

**EUROPEAN COMPARATIVE LAW:
Reasons for «Enhanced Comparison»
and Role of the CJEU**

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Fecha recepción: 30/03/2021
Fecha aceptación: 18/05/2021

EUROPEAN COMPARATIVE LAW: Reasons for «Enhanced Comparison» and Role of the CJEU

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1. INTRODUCTION

This article builds the proposal of two novel ideas upon a critical reconstruction of the concept and scope of European Law. Within the context of the European legal space, a more defined and restricted area has to be taken into account, which is named 'inner core', where legal comparison has become more likely and possibly more successful. This statement is justified and contrasted to normative, organizational and institutional factors, in light of the evolution of the methodology in European scholarship. In order to further enhance the comparative dimension of European law, the role of the CJEU becomes essential. Departing from previous studies on the use of comparative law, this article offers a new approach to case selection, in order to augment its methodological grounds.

Therefore, a comprehensive concept of European law, composed by EU law, domestic sources of law and norms of the European system of protection of human rights, needs to be endorsed, in order to grasp its intrinsically comparative nature. In this sense, European law must be understood as strictly connected to the concept of European legal space. After a critical analysis of the different scholarly interpretations of European law at the crossroads between national, international and *sui generis* norms, since the beginning of European integration (§ 2), the text explains through a threefold argumentative construction why Europe represents the ideal endeavor for

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‘enhanced comparison’, intended as methodologically sound comparison reaching effective results through mutual imitations.

First, the normative and institutional framework of the European legal space is peerless with respect to other regions, in the light of the constitutional quality of the links among the different legal systems, i.e., the common principles established by the EU Treaties and the guarantees ensured by the European Convention on Human Rights. The paramount consequences of this double link are that, on the one hand, any act adopted by domestic or European authorities is presumed to be consistent with a common set of values, and, on the other hand, any act can and shall be measured against the same standards. Furthermore, there are institutions in charge of enforcing such values (section 3.1). Such a framework creates extraordinary conditions for presuming the comparability of the systems belonging to the European legal space, in particular to what I call ‘inner core’, although a (less strict) justification of the choice of the case studies is still required.

Second, the European legal space is characterized by several overlapping inter-connections: vertically, horizontally, asymmetrically and cross-cutting. From this perspective, there is a particular area in which the peculiarities of European law emerge clearly, notably after the entry into force of the Lisbon Treaty: the regulation and protection of human rights. In order to explain the peculiarity, three elements are analyzed, namely the overlap of three standards of protection; the existence of substantive clauses fixing criteria to solve potential conflicts of norms; the role played by judicial bodies in the interpretation of such criteria, especially by the Court of Justice of the EU (CJEU). After describing the reasoning of the judges as an exercise of comparative methodology, section 3.2 deals with the positions adopted by the CJEU in cases of conflicts between standards of protection of human rights, introducing and discussing the concept of common constitutional traditions.

Third, taking into account the common normative and institutional framework, it becomes clear that mutual imitations in this context can be more effective, if realized through the proper methodology. To argue that, section 3.3 states that, for any practical target that has been allotted to legal comparison, within the inner core of the European legal space the odds of successful circulation of legal solutions are higher. Further causes of this phenomenon are the Europeanization of domestic administrations and the implementation of European norms and models at the domestic level.

As a result, the application of legal comparison within the jurisprudence of the CJEU becomes an essential element for European law, but there is the need for improving and adjusting the methodological toolbox used by the Court. Section 4 proposes a threefold approach in order to build a new methodology, consistent with qualitative (and not quantitative) standards for the selection of the case studies. The classification of the legal systems into models would be the premise of the work of the Court, starting with the normative model adopted by the Member State involved in the case. Using this model as a yardstick, the most different model would need to

be identified and explored as well. Finally, both extreme models would have to be inserted in a more complex framework and contrasted to the common European values and the targets that the EU is pursuing through the specific act.

2. EUROPEAN COMPARATIVE LAW: EVOLVING DEFINITIONS AND CONCEPTUAL ELABORATIONS

This text is built upon the idea that European law presents essential features that promote and favor comparative studies in the European legal space; also, it has acquired new targets in a phase of crises of European integration¹. In modern times, European comparative law does not have as its sole, nor even main, target the creation of common norms for all the systems belonging to this area, but it needs to represent a model of adjustment of differences: unity in diversity, possibly through a bottom-up process favoring inclusion.

Furthermore, European law, and EU law in particular, is ontologically comparative from two different perspectives: a) EU law is the result of the harmonization or unification of the different national systems; b) EU law can be an object of comparative studies as one of the legal systems that are compared in order to find analogies and differences².

The concept of European law adopted in this text and to a certain extent previously elaborated by von Bogdandy³ offers an innovative reconstructive approach aiming to reach beyond the conservative idea that all legal issues, particularly in public law, have to be understood through national sovereignty⁴. Rejecting such a

¹ Critical junctures have been essential to determine the direction of European integration, as it was stated by CASSESE, S. (2016), «L'Europa vive di crisi», *Rivista trimestrale di diritto pubblico*, n. 3. Other contributions devoted to the multiple crises of the EU published in the same issue provide relevant reflections in this respect as well.

² From this perspective, the construction of the *Integration Through Law* project at the European University Institute represents the best example, as it aimed to show the positive outcome of comparing the European Communities with a federal State like the USA. See in particular, CAPPELLETTI, M., SECCOMBE, M. & WEILER, J.H.H. (eds) (1986), *Integration Through Law: Europe and the American Federal Experience. Vol. 1: Methods, Tools and Institutions*, Berlin-New York, De Gruyter.

³ See VON BOGDANDY, A. (2016), «The Transformation of European law: The Reformed Concept and its Quests for Comparison», *Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper Series*, n. 14. For a constitutional law approach, see VON BOGDANDY, A., CRUZ VILLALÓN, P. & HUBER, P. (2013), *El Derecho Constitucional en el Espacio Jurídico Europeo*, Valencia, Tirant lo Blanch; BIFULCO, R. (2018), «Europe and Constitutional Pluralism: Prospects and Limitations», *The Italian Journal of Public Law*, vol. 10, n. 2, pp. 167-185; VEDASCHI, A. (2019), «La crisi dell'identità europea: verso una nuova costituente?», *Diritto Pubblico Europeo Rassegna online*, n. 1, pp. 28 ff.

⁴ JELLINEK, G. (1882), *Die Lehre von der Staatenverbindung*, Berlin, Haering, p. 36 (first published in 1882 and then in Walter Pauly ed., 1996). European constitutionalism had traditionally insisted on indivisibility of sovereignty, but this vision could not explain the legal reality of the EU and

perspective does not mean that one can completely neglect the relevance of each individual domestic legal system. Nevertheless, the concept of European law cannot be identified as totally dependent from national laws (and domestic sovereignties), as if it were a mere example of international legal environment⁵. In this interpretation, European law differs from the 'global' approach to international law as well⁶, remaining linked to national laws in a way that is possible exclusively in the European legal space. European law is based on an interconnection between the systems involved that goes beyond any other experience of supranational/international governance, creating a unique example of legal space⁷ where the use of comparison becomes more useful and even necessary.

The concept of European law which is supported here was anticipated somehow already in the late 1960s and 1970s, when European law started to be considered as a relevant field of study in itself⁸. Strictly associated to the evolution of this branch of law was the consideration and self-understanding of legal scholarship, emerged already with the crisis of the European positivistic approach and analysed by Carl Schmitt who advocated for the role of scholars in preserving the unity of the legal systems, even with different tasks being allotted to them in each European country⁹.

As a matter of fact, European law has been interpreted in several different ways since the start of European integration. Over time, academic positions spanned from a mere branch of international law, to the ensemble of all domestic laws belonging to the European Communities, up to a new autonomous field.

its 'supranationalism', as it was underlined by SCHÜTZER, R. (2016), *European Constitutional Law*, 2nd ed., Cambridge, CUP, pp. 62-63.

⁵ On the constitutional aspirations of EU law and the impact on sovereignty, see PATRONI GRIFFI, A. (2019), «L'Europa e la sovranità condivisa: appunti di un discorso sulle ragioni del diritto costituzionale europeo», *Diritto Pubblico Europeo Rassegna online*, n. 1, pp. 99-110 and CARRINO, A. (2014), *Il problema della sovranità nell'età della globalizzazione. Da Kelsen allo Stato-Mercato*, Soveria Mannelli, Rubbettino.

⁶ KLABBERS, J. (2015), *Introduction to International Organizations Law*, 3rd ed., Cambridge, CUP, pp. 14-15; DE WITTE, B. (2012), «The European Union as an International Legal Experiment», in DE BÚRCA, G. & WEILER, J.H.H. (eds), *The Worlds of European Constitutionalism*, Cambridge, CUP, pp. 19 ff.

⁷ This concept does not reject the existence and relevance of individual legal orders, as all decisions «on the validity, legality, legal effects, and legitimacy of an act requires attributing this act in a first crucial step to a specific legal order». Nevertheless, European law «holds that any decision on the validity, legality, legal effects, and legitimacy of many such acts requires considering the greater framework as well», in the light of the idea of European legal space: see VON BOGDANDY, A. (2016), *cit.*, p. 9.

⁸ RASMUSSEN, M. (2010), «Constructing and Deconstructing «Constitutional» European Law: Some Reflections on How to Study the History of European Law», in KOCH, H., HAGEL-SORENSEN, K., HALTERN, U. & WEILER, J.H.H. (eds), *Europe: The New Legal Realism: Essays in Honour of Hjalte Rasmussen*, Copenhagen, Djoef Publishing, p. 644.

⁹ SCHMITT, C. (1950), *Die Lage der europäischen Rechtswissenschaft*, Tübingen, Internationaler Universitäts-Verlag, pp. 14 ff. explained to what extent the crisis of the positivistic model implied a corresponding crisis of European scholarship and how that could be exploited as an opportunity.

Some scholars identified European law with Community law¹⁰ or focused on the influence of specific legal systems (Belgium and the other founding members) on the European Communities' construction, with the example of the preliminary reference as a kind of common element for European legal orders¹¹. The existence of a common law as such was put under scrutiny by international scholars who argued that only the categories of international law and domestic law could be applied to European integration, as far as, even through the transposition of EU norms, the outcome would be a norm embedded in each domestic legal system¹².

