# Comparative Law and European Law: the End of an Era, a New Beginning, or Time to Face the Methodological Challenges?*

Antonina Bakardjieva Engelbrekt**



---

* This article is a slightly revised version of Bakardjieva Engelbrekt, Antonina, *Comparative Law and European Law: An End of an Era, a New Beginning, or Time to Face the Methodological Challenges?*, in: Derlén and Lindholm (eds), Festskrift till Pär Hallström, Uppsala: Iustus, 2012, 31-50.

** Antonina Bakardjieva Engelbrekt is Professor of European Law at the Faculty of Law, Stockholm University and holder of the Torsten and Ragnar Söderberg Chair of Legal Science (2014-2018).

## 1 Comparative Law and European Law: an Introduction

The relationship between comparative law and European Law seems at first glance to be harmonious and unproblematic. It can hardly be disputed that comparative law has been instrumental in the early years of construction of the European Communities and for their evolution toward "an ever closer union". Comparative insights have certainly informed the text of the Treaties and the design of the European institutions. With their international staff institutions like the Commission and the Court are natural laboratories of comparative law, bringing experience from different legal traditions into a creative melting pot of legal exchange and experimentation. More ambitiously and explicitly, comprehensive comparative studies traditionally pave the way to legal harmonization in constantly expanding spheres of economic and political integration.[1] Famously, the Court of Justice of the EU (CJEU) has elaborated a sophisticated comparative methodology for filling lacunas and interpreting Community/Union law.[2]

More recently however, tendencies toward codification, harmonization and convergence have prompted some scholars and policy makers to see a diminishing relevance of comparative law for the European project.[3] On a deeper level comparative law has been criticized for suffering of what has become known as "methodological nationalism" and as being incapable of improving our understanding of the European Union as a complex system of multilevel governance.[4] Others claim, on the contrary, that there has never been a greater need for linking the study of European Law with innovatory comparative legal research.[5]

In the following I will approach the question of the future of the relationship between comparative law and European Law. I will in a first step elaborate on some basic premises like the different meanings of comparative law and the comparative legal method. In a second step I will try to map the various ways the comparative legal method has been used in the context of EU law and EU law research. I will then look into the challenge of comparative law when applied within a system of multilevel governance. The problem of "unpacking"

---

1 *See* Rob Van Gestel and Hans Micklitz, *Comparative Law and EU Legislation: Inspiration, Evaluation or Justification?*, in Adams, M. & Heirbaut, D. (eds.) The Method and Culture of Comparative Law, Oxford: Hard Publishing, 2014, 301-317.

2 Koen Lenaerts, *Interlocking legal orders in the European Union and Comparative Law*, International and Comparative Law Quarterly 2003, 873–906.

3 *See* Mathias Siems, *The End of Comparative Law*, 2 The Journal of Comparative Law 2007, 133–150.

4 *See* Christian Joerges, *The Challenges of Europeanization in the Realm of Private Law: A Plea For a New Legal Discipline*, 14 Duke Journal of Comparative and International Law 2004, 149. On the concept of methodological nationalism in social sciences *see* Ulrich Beck, *What is globalization?*, Cambridge: Polity Press, 2000, 64 ff.

5 Renaud Dehousse, *Comparing National Law and EC Law: The Problem of the Level of Analysis*, 42 American Journal of Comparative Law 1994, 761–781.

mutually interdependent units of comparison in a multilevel governance context will be revisited,[6] touching upon issues of research design and inter-disciplinarity.

Finally, I will argue for broadening the use of comparative legal methods in the research on EU law. European integration has entered a new more mature and complex phase, whereby it is unsatisfactory to treat the European Union in isolation as a self-sufficient system separate from its component states. Instead, deeper understanding of the interaction between the supranational and national level and between individual national units in the supranational system is needed and here creative comparative law can make an important contribution. In addition, new fields of comparative legal research, namely comparing interlocking supranational and international systems of governance are emerging, setting even higher demands on scholarly creativity and methodological discipline. Overall, it is submitted that a renewed focus on the methodology of comparative legal research is required. Careful thought on research design to capture the dynamic of system interpenetration and legal and institutional change, as well as greater openness to interdisciplinary research are suggested as ways for coping with the methodological challenges.

## 2 Back to Basics: What do we Mean by Comparative Law?

Before I go further in the analysis of the use of comparative law in the context of EU law some preliminary notes on terminology are in order. Whenever we speak of comparative law there seems to be a need to clarify what do we mean by this concept. It is generally accepted that we cannot speak of comparative law as a branch of law, in terms of complex of rules, principles and practices governing a discrete area of social relations. Rather it is a question of a method for the analysis of different legal systems and their rules and institutions.[7] The views differ on the question of whether comparative law should be conceptualized as a separate legal discipline. On this point Strömholm has argued convincingly that in those instances where the comparison constitutes the main subject and purpose of a scholarly work and does not only serve a secondary and supportive function, comparative research indeed generates new knowledge and should be seen as a separate legal discipline.[8]

Following an unassuming working definition introduced by Constantinesco in his treatise on the method of comparative law, and elaborated further by Bogdan, the subject of comparative law is conceived as "the comparing of different legal systems (and elements thereof) with the purpose of ascertaining their similarities and differences; working with the similarities and differences that have been ascertained (for instance explaining their origin, evaluating the

6 *See* Dehousse (1994).

