

The Role of Comparative Law in EU Legal Method

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1 Introduction

This article explores the way comparative law is used in connection with the development of European Union law.

In the years before the founding of the European Union (originally as the European Economic Community) in the middle of the 20th century comparative law studies in Europe were usually carried out in relation to national legal systems and consisted in cross-national comparisons. The purpose of such studies could be different. Sometimes it was a means to get a deeper understanding of problems arising in the author's own national law and thus used as a help to give a correct answer to questions about what was already valid law in that system. Very often comparative studies were carried out in connection with proposals for legal reform, i.e. as an instrument to support *de lege ferenda* argumentation.

As a helping aid in developing EU law comparative legal studies may still be cross-national and designed to assist legal reform. In a present day (2015) EU context comparative law studies are, however, often cross-level studies¹ carried out to assess what is the law already in force or comparisons between the EU fundamental rights regime and the ECHR human rights regime.²

The article is structured in the following way: the role of comparison as an instrument of unification of internal market law is discussed in section two. Section three looks at comparison of different language versions of EU law. The role of comparative law in the legal method applied in the integrated system made up of Union law and national law of the EU Member States within the scope of EU law is dealt with in section 4. Section 5 analyses comparison as a means to develop European human rights law. Section 6 contains the conclusion of the article.

2 Comparison as an Instrument of Unification of Internal Market Law in the European Union

Legal differences between the EU Member states may operate as restrictions on the internal (common) market which is better served by a common, unified law in Europe, especially as regards the most economically and commercially relevant parts of the legal system, than by legal diversity. When the EU legislator proposes directives or regulations the proposals are often based on information on the comparative situation in the Member states in the area concerned. In the EU Commission's monitoring of EU law and its

1 See Renaud Dehousse: *Comparing National and EC Law: The Problem of the Level of Analysis*: The American Journal of Comparative Law, Vol. 42, No. 4 (Autumn, 1994), p. 761.

2 See Sionaidh Douglas-Scott, *A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights Acquis*, 2006 Common Market Law Review 43, p. 629 and See Guy Harpaz, *The European Court of Justice and its Relations with the European Court of human Rights: The Quest for Enhanced balance, Coherence and Legitimacy*, 2009 Common Market Law Review 46, p. 105.

implementation, the Commission is assisted by a number of networks or expert groups with members from the different EU member states in regard to different fields of law.³ In some areas attempts at law reform have been made over a long period of time. That is typically in areas of law where there are very considerable legal differences at national level in the member states. Comparative law can thus sometimes show when proposals for law reform are unrealistic. As an example rules on information, consultation and participation of workers in companies may be mentioned.

In 1970, the Commission presented to the Council a draft Regulation concerning the European Company Statute and a draft Directive on the question of worker participation under this Statute. In 1972, the Commission presented a proposal for a draft Fifth Directive on Company Law. It was later amended⁴ but never adopted and it is now withdrawn. It took more than 30 years before the Council Regulation on SE Companies⁵ established a Statute for a European company (SE) with a view to creating a uniform legal framework enabling companies from different Member States to plan and carry out the re-organisation of their business on an EU scale. In the autumn 2001, the Directive supplementing the Statute for a European company with regard to the involvement of employees was adopted.⁶ There are now (2015) three Directives providing for the involvement of employees (i.e. information, consultation and participation) in enterprises adopting either the European Company Statute, the European Cooperative Society Statute⁷ or deriving from a cross-border merger.⁸ The European Works Council Directive was originally adopted in 1994 and replaced by a recast directive in 2009.⁹ An earlier draft –

3 See for example on corporate governance and company law “www.worker-participation.eu/Company-Law-and-CG/Corporate-Governance/EU-expert-groups”.

4 Amended Proposal for a Fifth Directive concerning the structure of public limited companies and the powers and obligations of their organs, O.J. No. C240 of 9.9.83, p.2; Bull: Supp. E.C. 61.83.

5 Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE).

6 Directive supplementing the Statute for a European company with regard to the involvement of employees 2001/86/EC.

7 Directive 2003/72/EC supplementing the Statute for a European Cooperative Society with regard to the involvement of employees.

8 Directive 2005/56/EC on cross-border mergers of limited liability companies.

9 Directive 94/45/EC on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees, now repealed and replaced by Directive 2009/38/ on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees (Recast).

the so-called Vredeling proposal¹⁰ – had been presented in 1983 and was later withdrawn.¹¹

Kahn-Freund¹² wrote in 1974 just after the access of UK to EU/EC:

What are the uses and what are the misuses of foreign models in the process of law making?