The multifaceted nature of European law was already understood by some scholars, such as Mosler, who intended it as a plurality of norms aiming at the target of integration¹³ or Pocar, who criticized the common approach to the field and the consequent conception as a new autonomous law totally separated from any existing legal phenomenon. From his perspective, European law was a sum of international, domestic and Community norms¹⁴. Also, Orsello dealt with both the 'small' (six Member States of the European Communities) and the 'bigger' Europe (Council of Europe) in order to grasp the nature of European law¹⁵.

The evolution of the concept of European law cannot be appreciated obviating a reference to the *Integration Through Law* (ITL) project carried out at the EUI and then published in seven volumes between 1985 and 1988, edited by Cappelletti, one of the Italian pioneers of comparative constitutional law, with Weiler and Seccombe¹⁶. While proposing a parallelism with the federal model¹⁷, these authors promoted the

¹⁰ A comprehensive study of the different exegetic positions on the legal system of European Communities was published by IGLESIAS BUIGUES, J.L. (1968), «La nature juridique du droit communautaire», *Cahiers de droit européen*, n. 4, pp. 501 ff.

¹¹ LAGRANGE, M. (1968), «La interpretación unitaria del derecho de las Comunidades Europeas. Aspecto de la acción prejudicial», *Derecho de la integración*, n. 3, pp. 59 ff.

¹² On the inexistence of an autonomous field, see BALLADORE PALLIERI, G. (1961), «Le Comunità Europee e gli Ordinamenti interni degli Stati Membri», *Rivista di diritto internazionale*, pp. 3 ff. For further argumentation, see TOMMASI DI VIGNANO, A. (1966), «Inesistenza di un «ordinamento comunitario europeo»», *Annuario di diritto comparato e di studi legislativi*, pp. 66 ff. For a completely distinct approach, see NERI, S. (1964), «Sulla natura giuridica delle Comunità Europee», *Rivista di diritto internazionale*, vol. 2, pp. 231 ff.

¹³ MOSLER, H. (1969), «Begriff und Gegenstand des Europarechts», *Zeitschrift für ausländisches Recht und Völkerrecht Heidelberg Journal of International Law*, vol. 28, pp. 481 ff. On the common rationalistic basis of European scholarship, see SCHMITT, C. (1950), cit., p. 29.

¹⁴ POCAR, F. (1973), *Lezioni di diritto delle Comunità europee*, Milano, Giuffrè, particularly the Introduction, pp. 1 ff.

¹⁵ ORSELLO, G.P. (1966), «Autonomia e originalità del diritto europeo», in ID. (ed.), *L'Italia e L'Europa*, Roma, Edizioni Abete, pp. 419 ff.

¹⁶ See the abovementioned volumes dedicated to ITL. On the political implications of the project, see the reconstruction offered by BYBERG, R. (2017), «The History of the Integration Through Law Project: Creating the Academic Expression of a Constitutional Legal Vision for Europe», *German Law Journal*, vol. 18, n. 6, pp. 1531 ff.

¹⁷ But not necessarily the progressive transformation of Europe into a federal State, as clearly stated by WEILER, J.H.H. (1984), «Eric Stein: A Tribute», *Michigan Law Review*, vol. 82, n. 5-6,

legal (constitutional) nature of the European project, endorsing the protagonist role assumed by the Court of Justice in the construction of the Communities¹⁸. Until that point in time, especially on the other side of the Atlantic, the discourse on the similarities between federalism and European integration was very present, before the discourse of the '*sui generis* nature' (or uniqueness) became more common in the old continent. Stein affirmed already in the 1960s that the mechanisms and the decision-making process of the European Communities were more consistent with the ones of a State, in terms of administrative and even constitutional law, than the ones that would be typically attached to an international body¹⁹. He pursued the comparison with the American federal model as a tool to make European integration more intelligible²⁰. From this perspective, Hay defined the process as an imperfect federalism²¹ and focused on the European supranational architecture as the emergence of a sort of federal hierarchy²².

Despite the paramount contributions by these scholars and the ITL project, with an eye to the extraordinary elements characterizing the EU with respect to other purely international or national arrangements, dominant European scholarship has considered those elements as impeding its comparison with other experiences²³, denying or limiting the comparability of the European model of integration with others. This approach has been strongly criticized, for instance, by Schütze, who

p. 1161. The same author used several categories of federalism – such as supremacy and implied powers –, when tracing the evolution of European integration, in his seminal work WEILER, J.H.H. (1991), «The Transformation of Europe», *The Yale Law Journal*, vol. 100, n. 8, pp. 2403 ff.

¹⁸ The foundational and 'constitutional' jurisprudence of the Court of Justice was being elaborated in those decades or slightly before, up to the case 294/83, *Parti écologiste «Les Verts» v European Parliament* [1986], in which it referred to the Treaty as the 'basic constitutional charter'.

¹⁹ The works of Eric Stein on these issues can be found in STEIN, E. (2000), *Thoughts from a Bridge: A Retrospective of Writings on New Europe and American Federalism*, Ann Arbor, University of Michigan Press.

²⁰ This is the interpretation offered by BOERGER, A. (2014), «At the Cradle of Legal Scholarship on the European Union: The Life and Early Work of Eric Stein», *American Journal of Comparative Law*, vol. 62, n. 4, p. 881.

²¹ HAY, P. (1963), «Federal Jurisdiction of the Common Market Court», *American Journal of Comparative Law*, vol. 12, n. 1, pp. 21 ff.

²² According to HAY, P. (1967), *Federalism and Supranational Organizations: Patterns for New Legal Structure*, Urbana-London, University of Illinois Press, the three European Communities did «possess both independence from and power over their constituent states to a degree suggesting the emergence of a federal hierarchy» (4). The term federal should be intended as attaching «to a particular function exercised by the organization and is used to denote, as to that function, a hierarchical relationship between the Communities and their members» (90). On the influence of Hay (and Stein) on the European discourse in terms of federalism, see MARTINICO, G. (2016), «The Federal Language and the European Integration Process: The European Communities Viewed from the US», *Politique européenne*, vol. 53, n. 3, pp. 43 ff.

²³ This aspect was emphasized by DEHOUSSE, R. (1994), «Comparing National and EC Law: The Problem of Level of Analysis», *American Journal of Comparative Law*, vol. 42, n. 4, p. 764, and developed by MARTINICO, G. (2016), cit., p. 52.

defined the *sui generis* theory as an anti-theory²⁴, proposing the federal prism as a useful mechanism to explain the nature of the EU²⁵. The legal basis provided by the ITL project for founding European integration, although critically assessed in the past decade²⁶, seems to be still relevant for the current discussions²⁷. Challenging European scholars a few years ago, Azoulai suggested that ‘we must attempt to develop an approach which gives credit to the legal categories and instruments that allow such a thing as integration to exist whilst constantly bringing into question the political and cultural preconceptions through which we look at it’²⁸. I consider that the input coming from comparative law and its use by the CJEU, with the support of European scholarship, can contribute to the cause²⁹.

3. EUROPE (*RECTIUS*, ITS ‘INNER CORE’) AS THE IDEAL ENDEAVOR FOR ‘ENHANCED COMPARISON’: INTERCONNECTED SYSTEMS IN A UNIQUE LEGAL SPACE

This section develops and explains the major unique features of the European legal space, or better its ‘inner core’ as defined in § 3.1, from three points of view: first, the normative and institutional framework, based on the presence of constitutional standards with bodies in charge of upholding them; second, the presence of judicial bodies in charge of applying and interpreting the different standards of protection of rights, balancing constitutional provisions and European norms (§ 3.2); third, the likelihood and higher potential success of imitations with respect to different geographical areas, due to the accuracy of the applicable methodology (§ 3.3).

²⁴ SCHÜTZE, R. (2009), *From Dual to Cooperative Federalism: The Changing Structure of European Law*, Oxford, OUP, p. 3.

²⁵ SCHÜTZE, R. (2016), «Two-and-a-half Ways of Thinking about the European Union», *Politique européenne*, vol. 53, n. 3, pp. 28 ff.

²⁶ For instance, the constitutional approach based on the American model, intended as a «monist, hierarchical, functionally state-like vision of integration» was criticized by AVBELJ, M. (2008), «The Pitfalls of (Comparative) Constitutionalism for European Integration», *Eric Stein Working Paper*, n. 1, p. 23.

²⁷ An excellent example is provided by the recent volume by SANDULLI, A. (2018), *Il ruolo del diritto in Europa. L'integrazione europea dalla prospettiva del diritto amministrativo*, Milano, FrancoAngeli. The author explicitly refers to the contributions on comparative federalism as the most original legal interpretations of European integration (see pp. 50 ff.).

²⁸ AZOULAI, L. (2016), «“Integration through law” and us», *International Journal of Constitutional Law*, vol. 14, n. 2, p. 462.

²⁹ PALERMO, F. (2005), *La forma di Stato dell'Unione europea. Per una teoria costituzionale dell'integrazione sovranazionale*, Padova, CEDAM, pp. 3 ff., already fifteen years ago pointed out that the ‘law of integration’ needs to be comparative because it is based on the interactions between legal cultures, arrangements and rules that coexist within the same legal system in the framework of a (new) multidimensional constitutional law.

3.1. ...because of the normative and institutional framework

Exclusively within the European legal space, there are connections of *lato sensu* constitutional nature creating a special normative framework. All legal acts of any public authority within Europe, in fact, are subject to the common principles of Article 2 TEU, supplemented by the guarantees provided by the ECHR³⁰.

Here the concept of 'inner core' of the European legal space comes into play. In fact, instead of broad, fuzzy and variable geographical conceptions involving different States according to the topic, I consider that the unique overlap of obligations, constitutional standards and guarantees applies to a subsection of States, namely the ones that belong to the EU and at the same time to the European system of protection of human rights.

From the EU law perspective, the Treaties fix several 'constitutional' requirements. Art. 2 TEU in particular establishes that «the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail». These standards have to be applied «to every exercise of public authority in the European legal space, be it through the Union or through the Member States»³¹. If that was not enough, Article 7 TEU as well seems to imply that all actions undertaken by the Member States must be measured against these standards³² and this mechanism is also embedded in the domestic systems³³. In order to complete the framework, EU norms identify the institutional actors in charge of checking upon the respect of these standards throughout the Union.

