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Pleading for European Comparative Administrative Law

What is the Place for Comparative Law in Europe?

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Abstract

This article pleads for reinforced communication and exchange between European and national courts, both in a vertical way, from the national to the European courts, and in a horizontal one, among national courts from different Member States. Building an integrated legal order needs a lot of communication and exchange between the constituent parts, quite more than is presently seen in the European Union. Courts at all levels will greatly benefit from knowing the case law from different jurisdictions which in the end are charged with the application of the same European rules. The barriers due to the specific legal traditions now separating different legal orders could be lowered thanks to a better mutual knowledge and understanding, making a shared European legal culture possible.

1 What is the Place for Comparative Law in Europe?

The debate has been quite intense in the past years on the question of whether or not national legal systems are converging under the pressure of European law. In general terms, the question is probably begging different answers positioning themselves along the blurred line between a half full and half empty glass. Serious research will probably produce nuanced results, with more or less, a lot or very little convergence according to different issues, but then again the data from each sector will be liable to different readings, as has been the case concerning judicial review.[1]

A different question has been underlying the debate, this one focusing on the role, if any, for comparative law in Europe. To put it simply, the argument is that, provided that legal systems are converging, the same possibility of using comparative law will evaporate. This paper endeavours to show that comparative law's role is now more important than ever as a direct result of the convergence process. While this process is very complex, it has the potential to last forever, as perfect convergence always eludes its pursuers.

[1] Research here has been massive, and positions varied: for a selection C. Kilpatrick, T. Novitz and P. Skidmore (eds.) *The Future of Remedies in Europe* (Oxford, Hart, 2000); more recently and for complete references see M. Eliantonio *Europeanisation of Administrative Justice?* (Groningen, Europa Law Publishing, 2008).

Centrifugal forces never sleep, and even legal systems feigning unification have to develop institutions to keep the law in line, such as the *stare decisis* doctrine for the common law systems and the *Cour de cassation* for those countries under French influence.[2]

In the European legal order, which is neither unified nor, even strictly speaking, federal, centripetal and centrifugal forces fight an incessant war.[3] Comparative law, by helping to better know the differences, is invaluable not just in measuring the positions on the ground, but in discerning and understanding the points of attrition and in finding ways to smooth them as much as possible or desirable. Keep in mind that the desired end is not uniformity, as a degree of differentiation is not only unavoidable but helpful: '*L'harmonisation ne veut pas dire l'unification. Elle admet les differences et les ordonne*'.[4] It is, however, necessary to limit the differences in order to prevent them from interrupting the harmonious workings of the integration process. The formula of '*pluralisme administratif eurocompatible*' provides room for both plurality and unity.[5]

2 Reinforcing the Flow of Information

A prerequisite of comparison is knowledge of something else. To make any comparison, one needs to know at least two things. Any discourse about convergence involves comparing rules and principles

[2] When comparing England and France R. Cross and J.W. Harris *Precedent in English Law* 4th (Oxford, Clarendon, 1991) 14, came to the conclusion that, 'Notwithstanding the great theoretical differences between the English and French approaches to case-law, and the total absence of rules of precedent in France, the two system have more in common that might be supposed'; the first fact to support the conclusion was that 'French judges and writers pay the greatest respect to past decisions of the *Cour de Cassation*'.

[3] It is therefore necessary 'to stay clear, on the one hand, of the naïve assumption that European integration is a process of real convergence without concomitant divergence, and, on the other, of the pessimistic assumption that there is a process of divergence without hope of real convergence' S. Prechal and B. van Roermund 'Binding Unity in EU Legal Order: An Introduction' in S. Prechal and B. van Roermund (eds.) *The Coherence of EU Law. The Search for Unity in Divergent Concepts* (Oxford, Oxford University Press, 2008) 8; see also the contributions in P. Beaumont, C. Lyons and N. Walker (eds.) *Convergence and Divergence in European Public Law* (Oxford, Hart, 2002).

[4] M. Delmas-Marty *Pour un droit commun* (Paris, Seuil, 1994) 240; the book was translated into English under the title *Towards a Truly Common Law: Europe as a Laboratory for Legal Pluralism* (Cambridge, Cambridge University Press, 2002).

[5] See M.P. Chiti 'Les droits administratifs nationaux entre harmonisation et pluralisme eurocompatible' in J-B. Auby and J. Dutheil de la Rochère (dir.) *Droit Administratif Européen* (Bruxelles, Bruylant, 2007) 669 f.

from different legal orders, to see whether distances are being reduced or increased. At the same time, even if convergence through parallel developments cannot be ruled out, convergence is normally the result of imitation, of knowingly adopting foreign rules which seems to be preferable to the ones that are in place. These platitudes deserve mentioning because after the age of codification most lawyers knew only one thing, their own legal order – their national legislation, case law, and scholarly works. Legal systems were very introverted.

These days, knowledge of domestic rules is patently not enough. Knowledge of European law is a necessity. This means we need (as we indeed have) robust information flows from Europe to the different Member States. Most EU legislation and – to a lesser extent – case law are available in all the official languages. The same applies to the websites of European institutions. These days, legal journals in the Member States publish and discuss the same materials. Other editorial products supplement the knowledge of domestic legal practitioners.

This is not sufficient to create an epistemic (legal) community or, to use a more venerable expression, a *jus commune*.[6] One feature is striking – the scholarly world of European law is still, to a fair extent, compartmentalised along linguistic (if not national) lines.[7] Being written in English, and to a lesser extent, in French, a number of legal journals, either general or specialised, attract contributions from many different Member States and have a correspondingly wide circulation.[8] These are the only true European instruments of discussion and information besides the official documents and websites. All the remaining publications concerning European law have contributors and readerships very much limited along linguistic lines. As such, their impact cannot be but limited.[9]

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6 The *jus commune* is quite often recalled: e.g. W. Van Gerven 'Bridging the Gap between Community and National Laws: Towards a Principle of Homogeneity in the Field of Legal Remedies?' in *Common Market L. Rev.* 1995, 679; R. Caranta 'Judicial Protection against Member States: A New Jus Commune Takes Shape' in *Comm. Market Rev.* 1995, 703.