The future legal historian, looking back at the development of British legislation in the twentieth century will note that, to a degree unknown in previous times, the law has become open to foreign influences. . .

Examples of legislation-especially in the field of commercial law-passed with the object of international unification are numerous, and their number will grow more rapidly as a result of the entry of the United Kingdom into the European Communities. Transport by sea," by road, by air have been regulated to some extent by such international legislation.

Our membership in the EEC has immediately involved important adjustments of the law to foreign patterns: in some respects, for example in the law of competition and monopoly, it was the automatic result of the Treaty and law made under the Treaty becoming part of English law through the European Communities Act, in others it resulted from explicit provisions of that Act, for example in company law.

He argued for a thesis on the degree to which any rule can be transplanted. Before presenting his own thesis he cited Montesquieu who stated:¹³

Les lois politiques et civiles de chaque nation . . . doivent & re tellement propres au peuple pour lequel elles sont faites, que c'est un grand hazard si celles d'une nation peuvent convenir d'une autre.

According to Kahn-Freund the question is in many cases no longer as asserted by Montesquieu how deeply a law is embedded, how deep are its roots in the soil of its country, but who has planted the roots and who cultivates the garden. Or in non-metaphorical language: how closely it is linked with the foreign power structure which plays a decisive role in the law-making and the decision-making process. He illustrates his thesis with examples from procedural law and collective labour law.

So far, most of the unification of EU internal market law has been achieved without the EU interfering in who decides what at national level. The development of EU internal market law is thus compatible with Kahn-Freund's thesis on uses and misuses of comparative law and the possibility of legal transplants, see below in section 5 on EU fundamental rights law where the development seems to be different.

10 See Docksey, Christopher: *Information and Consultation of Employees: The United Kingdom and the Vredeling Directive*, *The Modern Law Review* 1986 p.281.

11 See further Ruth Nielsen: *EU Labour Law*, Copenhagen 2013, Chapter 4.

12 Otto Kahn-Freund, Otto: *On Uses and Misuses of Comparative Law*, *Modern Law Review* 1974 p. 1.

13 *Esprit des Lois*, Rook I. Chap. 3 (Des lois positifes).

3 Comparison of Different Language Versions of European Union Law

The European Union was founded in 1958 as the European Economic Community by six countries with four languages between them (French, German, Italian and Dutch). Today (2015), it has 28 member states with a total of 24 languages.

The linguistic diversity of EU law can limit its uniformity and the comparability of provisions stemming from different levels.¹⁴ In its *CILFIT* case law, the CJEU has held that the national courts of last instance are only free to omit references for a preliminary ruling after looking at the different language versions¹⁵ and comparing them with each-other. The CJEU thus requires national judges to use an interactive comparative approach in regard to different language versions of EU law. The CJEU held:

16. Finally, the correct application of Community law may be so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved. Before it comes to the conclusion that such is the case, the national court or tribunal must be convinced that the matter is equally obvious to the courts of the other Member States and to the Court of Justice. Only if those conditions are satisfied, may the national court or tribunal refrain from submitting the question to the Court of Justice and take upon itself the responsibility for resolving it.

17. However, the existence of such a possibility must be assessed on the basis of the characteristic features of Community law and the particular difficulties to which its interpretation gives rise.

18 To begin with, it must be borne in mind that Community legislation is drafted *in several languages and that the different language versions are all equally authentic*. An interpretation of a provision of community law thus involves a *comparison* of the different language versions.

19. It must also be borne in mind, even where the different language versions are entirely in accord with one another, that Community law uses terminology which is peculiar to it. Furthermore, it must be emphasized that legal concepts do not necessarily have the same meaning in Community law and in the law of the various Member States.

20. Finally, every provision of community law must be placed in its context and interpreted in the light of the provisions of community law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied.

21 In the light of all those considerations, the answer to the question submitted by the Corte Suprema di Cassazione must be that the third paragraph of article 177 of the EEC Treaty [now Article 267 TFEU] is to be interpreted as meaning that a court or tribunal against whose decisions there is no judicial remedy under national

14 See Sacha Prechal and Bert van Roermund (Eds.): *The Coherence of EU Law - The Search for Unity in Divergent Concepts*, Oxford 2008.