The result of such interlocking legal standards is that the validity and the legitimacy of domestic actions should depend on the fulfillment of the requirements established by both the corresponding legal system and the European norms. Nevertheless, these mechanisms have shown several flaws in the management of the financial crisis, the refugee crisis (and most likely the COVID-19 pandemic's management) and the threats to basic European values by Poland and Hungary, opening

³⁰ On these concepts, see again VON BOGDANDY, A. (2016), cit.

³¹ VON BOGDANDY, A. (2016), cit.

³² This is a relevant issue for both European supranational organizations: see CANNONE, A. (2018), *Violazioni di carattere sistemico e Convenzione europea dei diritti dell'uomo*, Bari, Cacucci; VON BOGDANDY, A. & IOANNIDIS, M. (2014), «Systemic Deficiency in the Rule of Law: What it is, What has been Done, What can be Done», *Common Market Law Review*, vol. 51, n. 1, pp. 59 ff.

³³ GRABENWARTER, C. (2009), «National Constitutional Law Relating to the European Union», in VON BOGDANDY, A. & BAST, J. (eds), *Principles of European Constitutional Law*, Munich-Oxford-Baden-Baden, C.H. Beck-Hart-Nomos, p. 85; MAYER, F.C., *Multilevel Constitutional Jurisdiction*, *ibidem*, p. 399.

up to the discussion on systemic deficiencies³⁴, populism³⁵ and the violations of the rule of law³⁶.

Similar conclusions apply to the ‘constitutional’ standards set by the ECHR. As a result, the peculiar legal and institutional framework in which the member States of the EU are embedded has a major implication in terms of application of comparative methodology, as it reduces the burden of proof of the comparability among the case studies. In fact, they are all subject to similar obligations and principles³⁷. Although the comparability, to a certain extent, can be presumed, this does not equate the case of the EU to that of a federal State, in which the strength and value of the constitutional horizontal obligations and specific supremacy clauses is still stronger. In other words, the burden of proof is reduced, not eliminated³⁸.

³⁴ On the potential response by the EU, see HALMAI, G. (2018), «How the EU Can and Should Cope with Illiberal Member States», *Quaderni costituzionali*, vol. 38, n. 2, pp. 313 ff.; CLOSA MONTERO, C. (2018), «La protección de los valores fundamentales de la UE frente a la violación por parte de sus Estados miembros», in MOLINA, I. & CLOSA MONTERO, C. (eds), *El futuro de la Unión Europea*, Madrid, Real Instituto Elcano, pp. 93-104; CLOSA MONTERO, C., KOCHENOV, D. & WEILER, J.H.H. (2014), «Reinforcing Rule of Law Oversight in the European Union», *EUI Working Papers*, n. 25; MOXHAM, L. & STEFANELLI, J. (2013), «Safeguarding the Rule of Law, Democracy and Fundamental Rights: A Monitoring Model for the European Union», *British Institute of International & Comparative Law*.

³⁵ In the vast bibliography, see at least the contributions collected in the special issue n. 3/2019 of the German Law Journal on «Populist Constitutionalism: Varieties, Complexities and Contradictions», in particular HALMAI, G. (2019), «Populism, Authoritarianism and Constitutionalism», pp. 296-313; SCHEPPELE, K.L., «The Opportunism of Populists and the Defense of Constitutional Liberalism», pp. 314-331; and BLOKKER, P. (2019), «Varieties of Populist Constitutionalism: The Transnational Dimension», pp. 332-350. See as well RODOMONTE, M.G. (2019), «Il populismo sovranista e l'Europa. A proposito di crisi della democrazia e del processo di integrazione europea», *Nomos*, n. 2, pp. 1 ff.; KOCHENOV, D. (2014), «Europe's Crisis of Values», *Revista Catalana de Dret Públic*, vol. 48, pp. 106-118.

³⁶ DI GREGORIO, A. (2017), «Lo stato di salute della *rule of law* in Europa: c'è un regresso generalizzato nei nuovi Stati membri dell'Unione?», *DPCE Online*, vol. 28, n. 4, pp. 175 ff.; TUORI, K., BESSELINK, L., HALMAI, G. & PINELLI, C. (2019), «The Rule of Law Crisis in Europe», *Diritto Pubblico*, n. 1, pp. 267-287; SAFJAN, M. (2019), «The Rule of Law and the Future of Europe», *Il Diritto dell'Unione Europea*, n. 3, pp. 425-440. On the crises of European integration, VON BOGDANDY, A. & SONNEVEND, P. (2015), *Constitutional Crisis in the European Constitutional Area. Theory, Law and Politics in Hungary and Romania*, Munich-Oxford-Baden-Baden, C.H.Beck-Hart-Nomos; LAZARIDIS, G. & CAMPANI, G. (eds) (2017), *Understanding the Populist Shift: Othering in a Europe in Crisis*, London-New York, Routledge; CASTELLS, M. et al. (eds) (2018), *Europe's Crises*, Cambridge, Polity; MARGIOTTA, C. (ed.) (2018), *Europa: diritto della crisi e crisi del diritto. Austerità, diritti, cittadinanza*, Bologna, il Mulino; the articles collected in RAGONE, S.(ed.) (2020), «Los efectos de la crisis financiera sobre las instituciones nacionales: gobiernos, parlamentos y tribunales», *Federalismi.it*, special issue n. 13.

³⁷ On this horizontal perspective, see CANOR, I. (2013), «My Brother's Keeper? Horizontal «Solange». An Ever Closer Distrust Among the Peoples of Europe», *Common Market Law Review*, vol. 50, n. 2, p. 383.

³⁸ A relevant supplementary argument is the principle of mutual recognition and mutual trust which applies to several sectors, from products to judgments. See ESTEBAN DE LA ROSA, G. (2020),

3.2. ...because of the coexistence of different interconnections

Within this context, there are several coexisting and overlapping interconnections³⁹: a) *horizontal*, between legal systems belonging to the same level (i.e. domestic systems), which influence each other much more than in other geographical areas as it will be explained later; b) *vertical*, between the Member States and the EU, as well as the Member States and the European system of protection of human rights; c) *cross-cutting*, which involve the EU, the Member States and the European system of protection of human rights; d) *asymmetrical*, since the number of European States belonging to each system is different. The asymmetry is present even inside each specific group, in particular as it concerns the Member States of the EU. Several sub-groups can be identified: members of the Eurozone vs. non-members; original founding Member States vs. newcomers, divided into the subsequent waves of accession. Over the past years, new cleavages have emerged that lead to novel distinctions among the Member States: creditors vs. debtors, rich vs. poor; pro-solidarity vs. against-solidarity; more recently, 'frugal' States vs. the rest of Member States or the Mediterranean ones⁴⁰.

Within the abovementioned multi-layered arrangement, a further element of complexity was the entry into force of the Lisbon Treaty and the recognition of the Charter of Fundamental Rights of the EU as a source of law with the same legal value as the primary sources of the European legal system (the Treaties)⁴¹. According to Cruz Villalón, the Charter represented an added value for the protection of fundamental rights in Europe, consistently with the structure and internal logic of the

«¿Transformación del reconocimiento de decisiones en el Espacio europeo de justicia?», *Revista General de Derecho Europeo*, n. 50; ÁLVAREZ GARCÍA, V.J. (2019), «El reconocimiento mutuo de mercancías en la Unión Europea», *Revista General de Derecho Administrativo*, n. 52; HAZELHORST, M. (2018), «Mutual Trust Under Pressure: Civil Justice Cooperation in the EU and the Rule of Law», *Netherlands International Law Review*, vol. 65, pp. 103-130; JANSSENS, C. (2013), *The Principle of Mutual Recognition in EU Law*, Oxford, OUP, p. 257, where the author develops the principle of mutual recognition as a cross-policy principle for the EU legal order; beyond the traditional discussion in internal-market law, the principle has been intensively debated in particular with regard to the area of freedom, security and justice: see LENAERTS, K. (2015), «The Principle of Mutual Recognition in the Area of Freedom, Security and Justice», *Il Diritto dell'Unione Europea*, n. 3, p. 525.

³⁹ See CABRAL, P. & NEVES, R. (2011), «General Principles of EU Law and Horizontal Direct Effect», *European Public Law*, vol. 17, n. 3, pp. 437-451; SEMMELMANN, C. (2013), «General Principles in EU Law between a Compensatory Role and an Intrinsic Value», *European Law Journal*, vol. 19, n. 4, pp. 457-487; MAYER, F.C. (2013), «Constitutional Comparativism in Action. The Example of General Principles of EU Law and How they are Made-a German Perspective», *International Journal of Constitutional Law*, vol. 11, n. 4, pp. 1003 ff.

⁴⁰ This issue was addressed in a comparative framework by RAGONE, S. (2014), «Constitutional Effects of the Financial Crisis at European and National Level: A Comparative Overview», *Revista General de Derecho Público Comparado*, n. 15, pp. 1 ff.

⁴¹ DE BÚRCA, G. (2013), «After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?», *The Maastricht Journal of European and Comparative Law*, vol. 20, n. 2, p. 168.

system. As a consequence, fundamental rights would be integrated into the EU's legal system, providing coherence and imposing a systematic interpretation, beyond individual cases, through a new constitutional dogmatic⁴². Furthermore, the same author argued that the Charter should be seen as the 'venous system' through which the culture of fundamental rights currently circulates in the constitutional space of the Union. This emerging strategic position of the Charter needs to be understood not as an exclusive and direct consequence of EU law as it is interpreted by the CJEU, but also in light of the actions of the courts of the Member States, which play a crucial role in consolidating the value of the Charter⁴³.

Additionally, as it was previously stated, the transnational dynamics that feed the evolution of European integration go beyond EU law. The European Convention on Human Rights and the evolving interpretation by the European Court of Human Rights, in parallel to principles of EU law and in particular to the novel drafting of Article 6 TEU, have progressively achieved a para-constitutional relevance for the Member States of the EU. The impact of this phenomenon on domestic legal systems can be fully grasped only from a comparative perspective⁴⁴.