7 Its worth remembering that the pioneering study in this area, J. Schwarze *European Administrative Law* 2nd (London, Sweet & Maxwell, 2006), was originally published in German and later also translated in French.

8 B. Markesinis *Comparative Law in the Courtroom and in the Classroom* (Oxford, Hart, 2003) 76 f, stresses the inevitable dominance of English, the *lingua franca* of business and finance and law.

9 This is the problem facing for instance the *Rivista italiana di diritto pubblico comunitario*, having been published in Italy for above 20 years but failing to attract much international readership; the problem is shared by otherwise excellent works such as M. Chiti – G. Greco (eds.) *Trattato di diritto amministrativo europeo* 2nd ed. (Milano, Giuffré, 2007), and G. Della Cananea (ed.) *Diritto amministrativo europeo* (Milano, Giuffré, 2006). A different fate may befall to books such as J-B. Auby and J. Dutheil de la Rochère (dir.) *Droit Administratif*

Basil Markesinis has cautioned that even when using the same language conceptual misunderstandings are possible.[10] Things may only be worse when different languages are used. As Lord Denning famously put it, 'Words are the lawyer's tools of trade'.[11] He suggested 'would-be' lawyers to become acquainted with the masters of language (in his case, English).[12] The problem is, European institutions have a fair number of working languages and European law has an even vaster number of official languages. The consequence is that European law is very much nationalised once it enters the legal order of Member States, not only in the very obvious sense that some instruments – such as the directives – need implementation into national law (and that the despicable practice of cut and paste implementation, widespread in many Member States, leads to insufficient attention being paid to often divergent conceptual apparatus and consequent problems in understanding and applying rules having their origin in Europe). What is relevant here is another aspect of nationalisation. Much of the analysis and debate on the meaning and application of European rules becomes introverted in the different linguistic areas and more often so in the separate national legal systems. So, for instance, Italian practitioners read books and articles written by other Italians, possibly, but not necessarily, scholars, which in turn write mainly in Italian and rarely read anything written in a language different from Dante's.

To a certain extent, this is inevitable. The implementation of the same European rules is often going to raise different questions in different legal contexts. The first concern of every lawyer is how to apply the new rules in practice. It is therefore inevitable to find that the same directive or judgment may be approached very differently from country to country. This, specifically, accentuates the perception that the national legal orders are still quite distant. However, European legal traditions are not galaxies apart. A question relevant in Italy may very well be relevant in France; one country could have already attempted an answer while the other one is still searching for one. It would make sense to learn from fellow Member States. The quality in the analysis and discussion of European rules would benefit from a much more intense cross-border dialogue.[13] Attention to other jurisdictions' take on Community law issues will not just be helpful, it will in time lead to the

Européen above fn 5; apart that French is more widely read than Italian, involving contributors from many Member States helps the dissemination of the book.

[10] B. Markesinis *Comparative Law in the Courtroom and in the Classroom* above fn 8 174.

[11] Lord Denning *The Discipline of Law* (London, Butterworths, 1979) 5.

[12] *Ibid.* 6 f.

[13] This is not a new idea: see the 'Prologue' to A-M. Slaughter, A. Stone Sweet and J.H.H. Weiler (eds.) *The European Courts and National Courts* (Oxford, Hart, 1998) xii f: 'Judicial dialogue can also be horizontal – among national courts of different countries'.

creation of true legal comity, where shared problems are dealt with through common interpretative tools, language(s) necessarily included.[14]

Reinforcement of a second information flow is also necessary. The doctrine of *primauté*, binding effect of Community law, strongly conveys the message of a one-way influence, from Europe to the Member States. A reading of the relationship between European and national courts that is confined to a top-down approach must be subject to a number of important qualifications. First of all, the history points to an exchange process primarily going from the national courts to the European ones. It is well known that Art. 33 ECSC Treaty, which lays down the grounds for legality review of decisions taken by Community institutions according to a formula which still resounds in Art. 230 EC Treaty, was drafted along the classical French *cas d'ouverture* of the *recours en annulation pour excès de pouvoir*,[15] including the famous *détournement de pouvoir*.[16] French case law was to deeply influence the reading of the provision mentioned. The influence of national administrative law did not stop at the wording of the Treaties. When called upon to apply the provisions referred to above, the Community courts have had to develop fairly generic concepts such as the violation of any rule of law or abuse of power. Here again the case law has looked into national laws for inspiration. French administrative law has, again, been widely followed. French, being the language used for deliberations, has certainly helped in reading the grounds for annulment along French lines. When counsels discuss issues of manifest error of assessment, they are framing their reasoning in the mould cast created when the *Conseil d'Etat* started reviewing *erreur manifeste d'appréciation*. German administrative law, with its sheer intellectual might, has proved to be a vital source of general principles in framing judicial review, such as proportionality and legitimate expectations. The list of principles relevant for the ground of violation of any rule of law is, however, very long, and some of them pertain to the protection of fundamental rights,[17] again a core concern in German administrative law.[18]

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[14] See R. Caranta 'Learning from our Neighbours: Public Law Homogenization from Bottom Up' *Maastricht Journ. of Eur. Comp. L.* 1997, 220.

[15] Unsurprisingly the derivation is clearer in the French, where we don't just find *détournement de pouvoir* but also the *violation des formes substantielles*.

[16] Both *recours en annulation* and *détournement de pouvoir* are indeed the terms used in the French version of the ECSC Treaty.

[17] Indeed, 'respect for fundamental rights is [...] a condition of the lawfulness of Community acts': Opinion 2/94 [1996] ECR I-1759, para 34; see also the conclusions by Advocate General Jacobs for Case C-84/95 *Bosphorus* [1996] ECR I-3953, para 53, and more recently Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat Int. Foundation* [2008] ECR I-6351, para 284.

[18] See J. Schwarze 'Les sources et principes du droit administratif européen' J-B. Auby and J. Dutheil de la Rochère (dir.) *Droit Administratif Européen* above fn 5, 322 ff.