15 Case 283/81 *CILFIT*.

law is required, where a question of Community law is raised before it, to comply with its obligation to bring the matter before the Court of Justice, unless it has established that the question raised is irrelevant or that the Community provision in question has already been interpreted by the Court or that the correct application of Community law is so obvious as to leave no scope for any reasonable doubt. The existence of such a possibility must be assessed in the light of the specific characteristics of Community law, the particular difficulties to which its interpretation gives rise and the risk of divergences in judicial decisions within the Community.

As appears, the CJEU has held that the different language versions of EU legal acts are all equally authentic. It may, however, be questioned whether that is a realistic statement. Some of the EU-languages are not as necessary as others. It is for example clearly possible to do very good research in EU law without being able to read the small language versions of the legal texts, e.g. the Danish versions. The major languages (French, German and English) are much more mandatory. The French language has a particularly important position because it is usually the working language of the CJEU. Consequently, the French version of a judgment from the CJEU is normally the only one which all the participating judges have accepted as an expression of their views.

It may be questioned whether the CJEU judgments in different languages can be regarded as expressing a uniform answer to the questions referred to the Court. In the national (Swedish) part of the *Laval* Case,¹⁶ it has been argued that the CJEU judgment in that case does not lay down the same rule in the English language version and the continental language versions of the judgment. The *Laval* case was about a Latvian company (*Laval*) which had won a contract for construction work at a school in the municipality of Vaxholm (Sweden) in an EU tender. In spring 2004, *Laval* posted Latvian building workers to a Swedish subsidiary of *Laval* to carry out the work. The Swedish trade union for building workers (*byggandsarbetarförbundet* and one of its departments) took industrial action (blockade + secondary action). On 29 April 2005, the Swedish Labour Court decided to refer preliminary questions to the CJEU on the interpretation of Article 57 TFEU. The CJEU handed down its judgment on 18 December 2007. On 2 December 2009, the Swedish Labour Court handed down its judgment.

In brief, the English language version of the EU judgment states that what the trade unions did in *Laval* is contrary to EU law, but the continental language versions rather state that a legal system that allows the trade unions to do what they did is contrary to EU law. The English language version states:

Article 49 EC and ...are to be interpreted as precluding a trade union, in a Member State ...from attempting, by means of collective action ...to force a provider of services....

The French (and similarly the German and Swedish versions) states:

¹⁶ Case C-341/05, *Laval*.

Les articles 49 CE et ...doivent être interprétés en ce sens qu'ils s'opposent à ce que, dans un État membre..., une organisation syndicale puisse tenter de contraindre...

The trade unions argued before the Swedish Labour Court that it was the Swedish state's responsibility, not the trade unions' if Swedish law was contrary to EU law. On 2 December 2009, the Swedish Labour Court handed down its judgment.¹⁷ With four votes over three, it ruled that it followed from EU law that the trade unions should pay damages to Laval. The Labour Court held that a duty for the trade unions to pay damages to Laval could not be based on Swedish law, but the Swedish Labour Court found a basis for such a liability in EU law which applied directly.¹⁸ The Swedish Labour Court cited the English language version of the CJEU's *Laval* judgment in support of its ruling. The trade unions argued that it should have used the continental (including the Swedish) version of the judgment.¹⁹

4 Comparative Law as a Means to find out what is Valid Law in the Integrated System made up of Union law and National Law of the EU Member States within the Scope of Union Law

During the past 50-60 years Union law has developed into a *sui generis law* that is integrated in the national law of the EU member states in areas falling within the scope of EU law. The specific characteristics or features of EU law concern in particular the autonomy of the EU legal order and its character of a multi-level system.

With regard to the autonomy of the EU legal order, the CJEU held – already in 1964²⁰ – that the founding Treaties of the European Union created an autonomous legal order which was neither national law, nor public international law. The essential features which characterise the EU legal order as a new, autonomous legal order include its primacy over the national laws of the Member States and the direct effect of a series of provisions of EU law. The protection of that legal order has been one of the cornerstones of the case-law of the CJEU for more than 50 years and now enjoys broad recognition. The special features of the EU as a multi-level system include the fact that, within the EU, competences and responsibilities are distributed

17 “www.arbetsdomstolen.se/upload/pdf/2009/89-09.pdf”. An unofficial translation by Erik Sjödin of the Swedish Labour Court's judgment in *Laval* into English may be found at the labour law portal “arbetsratt.juridicum.su.se”.