Especially as regards the protection of human rights, I consider that the uniqueness of what I would call 'the European model' relies on three elements⁴⁵: a) the overlap of three levels of protection with potentially different and conflicting standards (domestic, EU, ECHR, not even considering situations where also a subnational entity is entitled to regulate certain rights); b) the existence of clauses establishing criteria to select the applicable standard, that require the use of comparative methodology; c) the presence of judicial bodies⁴⁶, in particular the CJEU, that has to

⁴² CRUZ VILLALÓN, P. (2017), «La incidencia de la carta (DFUE) en la confluencia de la eficacia horizontal de los derechos fundamentales y la ineficacia horizontal de las directivas: De Küçükdeveci a Dansk Industri», *Anuario de la Facultad de Derecho de la Universidad Autónoma de Madrid*, p. 101. See RIDOLA, P. (2010), *Diritto comparato e diritto costituzionale europeo*, Torino, Giappichelli, pp. 163 ff.

⁴³ CRUZ VILLALÓN, P. (2017), «El valor de posición de la carta de derechos fundamentales en la comunión constitucional europea», *Teoría y Realidad Constitucional*, n. 39, p. 85.

⁴⁴ MOURA VICENTE, D. (2020), «El rol del Derecho Comparado en la aplicación del Convenio Europeo de Derechos Humanos», in ÁLVAREZ GONZÁLEZ, S., ARENAS GARCÍA, R., DE MIGUEL ASENSIO, P.A., SÁNCHEZ LORENZO, S. & STAMPA CASAS, G. (eds), *Relaciones transfronterizas, globalización y derecho: Homenaje al Prof. Dr. José Carlos Fernández Rozas*, Cizur Menor, Thomson Reuters-Civitas, pp. 1109-1128; KELLER, H. & STONE SWEET, A. (2008), *A Europe of Rights-The Impact of the ECHR on National Legal Systems*, Oxford, OUP. From the perspective of the accession of the EU to the system as a relevant change, see CORTÉS MARTÍN, J.M. (2018), *Avatares del proceso de adhesión de la Unión Europea al Convenio Europeo de Derechos Humanos*, Madrid, Reus.

⁴⁵ For a general overview, see SCHILLACI, A. (2012), *Diritti fondamentali e parametro di giudizio. Per una storia concettuale delle relazioni tra ordinamenti*, Napoli, Jovene; REPETTO, G. (ed.) (2013), *The Constitutional Relevance of the ECHR in Domestic and European Law. An Italian Perspective*, Cambridge, Intersentia; ARNOLD, R. (ed.) (2016), *The Convergence of the Fundamental Rights Protection in Europe*, Dordrecht, Springer.

⁴⁶ The question here is which judicial actor shall be the guardian of the European constitution, as it was asked by CALVANO, R. (2004), *La Corte di Giustizia e la costituzione europea*, Padova, CEDAM,

interpret these clauses in such a way as to preserve the objectives of European integration without dismantling national identities⁴⁷.

The clauses of both the European Convention on Human Rights (Article 53, providing that no clause shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party) and the Charter of Fundamental Rights of the EU (Article 53, according to which nothing «shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognized, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions»), fix criteria for the resolution of conflicts between norms, similar to parameters existing in decentralized – often federal – systems where several subjects qualified to regulate the same rights coexist and, nowadays, assume relevance in the European legal space.

The application of these criteria postulates a much more complex activity by the judge, who has to reconstruct the content of each of the provisions that, *a priori*, can be applied to the specific case. As a matter of fact, the judge is faced with two provisions that could be used to solve the case; between them, he will have to choose the one that leads to the better protection of the right, comparing the effects of the rules and not their intrinsic characteristics (such as hierarchy, competence, specialty, time, etc.). From this perspective, the operation that the judge has to perform is equivalent to carrying out a methodologically correct comparative study.

All requirements are met for a comparative investigation to be pursued: there are two (or, in few cases, more) objects to be compared; the use of the comparative method goes beyond a mere comparison between the two norms and the operation does not have the purpose of only analyzing one domestic legal order. Preliminarily, the judge will have to verify the comparability of the objects and to do so he will have to reconstruct the actual scope and meaning of the provisions, examining all the so-called 'formants'⁴⁸. Rarely the text alone provides a complete knowledge of the

pp. 276 ff. See as well SCIARABBA, V. (2008), *Tra fonti e Corti. Diritti e Principi fondamentali in Europa: Profili costituzionali e comparati degli sviluppi sovranazionali*, Padova, CEDAM, pp. 27 ff.

⁴⁷ On the complex relationship between the protection of human rights at the European and the domestic level, see at least VON BOGDANDY, A., KOTTMANN, M. & ANTPÖHLER, C., DICKSCHEN, J., HENTREI, S., & SMRKOLJ, M. (2012), «Reverse Solange - Protecting the Essence of Fundamental Rights Against EU Member States», *Common Market Law Review*, vol. 49, pp. 489 ff. An interesting approach, advocating for a sort of 'soft constitutionalism', was adopted by GORDILLO, L.I. (2012), *Interlocking Constitutions. Towards an Interordinal Theory of National, European and UN Law*, Oxford, Hart. On the role of the multilayered judiciary, see MARTINICO, G. (2013), *The Tangled Complexity of the EU Constitutional Process: The Frustrating Knot of Europe*, London-New York, Routledge.

⁴⁸ SACCO, R. (1991), «Legal Formants: A Dynamic Approach to Comparative Law (Installment I of II)», *American Journal of Comparative Law*, vol. 39, n. 1.

legal solution adopted by the legal system. Therefore, the judge will be obliged to take into account the evolution of jurisprudence and scholarship in the specific country as well, adopting all the precautions that comparatists have to apply in order to avoid bias and mistakes. For instance, according to the system to which the provision belongs, the judge will have to assign a different value to each of the abovementioned 'formants', because their weight depends on the system of sources of law of the corresponding legal order. Respecting all the criteria developed by the studies on comparative methodology, the judge will be able to carry out a truly homogeneous comparison between norms and choose the one to be applied in the concrete case according to the level of protection. Of course, he could make use of foreign 'precedents' as well, but comparative law quotations in the judgments have a different nature, as they do not represent an obligation. It is (just) a possibility, the utility and likelihood of which is potentiated in the European legal space⁴⁹.

The third factor (sub c) being the presence of different jurisdictional bodies, in particular the CJEU, in charge of interpreting these clauses, their exegesis has been highly debated and even criticized at times⁵⁰ but it represents a progressive sign of the necessary adjustments of EU integration. Concerning Article 53 of the Charter, in the *Melloni* case⁵¹, in which the Spanish Constitutional Court was defending a higher standard of protection of the due process according to its own interpretation

⁴⁹ RAGONE, S. (2010), «La aplicación de las cláusulas sobre el nivel de protección de los derechos: una nueva función subsidiaria de la comparación jurídica», *Revista General de Derecho Público Comparado*, n. 7, pp. 1 ff.; RAGONE, S. (2017), «Buscando la protección más amplia: el derecho comparado como herramienta esencial en el sistema multinivel europeo», in SAIZ ARNAIZ, A. MORALES ANTONIAZZI, M., UGARTEMENDIA ECEIZABARRENA, J.I. (eds), *Jurisdicción constitucional en la tutela de los derechos fundamentales de la UE. Especial referencia al Espacio de Libertad, Seguridad y Justicia*, Oñati, IVAP, pp. 79 ff. On the evolution of the Italian case law concerning the issue, LUPO, N. (2019), «Con quattro pronunce dei primi mesi del 2019 la Corte costituzionale completa il suo rientro nel sistema «a rete» di tutela dei diritti in Europa», *Federalismi.it*, n. 13, pp. 1-28. A critical assessment can be found in MORRONE, A. (2019), «Suprematismo giudiziario. Su sconfinamenti e legittimazione politica della Corte costituzionale», *Quaderni costituzionali*, n. 2; and in PANZERA, C. (2019), «Dal patto costituzionale del singolo stato al patto costituzionale europeo. La questione della «doppia fedeltà»: l'esperienza italiana», *Revista General de Derecho Constitucional*, vol. 29. On the use of foreign judgments and norms, see at least the recent and comprehensive volume by FERRARI, G.F. (ed.) (2019), *Judicial Cosmopolitanism. The Use of Foreign Law in Contemporary Constitutional Systems*, Brill Nijhoff, Leiden-Boston.

⁵⁰ See, on the *Melloni* case, BESSELINK, L. (2014), «The Parameters of Constitutional Conflict After Melloni», *European Law Review*, vol. 39, pp. 531 ff.; IACOMETTI, M. (2013), «Il caso Melloni e l'interpretazione dell'art. 53 della Carta dei Diritti fondamentali dell'Unione Europea tra Corte di Giustizia e Tribunale Costituzionale spagnolo», *Osservatorio Associazione Italiana Costituzionalisti*. On the Taricco saga, see LUCIANI, M. (2017), «Intelligenti pauca. Il caso Taricco torna (catafratto) a Lussemburgo», *Giurisprudenza Costituzionale*, n. 1, pp. 535 ff.; AMALFITANO, C. (ed.) (2018), *Primato del diritto dell'Unione Europea e controlimiti alla prova della «Saga Taricco»*, Milano, Giuffrè. On both cases, ARROYO JIMÉNEZ, L. (2018), «Constitutional Empathy and Judicial Dialogue in the EU», *European Public Law*, vol. 24, n. 1, pp. 57 ff.

⁵¹ Case C-399/11, *Stefano Melloni v. Ministerio Fiscal* [2013].

of Article 24 of the Spanish Constitution, the CJEU stated that «where an EU legal act calls for national implementing measures, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised»⁵².

In the posterior case in which Article 53 represented the core of the preliminary reference, when the Italian Constitutional Court argued that in the Italian legal system the principle of legality includes aspects related to the prescription as a part of substantive criminal law, differently from the European system (*Taricco II*⁵³), the CJEU did not engage in defining the scope of the Article. It just quoted the precedent judgment on the issue essentially avoiding it (so called *Taricco I*⁵⁴: «if the national court decides to disapply the provisions of the Criminal Code at issue, it must also ensure that the fundamental rights of the persons concerned are respected», para 46).