7 Michael Bogdan, *Comparative Law*, 1998, 18; In a similar sense Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law*, Oxford: Clarendon Press, 1998, 2ff.

8 Stig Strömholm, *Har den komparativa rätten en metod?*, SvJT 1972, 456–465.

solutions utilized in the different legal systems …); and the treatment of the methodological problems connected with these tasks including those connected to the study of foreign law."[9]

Although this definition does not specify the character of the legal systems to be compared, there is a tacit assumption that it is a question of nation-state legal systems.[10] It is also well known that the bulk of comparative law work – both theoretical and practical – has been focused on the comparison between national legal systems, emanating from unitary or federal nation states. Nevertheless, there is in my view no inherent limitation that would preclude extending the concept of comparative law also to comparative studies of legal systems of a different type, notably supranational and international legal systems and organizations, or cross-level comparisons between national and supranational (or international) legal systems. Naturally such comparisons require methodological adjustments to which I shall return below, but there is sufficient similarity in the main methodological premises that justify a broad conception of comparative law.

One important distinction, which is acknowledged by most comparatists, is that between theoretical and practical (or one could say applied) comparative law, or in other words the difference between comparative law as an academic discipline, on the one hand, and comparative law as a tool for law making and legal interpretation, on the other.[11] Whereas in both contexts the comparative legal method follows similar principles, there are obvious differences in objectives, scope and ambitions of comparison. Importantly, the comparison is undertaken by different actors – the legislator, the judge and the scholar, whose work is framed by their respective professional roles, codes and limitations; something inevitably influencing the way comparative law is employed in the respective context.

The distinction between practical and theoretical comparison may appear trivial but is important. Failure to indicate which type of comparative law is discussed may occasionally misguide the debate, for instance on issues like the comparability of legal rules (and systems), or of the feasibility and desirability of comparative law, to name but a few.[12] It is not by accident that Otto Kahn Freund in his famous article "On Uses and Misuses of Comparative Law", makes an introductory disclaimer that his whole argument on the sometimes problematic aspects of legal transplants, has no bearing on comparative law as

---

9 Bogdan (1998), at 18. *Cf* Léontin-Jean Constantinesco, *Rechtsvergleichung II: Die rechtsvergleichende Methode*, Köln-Berlin: Heymanns, 1972.

10 Zweigert and Kötz expressly state that "comparative lawyers compare the legal systems of different *nations*" (my italics), *see* Zweigert and Kötz (1998), at 4.

11 *See* Zweigert and Kötz (1998), at 50.

12 An example of an otherwise eloquent and provocative article on the desirability and feasibility of comparative law, which conflates the discussion on practical and theoretical uses is Annelie Gunnerstad and Torbjörn Ingvarsson, *Den komparativa rätten – värd en omväg?*, SvJT 1997, 152.

an academic discipline.[13] Consequently his critical view on the import of foreign labor law solutions in the radically different institutional and legal context of UK industrial relations was not to be extended to theoretical comparisons and their desirability or feasibility. Clearly, the success of a project of legal reception or borrowing depends on a number of complex factors of political and institutional character whereas the quality of a scholarly comparative work is judged by its capacity to generate better understanding of the phenomena analyzed. The methods for assessing feasibility and success are also essentially different. In the following I will speak of the use of comparative law in both practical and theoretical terms, but my concluding reflections on the methodological challenges of comparative law are exclusively directed at scholarly comparative work.

Concerning the comparative legal method, I generally subscribe to the functional understanding, taking the function of legal rules and institutions as the basis for all legal comparison and for identifying the *tertium comparationis*.[14] At the same time, as shall become evident in the following, I will argue that there are a number of other methodological concerns that require close scrutiny when undertaking comparisons in the context of European law.

## 3 The Many Practical Uses of Comparative Law in European Law

The usefulness of comparative law for the construction of the European Communities, now Union, is largely undisputed. Three main modes of practical application of comparative law can be discerned:

### *3.1 Spontaneous Comparative Influences*

Comparative influences of different national legal traditions are visible both in the substantive law as well as in the institutional and constitutional principles on which the Union rests and have been much discussed in the legal literature. Many authors, among them a number of judges and Advocate Generals at the ECJ have for instance commented on the importance of the French administrative tradition for shaping not only the text of the European treaties, but also the structure and style of its institutions, notably the Court and its

13 *See* Otto Kahn Freund, *On Uses and Abuses of Comparative Law*, Modern Law Review 1974, 1–27, at 1.