18 It stated: It must be regarded as clarified that there is a general principle of Community law according to which damages should be due even between private individuals in case of an infringement of a Treaty provision with horizontal direct effect. That ... is clear from the Raccanelli case.“

19 Swedish was the procedural language of the case.

20 See case 6/64, COSTA/ENEL.

among national and EU authorities on the basis of numerous provisions of primary and secondary law.

It seems obvious that the long-term trend has been towards increased diversity. The Community/Union was founded by six civil law countries. Later, the number of member countries has been enlarged to currently 28 countries, including both countries belonging to the common law and the civil law tradition. Linguistic diversity has as set out above in section 3 - also increased greatly. In the original Community there were 4 different languages, the current EU has 24 different languages.

It is conceivable that within an area several incompatible source of law are applied. Since the early 1970s, theories of legal pluralism – mainly within legal anthropology and sociology of law have been developed. In these theories law is seen as a plurality of conflicting overlapping legal systems.

The Lisbon Treaty introduced a provision in Art 2 TEU on the values of the Union. Here, the expression a society characterized by pluralism, is used to describe a society that accommodates diversity, i.e. as a positive value of the EU. The Union's motto is today 'United in diversity'. The EU has moved towards an ever closer union with a coherent legal system in which national and EU law is integrated. At the same time EU law has been greatly expanded and the ability to accommodate diversity has increased significantly. The EU has developed rules for how conflict at EU and national levels to play together, see below in section 3.1. of EU law specific characteristics.

When a legal issue arises at national level that is in the scope of EU law, the first duty of the national court is according to the case law of the CJEU to interpret national law in conformity with EU law, see the Dominguez-case where the CJEU stated:²¹

It should be stated at the outset that the question whether a national provision must be disapplied in as much as it conflicts with European Union law arises only if no compatible interpretation of that provision proves possible.

24 In that regard, the Court has consistently held that when national courts apply domestic law they are bound to interpret it, so far as possible, in the light of the wording and the purpose of the directive concerned in order to achieve the result sought by the directive and consequently comply with the third paragraph of Article 288 TFEU. This obligation to interpret national law in conformity with European Union law is inherent in the system of the Treaty on the Functioning of the European Union, since it permits national courts, for the matters within their jurisdiction, to ensure the full effectiveness of European Union law when they determine the disputes before them (see, *inter alia*, Joined Cases C-397/01 to C-403/01 *Pfeiffer and Others* [2004] ECR I-8835, paragraph 114; Joined Cases C-378/07 to C-380/07 *Angelidaki and Others* [2009] ECR I-3071, paragraphs 197 and 198; and Case C-555/07 *Küçükdeveci* [2010] ECR I-365, paragraph 48).

25 It is true that this principle of interpreting national law in conformity with European Union law has certain limitations. Thus the obligation on a national

21 Case C-282/10, *Dominguez*, point 23-25.

court to refer to the content of a directive when interpreting and applying the relevant rules of domestic law is limited by general principles of law and it cannot serve as the basis for an interpretation of national law *contra legem* (see Case C-268/06 *Impact* [2008] ECR I-2483, paragraph 100, and *Angelidaki and Others*, paragraph 199).

In *Pheiffer*,²² the CJEU held that the national court should look at national law as a whole, see the following statement:

when hearing a case between individuals, the national court is required, when applying the provisions of domestic law adopted for the purpose of transposing obligations laid down by a directive, to consider the whole body of rules of national law and to interpret them, so far as possible, in the light of the wording and purpose of the directive in order to achieve an outcome consistent with the objective pursued by the directive.

The national court must thus when fulfilling its duty to EU consistent interpretation of national law make a cross-Level comparison of the whole of national law and the EU provision at issue. There is no duty to EU consistent interpretation *contra legem*. This limitation of the duty to EU consistent interpretation probably only means that there is no duty for the national court to interpret national law in a way that is incompatible with the wording of national legislation. In Denmark, the Supreme Court has taken a different view²³ and held that there is no duty for national courts to interpret their law that is inconsistent with case law or preparatory works of legislation. That interpretation gives national judges a much broader competence.