In particular, the decision to apply the criterion of competence in combination with other criteria (as in *Melloni*) is also symptomatic of the need to finetune mechanisms that allow the existence of different identities within a collective legal framework. The role of the CJEU and the use of the instrument of common constitutional traditions needs to be tempered by the importance of domestic courts in the protections of rights⁵⁵. If analyzed over time, the case law of the CJEU has experienced expansions and contractions, but overall has led to a «steady broadening of the scope of application of the Charter to the states, as well as the concomitant power of the CJEU to interpret fundamental rights»⁵⁶, which has been interpreted extensively by the Court itself.

Indeed, the work of the CJEU can be further supported by the use of the concept of common constitutional traditions as elements of legal thinking, rules and practice⁵⁷ which have led to harmonization, especially in terms of interpretation

⁵² *Ibidem*.

⁵³ Case C-42/17, *M.A.S. and M.B.* [2017].

⁵⁴ Case C-105/14, *Ivo Taricco and Others* [2015].

⁵⁵ TORRES PÉREZ, A. (2017), «The federalizing force of the EU Charter of Fundamental Rights», *International Journal of Constitutional Law*, vol. 15, n. 4, pp. 1080 ff. The author reads the evolution of the model through the prism of federalism and the example of the USA. See the interesting approach taken by SARMIENTO, D. (2013), «Who's Afraid of the Charter? The Court of Justice, National Courts and the New Framework of Fundamental Rights Protection in Europe», *Common Market Law Review*, vol. 50, n. 5, pp. 1267 ff.

⁵⁶ TORRES PÉREZ, A. (2017), *cit.*, p. 1088. For a comparative assessment of the *Melloni* and *Taricco* cases, see FENUCCI, T. (2018), «A proposito della Corte di Giustizia UE e dei c.d. «controlimiti»: i casi *Melloni* e *Taricco* a confronto», *Freedom, Security & Justice: European Legal Studies*, n. 1, pp. 95-110.

⁵⁷ See CASSESE, S. (2017), «The “Constitutional Traditions Common to the Member States” of the European Union», *Rivista trimestrale di diritto pubblico*, vol. 67, n. 4, pp. 939 ff.; COMBA, M.E. (2017), «Common Constitutional Traditions and National Identity», *ibidem*, pp. 973 ff.; GRAZIADEI, M. & DE CARIA, R. (2017), «The “Constitutional Traditions Common to the Member States” in the

and elaboration of common values, common culture when not a common constitutional identity⁵⁸. Nevertheless, the pursuit of a common identity cannot be considered as the main target of European integration anymore, the new challenge being the inclusion within the project also of constitutional differentiation; the principle of which could be «basic consonance between the constitutional identity of the Union and that of each of the Member States»⁵⁹.

3.3. ...because mutual imitations can be stronger and more effective

The second step in this reconstruction is related to the function that can be recognized to comparative law in such an interconnected system. Methodology and targets of legal comparison have been at the core of research for decades, and in particular, in European scholarship, the scientific and methodological nature of comparative law has been discussed at length. In the 1950s, after World War II, these studies received new impulse, thanks to Gutteridge's now classic introduction; to David in France, Gorla in Italy, Zweigert in Germany and the (re-)establishment of the Max Planck Institute for Foreign and Private International Law. Additionally, the spread of comparative law could also have been favored by the particular working conditions in Europe: comparatists were participating in the Europeanization project

Case-Law of the European Court of Justice: Judicial Dialogue at its Finest», *ibidem*, pp. 949 ff.; POLICINO, O. (2015), «Corte di giustizia e giudici nazionali: il moto «ascendente», ovvero l'incidenza delle «tradizioni costituzionali comuni» nella tutela apprestata ai diritti dalla Corte dell'Unione», in RUGGERI, A. (ed.), *Crisi dello stato nazionale, dialogo intergiurisprudenziale e tutela dei diritti fondamentali*, Torino, Giappichelli; Interestingly, NICOLA, F. (2016), «National Legal Traditions at Work in the Jurisprudence of the Court of Justice of the European Union», *American Journal of Comparative Law*, vol. 64, n. 4, pp. 865 ff., explained how, since its beginnings, the judges, advocates general, legal practitioners at the CJEU have referred to national legal traditions fostering a comparative interpretation of EU law, favoring the defense and elaboration of novel concepts without neglecting to check their compatibility with domestic systems.

⁵⁸ See the opinion of Advocate General Pedro Cruz Villalón in Case C-62/14 *Gauweiler and Others v. Deutscher Bundestag* [2015], § 61: the CJEU «has long worked with the category of 'constitutional traditions common' to the Member States when seeking guidelines on which to construct the system of values on which the Union is based». This way, «The Union has thus acquired the character, not just of a community governed by the rule of law, but also of a "community imbued with a constitutional culture"». Already ten years ago, PIZZORUSSO, A. (2008), «Common Constitutional Traditions as Constitutional Law of Europe?», *Sant'Anna Legal Studies STALS Research Paper*, n. 1, pp. 27 ff., underlined the relevance of these traditions for the creation of European constitutional law.

⁵⁹ See again the opinion of Advocate General Pedro Cruz Villalón in Case C-62/14 *Gauweiler and Others v. Deutscher Bundestag* [2015], § 61: «That common constitutional culture can be seen as part of the common identity of the Union, with the important consequence, to my mind, that the constitutional identity of each Member State, which of course is specific to the extent necessary, cannot be regarded, to state matters cautiously, as light years away from that common constitutional culture. Rather, a clearly understood, open, attitude to EU law should in the medium and long term give rise, as a principle, to basic consonance between the constitutional identity of the Union and that of each of the Member States».

and had a clearly defined goal, which was the establishment of a common private law of Europe and instruments for cooperation⁶⁰.

More recently, also in Eastern Europe there has been a multiplication of methodological studies with a relevant participation into the European debate. Overall, comparative law developed steadily from a European viewpoint, even more after 1990, due to the evolution of integration through the adoption of paramount European Treaties, with the expansion of intellectual horizons⁶¹. Doubts about the role and purpose of legal comparison are still alive⁶², although the practical outcome of this discipline has confirmed to be more and more evident⁶³, as well as its connection with European integration.

As García Roca explains, Europeanization of domestic laws is an extremely relevant factor for the understanding of one own's legal system and of the importance of comparative law⁶⁴. Belonging to the European Communities first and to the European Union later has had a significant impact on every field of national law, from private and commercial law, up to labour law and even all branches of public law, including administrative and constitutional law⁶⁵. «All these concepts call for an elaboration based on a comparison of deep layers of domestic legal thought, not just of positive law. That evolution is by no means limited to the transnational level: Community law has led to a 'Europeanization' of domestic law

⁶⁰ REIMANN, M. (2002), «The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century», *American Journal of Comparative Law*, vol. 50, n. 4, pp. 671 ff.

⁶¹ REIMANN, M. (2002), cit., p. 692.

⁶² «What is a comparatist: a scholar without decision and an advocate of non-law? A student of governance, a specialist in the hermeneutic conventions and diplomatic protocols by means of which social hierarchies are propagated?», asks GOODRICH, P. (2012), «Interstitium and Non-Law», in MONATERI, P.G. (ed.), *Methods of Comparative Law*, Cheltenham, Elgar, p. 219.

⁶³ BASEDOW, J. (2016), «Hundert Jahre Rechtsvergleichung. Von wissenschaftlicher Erkenntnisquelle zur obligatorischen Methode der Rechtsanwendung», *JuristenZeitung*, vol. 71, n. 6, pp. 269 ff. (on European law, see in particular p. 274). With specific reference to private law, see VAN DER MENSBRUGGHE, F.R. (2009), «La place du droit comparé dans la construction des droits européens», in BAILLEUX, A., CARTUYVELS, Y., DUMONT, H. & OST, F. (eds), *Traduction et droits européens: enjeux d'une rencontre*, pp. 210 ff. With reference to administrative law, see the recent work by SCHMIDT-ASSMANN, E. (2018), «Zum Standort der Rechtsvergleichung im Verwaltungsrecht», *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, vol. 78, n. 4, p. 851.

⁶⁴ Further arguments on the use of comparison in constitutional law can be found in the questionnaire published recently by a prominent journal: (2018), «Encuesta: el método comparado en el Derecho Constitucional», *Teoría y Realidad Constitucional*, vol. 41, pp. 15 ff. The scholars who replied were Benito Aláez Corral, Francisco Balaguer Callejón, Raúl Canosa Usera, María Jesús García Morales, Javier García Roca and Pablo Pérez Tremps.

⁶⁵ CHITI, M.P. (2018), *Diritto amministrativo europeo*, 2nd ed., Milano, Giuffrè; DÍEZ-PICAZO, L., ROCA, E. & MORALES MORENO, A.M. (2002), *Los principios del derecho europeo de contratos*, Madrid, Civitas; TIZZANO, A. (ed.) (2006), *Il diritto privato dell'Unione europea*, Torino, Giappichelli; ZIMMERMANN, R. (2006), *Die Europäisierung des Privatrechts und die Rechtsvergleichung*, Berlin, De Gruyter; SIEBER, U. (2009), «Die Zukunft des europäischen Strafrechts», *Zeitschrift für die gesamte Strafrechtswissenschaft*, vol. 121, n. 1; GÓMEZ-JARA DÍEZ, C. (2015), *European Federal Criminal Law*, Cambridge, Intersentia.

(and its institutions)»⁶⁶. The fuzziness of this concept does not imply that a scholar shall avoid engaging with the comparative implications of the phenomenon. On the contrary, it is one of the elements pushing towards a new understanding of comparative law in the European legal space, the core idea being that *practical aims of legal comparison can be better achieved in this particular context*.

Even the most schematic classification of practical targets of legal comparison includes several uses of comparative law, namely: a) for constituent assemblies and constitutional amendments; b) for legislative drafting; c) for harmonization or unification of laws, i.e., drafting of international treaties or supranational sources of law (like the secondary legislation of the EU); d) for grounding judgments offering courts (at least) arguments *ad adiuvandum*⁶⁷. In all of them, a paramount role is played by the concept of legal imitations (here preferred to others, such as transplants, which may not perfectly suit the European context), with the necessary *caveat* when deciding to copy a foreign solution: the national *status quo*, traditions, socio-economic and legal context have to be taken into account. Nevertheless, within the European legal space, the odds of an effective imitation are higher than in any other geographical area.