More generally, the members of the European courts, judges, advocates generals, and also the people working in their cabinets, bring to Luxemburg their own intellectual backgrounds, first and foremost, backgrounds shaped in their respective national legal orders. This alone implies the potential for influence from domestic legal ideas. In the end, 'the process by which Community law and national law influence each other is not solely a one-way affair'.[19] This *de facto* cross-fertilisation process would deserve to become more open and structured, with European courts more often expressly referring to and discussing national law. The position could also be advocated that European courts could not be insensible to the national precedents. [20]

3 Precedents From Other Jurisdictions

The common law world traditionally gives us an excellent instance of a judicial – and more generally – legal comity. Common law courts are not bound by judgments of foreign courts, nor are they bound by decisions taken by courts having their same rank. However, the judgments of other courts may have persuasive influence, which may be very strong. In an often quoted speech, Brett MR famously holds that 'There is no statute or common law rule by which one court is bound to abide by the decision of another of equal rank, it does so simply from what may be called comity among judges'.[21]

The position was in part due to the fact that most common law countries belonged to the same institutional framework, be it the British empire of the past or its successor the Commonwealth, and the Privy Council acted as a bridge between the case law of England and that of other jurisdictions,[22] not least because of the almost coincident composition of the Judicial Committee of the Privy Council and the Appellate Committee of the House of Lords.[23]

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[19] J.H. Jans, R. de Lange, S. Prechal and R.J.G.M. Widdershoven *Europeanisation of Public Law* (Groningen, Europa Law Publishing, 2007) 5.

[20] I have much benefited here from the paper by H.J. van Harten 'National judicial autonomy' that is included in this book and was presented at the First REALaw Research Forum.

[21] *The Vera Cruz (No 2)* (1884) 9 Probate 97, at 98; the quotation is quite popular (e.g. R. Cross and J.W. Harris *Precedent in English Law*, above fn 2, 87, even if the year is, as often, wrongly indicated as 1880).

[22] The distinction between binding and persuasive precedents was quite complex, depending from a number of considerations: see R. Cross and J.W. Harris *Precedent in English Law*, above fn 2, 22 ff, and in the case law *de Lasala* v. *de Lasala* (1980) AC 546, at 577 ff (Lord Diplock).

[23] See *de Lasala* v. *de Lasala* (1980) AC 546, at 558: 'since the Judicial Committee of the Privy Council [...] shares with the Appellate Committee of the House of Lords a common

The peculiar common law notion of 'binding' precedent – or *stare rationibus decidenis* (shortly *stare decisis*) – is possibly at the root of the polemics against the reference to foreign material by the US Supreme court.[24] Even those arguing against such reference are, however, normally ready to concede that borrowing good ideas from abroad is perfectly fine.[25]

Once the United Kingdom entered the (then) EEC, English courts turned their attention to what happened on this side of the Channel. A very early case was *Schorsh Meier*, where the Court of appeal unanimously departed from an established case law holding that judgments could be given in Pound Sterling only.[26] Lord Denning, with whom Foster J concurred, based his ruling on the finding that the rule binding courts to give judgment in the national currency was not just inconsistent with the EEC Treaty, but was at odds with the practice in other European jurisdictions, Germany among them.[27]

These days the interest displayed by English highest courts for Continental legal materials is not limited to European law questions, even if European law has been the single most powerful factor in the renewed English interest for the law(s) across the Channel.[28] A very relevant case in this context is

membership', 'This Board is unlikely to diverge from a decision which its members have reached in their alternative capacity' (Lord Diplock).

[24] In 2005, two Supreme Court justices, conservative Antonin Scalia and liberal Stephen Breyer, held an informal debate on the issue of referring to foreign precedents at the American University in Washington: see http://www.freerepublic.com/focus/news/1352357/posts, and the issue regularly resurfaces on the occasion of the appointment of new Supreme court members, including the latest, Sonia Sotomayer http://judiciary.senate.gov/resources/webcasts/index.cfm?t=m&d=07-2009&p=nominations ; considering that the notion of 'binding' precedent is however weaker in the USA than in England (see R. Cross and J.W. Harris *Precedent in English Law*, above fn 2, 19 ff, who remarks that the US Supreme Court, as a constitutional court, is necessarily more open to depart from its precedents), the attitude discussed here is also possibly attributable to uneducated nationalist chauvinism.

[25] See e.g. J. Yoo 'Peeking Abroad?: The Supreme Court's Use of Foreign Precedents in Constitutional Cases' in University of Hawaii Law Review, 2004, available at http://ssrn.com/abstract=615962 .

[26] *Schorsh Meier G.m.b.H.* v. *Hennin* [1975] QB 416; in *Miliangos* v. *George Frank (Textiles) Ltd* [1976] AC 443, the House of Lords held that the Court of appeal in *Schorsh Meier* had been wrong in departing from the precedents, but agreed that those precedents were obsolete and overturned them.

[27] *Schorsh Meier G.m.b.H.* v. *Hennin* [1975] QB 416, at 424 (Lord Denning MR); Lawton LJ felt himself bound to follow the precedents even if he characterised as chauvinistic the approach of the old case law favouring Pound Sterling as if it were the best currency around (at 430); see the analysis by M. Zander *The Law-Making Process* 6th (Cambridge, Cambridge University Press, 2004) 226 ff.