14 *See* Zweigert and Kötz (1998), 28–46; similar Hallström (2010), at 576; For further elaboration on the distinction between function and goal and between explanatory and evaluative comparative analysis, *see* Antonina Bakardjieva Engelbrekt, *Fair Trading Law in Flux? National Legacies, Institutional Choice and the Process of Europeanisation*, Stockholm 2003, at 67-68.

abstract, impersonal and deductive reasoning.[15] In a similar manner German administrative and constitutional law is seen as the source of inspiration for much of the Community/Union evolution in the areas of general administrative law principles and fundamental rights.[16] The accession of the UK and Ireland to the European Community have arguably introduced a common law approach in the interpretation of cases and an emphasis on procedure and on parties procedural rights.[17] Finally, the accession of the Scandinavian countries and in particular of Sweden and Finland in 1995, has brought to the fore concerns for transparency and public access to Community acts.[18] These influences, while widely acknowledged, can hardly be seen as examples of applied comparative law. The preference for one legal solution or approach over another is in most of these instances not a result of systematic comparative work, but rather of the convincing power of the respective national solution, or in particular in the early days of the European project with only six continental states as its members, a product of the shared knowledge base and experience of the drafters of Community laws and the staff of Community institutions.[19]

### *3.2 Structured use of Comparative Analysis in Legislative Work*

A much more intense and methodologically conscious use of applied comparative law takes place in the myriad of projects of approximation and harmonization of areas of law and regulation that eventually form the large part of the Community legislative *acquis*. The scope and comprehensiveness of the comparative analyses admittedly differ depending on a variety of factors, among others the area of law and policy concerned, the type of harmonization undertaken (minimum, maximum, full or partial) and the form of the legislative act under preparation. The proclivity to comprehensive academic studies may have been greater in the initial stages of European integration when the number of required country analyses was limited. To take one example from an area I am well familiar with, that of unfair competition law, the first initiatives toward approximation in the early 1960s resulted in an impressive academic study

15 *See* among others the Dutch judge Thijmen Koopmans, *The Birth of European Law at the Crossroad of Legal Traditions*, 39 American Journal of Comparative Law 1991, 493–507, and the Irish Advocate General Nial Fennely, *Legal Interpretation at the Court of Justice*, 20 Fordham International Law Journal 1996-1997, 656–679, at 661.

16 For an extensive account on the comparative origins of general principles *see* Xavier Groussot, *General Principles of Community Law*, Groningen: Europa Law Publishing, 2006, at 17 ff.

17 Koopmans (1991), *see* also Jörgen Hettne's reasoning about a multi-cultural doctrine of interpreting precedents in Jörgen Hettne and Ida Otken Eriksson (reds), *EU-rättslig metod*, Norstedts juridik 2011, at 49.

18 *See* Groussot (2006), 9: Ulf Bernitz and Anders Kjellgren, *Europarättens grunder*, 5th ed., Stockholm: Norstedts juridik 2014, at 172 ff.

19 *See* Koopmans (1991), Fennely (1996-1997).

conducted by the Max Planck Institute in Munich under the leadership of its Director Professor Ulmer.[20] The study first produced six volumes, each comprising several hundred pages, reporting with academic depth and accuracy of all relevant aspects of this area of law in the six founding members of the European Communities. Later on, with the expansion of the Community, new volumes were added to cover the law and practice of the new accession states (UK, Ireland and Denmark). The ambitious harmonization suggested by the study (in the form of a Convention) never materialized. When the same issue was back on the Community agenda nearly forty years after, a new comparative study was commissioned, this time encompassing 15 EU Member States and more than four hundred pages.[21] Eventually, when the Unfair Commercial Practice Directive was adopted in 2003 yet another comparative study was requested by the Commission to assess the expected difficulties with implementation of the Directive in the national law of the eight (to become ten) new Member States from Central and Eastern Europe.[22] Obviously, producing comprehensive comparative studies becomes a daunting, if not a prohibitive task in the new highly pluralistic environment.

In a similar, though less ambitious manner, comparative follow-up reports have been a preferred method by the Commission to assess implementation of harmonized EU law. These studies are of varying analytical and synthetic ambition and strength.[23]

Yet it should be kept in mind that the number and scope of comparative preparatory work is not necessarily proportionate to the political and economic impact of a regulatory area. Some commentators have noted that occasionally even high profile legislative initiatives are carried out without proper anchoring in comparative work. It seems safe to assume that where important political and economic interests are involved the will to achieve compromise steers legislative negotiations more palpably than solid comparative research.[24]

---

20 *See* Eugen Ulmer, *Das Recht des unlauteren Wettbewerbs in den Mitgliedstaaten der EWG. Band I. Vergleichende Darstellung*, München: Beck 1965.

21 Micklitz, H.-W. et al., *Study on the Feasibility of a General Legislative Framework on Fair Trading*, Volumes I-II, Institut für Europäisches Wirtschafts- und Verbraucherrecht e.V., November 2000.