More specifically, there are two more concrete factors that increase the potential effectiveness of imitations within the European legal space, in addition to the existence of the common «constitutional» standards addressed in the previous sections: a) The Europeanization of domestic administrations and b) the implementation of European norms and models.

Concerning the factor sub, a), Europeanization of domestic administrations is a progressive phenomenon that has evolved in parallel in all Member States⁶⁸. Today, several countries have a senior or junior minister for European affairs; domestic Ministries have specific units dealing with EU law; Parliaments have devoted committees, and even national constitutional courts have units of comparative law that

⁶⁶ VON BOGDANDY, A. (2016), cit., p. 5. On the unique interconnection between comparison and Europeanization of law, see BERGÉ, J.S. (2013), «La comparaison du droit national, international, européen: de quelques présupposés et finalités», *Liber Amicorum: Mélanges en l'honneur de Camille Jaufret-Spinosi*, Paris, Dalloz, p. 89.

⁶⁷ For a comprehensive theoretical analysis of the practical uses of comparative law, see PEGORARO, L. & RINELLA, A. (2020), *Sistemi costituzionali*, Torino, Giappichelli, pp. 20 ff.

⁶⁸ In the vast literature concerning this topic, see DEBBASCH, C. (1987), *Administrations nationales et intégration européenne*, Paris, Editions du Centre National de la Recherche Scientifique; MÉNY, Y., MULLER, P. & QUERMONNE, J.L. (1996), *Adjusting to Europe: The Impact of the European Union on National Institutions and Policies*, London-New York, Routledge; KASSIM, H. (2005), «The Europeanization of Member State Institutions», in BULMER, S. & LEQUESNE, C. (eds), *The Member States of the European Union*, Oxford, OUP, pp. 285 ff.; GRAZIANO, P. & VINK, M. (eds) (2007), *Europeanization: New Research Agendas*, London, Palgrave Macmillan; or MAGONE, J.M. (2011), *Contemporary European Politics. A Comparative Introduction*, London-New York, Routledge, pp. 158 ff., distinguishing between horizontal and vertical Europeanization.

privilege European systems⁶⁹. The national administrations of the EU Member States have been subject for years to the same pressure towards standardization. Nevertheless, both empirical and theoretical studies⁷⁰ prove that no substantive convergence has been achieved in spite of the circumstances, like the common legal framework and the decision-making process at the European level, that would push towards the adoption of similar or identical legal/institutional mechanisms⁷¹. The result has not been the adoption of a common model; the persistence of different administrative models, embedded in a similar context, has favoured imitations and adaptations of foreign systems.

This phenomenon was clear with the administrative changes occurred in the Member States from Eastern Europe that joined the EU in 2004. Overall, it is an ongoing process for the entire European legal space. In 2008, for instance, the Report by the Spanish Council of State on the insertion of European law in the domestic legal system advocated for the imitation of foreign models in order to improve the domestic performance in European affairs⁷². A more recent example can be seen in the circulation of anti-crisis measures and management of memoranda of understanding signed with the Troika in countries whose economies were most severely affected by the financial crisis⁷³.

Concerning the factor sub b), i.e. the implementation of European standards and models, there are at least three areas where imitations and diffusion are extremely clear, one being the transposition of directives through internal legal mechanisms (e.g. the annual European law in Italy); another being the transformation of the administrative procedure in a mixed procedure where domestic and European law overlap; the last being the establishment of independent agencies as administrative bodies alien to the continental bureaucratic tradition⁷⁴.

⁶⁹ An extraordinary example is represented by the comparative law unit of the Italian Constitutional Court, whose dossiers can be found online on the website of the Court: https://www.cortecostituzionale.it/jsp/consulta/documentazione/diritto_comparato.do (last accessed on the 20th of March 2021).

⁷⁰ This point was clarified by GOETZ, K.H. & MEYER-SÄHLING, J.H. (2008), «The Europeanisation of National Political Systems: Parliaments and Executives», *Living Reviews in European Governance*, vol. 3, pp. 4 ff.

⁷¹ On the incentives for the adoption of an effective governance before joining the EU, LIPPERT, B., UMBACH, G. & WESSELS, W. (2011), «Europeanization of CEE Executives: EU Membership Negotiations as a Shaping Power», *Journal of European Public Policy*, vol. 8, n. 6, pp. 980 ff.

⁷² *Informe sobre la inserción del Derecho europeo en el ordenamiento español*, 14th of February 2008, which was partially inspired by the *Rapport public 2007* of the French Council of State (*L'administration française et l'Union européenne. Quelles influences? Quelles stratégies?*, Études & Documents, n. 58). See ALONSO GARCÍA, R. (2008), «La inserción del derecho europeo en el ordenamiento español (Informe del Consejo de Estado de 14 de febrero 2008)», *Revista de Derecho Comunitario Europeo*, n. 29, pp. 7 ff.

⁷³ See RAGONE, S. (ed.) (2018), *Managing the Euro Crisis: National EU Policy Coordination in the Debtor Countries*, London-New York, Routledge, and the literature quoted in the volume.

⁷⁴ Starting from CASSESE, S. (1987), «Divided Powers: European Administration and National Bureaucracies», in ID. (dir.), *The European Administration*, Bruxelles, IISA; up to DE LUCIA, L. & MARCHETTI, B. (2015), *L'amministrazione europea e le sue regole*, Bologna, il Mulino; HARLOW, C.,

When taking into account all these factors of convergence and mutual influence, the need and utility of adopting a comparative approach become clear. Not only because scholars who do not know foreign constitutions and legal systems have a more reduced knowledge of their own, but also because the potential choice of the model to imitate (or avoid) is fundamental, as not only reception and influence, but also the refusal of reception has to be justified in light of legal and cultural differences⁷⁵.

A further element that improves what we could call the methodological correctness of comparative law in the European legal space is the 'personal' or 'human' interconnection. Administrators, lawyers, academics, political actors are increasingly involved in networks and joint projects⁷⁶. The administration of the EU, in fact, is made up of officials from all Member States, and all the bureaucratic machinery is based on plurality of languages and nationalities. The legal service of the CJEU, in particular, has played a very relevant role, systematically seeking to gain (and finally obtain) the cooperation of domestic judiciaries in the application and development of European law. The prerequisite for this process to be a success was the establishment of an independent academic field of European law, achieved in 1961 with the *Fédération Internationale pour le Droit Européen* (FIDE)⁷⁷. As it was mentioned before, the academic field of European law rapidly consolidated starting in the 1960s, with new University departments and centers of European law founded, journals, conferences and research projects. In parallel, also comparative law centers, degrees, courses and masters have multiplied (even in those countries where comparative law is still not considered as a specific field, as in France or Spain). Academic cooperation and joint projects between Universities belonging to different Member States is now a daily routine, and not exclusively thanks to funding coming from the EU, such as Jean Monnet actions⁷⁸. The context of European integration itself contributes to an environment that makes comparative perspectives more and more plausible, as elements

LEINO, P. & DELLA CANANEA, G. (eds) (2017), *Research Handbook on EU Administrative Law*, Cheltenham, Elgar; CHITI, M.P. (ed.) (2018), *Diritto amministrativo Europeo*, 2nd ed., Milano, Giuffrè; MARTÍN DELGADO, I. & DI LASCIO, F. (eds) (2018), *Diritto amministrativo europeo e diritti nazionali. Influenze, tensioni e prospettive*, Napoli, Editoriale Scientifica.

⁷⁵ HÄBERLE, P. & KOTZUR, M. (2016), *Europäische Verfassungslehre*, 8th ed., Baden-Baden, Nomos, p. 486. Already the so-called Trento Theses in the 1980s emphasized this point. They were further discussed and developed, applied also to the European «diritto comune», by GAMBARO, A. (2004), «The Trento Theses», *Global Jurist Frontiers*, vol. 4, n. 1.

⁷⁶ For an attempt of building the European project as a more plural phenomenon than a process mainly based on judicial dialogue, VAUCHEZ, A. & DE WITTE, B. (eds) (2013), *Lawyering Europe: European Law as a Transnational Social Field*, Oxford, Hart; and VAUCHEZ, A. (2015) *Brokering Europe: Euro-Lawyers and the Making of a Transnational Polity*, Cambridge, CUP. A very interesting contribution, from an historical perspective, concerning the years 1950-late 1980s is provided by RASMUSSEN, M. (2013), «Rewriting the History of European Public Law: The New Contribution of Historians», *American University International Law Review*, vol. 28, n. 5, pp. 1187-1221.

⁷⁷ RASMUSSEN, M. (2010), cit., p. 645.

⁷⁸ On the contribution of comparative law to the Europeanization of private law through the emergence of University networks, for example, VAN DER MENSBRUGGHE, F.R. (2009), cit., p. 210.

of internationalization of domestic law. Overall, the training of students in Law Schools is increasingly open to comparative law and other European systems, for both the subjects being taught and for the expansion of the Erasmus program for students' exchange. Not only research stays, lecturing or internships, but also working experiences in another European country are more common thanks to the evolution of the regulation on the circulation of workers and citizens.

4. WHAT ROLE FOR THE CJEU? FINAL REFLECTIONS ON ITS ACTUAL AND POTENTIAL USE OF COMPARATIVE LAW

Within this context, the role of the CJEU can be paramount. Major changes have occurred since it could be classified as a sort of European Council of State⁷⁹, and even from the times when its role was necessary to constitutionalize EU law through a predominantly top-down process⁸⁰. In the 1960s and the 1970s, legal scholarship was useful to legitimize the case-law of the ECJ, until the breakthrough of the constitutional paradigm thanks to the contributions of European experts, but not only – just as examples, one may think again of Stein's or Weiler's inputs to the elaboration of the European model of integration.