5 Comparison as a Means to Develop European Human Rights Law

5.1 Introduction

Human rights are regulated in Europe by two distinct regional regimes – the EU regime and the ECHR regime.²⁴ Within the EU regime, human rights were first developed by the CJEU as general principles of EC law. This judicial development, which forms part of a wider process of constitutionalization of the EC/EU, was later enshrined in the EU Treaty. Human rights within the ECHR regime are based on the ECHR as interpreted by the ECtHR and administered by the Council of Europe. The two regimes are distinct but they do not operate in isolation from each other. Growing formal and informal

22 Joined Cases C-397/01 to C-403/01, *Pheiffer and others*.

23 U 2014.914 H.

24 See Guy Harpaz, *The European Court of Justice and its Relations with the European Court of human Rights: The Quest for Enhanced balance, Coherence and Legitimacy*, 2009 *Common Market Law Review* 46, p. 105.

relations are being developed between them. Since the coming into force of the Lisbon Treaty – as at 1 December 2009 – Article 6 TEU has prescribed that the EU must access the ECHR. In 2013, the EU Commission and the Council of Europe reached agreement on a draft agreement on the accession of the EU to the ECHR.²⁵ The CJEU was asked for an opinion according to Article 218(11) TFEU. 18 December 2014, the CJEU delivered its opinion.²⁶ It finds that the draft agreement is incompatible with EU law, in particular because it does not guarantee the autonomy and specific characteristics of EU law sufficiently.

Generally, European human rights law is the least autonomous part of EU law. Bogdandy²⁷ thus states:

It should be noted that the human rights jurisprudence is the least “autonomous” part of the supranational legal order. In no other field does the ECJ rely so much on the national legal orders and international law. This approach was not necessary; human rights could have been developed on the basis of provisions in the EC Treaty, leading to a far more autonomous human rights case law.¹³⁰ Perhaps the ECJ embarked on this avenue because it saw – very much in line with national constitutional courts – fundamental rights as an expression of societal values, and European society in the 1970s as not being developed enough to serve as a convincing source of specific European values.

The reliance of EU in fundamental rights law on national law and international law, in particular ECHR provides ample opportunities for comparative studies both of national constitutional tradition and of EU law and ECHR law. Compared to the situation in the Nordic countries before EU general principles of law and fundamental rights in the EU are especially important.²⁸

5.2 *The Comparative Method used by the CJEU when Finding Fundamental Rights and General Principles of Law in the Common Constitutional Provisions of the Member States*

It is often stated both in legal literature and in CJEU case law that the CJEU uses a comparative method, *i.e.* looks at the different principles and fundamental rights existing in national law to find inspiration for EU law on

25 Council of Europe, 47+1(2013)008rev2, Appendix I, Draft revised agreement on the accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms.

26 Opinion 2/2013.

27 Armin von Bogdandy, *The European Union as a Human Rights Organization? Human Rights and the Core of the European Union* (2000) 37 *Common Market Law Review*, Issue 6, p. 1307.

28 See Reichel, Jane: *European Legal Method from a Swedish Perspective - Rights, Compensation and the Role of the Courts* in Neergaard, Ulla, Ruth Nielsen and Lynn M. Roseberry (eds.): *European Legal Method – Paradoxes and Revitalisation*, Copenhagen, DJØF Publishing 2011.

general principles and fundamental rights. AG Leger thus stated in *Commission v CCRE*:²⁹

As we know, to establish the existence of a general principle of Community law, the Court carries out a comparative examination of national legal systems. In this connection, it is unanimously agreed³⁰ that the Court does not seek to determine the arithmetical average of national laws or to fall into line with the lowest common denominator. On the contrary, the Court takes a critical approach³¹ and gives the answer which is most appropriate in relation to the structure and aims of the Community.³²

On the same subject Hartley writes:³³

When the Court looks to national law for inspiration, it is not necessary that the principle should be accepted by the legal systems of all the Member States. It would be sufficient if the principle were generally accepted by the legal systems of most Member States, or if it was in conformity with a trend in the Member States, so that one could say that the national legal systems were developing towards it.³⁴ It must again be emphasized, however, that whatever the factual origin of the principle, it is applied by the European Court as a principle of EU law, not national law.”