22 British Institute of International and Comparative Law, *Unfair Commercial Practices. An Analysis of the Existing National Laws on Unfair Commercial Practices between Business and Consumers in the New Member States*, 2005.

23 For an in-debt analysis of the use of comparative law in European legislation *see* Van Gestel and Micklitz (2014).

24 Dehousse (1994), 763 with reference to Constantinesco, 2 *Traité de droit comparé* 1974, at 351.

### *3.3 Use of the Comparative Method by the European Judiciary*

Probably the most widely observed use of comparative law in the work of the Community/Union institutions is the particular brand of comparative law methodology developed by the CJEU and applied by it for filling gaps and interpreting EU law. The various situations and ways in which the comparative method has been employed by the Court have been analyzed in much detail by others and will not be addressed here.[25] It suffices to note that the method has quite rightly been called an "evaluative" one, since the Court has always seen itself empowered to distill the solution that is most suitable from the point of view of the integration project. As aptly summarized by Groussot, the comparative methodology of the Court can best be understood in its triangular relationship with teleological interpretation and the gap-filling function of the general principles.[26] Nevertheless, this somewhat opportune comparative law methodology has been highly praised in the legal literature, often by the very architects of this doctrine. In the words of Koopmans "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."[27]

## 4 A Comparative Law era in European Law: at its end or its Beginnings?

The above described multiple uses of comparative law in the practical process of European integration may suggest that the European Union has been experiencing an era of comparative law. Yet the question has been raised if we are not entering a phase of diminishing relevance of comparative law for the European project.[28] Indeed the European Union has evolved into a mature system of governance with its own institutions, general principles, legal methodologies and sources of law. The law of the EU is increasingly moving toward codification of judicial practice, harmonization and autonomous interpretation, taking the objectives and the goals of the Union as its starting point and foundation. Notably, within the field of general principles of EU law, one of the classical examples of the use of the comparative legal method for the judicial making of EU law, the situation may be changing, Following the entry into force of the Lisbon Treaty, the EU Charter of Fundamental Rights has become formally binding and part of the EU legal order. Moreover the accession of the European Union to the European Convention of Human Rights

25 *See* most comprehensively Lenaerts (2003).

26 Groussot (2006), 17.

27 Koopmans (1991), 505.

28 *See* Siems (2004).

has been set as a firm constitutional commitment.[29] This development arguably marks a new phase of independent, EU-centered, endogenously produced general principles, shrinking the room for comparative law as a tool for judicial law making. Recourse to the common constitutional traditions of the Member States would probably be less motivated and may even be questionable from a methodological point of view given the existence of fundamental rights and principles set out in the Charter, resulting from a supranational legislative process, rather than a comparative law exercise.

In a different vein, the move from minimum to full harmonization in a number of areas seems at first glance to reduce the room for national concepts, doctrines and solutions. Celebrating the launching of full harmonization initiatives, the Commission has occasionally boldly declared the expected withering away of national laws and legal doctrines, indirectly implying the gradual irrelevance of studying national legacies and specificities comparatively. [30]

At the same time, irrespective of how we assess the prospects for practical use of comparative law by the EU institutions, there are a number of factors that militate in favor of boosting theoretical comparative work in European law research. In fact, when it comes to theoretical work, in the mid-1990s Renaud Dehousse deplored the limited use of comparative law by European law scholars. His diagnosis was that the study of the European Community had been influenced by its origin as an international organization and had initially attracted foremost the attention of international lawyers. However, with the Community transformation into a more elaborate form of political organization he prognosticated not the end, but rather the beginning of a comparative era in EC law. [31] Indeed, a decade later Joerges seemed to discern a revival of comparative law research related to European private law and an increased interest in intra-European comparisons, replacing the initial focus on EU-US comparative work.[32] Apart from the already mentioned factors, I can add a few more reasons for this new, and in my view pertinent, fascination with comparative law in European studies.

### *4.1 Enlargement*

With the enlargement of the Union, the sphere of EU law has expanded not only geographically, but also in terms of new areas of competence. This

29 The situation is of course more complicated after the CJEU issued its Opinion 2/13 on the EU accession to the ECHR.

30 According to the press release accompanying a Commission proposal for a full harmonisation Directive on Unfair Commercial Practices, the proposal was said to advance a single set of rules which were expected to do nothing less than 'replace the existing multiple volumes of national rules and court rulings on commercial practices', *see* EU Press release IP/03/857, Brussels, 18 June, 2003.

31 Dehousse (1994), 780.

32 Joerges (2004), 160.

advancement has implied on the one hand a major push toward ensuring alignment of the law of the Candidate States with the Community/Union *acquis* and toward compliance with the institutional requirements of membership. In the course of the Eastward enlargement new accession states have undergone a process of major reform of their legal systems. An impressive, mass scale operation of legal transformation has been taking place "in the shadow" of European accession, whereby the European Union *acquis* occasionally play the role of model laws for reforming and sometimes even for building from scratch whole new branches of national law.

