal system and court practice is similar to that in Estonia.[49] Following the instructions given by the Estonian Supreme Court, the use of comparative method starts with a particular question and proceeds to finding previous interpretations or applications of the rule, finding proper sources for

47. ZWEIGERT, KÖTZ, *supra* note 1, pp. 33-46.
48. BELL, *supra* note 46, p. 433.
49. Civil Chamber of the Estonian Supreme Court explained the use of foreign law by the courts first time in the judgments from February 11, 2003 in the civil case No. 3-2-1-9-03 following with judgments from December 21, 2004 (civil case No. 3-2-1-145-04), December 9, 2008 (civil case No. 3-2-1-103-08) and October 12, 2011 (civil case No. 3-2-1-90-11).

comparative material and interpretation of it for the national legal system only.[50] Here, we see that the Estonian Supreme Court defines in its instructions the core elements of comparative law: finding a similar legal system and similar law, researching contextual elements of the regulation, and studying the differences between the possible solutions in different national legal systems. The task is not easy, especially in cases involving questions of interpretation.

Thus, the use of comparative law is left only for cases where the local law is open to interpretation, where very complex regulations and institutions were used.[51] Small jurisdictions often use transplants from large jurisdictions where the rules are more complex for very pragmatic reasons; namely, because lawmakers in a large jurisdiction will naturally tend to invest greater resources in analysis of the content and functioning of the rules.[52] That should encourage the courts of small jurisdictions to look into court practices of countries with similar legal systems, but not only in cases where there is an "open" rule to interpret.

Today, comparative law is not only a method, but also a field of substantive knowledge.[53] The question becomes: where to find a proper law? For small jurisdictions, the European projects in the field of harmonization of private law involving editing a collection of substantive law and court cases from different legal systems are of great help. The Draft Common Frame of Reference, consisting of six books of black letter rules and comparative material in private law, acts as basic material for searching and finding solutions to questions of national law. Furthermore, language skills play an important role in using comparative sources by national courts. Courts usually are limited by their own problems. However, if judges use foreign law, the question is always, to what

50. This is called national comparative law by ZWEIGERT, KÖTZ, *supra* note 1, p. 44.
51. It is not proved that small jurisdictions have simple rules and vice versa. See DAVIS, *supra* note 9, p. 170.
52. *Id.*, p. 172.
53. REIMANN, *supra* note 3, p. 684.

purpose is it being used? Should judges compare only rules or also context, application, cultural background, economic environment? In reality, courts use foreign law only if it is brought to their attention by the parties, if it is a very complicated question or if they would like to be sure that a higher court will not overrule the decision. Usually it is not a comparative use, but only the use of court practice[54] applied in the same situation.

4. Comparative law in Estonian court practice

4.1 Interrelation between comparative method and interpretation of law

Using comparative method in judicial process starts usually in the first stage from the study of foreign legal texts to find out similarities between the national law and foreign legal sources. This process involves an analysis and comparison of texts, study of the history of rules, underlying reasons that guided their formulation and other important information to get a logically complete and consistent picture of the mechanism of the legal regulation. Sometimes, the utilitarian principles and arguments brought up in choosing the final solution are also studied.[55] It may help understand the basic principles of the rule and its application or justifications in adapting the rule. But this is the first step in

54. Article 14: Communication of judgments applying this Regulation.1. Member States shall ensure that final judgments of their courts applying the rules of this Regulation are communicated without undue delay to the Commission. 2. The Commission shall set up a system which allows the information concerning the judgments referred to in paragraph 1 and relevant judgments of the Court of Justice of the European Union to be consulted. That system shall be accessible to the public. See: http://ec.europa.eu/justice/contract/files/common_sales_law/regulation_sales_law_en.pdf.