[28] See B. Markesinis *Comparative law in the Courtroom and Classroom* above fn 8, 37.

the House of Lords judgment in *Fairchild*.[29] This case involved a number of employees who had worked for more than one employer over an extended period of time. In each workplace, employees were negligently exposed to asbestos dust, albeit over different timeframes. The employees eventually developed a fatal form of lung cancer extremely rare devoid of exposure to asbestos dust. However, it could not be said with any degree of certainty whether or not one particular exposure, and therefore any one particular employer, caused the employees' injuries. The traditional causation test in the common law of negligence involved assessing whether, on any given set of facts, it could be said that the loss suffered by a plaintiff would not have occurred "but for" the negligent act or omission of a defendant. In cases with multiple defendants, the almost insurmountable burden of proving which particular party or parties caused the harm was placed on the shoulders of the plaintiff. The House of Lords held that in this case, the traditional "but for" causation test was inappropriate since each employer likely made a substantial contribution towards increasing the employees' risk of contracting the disease. The court felt the need to rely on comparative law. As Lord Bingham put it under the significant caption "the wider jurisprudence", 'The problem of attributing legal responsibility where a victim has suffered a legal wrong but cannot show which of several possible candidates (all in breach of duty) is the culprit who has caused him harm is one that has vexed jurists in many parts of the world for many years [...]. It is indeed a universal problem calling for some consideration by the House, however superficially, of the response to it in other jurisdictions'.[30] Departing from the precedents was therefore justified with references from Scotland,[31] as well as other common law jurisdictions, including the US, Canada, and Australia,[32] from ancient Roman law,[33] and finally from civil law, the work of eminent scholars versed in comparative law being referred to as a source of information on the case law.[34]

Another instance worth remembering stems from a series of wrongly diagnosed child abuse cases. Parents having lost custody of their children for a time and claiming to have suffered psychiatric disorders as a consequence sued the National Health Service. English case law was against

[29] *Fairchild* v. *Glenhaven Funeral Services Ltd* [2003] 1 AC 32 HL.

[30] At 23.

[31] *Bonnington Castings Ltd* v. *Wardlaw* [1956] AC 613.

[32] At 621 ff, per Lord Bingham, at 69 per Lord Nicholls, and at 115 ff per Lord Rodger.

[33] At 113 f, per Lord Rodger.

[34] At 58 ff per Lord Nicholls, and at 117 f per Lord Rodger; Ch. von Bar *The Common European Law of Torts* (Oxford, Oxford University Press, 2000); W. van Gerven, J. Lever and P. Larouche *Cases, Materials and Text on National, Supranational and International Tort Law* (Oxford, Hart, 2000), and B.S. Markesinis and H. Unberath *The German Law of Torts* 4th (Oxford, Hart, 2002), are referred to more than once.

recognising a duty of care of doctors towards the parents' and the action was accordingly dismissed in the lower court and in the Court of appeal.[35] While the majority of the Law Lords were ready to affirm the decision, Lord Bingham dissented. His Lordship recalled at length the case law by the Strasbourg court going against the restrictive English approach to duty of care.[36] He also considered cases from other common law jurisdictions,[37] including New Zealand,[38] the US,[39] and Australia.[40] And he drew arguments from civil law jurisdictions, holding:

> 'It would seem clear that the appellants' claim would not be summarily dismissed in France, where recovery depends on showing gross fault: see Markesinis, Auby, Coester-Waltjen and Deakin, *Tortious Liability of Statutory Bodies* (1999), pp 15-20; Fairgrieve, "Child Welfare and State Liability in France", in *Child Abuse Tort Claims against Public Bodies: A Comparative Law View,* ed Fairgrieve and Green (2004), pp 179-197, Fairgrieve, "Beyond Illegality: Liability for Fault in English and French Law", in *State Liability in Tort* (2003), chap 4. Nor would they be summarily dismissed in Germany where, it is said, some of the policy considerations which influenced the House in *X* v. *Bedfordshire* were considered by those who framed §839 of the BGB and were rejected many years ago: see Markesinis *et al., op. cit.,* 58-71; Martina Künnecke, "National Report on Germany", in Fairgrieve and Green, *op. cit.,* pp 199-207. Yet in neither of those countries have the courts been flooded with claims.'[41]

What is useful outside the province of European law obviously becomes necessary when dealing with issues which are ruled by the Treaty and the implementing instruments. The knowledge of the case law of other Member States is a necessary component of the building of an integrated – even if to some extent plural – legal system. This does not mean that precedents from other jurisdictions should be considered authoritative. The idea of 'binding' precedents is totally inappropriate in the context where non-hierarchical links are established, such as is the case with cross-border references by domestic courts. If the ideal of a comity embracing all European lawyers were taken seriously, judgments deciding Community law issues would

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35 *D* v. *East Berkshire Community Health NHS Trust* [2003] 4 All ER (CA) 796.

36 *D* v. *East Berkshire Community Health NHS Trust* [2005] 2 All ER (HL) at 452 ff.

37 At 463 f.

38 *Gartside* v. *Sheffield, Young & Ellis* [1983] NZLR 37.

39 *Tarasoff* v. *Regents of the University of California* 551 P 2d 334 (1976) (California), *Wilkinson* v. *Balsam* 885 F Supp 651 (1995) (Vermont), *Hungerford* v. *Jones,* above, (New Hampshire), *Sawyer* v. *Midelfort and Lausted* (Case No 97-1969, 29 June 1999, Supreme Court of Wisconsin), *Stanley* v. *McCarver* 430 Ariz Adv Rep 3, 92 P 3d 849 (2004) (Arizona).

40 *Sullivan* v. *Moody* (2001) 207 CLR 562.

41 At 466.

necessarily be seen by national courts all over Europe as a strongly persuasive source of inspiration, provided, of course, that they are known.

4 National Precedents in Community Courts

National precedents are rarely, if at any time, referred to in the judgments by the Community courts. This is the case even with liability actions, notwithstanding the fact that, under Art. 288 of the EC Treaty, the liability of Community institutions is to be ruled by the general principles common to the laws of the Member States, thus making non-contractual liability an ideal ground for comparison. The fact is that the Court of Justice 'looks for those principles which best fit the legal thinking and development of the Member as a group. These principles need not to be the law in all of the Members, or even in a majority of them'.[42]

This does not mean the European courts never benefit from comparative law research. Pierre Pescatore remarked that the references found in the judgments are just the tip of the iceberg when confronted with the huge comparative work done by the Advocate Generals (and to a lesser extent by the services of the Commission).[43]

The conclusions by Advocate General Tesauro in *Brasserie du pêcheur and Factortame III* are indeed an essay in the comparative law of governmental liability. English and French case laws are discussed in depth, as are the literatures from those countries and Germany.[44] The same is true of the more recent conclusions by Advocate General Poiares Maduro in *Kadi*.[45] The case centred on the possibility to review Community regulations giving effect to measures taken by the Sanctions Committee of the United Nations Security Council against a person suspected of supporting terrorism. The Court of first instance held that judicial review should be limited 'to the observance by the institutions of the rules of jurisdiction and the rules of external lawfulness and the essential procedural requirements which bind their action'.[46] The judgment was criticised by the Advocate General who, in

[42] H.G. Schermers 'The Law as It Stands on Appeal for Damages' *Legal Issues Eur. Integration* 1975, I, 113.