As far as the use of comparative law is concerned, already in the case *Algera* (1957)⁸¹, there were references to national legal systems, in the sense that, in the absence of a rule in the Treaties, the Court felt compelled to look into the rules recognized by legislation, doctrine and case law of the Member States. In the case *Groupement des hauts fourneaux et aciéries belges* (1958)⁸², the Court referred to the 'principles usually admitted in legal orders of Member States'; in the case *Klomp* (1969)⁸³, it elaborated on a common legal principle to the Member States whose origin could be traced back to Roman law. From the 1980s on, several elements show the influence of comparative law in the Court's case law, but, while the opinions of the Advocates General may be rich in comparative references⁸⁴, the Court itself has been often

⁷⁹ RASMUSSEN, M. (2010), cit., p. 641. On the exegetical role of the CJEU, see the reconstruction by MARTINICO, G. (2009), *L'integrazione silente. La funzione interpretativa della Corte di Giustizia e il diritto costituzionale europeo*, Napoli, Jovene.

⁸⁰ BOERGER, A. (2014), «Transforming European Law: The Establishment of the Constitutional Discourse from 1950 to 1993», *European Constitutional Law Review*, vol. 10, n. 2, pp. 199 ff. Also, BASEDOW, J. (2016), cit., p. 294, talks of a change in the practice of the CJEU.

⁸¹ Joined Cases C-7/56 and C-3/57 to C-7/57, case *Dinecke Algera, et al. v. Common Assembly of the European Coal and Steel Community* [1957].

⁸² Case C-8/57, *Groupement des hauts fourneaux et aciéries belges contre Haute Autorité de la Communauté européenne du charbon et de l'acier* [1958].

⁸³ Case C-23/68, *Johannes Gerhardus Klomp v. Inspektie der Belastingen* [1969].

⁸⁴ See for instance the Opinions of AG Lagrange in the case 14/61, *Koninklijke Nederlandsche Hoogovens en Staalfabrieken N.V. v. High Authority of the European Coal and Steel Community* [1962], ECR 253; of AG Roemer in the case 5-71, *Aktien-Zuckerfabrik Schöppenstedt v. Council of the European*

reluctant to explicitly refer to them, showing a spontaneous use for mainly utilitarian aims⁸⁵.

This construction is related to the elaboration of the general principles of EU law, aiming at filling in the gaps in the EU legal order that arise from the principle of conferral and at assisting judges in interpreting unclear or uncertain written norms. The original sources (the Treaties) are to be integrated through the principles applied in several Member States, without the specific need for a majority. These principles are quite mobile, as their interpretation also relies on the case law of the ECHR and sources of international law and can contribute to the creation of a common European legal thinking⁸⁶. Over the decades, the Court has used comparative law for several purposes: first, as I mentioned, to establish the general principles of EU law; also, strategically, to ascertain the credibility and acceptability of its own decisions⁸⁷; to reach harmonization⁸⁸ or construct a common legal order⁸⁹, as well as to ensure European law, interpreting it in a way that would be efficient for the EU legal order and acceptable in its solution for the Member States⁹⁰. In fact, the Court seeks to find a solution that guarantees that the project of European integration is not put at risk, yet at the same time that its decision is sufficiently close the national legal traditions so as to be easily embraced and applied by domestic institutions, including national courts⁹¹.

Communities [1971], ECR 975, as well as in the joined cases 63 to 69/72, *Wilhelm Werhahn Hansamühle et al. v. Council of the European Communities* [1973], ECR 1259; or of AG Slynn in the case 155/79, *AM & S Europe Limited v. Commission of the European Communities. Legal Privilege* [1982], ECR 1642.

⁸⁵ See BARDIN, M. (2014), «Depuis l'arrêt Algera, retour sur une utilisation «discrete» du droit comparé par la Cour de justice de l'Union européenne», in ID. (ed.), *Le recours au droit comparé par le juge*, Bruxelles, Bruylant, pp. 99 ff. Critical on the fact that the Court did not publish the comparative dossiers also KAKOURIS, C.N. (1999), «L'utilisation de la Méthode comparative par la Cour de Justice des Communautés Européennes», in DROBNIG, U. & VAN ERP, S. (eds), *The Use of Comparative Law by Courts*, The Hague, Kluwer Law International, pp. 97 ff.

⁸⁶ See GALETTA, D.U. (2015), «General Principles of EU Law as Evidence of the Development of a Common European Legal Thinking: The Example of the Proportionality Principle (from the Italian Perspective)», in BLANKE, H.J., CRUZ VILLALÓN, P., KLEIN, T. & ZILLER, J. (eds), *Common European Legal Thinking. Essays in Honour of Albrecht Weber*, Cham, Springer, pp. 222 ff.

⁸⁷ COLNERIC, N. (2007), «Die Rolle der Rechtsvergleichung in der Praxis des EuGH», in EPINEY, A., HAAG, M. & HEINEMANN, A. (eds), *Die Herausforderung von Grenzen-Festschrift für Roland Bieber*, Baden-Baden-Zurich, Nomos-Dike, p. 319.

⁸⁸ SCHWARTZE, A. (2006), *Die Rechtsvergleichung in Europäische Methodenlehre: Handbuch für Ausbildung und Praxis*, Berlin, De Gruyter, p. 86.

⁸⁹ FERRERO, J. (2014), «Les recours au droit comparé dans l'interprétation de la CEDH», in DI MANNO, T. (ed.), *Le recours au droit comparé par le juge*, Bruxelles, Bruylant, p. 201.

⁹⁰ COLNERIC, N. (2007), cit., p. 322. The same idea was expressed by LENAERTS, K. (2003), «Interlocking Legal Orders in the EU and Comparative Law», *International and Comparative Law Quarterly*, vol. 52, n. 4, p. 879.

⁹¹ LENAERTS, K. & GUTMAN, K. (2015), «The Comparative Law Method and the Court of Justice of the European Union: Interlocking Legal Orders Revisited», in ANDENAS, M. & FAIR-GRIEVE, D. (eds), *Courts and Comparative Law*, Oxford, OUP, p. 173. On the search for a solution that may be accepted by the domestic legal system while fulfilling the requirements of the EU, see for

Nevertheless, the contribution of the case law of the CJEU to the evolution of European comparative law can be still improved and bettered. The Court has all the fundamentals to become one of major actors of comparative law in Europe⁹², although it is still exposed to critiques concerning the method⁹³, as it has been accused of rarely performing a thorough comparative examination of the Member States' constitutional orders, nor specifying the sources of interpretation examined⁹⁴.

On the one hand, the style of the judgments has not been considered particularly favorable for a strong comparative construction, as the Court constantly kept its decisions close to the Cartesian style of French law, stating what the law is, without dissenting opinions or thorough explanations⁹⁵. On the other hand, more frequently, the selection of the case studies has been criticized. A comprehensive comparison of all Member States' legal orders is an exception and, in many cases, cannot be achieved. According to a critical assessment of the former case law, when obviating some States, the doubt would remain as to whether the relevant legal orders have been included in a given comparison and whether the law in question has been correctly contextualized⁹⁶. The Court – it has been said – chooses between different solutions available through comparative law and then essentially *adapts* this solution to the case⁹⁷.

The CJEU responds to a different logic with respect to the majority principle applied by the ECHR in the consensus doctrine. In fact, as stated by Advocate General Kokott, «it is by no means inconceivable that even a legal principle which is recognized or even firmly established in only a minority of national legal systems will be identified by the Courts of the European Union as forming part of EU law. This is the case in particular where, in view of the special characteristics of EU law, the aims and tasks of the Union and the activities of its institutions, such a legal principle

instance the opinion of AG Poiares Maduro, in the case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v. Viking* [2007], point 60.

⁹² MAYER, F.C. (2013), cit., p. 1009.

⁹³ On the absence of rules, KAKOURIS, C.N. (1999), cit., p. 99.

⁹⁴ On these accusations of a discretionary and superficial comparative method, see TORRES PÉREZ, A. (2009), *Conflicts of Rights in the European Union: A Theory of Supranational Adjudication*, Oxford, OUP, p. 158.

⁹⁵ MAYER, F.C. (2013), cit., p. 1008. A critical assessment can be found in CONWAY, G. (2014), *The Limits of Legal Reasoning and the European Court of Justice*, Cambridge, CUP.

⁹⁶ MAYER, F.C. (2013), cit., p. 1010.

⁹⁷ BARDIN, M. (2014), cit., quotes the example of the case 11/70 *Internationale Handelsgesellschaft* [1970]. In this case, the Advocate General Dutheil de Lamoignon had elaborated on the relevance of domestic laws, which contribute to forming that philosophical, political and legal substratum common to the Member States with special reference to fundamental rights. Of course, this judgment is included among the landmark cases of the Court: PHELAN, W. (2019), *Great Judgments of the European Court of Justice. Rethinking the Landmark Decisions of the Foundational Period*, Cambridge, CUP, pp. 197 ff. In an interesting reassessment, DAVIES, B. (2016), «Integrity or Openness? Reassessing the History of the CJEU's Human Rights Jurisprudence», *American Journal of Comparative Law*, vol. 64, n. 4, pp. 801 ff., describes the tension between the pursuit of integrity of EU law and openness to domestic systems, with particular reference to the European Convention on Human Rights and starting from this judgment.

is of particular significance, or where it constitutes a growing trend»⁹⁸. The CJEU does not engage in empirical/statistical comparison, but rather in evaluative or critical comparison (*wertende Rechtsvergleichung*)⁹⁹: it is not necessary that a principle be present in each and every Member State's constitutional order nor in the majority, in order to qualify as an EU principle¹⁰⁰. The quest is for the best solution to suit the targets of the EU norm, not for the lowest or greater common denominator of the Member States' constitutions¹⁰¹.

Taken this into consideration, it becomes clear that the relevance of a comparative analysis pursued by the CJEU does not depend on quantitative standards (the number of cases), but on qualitative standards – the differentiation of the legal solutions examined¹⁰². Now, to achieve good qualitative comparison from this perspective, there is a need for an initial assessment of all legal solutions adopted in the EU, followed by a classificatory work into models, for simplification and explanation. The CJEU counts a considerable number of lawyers working on comparative law, who, as previously mentioned, collectively gather the necessary expertise and linguistic skills.