55. R. G. BARBOSA, "The philosophical approaches to intellectual property and legal transplants. The Mexican Supreme Court and NAFTA Article 1705", Houston Journal of International Law, vol. 31, no 3, 2009, pp. 515 – 564.

comparative research; it is only in the second step where different systems are compared. N. Jansen analyses[56] the meaning of comparison and comparative judgment, positing that comparison is constructing relations of similarity and dissimilarity that are based on full factual description. There are two historical approaches involved in comparative research – the common core and the better rules approach. The common core approach may lead to the discovery of differences without understanding the real degree or reasons to it. The comparative research based on better rule approach may overlook the fact that differences might be products of different legal terminology found in legal systems. In both cases, comparative knowledge may be used to justify normative statements but not as a proof of truth or superiority.

Legislative process and realization of laws are both factual components of rationalizing a legal order.[57] The process of constituting a legal norm, e.g. the determination of the meaning of legal rules, is a part of application practice where the courts can use foreign law and comparative law generally, mainly as a method of interpretation of law. The criteria of whether legal norms are complied with or not are established by the practice that has developed in a rule-of-law society; a departure from or non-adherence to that practice by the applier of law will change the content of the legal norm and constitute the creation of a new rule.[58] If there is no written law and there are gaps in the statutory legal system, the custom of a country takes precedence over other sources of law.[59]

In the first GPCCA of Estonia, 1994, the rules on interpretation of legal acts (Article 2) provided that "Interpretation of an Act shall be based on the ordinary meaning of words used in the Act

56. JANSEN, *supra* note 2, pp. 312-314.
57. R. NARITS, "About the Meaning of the Legal Aspect of Practical Semantics in Estonian Legal Orde", (2000) 5, *Juridica International*, 11.
58. See D. BUSSE, "Zum Regel-Charakter von Normtextbedeutungen und Rechtsnormen", (1988) 19, *Rechtstheorie*, 310, 311.
59. A. AARNIO, *Laintulkinnan teoria. Yleisen oikeustieteen oppikirja*. Juva, 1989, p. 253.

unless a specific meaning of the words is expressly used in the Act (1); If a word has several ordinary meanings, the meaning which best conforms to the purpose of the Act being interpreted shall be used (2) and A provision of an Act shall be interpreted together with the other provisions of the Act based on the purpose of the Act (3)". Here, the legislator has clearly given priority to linguistic interpretation, which means that the legislator was of the opinion that without linguistic interpretation it is not possible to understand the intent and purpose of the GPCCA. Such an approach seemed to be fully justified, and critics of the idea of changing the principles order of interpretation did not accept the logic that any interpretation of a law should not first be based on its text. The question was about the possibility of regulating the order of interpretation, and the possibility of beginning interpretation with a systematic interpretation and continuing with an objective, teleological interpretation.[60] However, this critique was not taken into account, and in 1996 the method of systematic interpretation based on the purpose of the act was moved to the first position and the method of grammatical-semantic interpretation was moved to the second and third positions[61]). The new version of the GPCCA adopted in 2001[62] consists of only one sentence, which provides that provisions of legal acts shall be interpreted together with the other provisions pursuant to the wording, spirit and purpose of the legal acts. As we see, there is no hierarchy of interpretation methods and courts are free to decide in which order the legal acts will be interpreted.

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60. R. NARITS, Interpretation of Law in the Estonian Legal System, (1996) 1, *Juridica*, 11-16.
61. GPCCA (1994 with the amendments from 1996): § 2. Interpretation of Acts. (1) A provision of an Act shall be interpreted together with the other provisions of the Act based on the purpose of the Act. (2) Interpretation of an Act shall be based on the ordinary meaning of words used in the Act unless a specific meaning of the words is expressly used in the Act. (3) If a word has several ordinary meanings, the meaning that best conforms to the purpose of the Act being interpreted shall be used.
62. See *supra* note 27.