[43] P. Pescatore 'Le recours, dans la jurisprudence de la Cour de justice des Communautés Européennes, à des norme déduites de la comparaison des droits des Etats membres' *Rev. int. dr. comp.* 1980, 338.

[44] Joined Cases C-46/93 and C-46/93 *Brasserie du pêcheur and Factortame III* [1996] ECR I-1029.

[45] Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat Int. Foundation* [2008] ECR I-6351.

[46] Case T-315/01 *Kadi* [2005] ECR II-3649 (para 279); see also Case T-306/01 *Yusuf and Al Barakaat Int. Foundation* [2005] ECR II-3533; the cases were distinguished in T-228/02 *Organisation des Modjahedines du peuple d'Iran* [2006] ECR II-4665, para 101.

his ultimately successful effort to demonstrate that the principle of effective judicial protection could suffer no exception, referred not only to cases from many Member States (Germany, Czech Republic, Italy, and Hungary) and to decisions by the European Court of Human Rights, but also to speeches by justices with the US and Israeli Supreme courts.[47]

Reference to national case law by the Court of Justice itself has happened in cases of constitutional relevance. When judgments could have been seen as conflicting with national constitutional traditions, the Court not only strived to show that this was not the case, but also agreed to be bound by these traditions.[48] So, for instance, quite recently the Court reiterated that

> 'Fundamental rights form an integral part of the general principles of law the observance of which the Court ensures. For that purpose, it draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or to which they are signatories.'[49]

This formula has become sort of a mantra; its repetition does not mean that the Court of Justice is actually doing any comparative exercise. Reference to the national constitutional traditions by the Court of Justice itself seems to be quite a defensive exercise, aimed at defusing potential criticism in constitutionally sensible cases. Something similar happens with reference to the case law by the European Court of Human Rights, with the relevant difference that the decisions by the European Court of Human Rights are duly quoted by the Court of Justice.[50]

To bring about a true sense of European judicial and legal comity embracing courts at all levels, the Court of Justice and the Court of first instance should be seen more often referring to and discussing national law(s) as evidence of legal reasoning worth considering if not necessarily following. The possible objection that courts only quote their equals (which would find support in the fact that the Court of Justice is quite ready to refer to the decisions taken by European Court of Human Rights), cannot really be accepted. The relationships between national courts and European courts

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47 Paras 31 ff.

48 The most re-known instance concerned the Court of Justice and the German *Verfassungsgericht*: full references and discussion in J. Kokott 'Report on Germany' in A-M. Slaughter, A. Stone Sweet and J.H.H. Weiler (eds.) *The European Courts and National Courts* above fn 13, 81 ff.

49 Case C-349/07 *Sopropé – Organizações de Calçado Lda*, Judgment of 18/12/2008, nyr, para 33; the Court quotes here Case C-274/99 P *Connolly* v. *Commission* [2001] ECR I-1611, para. 37

50 E.g. Case C-465/07 *Meki Elgafaji*, Judgment of 17/02/2009, nyr, paras 27 ff.

cannot be fully subsumed under the hierarchical paradigm. National courts are European courts,[51] involved in dialogue, or conversation, with the Court of Justice.[52]

A more difficult question is whether, and to what extent, the European courts should be sensible to the potential existence of a *communis opinion* or convergence among the laws of the Member States.

Quite often the Court of Justice has rejected arguments raised by Member States referring to their national case law to buttress their reading of a Community law rule. A few such cases focus on the definition of procurement contracts and on the distinction between procurement contracts and concessions. In a recent case, a Sicilian contracting entity had qualified an agreement for the disposal of waste as a service concession, not covered as such by Directive 92/50/EEC then in force, and awarded it without following the procedures laid down in the same directive. The EC Commission refused the construction of the concept of service concession expounded by the Italian government. The operators' remuneration did not lie with their right to exploit the service by receiving revenue from users, whilst assuming all risks linked to that exploitation. Therefore, according to the Commission, the agreement was in fact a service procurement, fully regulated under the directive. The Court of Justice felt pressed to address the issue of the relevance of the national case law, but clearly ruled it out

> '30 The Italian Government having, on various occasions, stressed that it is clear from national case-law that agreements such as the agreements at issue must be classified as service concessions, it must be noted as a preliminary point that the definition of a public service contract is a matter of Community law, with the result that the classification of the agreements at issue under Italian law is irrelevant for the purpose of determining whether they fall within the scope of Directive 92/50.
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> 31 The question whether the agreements at issue should or should not be classed as service concessions must therefore be considered exclusively in the light of Community law.'[53]

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[51] E.g. R. Barents, *The Preliminary Procedure and the Rule of Law in the European Union*, e P.J.G. Kapteyn, *Europe's Expectations of Its Judges*, in R.H.M. Jansen, D.A.C. Koster and R.F.B. van Zutphen (eds.), *European Ambitions of the National Judiciary* (The Hague, Kluwer, 1997) 66 ff and 181 respectively.

[52] See, also with specific reference to the co-operative preliminary reference procedure under Art. 234 of the EC Treaty, the contributions in A-M. Slaughter, A. Stone Sweet and J.H.H. Weiler (eds.) *The European Courts and National Courts* above fn 13.

[53] Case C-382/05 *Commission* v. *Italy* [2007] ECR I-6657; in para 30 the Court refers to Case C-264/03 *Commission* v. *France* [2005] ECR I-8831, para 36, and Case C-220/05 *Commune de Roanne* [2007] ECR I-389, para 40.