Yet there is a certain paradox in this particular case of transplantation. In the conventional case of legal borrowing the donor legal system can provide not only the substantive rules, but also the deeper substratum of institutional arrangements and practices that give "flesh and blood" to formal legal rules. These arrangements and practices work as a sort of legal "know how", the studying and incorporation of which in the recipient legal order often ensures the success of the legal transfer. The European Union, in contrast, relies for its effect and implementation on the institutional structures of the Member States. The Community/Union substantive standard is not necessarily accompanied by the so badly needed institutional blueprint ensuring the effectiveness of the transposed legal rules.

One way of overcoming this apparent gap is what can be defined as a "second order" legal transplantation, namely reception of legal and institutional models from old Member States by Accession and New Member States with the purpose of making newly transposed EU law operational. The institutional vehicles for such legal exchange in the EU context have taken the form of technical assistance programs, twinning projects, schemes for mutual learning and best practices and other creative forms of exchange inspired by the open method of coordination.[33] To what extent these "second order" legal transfers promote the uniformity and effectiveness of European Law or bring about new diversities is a matter that seems to require careful comparative research.[34]

### *4.2 Decentralized Enforcement of EU law*

Another consequence of the expansion of the EU in both geographical scope and areas of competence is the tendency toward decentralized enforcement of EU law. The Union lacks a full-fledged supranational administration and judiciary and relies for ensuring the effectiveness of EU law on the institutional structures and capacities of the Member State. Even in area such as EU

33 *See* Elsa Tulmets, *The Management of New Forms of Governance by Former Accession Countries of the European Union: Institutional Twinning in Estonia and Hungary*, 11 (5) European Law Journal 2005, 657–674. Susana Borrás and Claudio M. Radaelli, *Recalibrating the Open Method of Coordination: Towards Diverse and More Effective Usages*, SIEPS 2010:7.

34 Günther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences*', 61 (1) Modern Law Review 1998, 11–32.

competition law, boasting well-established supranational executive structures and judicial practices, the limited resources of the Commission and the explosive growth of supervisory tasks have made exclusive reliance on centralized enforcement untenable. Instead, Regulation 2003/1 has expressly entrusted national executive agencies and judiciaries with the task of supervising and enforcing EU Competition law in cooperation with the Commission.[35]

This decentralized model of enforcement may on the surface seem to decrease the need for engaging in comparison. Yet, at a closer look it becomes apparent that the opposite is rather true. National enforcement agencies are becoming far more deeply involved in the process of applying the common set of substantive standards which brings to the fore differences in institutional arrangements and enforcement modalities. These differences can result in unwanted discrepancies in substantive outcomes, which can jeopardize the fundamental premises of EU law, namely the ambition toward uniformity, effectiveness and equal treatment. It is therefore not accidental that a number of authoritative research projects and policy forums have become preoccupied with the topic of comparative enforcement. Issues that come at the center of attention are those about the balance between public and private enforcement, the structure, management and scope of competence of executive agencies, the institutional design of market monitoring and enforcement, including aspects of accountability, transparency and participation.[36] Similar expansion of Union activities in the area of enforcement can be noted also in other areas of EU law such as intellectual property and consumer protection to name a few.[37]

### *4.3 Comparative Law, European law and the theory of multi-level Governance*

Fundamentally, despite all tendencies toward approximation and convergence, there is hardly any evidence of the European Union turning into a European state, and even less so of withering away of the nation states that constitute the Members of the Union.[38] Quite to the contrary, these nation states are

35 *See* Ehlermann, *The Modernisation of EC Antitrust Policy: A Legal and Cultural Revolution*, CMLRev 2000, 537.

36 *See* for instance the topics of the recent comparative reports of the LIDC (International Ligue of Competition Law) on the size of fines in competition law cases (2011); on competition authorities discretionary powers when investigating cases (2009); on private enforcement of competition rule (2006) retrievable at "www.ligue.org/publication.php?txtt=21".

37 *See* on this trend Antonina Bakardjieva Engelbrekt, *Toward an Institutional Approach in Comparative Economic Law?*, in Bakardjieva Engelbrekt and Nergelius (eds), New Directions in Comparative Law, Cheltenham: Edward Elgar 2009.

38 *See* Karl-Heinz Ladeur, *Methodology and European Law—Can Methodology Change so as to Cope with the Multiplicity of Law?*, in: Van Hoecke (ed.) Epistemology and Methodology of Comparative Law, Oxford, Portland: Hart Publishing 2004, 91-121, 100 ff.

recurrently asserting their claims to sharing regulatory powers with the Union and to having the ultimate say on the decisive question of "Kompetenz-kompetenz". [39] Independent of this undecided contest of powers, Ladeur diagnoses a general crisis of statehood as a result of fragmentation of society's knowledge base, which generates dynamic toward novel governance arrangements and a new age of legal pluralism.