A distinction is often drawn between a minimalist, a maximalist and an evaluative approach to the use of comparative method in developing general

29 Case C-87/01 *P* [2003] ECR p. I-7617, Para. 64.

30 Leger’s note reads: “See, in particular, the Opinion of Advocate General Lagrange in the case of *Hoogovens v High Authority*, cited above, ECR 284; the Opinions of Advocate General Roemer in the case of *Duraffour v Council*, cited above, ECR 532 and 533, in Case 5/71 *Zuckerfabrik Schoppenstedt v Council* [1971] ECR 975, 991, and in *Joined Cases 63/72 to 69/72 Werhahn Hansamühle and Others v Council* [1973] ECR 1229, 1258 and 1259; and the Opinion of Advocate General Slynn in the case of *AM & S Europe v Commission*, cited above, ECR 1648 to 1650. Among academic writings, see H. Kutscher, cited above, p. I-29; J.-V. Louis, *L’ordre juridique communautaire*, Brussels, Office for Official Publications of the European Communities, sixth ed., paragraph 87; P. Pescatore, cited above, pp. 654 and 655; and J.-V. Louis, G. Vandersanden, D. Waelbroeck and M. Waelbroeck, *Commentaire J. Megret, Le droit de la CE*, vol. 10, *La Cour de justice, les actes des institutions*, éditions de l’université de Bruxelles, Brussels, 1993, second ed., p. 155.”

31 Leger’s note reads: “Opinion of Advocate General Roemer in the case of *Zuckerfabrik Schöppenstedt v Council*, cited above, ECR 991”.

32 Leger’s note reads: „*See Internationale Handelsgesellschaft* cited above, paragraph 4.”

33 Hartley, T. C.: *The Foundations of European Union Law*, Oxford 2010, p. 142.

34 Hartley’s note reads: “*See Hoogovens v. High Authority*, Case 14/61, [1962] ECR 2 53 at 283–4, where Advocate General Lagrange said that the Court is not content to adopt the common denominator between the different systems but ‘chooses from each of the Member States those solutions which, having regard to the objects of the Treaty, appear to it to be the best’”.

principles and fundamental rights.³⁵ Under the CJEU case law, it is not required that a general principle or fundamental right must be accepted in all the national systems in the EU or that only the best national solution can be accepted as an EU principle. The CJEU uses an evaluative approach and discerns generally accepted principles underlying national law in the Member States.

Koopmans concludes under the heading “A Two-Way Influence”: (emphasis added)³⁶

“... the Court of Justice has become one of the major sources of legal innovation in Europe not only because of its position as the Community's judicial institution, but also because of the intellectual strength of its *comparative methods*.³⁷ National courts take heed to the Court's way of reasoning. As a result, we sometimes see that legal principles which have made their way from the national legal systems to the Court's case law, in order to be transformed into principles of Community law, make their way back to the national courts. This happens, of course, not only because of their willingness to adopt a certain method of law finding; besides, national courts are often under an obligation to apply rules of Community law.”

5.3 *Comparison of EU Case Law and ECHR Case Law*

Compared to the ECHR, the EU Charter on Fundamental Rights goes much further in protecting economic and social rights.³⁸ The content of the solidarity provisions in the Charter draws heavily on the Council of Europe Revised Social Charter from 1996 to which there are many references in the Explanatory remarks. All 28 EU Member States are signatories to the Revised Social Charter from 1996, but twelve of them have not ratified this convention and have consequently never been bound by it under public international law.³⁹

35 See for example Groussot, Xavier: *Creation, Development and Impact of the General Principles of Community Law: Towards a jus commune europaeum?*, Lund 2005, p. 88 *et seq.*

36 Koopmans, Thijmen: *The Birth of European Law At The Cross Roads Of Legal Traditions*, *The American Journal of Comparative Law*, 1992 (vol 39) p. 493.

37 Koopman's note reads: “See P. Pescatore, “Le recours dans la jurisprudence de la Cour de Justice des Communautés européennes a des normes deduites de la comparason des droits des Etats membres,” *Revue trimestrielle de droit commercial* 337 (1980).”

38 The ECHR offers some protection of economic and social rights. In *Airey v Ireland* (Application no. 6289/73, judgment of 9 October 1979), the ECtHR stated (emphasis added): “Whilst the Convention sets forth what are essentially civil and political rights, many of them have implications of a social or economic nature. The Court therefore considers, like the Commission, that *the mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation; there is no water-tight division separating that sphere from the field covered by the Convention.*”

39 Austria, Czech Republic, Denmark, Germany, Greece, Hungary, Latvia, Luxembourg, Poland, Slovakia, Spain and the United Kingdom.