The same line of reasoning had been at the core of a ruling for preliminary reference handed down only a few months earlier. The municipality of Roanne in France had concluded an agreement providing for the development of a leisure centre in successive phases. The first phase consisted of the construction of a multiplex cinema and commercial premises intended to be transferred to third parties and works intended to be transferred to the contracting authority (a car park as well as access roads and public spaces). The later phases, which require the signature of an addendum to the agreement, principally concerned the construction of other commercial or service premises and a hotel. Public procurement procedures were not followed, since according to the municipality of Roanne, fully supported by the French Government, the agreement at issue could not be construed as a works procurement contract under French law.[54] This stance was defeated by the Court of Justice, holding that

> 'the definition of a public works contract is a matter of Community law. Since Article 1(a) of the Directive makes no express reference to the law of the Member States for the purpose of determining its meaning and scope, the legal classification of the contract in French law is irrelevant for the purpose of determining whether the contract falls within the scope of the Directive.'[55]

This approach has sound reason. Harmonisation would be impossible to attain if concepts referred to in Community law provisions were read differently from country to country in homage to their respective legal traditions. But what if convergence was already present, national laws and case laws sharing the same reading of some concept? Acceptance of alien legal concepts is always problematic. It is not just a question of laziness, the unwillingness to make the effort required for understanding new things; many lawyers have grown appreciating the overall systematic coherence of their respective legal systems; alien concept may easily offend these quasi-aesthetic feelings. Diverging from an interpretation holding the ground all across Europe would not just maximise the problem, it would fly in the face

[54] See Case C-220/05 *Commune de Roanne* [2007] ECR I-389, para 31: 'In accordance with French law, public development agreements concern the overall implementation of all aspects of a town planning project or of certain town planning policies, in particular, the planning of the project, management of the legal and administrative aspects, the acquisition of land by way of expropriation and putting in place procedures for the award of contracts'.

[55] Para 40; Case C-264/03 *Commission* v. *France* [2005] ECR I-8831, para 36, is referred again; the precedent related to the definition of public service contracts; The Court of Justice held that since Art. 1(a) of Directive 92/50/EC 'makes no express reference to the law of the Member States for the purpose of determining its meaning and scope, there is no need to inquire as to how French law categorises such agreements'.

of the shared view entertained by all in the legal community, it would undermine the basis of the still fragile sense of comity.

This does not mean that under no circumstances could the European courts depart from the *communis opinio* of their national brethrens. The interpretation shared at national level might go against or just hinder the need of achieving integration which is arguably the stronger motivation of many of the interpretative choices made by the Court of Justice.[56] What is accepted is that these choices would more easily command the attention and the following of domestic courts if the contrasting rationale of national and European law on the issue were openly discussed.

5 Target Areas for Comparative Research in Administrative Law

Most of the European Union's competences have some bind on administrative law. As was earlier remarked, 'in most Member States, Community law has traditionally been enforced by means of administrative law. This is why its influence is felt particularly strongly in this field'.[57] Private law is more marginally affected; measures to foster the four freedoms at times invest contract law, as is the case with consumer protection. Somewhat paradoxically, a fair number of major projects have been launched in the field of European private comparative law.[58] Traditionally, comparative private law has been more developed than public comparative law and administrative comparative law has been the absolute laggard.[59]

[56] Starting with the judgment in *van Gend en Loos* holding that the European Communities constitute a new kind of legal order Case C-26/62 *Van Gend en Loos* [1963] ECR 1, para 3; T. Eijsbouts 'Direct Effect, the Test and the Terms. In Praise of a Capital Doctrine of EU Law' in J.M. Prinssen and A. Schrauwen (eds) *Direct Effect. Rethinking a Classic of EC Legal Doctrine* (Groningen, Europa Law Publishing, 2002), 242 f., recalls that already in *van Gend & Loos* the Court departed from the traditional approach to Treaties interpretation; that the needs of market integration have been the reason for the specific and peculiar development of Community antitrust law has been convincingly argued by G. Amato *Antitrust and the Bounds of Power* (Oxford, Hart, 1997) 45 ff, who doubts the present relevance of the needs in question.

[57] J.H. Jans, R. de Lange, S. Prechal and R.J.G.M. Widdershoven *Europeanisation of Public Law* above fn 19, 4; the point was already stressed by T. Koopmans 'The Birth of European Law at the Crossroads of Legal Traditions' in *Am. Journ. Comp. Law*, 1991, 494.

[58] See e.g. M. Bussani and U. Mattei (eds.) *The Common Core of European Private Law, Essays on the Project* (Alphen aan den Rijn, Kluwer, 2002).

[59] According to J. Rivero 'Vers un droit commun européen: nouvelles perspectives en droit administratif' in M. Cappelletti *New Perspectives for a Common Law in Europe – Nouvelles perspectives d'un droit commun en Europe* (Leyden et al., Sijthoff et al, 1978), 391, 'Il faut reconnoitre que le droit administrative a fait longtemps figure de parent pauvre dans le

The relatively more advanced developments we find in private comparative law may be due to a regrettably widely held prejudice that divergence between countries is more pronounced in public than in private law. It is often said that 'In public law the wider political setting has a deep and obvious impact on the legal problem before a court and in some respects this may accentuate the differences over the similarities that exist between different legal systems'.[60] The reality could not be more different from this picture. European countries share the same basic public law structure made of democracy, separation of powers, Rule of law, and respect for human rights. These elements are not only shared, they are held to be so relevant to the European identity, that they are required as a necessary condition for the accession of new Member States (they made up the first of the Copenhagen criteria).[61] Long before the European Union's *Drang nach Osten*, administrative law in the then Member States shared much in terms of problems and solutions (not to speak of the same ideological adherence to the Welfare State model).[62]

Now being part of the same public law organisation is by itself a powerful factor pushing for some convergence between the rules and procedures followed in giving effect to the same EU provisions.[63] The case law has qualified the principle of procedural autonomy of the Member States.[64] It is only applicable in the absence of harmonised rules and in any case national rules must comply with the principle of *effet utile*. Most of the more incisive judgments focus on judicial review; administrative procedures are still very much the province of national law, but the European case law is making inroads there too.[65]

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monde du droit comparé, et que les spécialistes du droit privé ont occupé, et occupant encore, le devant de la scène'.