Against this background a conceptualization that has gained wide recognition among political scientists, but also lawyers, is the one of the Union as a multi-level system of governance where the international, supranational and the national level coexist and interact in both a top down and bottom up manner. Implied in the concept is that the powers and the resources for political action are shared by a multitude of public as well as private actors, operating at different mutually interconnected levels, not necessarily in a hierarchical relationship to each other.[40]

Within the EU governing functions are europeanised, but this Europeanisation takes place in various modes, both hierarchical and voluntary, and involves a plurality of actors. Drawing on the experience of federal states (notably Germany) Fritz Scharpf identifies four main forms of Europeanisation of governing functions that evolve in the EU as a system of multiple layers. Apart from intergovernmental negotiations (where unanimous voting is the rule) and joint decision-making procedures, he brings forward the role of centralized institutions like the Court and the Commission exercising what he calls "hierarchical direction", as well as the less visible but crucial forms of mutual adjustment of national legal and political systems, that can sometimes take the form of system competition.[41] In addition, a fifth category of emerging soft forms of Europeanised governance, taking the shape of benchmarks, mutual learning and other guises of the open method of coordination is seen to be on the rise with still unclear implications for effectiveness and legitimacy.[42]

Understanding the meandering logic of this brave new world of legal pluralism is hardly possible without a deep level comparison of national and supranational governance structures and practices.[43] The legacies of national administrations are tenacious, but so are the often less visible arrangements of

---

39 On the German Constitutional Court's "Lissabon" decision *see* Franz C. Mayer, *Rashomon in Karlsruhe - A reflection on Democracy and Identity in the European Union*, Jean Monnet Working Paper 05/10.

40 On the concept of multi-level governance *see* Fritz Scharpf, Regieren im europäischen Mehrebenensystem—Ansätze zu eine Theorie, *Leviathan* 2002, 65; Scharpf, *Notes toward a Theory of Multi-Level Governing in Europe*, MPIfG Discussion Paper 00/5. For legal treatment *see* Nick Bernard, *Multilevel Governance in the European Union*, The Hague: Kluwer 2002.

41 Scharpf (2000), 11 ff.

42 Sharpf (2000), 22 ff.

43 Buxbaum speaks of a coordinating function of legal comparison in the European context. *See* Richard Buxbaum, *Die Rechtsvergleichung zwischen nationalem Staat und internationaler Wirtschaft*, 60 RabelsZ 1996, 201–230.

private and public-private governance at national, supranational and transnational level. As suggested by Dehousse the real challenge is keeping the units of anlaysis (national and supranational) separate despite their interdependence [44] Nevertheless, engaging in the interaction between interdependent and structurally different units and integrating them in one single analysis seems imperative for the improved understanding of the Union.

### *4.4 The European Union in a Globalized World*

Yet another factor that enhances the need for comparative law research is the constantly increasing interaction of the European Union with other international, supranational and federal systems for legal, political and economic integration. Obviously the opening of markets, new information and communication technologies and global risks challenge the nation state and require new forms of governance for the production and management of global public goods.[45] The European Union can in this context be seen as one among various model of supranational governance, which at least until the recent Eurocrises, was considered as fairly successful. This creates keen interest in comparing the European Union with similar institutional arrangements. Comparative analysis between (grossly) functionally equivalent supranational and international organizations emerges as one fruitful field of comparative research connected to European law. It can be noted that one of the most incisive analysts of the European integration project, Joseph Weiler has set up a whole field of research within the Jean Monnet Center for International and Regional Law and Justice at New York University where the foundations, institutional design, and constitutionalisation of existing arrangements for governing the international economy are subject to critical comparison and scrutiny.

In fact under this heading one should also refer legal comparisons between the European Community and the US American federal system, which have been enjoying wide popularity already from the outset of the European project.[46] Such comparisons are also today a source of valuable insights.[47]

Nowadays, the European Union with its institutional design and guiding principles serves in its turn as inspiration for other regional integration organizations. Armin von Bogdandy emphasizes as particularly worthy

---

44 Dehousse (1994), 771 ff.

45 *See* Ladeur (2004).

46 *See* Cappelletti, Seccombe and Weiler, *Integration through Law. Europe and the American Federal Experience*, 1980.