Estonian Supreme Court judgments are long, structured texts. Often through *obiter dicta*, they provide context for different opinions, thoroughly explore a relevant area of law, or provide explanations of previous judgments or a hypothetical set of facts, explaining how the court believes the law would apply to those facts. These parts of the judgments are not binding, but may consist of rules accepted by the Supreme Court as customary law. The Criminal Chamber and the Administrative Law Chamber of the Supreme Court have been modest in supporting the use of foreign law (one judgment in each), whereas the Chamber of Constitutional Review (four judgments) and the Civil Chamber of the Estonian Supreme Court (five judgments) have been more open to foreign sources. In most cases the references were made to German legal acts or doctrine.

4.2 Use of legal practice with direct references to the donor legal system

There are judgments where direct references to foreign court practice were made. A useful example is an Estonian defamation case involving the liability of Internet intermediaries for the publication of insulting commentaries. In the judgment, the Estonian Supreme Court refers to the German court practice with direct reference to the judgment of BGH VI ZR 101/06, 27.03.2007. In dynamic fields of law the use of the comparative method is reasonable, and references to relevant cases from other legal systems should not depend on the similarities or differences between legal systems as expressions of the process of globalization of law.[63] Direct reference to foreign court practice was made also in the case where the concept of business secret was applied, here the reference was made through the scholarly writings.[64] Another example of the use of foreign law is a 2011 judgment, in which the Estonian Supreme Court[65] held that the German Supreme Court's

63. JANSSEN, SCHULZE, *supra* note 6, p. 237.
64. Judgment of the Estonian Supreme Court from December 9, 2008 in the civil case No. 3-2-1-103-08.
65. Judgment of the Estonian Supreme Court from October 12, 2011 in the civil case No. 3-2-1-90-11.

application of the Property Law Act concerning the determination of remuneration for the use of a public road in order to access an immovable (Article 156 of the Property Law Act) is an established source for interpreting and applying Estonian law. The Estonian Supreme Court found that this rule should ultimately be interpreted further, going beyond the interpretation given by German Supreme Court.

4.3 Use of legal practice without references to donor legal system

There are cases in which the Supreme Court took into account foreign legal practice that was directly applied in lower courts without any references afterwards to that practice. One of the most recent cases was the application of the concept of change of circumstances under Article 97 of the Estonian Law of Obligations Act.[66] German court practice was used as a source for main arguments in assessing the change of balance between the obligations of the parties due to the financial crises by first instance court. First instance court refers to the commentaries of the German Civil Code, where the difference between two situations should be changed at least 50 % to be qualified as essential change of circumstances. Circuit Court did not consider the German court practice as a relevant source, but the Supreme Court overruled the judgment, explaining that the difference between value and price of the assets exceeding 50 % can be used as bases for the claim under the concept of change of circumstances, but without any references to German legal theory or court practice.

Foreign law was also used in interpretation of Article 143 of the Law of Obligations Act. There are three judgments[67] of the Su-

66. Judgment of the Estonian Supreme Court from October 26, 2010 in the civil case No. 3-2-1-76-10.

67. See the Supreme Court judgments from March 23, 2006 in the civil case No. 3-2-1-8-06, from November 5, 2008 in the civil case No. 3-2-1-89-08 and from December 8, 2009 in the civil case No. 3-2-1-126-09.

preme Court concerning the meaning of the contract of consumer surety provided for in Article 143 of the LOA. Article 143 of the LOA states that contract of consumer surety is void if the maximum amount of money covered by the liability of the surety is not agreed upon. The aim of such a rule is to limit the liability of the consumer, and to point the consumer's attention to the sum she or he can be held liable for.[68] The rule was transplanted from Article 493 (1) of the Swiss Code of Obligations.[69] Under the court practice established by Swiss courts, the Estonian Supreme Court established a rule whereby a person who can be qualified as acting outside his or her economic interests is not a person who provided surety by holding all or majority shareholding in the company. In the beginning of the financial crisis (end of 2008 and beginning of 2009) suretyship was demanded from the shareholders of the company or members of the management board, often in an amount upwards of ten times more than the share capital paid into the limited liability company.[70] Under the interpretation of the Estonian Supreme Court, most of the members of the board or management became non-consumers and outside the protective rules applicable to consumers as sureties. The majority of the public considered it as an unfair solution[71] and the Ministry of