[60] B. Markesinis *Comparative Law in the Courtroom and in the Classroom* above fn 8, 183.

[61] Ch. Hillion 'The Copenhagen criteria and their progeny' in Ch. Hillion (ed), *EU Enlargement: a legal approach* (Oxford, Hart, 2004).

[62] J. Rivero 'Vers un droit commun européen: nouvelles perspectives en droit administratif' above fn 58, 389 ff; the Author finds the main difference in legal techniques; of this later in the paper.

[63] J. Rivero 'Vers un droit commun européen: nouvelles perspectives en droit administratif' above fn 58, 406.

[64] The extent of the qualification being the matter for debate: see C. Kakouris 'Do the Member States possess judicial procedural "autonomy"?' *Common Market L. Rev.*, 1997, 1389; G.C. Rodriguez Iglesias – J-P. Keppenne 'L'incidence di droit communautaire sur le droit national' in *Mélanges en hommage à Michel Waelbroeck* vol. I (Bruxelles, Bruylant, 1999) 517 ; more recently M. Dougan *National remedies before the Court of Justice – Issues of harmonisation and differentiation* (Oxford, Hart, 2004), and M. Eliantonio *Europeanisation of Administrative Justice?* above fn 1.

[65] J.H. Jans, R. de Lange, S. Prechal and R.J.G.M. Widdershoven *Europeanisation of Public Law* above fn 19, 199 ff.; J.M. Davidson 'The Full effect of Community Law – An Increasing Encroachment upon National Law and Principles' [2008/2] *REALaw* 113.

In this perspective, ample scope for comparative research opens itself in administrative law. Just a few suggestions will suffice here. The first and most obvious instance is judicial review. The case law on the requirements of effective judicial protection of EU rights in front of national courts is quite robust and has been subject to massive, if not unanimous in the assessment of the legal situations, scholarly attention.[66] Here it is enough to recall that 'Within the limits of effective judicial protection, many national procedural law blooms can flourish'.[67] More research is still needed in regards to the extent of which judgments by the European Court of Justice have actually been given effect at national level.[68] Related to this is the issue of the general principles of administrative law, many of which are relevant for judicial review. Concerning both judicial protection and general principle, the scope for comparative analysis would not be limited to similarities and dissimilarities between the case laws of European and national courts on the one hand, and between different domestic approaches on the other. One interesting line of investigation would relate to a sort of 'internal comparative analysis'. For instance, it could be aimed at finding out if the proportionality or the precautionary principles are used consistently in the case law of European courts or whether the same principle is differently handed in direct actions depending on whether they are brought against the European or national institutions.[69] Similar researches inevitably lead to focus on the most central concepts of administrative law, foremost among them rights and other legal entitlements, and discretion. Precious work has already taken place on this.[70]

Organisation and procedure would also be relevant. Efficient institution and effective ways to implement European law devised in one Member State would normally command the attention if not the imitation of other countries (and from European institutions themselves) and may provide a model for measures of harmonisation. Just to give some instances, the European ombudsman has evolved from national patterns and in turn has the potential to influence their developments. The same is true concerning right of access to documents. The *MyTravel* litigation has now seen the opposing

[66] Above fn 1 and 63.

[67] J.H. Jans, R. de Lange, S. Prechal and R.J.G.M. Widdershoven *Europeanisation of Public Law* above fn 19, 369.

[68] This could ideally followed the template provided by M. Eliantonio *Europeanisation of Administrative Justice?* above fn 1; see also, with reference to the ECHR, S. Mirate *Giustizia amministrativa e Convenzione europea dei diritti dell'Uomo* (Naples, Jovene, 2007).

[69] The latter being in my opinion the case concerning the latter principle: R. Caranta 'The Precautionary Principle in Italian Law' in M. Paques (ed.) *Le principe de précaution en droit administratif. The Precautionary Principle and Administrative Law* (Bruxelles, Bruylant, 2007) 199, and 'Le principe de précaution dans la jurisprudence récente de la C.J.C.E.', in *Aménagement – Environnement* 2008, 181.

[70] Results may be read in S. Prechal and B. van Roermund (eds.) *The Coherence of EU Law. The Search for Unity in Divergent Concepts* above fn 19, 3.

armies deploying across the battle camp. Comparative research will be instrumental to the outcome of a struggle of evident constitutional value.[71] Finally, the problem of fraud investigations, including the guarantee of the rights of those involved, is relevant at both European and national level.[72]

Comparisons focusing on sector policies would also be relevant. Work has already started on some of them, such as competition (an ideal target given the fact that the institutions at both European and national level are involved in monitoring the compliance with Treaty rules),[73] and public procurements, where both substantive and procedural harmonisation measures have given rise to massive case law in both European and national *fora*.[74]

Different research, or different lines of the same research, should target both the law in the books and the law in action, covering all the shades from the most abstract concepts to the solutions given to specific cases. Or the other way around as it has been suggested: 'the study of a foreign legal system, especially through decisional law rather than through doctrinal writings, has the advantage of putting one initially at ease. For invariably in such studies one is starting the discovery journey by looking at litigated situations that are the same in most countries. Teaching and understanding law through cases also offers the inestimable advantage of making the student's experience of the world deepen as his study progresses in sophistication. Of course, the product of such research can, initially, be quite fragmented, resembling a painting of the pointilliste school that has to be admired by standing somewhat back and slowly taking in the whole. The contrast with the world of geometry, architecture, and consistency, which academics so like to construct, could not be greater. Yet the comparative juxtaposition of factually similar cases makes one feel at home. For the observer is comparing familiar situations and not confused by structures, terminology or

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[71] T-403/05 *MyTravel Group*, Judgment of 09/09/2008, nyr; see the appeal Case C-506/08 *Sweden*, pending.