47 *See* for instance the influential analysis by Maduro of the case law of the European Court of Justice on free movement of goods building heavily on comparison with the due process clause in the US Constitution and the ebbs and tides of its use by the American Supreme Court for defining the scope of states' regulative powers. Miguel Maduro Poiares, *We, The Court. The European Court of Justice and the European Economic Constitution*, Oxford: Hart Publishing, 1998.

studying the rich experience of the EU in infusing democratic legitimacy in the project of economic integration by tools of transparency, participation, accountability.[48] The use of EU as a model for the Andean Community, and in particular the attempt to transplant the procedural and institutional design of the European Court of Justice with its preliminary reference procedures, is discussed in an intriguing analysis by Karen Alter and Larry Helfer, demonstrating the potential and limits of legal reception between supranational systems.[49] Another cluster of comparative research in this group tackles the similarities and distinctions between the EU and the WTO as organizations for international economic governance. Common vectors for comparison are the problem-solving capacity, the legitimacy and the degree of constitutionalisation of such systems of governance.[50]

On a regional and European plane, the institutions and practice of the European Union and the Council of Europe in the area of human rights protection, or between the EU and the European Patent Organisation, as organizations involved with the governance of innovation provide present other potentially interesting fields for comparative exploration.[51]

## 5 New Research Questions and Methodological Challenges

To be sure, the above briefly sketched social, economic and political factors that generate a need for comparative law research, raise often new research questions and require new creative methodologies and theoretical approaches. Beyond the classical tasks of comparative law, namely ascertaining similarities and differences between legal systems and evaluating different legal solutions, new objectives emerge relating chiefly to ascertaining and explaining the mutual relation between the units of comparison. In the context of Europeanisation a particular intriguing query is whether comparative research

48 Armin von Bogdandy, *Democratic Legitimacy of Public Authority Beyond the State – Lessons from the EU for International Organizations, Paper presented at the Jean Monnet Center seminar "The EU Model of Postnational Democracy - Failure or Lessons for the World?"*, April 27, 2011, on file with the author. See, however, for a more skeptical view *see* Franz C. Mayer, Rashomon in Karlsruhe - *A reflection on Democracy and Identity in the European Union*, Jean Monnet Working Paper 05/10.

49 *See* Laurence Helfer and Karen Alter, *The Andean Tribunal of Justice and its Interlocutors: Understanding Preliminary Reference Patterns in the Andean Community*, 41 *N.Y.U.* Journal of International Law and Politics 2009.

50 *See* Michael Zürn and Christian Joerges (eds), *Law and Governance in Post National Europe*, Cambridge University Press, 2005, where compliance with regulations at the regional (EU), national (Germany) and international (WTO) level is compared, reaching the provocative conclusion that compliance was highest at the regional EU level.

51 *See* for instance Antonina Bakardjieva Engelbrekt, *Dilemmas of Governance in a Multi-level European Patent System*, in Hans Henrik Lidgard (ed.) National Developments at the Intersection Between IPR and Competition Law, Swedish Studies in European Law, 2011, 37–63.

can document trends toward convergence or divergence between the European and national (or international/supranational) legal system, or between two and more national systems within the common European edifice. This question can be seen as a descriptive and empirical one. On the other hand, it is tempting through comparative research to address the more difficult normative question of the right balance between unity and diversity within the European project.

These new research questions and novel domains of comparative studies broadly related to European law, raise serious methodological challenges. Some of these challenges have been insightfully analyzed by Renaud Dehousse in his 1994 article on the problem of the level of analysis when comparing national and EC law.[52] Although the focus of the article is on cross-level comparison (i.e. between EC/EU law and the law of a Member State), it successfully captures some of the more general intricacies of comparative methodology in the context of European integration. In particular, the interdependence between the system (EU) and its component parts makes it difficult to apply classical methods of comparative law, which are shaped for the comparison of discrete and independent municipal law systems.

On a more general level the main problem may indeed be the already mentioned bias of classical comparative law toward the so called "methodological nationalism". Methodological nationalism is characterized by the "assumption that the nation state or national society is the natural social and political form of the modern world".[53] This would imply that the comparative approach is static. State legal systems are in such an understanding perceived as discrete, given and resistant to change. The overemphasis and probably natural fixation with the nation state have prompted criticism that conventional comparative law research remains fairly irrelevant for describing, explaining and providing new insights in the complex interdependencies characterizing multi-level pluralistic systems of governance. The accusation is that the discipline, so applied, fails to capture the dynamics of mutual interaction and influence, of resistance and surrender to change and the involvement of private and public-private structures in the governance process.[54]

There seems therefore to be a pressing need for innovatory comparative research and creative comparative methodology that can meet the exigencies of a changing world. Some elements for such methodology have been suggested by David Gerber, beyond the narrow context of European law. According to Gerber the interest of comparative law scholars should be directed at system dynamics,[55] i.e. at the deeper levels of operation of the legal system, and at identifying the main factors for legal change. As Gerber has suggested, to understand system dynamics we should shift the attention from norms

---

52 Dehousse (1994).

53 Beck (2006).

54 Joerges (2004).

55 David Gerber, *System Dynamics: Towards a Language of Comparative Law?*, The American Journal of Comparative Law, 719-738.

(substantive law) to decision-making processes. The latter according to him comprise the following tentative elements:

- Legal texts (authoritative texts: statutes, administrative regulations, judicial decisions, etc);

- Institutions (structures of power, decision-making procedures);

- Communities (epistemic communities of lawyers, regularized patterns of relationships among actors that affect legal decision-making, in particular between judges, practicing lawyers, legal scholars etc);

- Modes of legal thought (ideas).