From a procedural perspective, as it was described by von Bogdandy, an improvement could be achieved refining the contribution provided by the Member States. According to Article 61 of the Rules of Procedure, the Court is entitled to submit questions to the Member States within a specific deadline. This clause lets the CJEU ask the Member States to submit dossiers concerning their own legal solution, in order to collect comparative information. The department in charge of research and documentation would be certainly obliged to fill the gaps deriving from the differentiated (or absent) feedbacks by the Member States, as it happens for the submitted observations in preliminary reference proceedings. Overall, the department would

⁹⁸ Advocate General Juliane Kokott's opinion in Case C-550/07, *Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd v. European Commission*, para 95.

⁹⁹ As Advocate General Roemer defined it in the abovementioned opinion in the case *Werbahn Hansamühle*, ECR 1259, in order «to ascertain which legal system emerges as the most carefully considered» (1260). On this issue, see ZWEIGERT, K. & PUTTFARKEN H.J. (eds) (1978), *Rechtsverglei-chung*, Darmstadt, Wissenschaftliche Buchgesellschaft, pp. 400-402; BARTELS, H.J. (1982), *Methode und Gegenstand intersystemarer Rechtsvergleichung*, Tübingen, Mohr; HERDEGEN, M. (1983), *Die Haftung der Europäischen Wirtschaftsgemeinschaft für fehlerhafte Rechtssetzungsakte*, Berlin, Duncker & Humblot, pp. 38 ff.; SCHILLIG, M. (2009), *Konkretisierungskompetenz und Konkretisierungsmethoden im Europäischen Privatrecht*, Berlin, De Gruyter; SEYR, S. (2010), «Verfassungsgerichte und Verfassungsvergleichung. Der EuGH», *Journal für Rechtspolitik*, vol. 18, n. 4.

¹⁰⁰ MAYER, F.C. (2013), cit., p. 1077.

¹⁰¹ KAKOURIS, C.N. (1999), cit., p. 100. See also LENAERTS, K. & GUTIÉRREZ-FONS, J.A. (2011), «The Role of General Principles of EU Law», in ARNULL, A., BARNARD, C., DOUGAN, M. & SPAVENTA, E. (eds), *A Constitutional Order of States? Essays in EU Law in Honour of Alan Dashwood*, Oxford, Hart, p. 183.

¹⁰² On this point, see in general terms MARTÍNEZ SORIA, J., *Die Bedeutung der (Verfassungs-) Rechtsvergleichung für den europäischen Staaten- und Verfassungsverbund. Die Methode der Rechtsvergleichung im öffentlichen Recht*, in https://www.jura.fu-berlin.de/forschung/europarecht/bob/berliner_online_beitraege/Paper48 (last accessed on the 20th of March 2021).

have a paramount role in the critical recollection and examination of the different legal solutions, in order to classify them into models, but it could rely on a set of data provided by the Member States and not only on its own research. Obviously, this input can be seen as a process, in which the collaboration of the Member States is an essential element and would be improved and adjusted over time¹⁰³. The publication of these comparative notes on the example of the Italian Constitutional Court can also provide a new impulse to European comparative law and consolidate the cooperation between practitioners, institutional actors, and academics while contributing to the legitimacy of judgments by the CJEU and its interaction with national judges¹⁰⁴. A step into this direction has been taken through the Judicial Network of the European Union (*Réseau judiciaire de l'Union européenne* - RJUE), established on the initiative of the President of the CJEU and the Presidents of Constitutional/Supreme Courts of the Member States in 2017, upon the celebration of the 60th anniversary of the signing of the Treaties of Rome. A few months later this exchange platform was put into place and soon an open access section was included, in order to «share and centralise information and documents relevant to the application, dissemination and study of EU law, as interpreted and applied not only by the Court of Justice of the European Union but also by national courts and tribunals. It also aims to promote *mutual knowledge and understanding* of the laws and systems of the Member States *from a comparative law perspective* that can facilitate consideration of the legal traditions of each Member State»¹⁰⁵. To achieve this target, the platform offers direct access to: preliminary rulings and references for a preliminary ruling submitted after the 1st of July 2018; selected domestic judgments relevant for European law; research materials, such as notes, studies, fact sheets and data realized by the courts that belong to the Network. Within this last category, few research notes of comparative law elaborated by the Directorate-General for Library, Research and Documentation, are published.

¹⁰³ In VON BOGDANDY, A. (2016), cit., pp. 20-21, also the subsequent participation of Member States and EU Institutions in the check of the dossiers was emphasized.

¹⁰⁴ This target would be especially valuable in light of the evolution of the relationship between domestic courts and the CJEU and the increasing relevance of the legitimacy of the CJEU, as demonstrated by recent studies. In this respect, PAVONE, T. & KELEMEN, D. (2019), «Evolving Judicial Politics of European Integration: The European Court of Justice and National Courts Revisited», *European Law Journal*, vol. 25, n. 4, pp. 352 ff., have explained that the 'judicial empowerment thesis' vis-à-vis domestic governments has diminished and there is a risk of a progressive reduction of the decentralized application of the EU legal system. Updated empirical data on the issue can be consulted in MAYORAL, J.A. (2019), «Judicial Empowerment Expanded: Political Determinants of National Courts' Cooperation With the CJEU», *European Law Journal*, vol. 25, n. 4, pp. 374 ff. On the connections with the challenges to the legitimacy of European integration, see HORSLEY, T. (2020), *The Court of Justice of the European Union as an Institutional Actor*, Cambridge, CUP, pp. 266 ff.

¹⁰⁵ See https://curia.europa.eu/jcms/jcms/p1_2170125/en/#:~:text=The%20Judicial%20Network%20of%20the%20European%20Union%20%28R%C3%A9seau,of%20the%20signing%20of%20the%20Treaties%20of%20Rome (last accessed on the 20th of March 2021).

Nevertheless, not even the CJEU can be required to devote equal attention to all Member States. And that is not necessary when several countries show commonalities in their regulation: similar norms, not the same norms, are enough to ascribe two legal systems to the same model and therefore a joint analysis is sufficient. The first model to be considered will necessarily be the one into which the case under scrutiny falls. Then the examination may open to the rest of cases. The first set of questions to be asked would be whether that specific legal solution has been adopted by the majority of the Member States; what features characterize the Member States which have chosen the same solution, if there is a common pattern or condition; to what extent that solution is peculiar to the specific Member State. After the reconstruction of the different models, the second set of questions would be dedicated to the legal solutions belonging to the most different possible model, in order to test whether the response of the CJEU would be applicable also to the most divergent legal context. In the third step, all these solutions, including the intermediate models, will need to be contrasted with both the values of the EU as defined by the Treaties and the target that the EU is pursuing through the corresponding rule subject to CJEU's decision.

Through this threefold approach, a novel, more flexible method to select the case studies for the CJEU could be implemented. In the final judgment (or *rebus sic stantibus*, at least in the corresponding research note), there would be no need to mention all the case studies analyzed, but just the 'models' of reference, with particular attention to the most different one from the solution under scrutiny. Such a method would allow the CJEU to better justify the choice of the Member States, while engaging into a dialogue with the others applying different models. In particular, as the interpretation reached by the Court will involve future cases, the effort of being aware of national sensibilities and essential moral and political values to strive for a common synthesis would be facilitated by the comparative approach, reducing future conflicts also with the constitutional rules of particular States¹⁰⁶. Additionally, this method could be applied to both cases in which the CJEU employs comparative law as well, namely lacunas and interpretation of EU norms¹⁰⁷, promoting the role of the Court as a leading actor in the development of European Comparative Law.

¹⁰⁶ On this last point, TORRES PÉREZ, A. (2009), cit., p. 154.

¹⁰⁷ A comprehensive reconstruction of the cases in which the CJEU used to apply the comparative method can be found in LENAERTS, K. (2003), cit., pp. 883 ff., who divided the cases into two main possibilities: filling a lacuna (pp. 883 ff.) and interpreting a European norm (pp. 894 ff.). For each case, the author imagined situations where there are different degrees of convergence among the Member States.

Título:

Derecho Comparado Europeo: razones para una «comparación reforzada» y papel del TJUE

Sumario:

1. INTRODUCCIÓN. 2.- DERECHO COMPARADO EUROPEO: EVOLUCIÓN DE DEFINICIONES Y ELABORACIONES DOCTRINALES. 3.- EUROPA (*rectius*, SU 'NÚCLEO') COMO CONTEXTO IDEAL PARA UNA «COMPARACIÓN REFORZADA»: SISTEMAS INTERCONECTADOS EN UN ESPACIO JURÍDICO ÚNICO. 3.1.- ...debido al marco normativo e institucional. 3.2.- ...debido a la coexistencia de distintas interconexiones. 3.3.- ...debido a la posibilidad de imitaciones mutuas más eficaces. 4.- ¿QUÉ PAPEL PARA EL TJUE? REFLEXIONES FINALES SOBRE SU USO ACTUAL Y POTENCIAL DEL DERECHO COMPARADO.

Abstract:

This paper offers a critical reconstruction of the conceptual and comparative assessment of European Law, while putting forward two novel ideas. On the one hand, the author elaborates upon the existence of an 'inner core' within the European legal space which is distinctively prone to successful and methodologically sound comparison, providing a threefold justification of her reasoning. Such justification is based on the unique normative and institutional framework, on the overlap of interconnections between the coexisting legal systems and on the evolution of the methodology in European scholarship. On the other hand, the author focuses on the role of the CJEU, departing from previous studies on the use of comparative law and proposing a new approach to case selection and application of legal comparison.

Resumen:

Este artículo ofrece una reconstrucción crítica del fundamento conceptual y comparativo del Derecho Europeo, presentando dos ideas innovadoras. Por un lado, la autora profundiza en la existencia de un «núcleo» del espacio jurídico europeo, que es especialmente propenso a una comparación exitosa y metodológicamente sólida, proporcionando una triple justificación de su razonamiento. Esta justificación se basa en el marco normativo e institucional único de la UE, en la superposición de interconexiones entre los sistemas jurídicos y en la evolución de la metodología de la doctrina europea. Por otro lado, la autora se centra en el papel del TJUE, alejándose de estudios previos sobre el uso del derecho comparado y proponiendo un nuevo enfoque para la selección de casos y la aplicación de la comparación jurídica.

Keywords:

European Law; Legal Comparison; European Legal Space; Court of Justice of the EU; Legal Scholarship

Palabras-clave:

Derecho europeo; comparación jurídica; espacio jurídico europeo; TJUE; doctrina jurídica