68. Commented edition of the Estonian Law of Obligations Act provides full overview of sources used in borrowing and transplanting legal concepts or legal theories. For example, comments to Article 143 of the LOA refer to Article 493 (1) of the Swiss Code of Obligations (Schweizerische Zivilgesetzbuch. Fünfter Teil: *Obligationenrecht*). Under the Swiss law the contract of surety is valid only where the surety makes a written declaration and indicates in the surety bond the maximum amount for which he is liable. Where the surety is a natural person, his declaration must additionally be done in the form of a public deed in conformity with the rules in force at the place where the instrument is drawn up. Where the liability under surety does not exceed the sum of 2,000 francs, it is sufficient for the surety to indicate the amount for which he is liable and the existence of joint and several liability, if any, in his own hand in the surety bond itself.
69. Law of Obligations Act; see *supra* note 2, commented edition, art. 143.
70. This argument has been used at least once by the lower court referred in the Supreme Court judgment from November 5, 2008 in the civil case No. 3-2-1-89-08.
71. Also the rule stated in Art. 7:857 of the Dutch Civil Code states that the provisions of the section covering suretyship given by a natural person

Justice reacted to this situation by amending the law. At present, the law provides that all natural persons who are obliged under the contract of suretyship are consumers, and now the members of the management or shareholders as sureties enjoy the full protection provided for consumers.

Swiss law was used also in a 2008 case,[72] in which the main question was how to interpret the rule which provides to the acquirer the right to revoke a residential or business lease contract within three months' transfer, or encumbrance of the object of a lease if the acquirer urgently needs the leased premises (Article 323 of the LOA). This rule was transplanted from the Swiss Code of Obligations Article 261. Lower courts made references to the comments of the Swiss Code of Obligations where very wide interpretation of the rule was described. The Supreme Court did not apply the wide interpretation from Swiss law, explaining that in the given circumstances, the interpretation based on Swiss law is not acceptable. It was done without any references to reasons as to why the interpretation of the donor legal system was not applicable.

One of the most interesting examples is the doctrine of strict liability in cases of non-conformity of the purchased goods. In Estonia, issues regarding a contract of sale are governed by the LOA, in which the regulation of the contract of sale derives mainly from the United Nations Convention on Contracts for the International Sale of Goods, the German Civil Code, and the regulation of general rules on liability for non-performance from the PECL.

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apply only to suretyship entered into by a natural person acting neither in the conduct of a profession or business, nor for the benefit of the normal exploitation of the business of a company limited by shares or a private company with limited liability of which he is a director and in which, alone or with his co-directors, he holds a majority of the shares, see H. WARENDOR *et al.* (transl.), *The Civil Code of the Netherlands,* Kluwer Law International, 2009, p. 898.

72. Judgment of the Supreme Court from April 23, 2008 in the civil case No. 3-2-1-20-08.

General rules on liability for non-performance can be found in Articles 100 to 107 of the LOA and general rules on specific remedies in Articles 108 to 118. General rules will apply only if there are no special rules, which in the case of sales law are provided for in Articles 208 to 224 of the LOA. Estonian law follows in general terms the principle of liability based on excusability. Article 103 (1) of the LOA equates liability with a lack of excuse for non-performance, i.e., if the actions of the breaching party are not legally excusable, it entitles the other party to implement available legal remedies in consequence of the non-performance. The general regulation found in LOA is thus basically the same as the one set forth in PECL Article 8 (1). Even when the breach is excused under law, it necessarily entitles the other party to resort to legal remedies provided in Article 105 of the LOA (likewise in PECL Article 8:101 (2)) such as refusal to perform, unilateral termination of contract, and reduction in payment, or, in the case of commercial transactions, the imposition of interest for late payment.