This programmatic approach seems particularly apt for comparative studies in the context of the European multi-level system of governance. It is precisely by broadening the enquiry from legal texts to encompass institutional structures, decision-making processes and actors involvement that the interdependence problem between the different units of comparison can be successfully approached.

Needless to say, such broadening of the enquiry calls for richer set of theoretical and methodological approaches. Whereas legal texts can be analyzed with conventional methods of legal dogmatics and classical comparative law, analyses of legal institutions, communities and modes of thought seem to require closer interaction with other social sciences.

In my own research, I have been applying a more explicitly interdisciplinary approach to the comparative study of Europeanisation. [56] It builds on a combination of two different strands in new institutional economics, namely comparative institutional choice as developed by Neil Komesar[57] and historical institutionalism as advanced by Nobel prize winning economic historian Douglass North. [58] Comparative institutional analysis requires a careful comparison between alternative decision-making processes (institutions) – the market, the political process and the courts – for solving specific societal problems. As a main factor for comparative evaluation one should, in this view, consider the costs and benefits for participation of affected actors in the respective decision-making process. Historical institutionalism, in turn, highlights institutions' propensity to persist over time. Institutional paths may be followed not because they are efficient but because their change is costly. It requires the careful process-tracing and evolution of institutional legacies to unearth unproductive lock-ins and path dependences.

---

56 *See Toward an institutional approach in comparative economic law?*, 2009, at 238 ff.

57 Neil Komesar, *Imperfect Alternatives, Choosing Institutions in Law, Economics and Public Policy*, Chicago: The University of Chicago Press, 1994.

58 Douglass North, *Institutions, Institutional Change and Economic Performance*, Cambridge: Cambridge University Press, 1990.

This approach allows in my view for a more productive conceptualisation of the complex relationship between national law and supranational and international law and institutions. By combining a participation-centered with a historical institutional perspective it provides a framework for analyzing the dual forces of continuity and change associated with Europeanisation and globalisation and their influence on national institutional frameworks. With its emphasis on actors, decision-making processes, but also deeper-level legacies, it arguably is responsive to Gerber's call for studying "system dynamic".

Certainly, there is a variety of possible methodological and theoretical perspectives that can be productively used or accommodated in the comparative study of European law. An interesting approach for interdisciplinary comparative research on Europeanisation offers the "variety of capitalisms" school of Hall and Soskice, still in the institutionalist tradition. [59] By studying comparatively the political economy of market institutions scholars in this theoretical string identify different welfarist traditions in the European Union and can shed new light on the debate on Social Europe and on the difficulties to find a common ground.

Irrespective of the choice of supporting theory what is important is not to lose out of sight the focus on system dynamics. Research design should be carefully elaborated to allow the study of substantive rules in their relation with enforcement modalities and to overcome the "private/public" dichotomy. Importantly, a constitutional perspective seems indispensable for any comparative research of Europeanisation. It would imply comparing the ways in which national, supranational and international levels are interlocked and what checks and balances are introduced to ensure democratic legitimacy and accountability in the different levels of governance.

Summing up, I believe that the analysis of Europeanisation can vastly benefit from a cross-country comparative research design bringing the supranational system and two or more component legal system into a common (e.g. triangular) analytical frame. If confined to a single legal system, institutional and legal analysis may give results highly specific to this jurisdiction and not yield to generalisation. At any rate, a comparative approach is better suited to generate findings of broader validity. It also brings the research design closer to the dynamic reality of European integration where Community legal rules and principles are forged against a background of divergent national legal and institutional approaches and then transmitted back for implementation and enforcement in the same national environment. Arguably, only such comparative analysis of legal change under European influence allows us to test contradictory claims of convergence and divergence of legal systems, of harmonisation or of disintegrative influences of European law on national law. Combining forces of legal scholars from different jurisdictions may of course be advisable to improve the quality and the feasibility of large-scale comparative enquiries.

---

59 Peter Hall and David W. Soskice (eds), *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage*, Oxford: Oxford University Press, 2011.

So in conclusion, returning to the question in the title of this chapter, I hope the analysis has demonstrated that there are no sign of an end to the comparative era in European Law. It would also be exaggerated to speak of a new beginning. Comparative law has from the very start been indispensable for gaining deeper understanding about European law and the European institutional and constitutional architecture. This intimate link between the two disciplines will, in my view not be weakened, but to the contrary, strengthened with deepening and widening of European integration. The growing complexity of the European construct and the closer interweaving between levels and forms of governance only call for further engagement in comparative enquiries. What is certain is that it is time to face the methodological challenges of comparative law in the context of Europeanisation and globalization, and of multi-level governance systems with careful thought on research design and greater openness to interdisciplinary cooperation.