The European courts refer in their judgments to a variety of sources of law stemming from both national law, EU law and public international law.⁴⁰ The CJEU refers to the ECtHR more often than does the ECtHR to the CJEU.⁴¹ In *Hoechst and Orkem*,⁴² the CJEU mentioned the ECtHR to note that it had produced no case law on the subject in question – namely, the right to inviolability of the business premises, and the right against self incrimination. The CJEU then decided those issues for itself, in ways contrary to subsequent case law of the ECtHR. The CJEU modified its position on these issues in *Roquette*, in which it stated that:⁴³

It should be recalled in that regard that, in paragraph 19 of the judgment in *Hoechst*, the Court recognised that the need for protection against arbitrary or disproportionate intervention by public authorities in the sphere of the private activities of any person, whether natural or legal, constitutes a general principle of Community law.

28. The Court has likewise stated that the competent authorities of the Member States are required to respect that general principle when they are called upon to act in response to a request for assistance made by the Commission pursuant to Article 14(6) of Regulation No 17 (see *Hoechst*, paragraphs 19 and 33).

29. For the purposes of determining the scope of that principle in relation to the protection of business premises, regard must be had to the case-law of the European Court of Human Rights subsequent to the judgment in *Hoechst*. According to that case-law, first, the protection of the home provided for in Article 8 of the ECHR may in certain circumstances be extended to cover such premises (see, in particular, the judgment of 16 April 2002 in *Colas Est and Others v. France*, not yet published in the Reports of Judgments and Decisions, § 41) and, second, the right of interference established by Article 8(2) of the ECHR ‘might well be more far-reaching where professional or business activities or premises were involved than would otherwise be the case’ (*Niemietz v. Germany*, cited above, § 31).

There are also comparative studies comparing CJEU and ECtHR case law in specific areas of law. Burri⁴⁴ has for example made a comparison of the two Courts’ case law on gender equality. Her central question is which protection against sex discrimination a citizen enjoys when he/she relies on a non-

40 Sophie Robin-Olivier: *European Legal Method from a French Perspective. The magic of combination: uses and abuses of the globalization of sources by European Courts* in Ulla Neergaard, Ruth Nielsen and Lynn M. Roseberry (eds.), *European Legal Method – Paradoxes and Revitalisation*, Copenhagen 2011.

41 See Sionaidh Douglas-Scott, *A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights Acquis*, 2006 *Common Market Law Review* 43, pp. 629.

42 Joined cases 46/87 & 227/88, *Hoechst*, Case C-374/87, *Orkem*.

43 Case C-94/00, *Roquette Frères SA*.

44 Susanne Burri: *Towards More Synergy in the Interpretation of the Prohibition of Sex Discrimination in Europe and Law? A Comparison of Legal Contexts and some Case Law of the EU and the ECHR*, “www.utrechtlawreview.org” Volume 9, Issue 1 (January) 2013.

discrimination provision in national law which implements EU law as interpreted by the CJEU compared to the protection provided under the ECHR after all national remedies have been exhausted as interpreted by the ECtHR.

5.4. *Legal Transplants in the Context of Fundamental Rights*

Above in section 2, Kahn-Freund's thesis on the limited transferability of law that is closely connected with the national power structures was discussed in relation to internal market law. It was concluded that the development of EU internal market law seems to be compatible with Kahn-Freund's thesis. The situation seems to be different with regard to EU fundamental rights law.

Historically, the starting point in the Nordic countries was that they - prior to entry into the EU - were examples of what in the political science literature is called majority-democracies to the difference of constitutional democracies. In majority democracies, there are no constitutional courts and the ordinary courts are reluctant to check whether the legislature meets the requirements of the constitution and fundamental rights (human rights). In contrast, the judicial control over the legislature's compliance with fundamental rights (human rights) is an important element of constitutional democracies such as Germany. The EU system is essentially a constitutional democracy. CJEU exercises legality control over both EU institutions and national institutions in areas which are in the scope of EU law. Denmark has been a member of the EC/EU for approximately 42 years. It has since the early 1980s frequently seen Danish legislation overruled as incompatible with EU rules. The Danish Supreme Court has still only once overruled a Danish law as contrary to the constitution. As Føllesdal states:⁴⁵

Nordic public debates have tended to conflate legitimacy and majoritarian parliamentarianism. Parliament is seen as the site of legitimacy, as the privileged arena for the expression of the general will. There are no Constitutional Courts, and the constitutions and constitutional conventions leave great scope to parliamentary discretion. Thus it is for the Parliaments themselves to decide whether legislation is within the bounds of the constitution.