[72] *La cooperazione fra Corte dei conti europea e Corte dei conti italiana. Esame comparato delle metodologie e dei procedimenti di controlli* (Rome, Corte dei conti, Seminario di formazione permanente, 2008), which is also available in French; O. Jansen and M. Langbroeck (eds.) *Defence Rights during Administrative Investigations* (Antwerpen – Oxford, Interscentia, 2007).

[73] O. Essens, A. Gerbrandy and S. Lavrijssen *National Courts and the Standard of Review in Competition Law and Economic Regulation* (Groningen, Europa Law Publishing, 2009).

[74] Jean-Bernard Auby is heading a major research group on comparative public contracts law http://www.public-contracts.net ; a big Comparative Law on Procurement Treatise is due this year. A group more focused on Community law has started the *European Public Contract Law Series* with the Danish publisher DIØF, the first volume being M. Comba and S. Treumer (eds.) *The In-House Providing in European Law* (forthcoming); see also the special issue of *Public Procurement L. Rev.* 3/2009 edited by Steen Treumer and focusing on the difference between selection and award criteria.

concepts that are either untranslatable or. If apparently easy to translate, misleading'.[75] Markesinis further maintains the necessity to search for the policy considerations which are the real reason for the interpretative choices.[76] However, the *Begriffshimmel* also deserves its share of the limelight; the structures, terminology or concepts provide the materials for what consistency and predictability there is in law; it's only natural that, actually shaping the legal mind, they may condition the outcome of the legal reasoning in specific cases.[77]

6 Conclusions

Building an integrated legal order needs a lot of communication and exchange between the constituent parts, quite more than is presently seen in the European Union.[78] It is not just that courts at all levels will greatly benefit from knowing the case law of different jurisdictions. Robust flow of information will lessen the still large barriers separating different legal orders. What is more important, it will make the evolution from plurality to comity possible. It seems too reductive to say that 'Comity normally means little more than courtesy'.[79] That may be true in so far as we consider comity between (sovereign States).[80] Judicial comity is somewhat deeper, involving deference and respect due by a court to another court independently from their rank in a hierarchy.[81]

What we are concerned with here, however, is not the niceties of the possibly different notions of comity in international and other branches of law. The point is that courts across the borders share a common sense of belonging to the legal profession. Building upon this and making communication stronger will lead to a deeper common understanding.

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[75] B. Markesinis *Comparative Law in the Courtroom and in the Classroom* (Oxford, Hart, 2003) 183.

[76] *Ibid.*, exp. 194 ff.

[77] As was remarked by J. Rivero 'Vers un droit commun européen: nouvelles perspectives en droit administratif' above fn, 391, 'entre les problèmes concrets et l'idéologie don't procède leur solution, le droit interpose sa technique. C'est elle qui permet de passer de l'une aux autres, à travers les cheminements qu'elle impose, qu'ils'agisse de la méthode de formulation de la règle, c'est à dire des sources, des abstractions par lesquelles elle schematise les réalités, c'est à dire des categories fondamentales, ou des voies qu'elle propose à celui qui veur défendre son droit, c'est à dire des procédures'.

[78] Or 'conversation' as is preferred by A-M. Slaughter, A. Stone Sweet and J.H.H. Weiler (eds.) *The European Courts and National Courts* above fn 13 (see 'Prologue', v).

[79] R. Cross and J.W. Harris *Precedent in English Law*, above fn 2, 89.

[80] And see *A Dictionary of Law* 7th (Oxford, Oxford University Press, 2009) ad vocem.

[81] *A Dictionary of Law* above fn 79, ad vocem.

In this context, the role for comparative law scholars could hardly be overestimated. As the recently appointed first President of the Supreme Court of the United Kingdom admitted a few years ago, when he was Master of the Rolls, 'Neither the practitioner nor the judge has the time to research, analyse and digest the law that is developing in jurisdictions other than his own. That is the task of the comparative lawyer'.[82] Even in England, a country where academic writers are not accorded the veneration which is due to them in places like Germany, it is accepted that 'any published comment on the case or the principle of law for which it stands could be significant in either strengthening or weakening its authority'.[83] In the context of European law, it is obvious that the undeniably deep linguistic differences may be more easily bridged by academics than by courts, provided, as Basil Markesinis cautions, that academics worry about the needs of courts rather than about themselves.[84] It is no coincidence that in cases like *Fairchild*, common law cases are quoted first hand, while judgments by civil law or Nordic law courts are referred to through the intermediation of scholarly works.[85] Academic works may, and should much more than is presently done, bridge the linguistic, and more generally, cultural gaps between different legal systems to a very relevant extent,[86] so much so, for instance, as to make possible for the English House of Lords to refer a Norwegian case.[87]

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[82] Lord Phillips of Worth Matravers 'Preface' to B. Markesinis *Comparative law in the Courtroom and Classroom* above fn 8, vii.

[83] M. Zander *The Law-Making Process* 6th (Cambridge, Cambridge University Press, 2004) 280.

[84] In this sense he has been a champion; as he writes 'my efforts have focused on making the foreign material first and foremost attractive to judges. In that context, I treated academics as secondary players': B. Markesinis *Comparative law in the Courtroom and Classroom* above fn 8, 35; he goes on remarking that 'since English judges rely heavily on information and argument coming from practitioners, a second aim has been to encourage as far as possible the co-operation of these two sides of the legal profession which could help the judges. Ultimately, I thus saw the relationship in triangular terms; and the remaining side of the triangle was occupied by the academics, playing a supporting but useful role by making the material, which they could best assemble, user-friendly and clear to the ultimate consumer: the judge'.

[85] Above, text corresponding to fn 41.

[86] "Bridge building between systems and even cultures" is at the centre of B. Markesinis *Comparative law in the Courtroom and Classroom* above fn 8, xi.

[87] *Fairchild* v. *Glenhaven Funeral Services Ltd* [2003] 1 AC 32 (HL), at 62 per Lord Bingham; the relevant passage of the case is quoted as from N. Nygaard *Injury/Damage and Responsibility* (2000); the book was printed in Oslo, Norway, under the title *Skade og ansvar* and never translated into English; Lord Bingham was provided a translation of the relevant passages.