According to the LOA, strict liability is applied as a rule upon breach of contract, which means that the obligor is released from liability only in cases of *force majeure*. Legal literature in Estonia has adopted a position regarding the sale contract stating that the seller who has delivered defective goods cannot be released from liability even in cases of *force majeure*, which essentially means the seller's absolute liability. Unlike the principle arising from Article 311a of the German Civil Code, the seller's unawareness of the non-conformity of the goods is absolutely insignificant according to Estonian law. According to the comments on Article 218 of the LOA, the provision serves as a special provision to Article 103 of the LOA, for which case the law provides that a person shall be liable for non-performance regardless of whether the non-performance is excused and, as a result, the seller cannot be released from liability for the delivery of defective goods, even though it could be excused. Hence, the comments of the LOA have assumed the position that the seller is liable with no exceptions (i.e., even in the case of *force majeure*) for the defects that the goods have at the moment when the risk is passed. This, in turn, means that the seller is no longer subject to strict liability but ab-

solute liability. This interpretation has been emphasised by the Supreme Court in a number of judgments,[73] even after legal scholars published very strong critiques.[74] In the first comments to the provisions regulating the liability in contractual relations, the position was not very clear (the first comments to the LOA were published in 2006).[75]

Conclusion

In conclusion, the court practice available in Estonia shows that foreign law can be used quite successfully at the level of comparative court practice. Finding foreign legal rules is not a difficult task, as there is a tradition in Estonia to provide comments to the legal acts with references to the donor legal systems. However, I have some doubts about the possibility that lower courts would use foreign law in the future without instigation by the parties' lawyers during court proceedings. Only the Supreme Court has the resources to carry out comparative research, study court practice and go through legal literature. The behaviour of society in different countries under the same rules can vary largely. In addition, even if economic differences disappear, cultural differences still largely remain. Therefore, foreign law cannot be a completely new argument, but provides additional support to the arguments already available in the domestic legal system.[76] M. Reimann aptly sums up the use of comparative law in court: its underlying con-

73. Judgments of the Estonian Supreme Court from November 30, 2005, in the civil case No. 3-2-1-131-05 and from September 26, 2007 in the civil case No. 3-2-1-71-07. Latest judgment is from February 8, 2012 in the civil case No. 3-2-1-156-11 where Supreme Court repeated already previously explained principles of liability of the seller for non-conform goods.

74. See A. VÄRV, P. KARU, "he Seller's Liability in the Event of Lack of Conformity of Goods", Juridica International 2009, 16, pp. 87-91.

75. Explaining the principles of strict liability, the interpretation given to the interrelation between articles 103 and 218 of the LOA was described as a position which could obviously be discussed; P. VARUL *et al.*, *supra* note 17, p. 392.

76. BELL, *supra* note 46, p. 460

ception of law is positivist, its methods are rather simplistic, and its goals are consciously one-sided.[77]

Countries like Estonia, which, at the end of the twentieth century, had an obligation to restore – and an opportunity to renew – its legal systems, provide a litmus test for the use of foreign law in modern European private law. However, if the method is only on the level of rules, without further attempts to understand the complexity of the foreign legal system, legal culture and political-economic situation, it is still too expensive and burdensome a task for all courts to follow. The Proposal of the European Commission from 10.11.2011 on a Common European Sales Law provides that Member States shall ensure that final judgments of their courts applying the rules of the Regulation are communicated without undue delay to the Commission. The Commission shall set up a system that allows the consultation of information concerning the judgments of Member States and relevant judgments of the Court of Justice of the European Union.[78] This will provide us with a collection of the judgments but does not ensure that the future judgments will be made on the bases of comparison. Here, the comparative lawyers should provide proper material to satisfy the needs of courts. Therefore, the use of comparative law in developing a national legal system is possible, but has very limited possibilities.

77. REIMANN, *supra* note 3, p. 692.
78. European Commission proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, Brussels, 11.10.2011, COM (2011) 635 final.