Scheinin expresses a similar view:⁴⁶

In the Nordic countries it is customary to state that it is the legislator that makes, through adopting and amending laws, all important decisions on policies and principles. The role of courts of law is seen as implementing the will of the legislator. Within Community law the situation is different as the normative framework of Community law is incomplete as a legal system and as the European

45 Føllesdal, Andreas: *Rawls in the Nordic Countries*, European Journal of Political Theory 2002 p. 181.

46 Scheinin, Martin: *Constitutionalism and Approaches to Rights in the Nordic Countries*, in Nergelius, Joakim (ed.): *Constitutionalism: New Challenges*. European Law from a Nordic Perspective, Leiden/Boston 2008.

Court of Justice (ECJ), consequently, has a strong position in the development of the law and in securing coherence in law.

As set out in section two comparative studies in regard to EU internal market law can show where law reform is likely to be impossible. In the field of human rights comparative studies serve more as opportunity openers that show persons who feel that their rights have been violated where they might benefit from invoking either EU law or ECHR law.

As an example of potential future use of comparing fundamental rights law in order to open more opportunities for aggrieved individuals the present discrimination in Danish law of workers (*arbejdere*, *Arbeiter* in German) as compared with salaried employees (*funktionærer*, *Angestellte* in German) may be mentioned.

Under Danish law workers (*arbejdere*, in German *Arbeiter*) are treated less favourably than salaried employees (*funktionærer*, in German *Angestellte*) on a number of points, for example with regard to payment during paid annual leave in the Holiday Act. A worker does not receive holiday compensation in regard to pension contributions from the employer, whereas a salaried employee gets his or her full wages, including all kinds of pension contributions, during holidays. After the Lisbon Treaty has come into force and the Charter has obtained the same legal value as the Treaties (TEU and TFEU) the question arises as to whether Article 20⁴⁷ and 31(2) on paid annual leave in the Charter have direct effect and supremacy over the Danish Holiday Act so that a Danish worker can claim the same as a salaried employee would be entitled to. In my view the answer is in the affirmative. Paid annual leave is clearly in the scope of EU law. It is provided for in the Working Time Directive⁴⁸ which Denmark has implemented in a way that treats workers and salaried employees differently. That is in my view a violation of Article 20 of the Charter.

The German constitutional court held in 1990⁴⁹ that a provision in BGB (*Bürgerliches Gesetzbuch*) providing for shorter periods of notice for workers (*Arbeiter*) than for salaried employees (*Angestellte*) was inconsistent with the German Constitution § 3(2).⁵⁰ An important factor in the development of the CJEU case law on fundamental rights has been its link to the doctrine of the supremacy of EU law over national law and the concern of the CJEU to avoid revolt among national constitutional courts against this doctrine by elevating fundamental rights to general principles of EU law. This context makes it unlikely that the CJEU will give an interpretation to Charter provisions, as for example Article 20, that provides for a lower level of protection than the

47 It reads: 'All persons are equal before the law', in German 'Alle Menschen sind vor dem Gesetz gleich'.

48 Originally 92/104/EC, now 2003/88/EC, Article 7.

49 BVerfGE 82, 126, available at "www.oefre.unibe.ch/law/dfr/bv082126.html". See Susanne Baer: *Constitutional quality: Equality: The Jurisprudence of the German Constitutional Court*, Columbia Journal of European Law 1999 p. 249.

50 It reads: 'Alle Menschen sind vor dem Gesetz gleich', i.e. it provides the same as Article 0 of the EU Charter.

equivalent provision in the German Constitution § 3(2) does. This is important for the likely spread of German style fundamental rights via the Charter to countries like Denmark with a weak tradition for protection of fundamental rights in labour and welfare law.

6 Conclusion

With the development of EU law comparative law has evolved beyond the nation state. In an EU context some cross-national comparisons are still relevant but in many situations cross-level comparisons or comparisons between EU law and ECHR law are more relevant. There are many examples of such comparisons both in CJEU case law and in legal scholarship.

Comparative studies involving EU law may have many different purposes. Some cross-level comparisons of national law and Union law are often necessary to assess what is the law currently in force. In regard to law reform comparative knowledge can give an indication of the feasibility of the proposed reform. For potential right-holders comparative studies can be useful to show where in the legal system they can obtain the best legal protection.