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## The European Court of Justice at Work: Comparative Law on Stage and Behind the Scenes

Michele Graziadei

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**THE EUROPEAN COURT OF JUSTICE AT WORK:  
COMPARATIVE LAW ON STAGE AND BEHIND THE  
SCENES**

Michele Graziadei\*

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ABSTRACT

*The European Court of Justice (ECJ) has often been hailed as an engine of European integration. Entrusted with the task of securing the uniform interpretation of the law of the European Union—among other functions—the ECJ makes use of comparative law for a variety of purposes. The very composition of the Court and its peculiar linguistic regime make the Court a major comparative law laboratory. Under the Treaties, the Court is explicitly authorised to*

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\* Professor, Faculty of Law, University of Turin (Italy). A shorter version of this article was presented as the 42nd John H. Tucker, jr. Lecture in Civil Law, held at LSU on Sept. 5, 2019. I am grateful to Prof. Olivier Moréteau for his wonderful hospitality, and for his comments on a previous version of this text. I wish to thank Christabelle Lefebvre for her great editorial assistance.

*resort to comparative law as a method of judicial interpretation with regard to certain aspects of European law. But comparative law is an essential tool for the Court in several other contexts as well. This article is the occasion to take a closer look at the role that comparative law plays in the development of the jurisprudence of the Court, and to showcase some salient applications of it. Quite often, the Court limits references to comparative law arguments to a few lines in its judgments. Nonetheless, comparisons that go far beyond the merely technical aspects of the law are part and parcel of the everyday business of the Court. Even when the language of comparative law is not overtly spoken, those comparisons define the ethos of the European Union, and show how the Union sets out to challenge, and change, the laws of the Member States.*

Keywords: comparative law, European law, legal harmonization, legal translation, general principles of law, autonomous concepts, constitutional traditions, constitutional identity, European Court of Justice.

## I. INTRODUCTION

The European Court of Justice, known as the ECJ, is entrusted with the task of securing the uniform interpretation and application of the law of the European Union (EU).<sup>1</sup> To achieve its mandate, the ECJ often draws on the methodologies of comparative law to interpret the law of the EU. I intend to showcase aspects of this practice and highlight how it has been fundamental to the growth of European law. The ECJ is now part of the Court of Justice of the European Union, which is comprised of the ECJ and the General Court. The General Court is a specialised Court of more limited jurisdiction. The ECJ remains the dominant forum for the most important part of the judicial business of the Union. In this paper, I will therefore mostly focus on the ECJ as a consumer of comparative law.

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1. Article 19 Treaty on European Union [hereinafter TEU].

There is an abundance of literature on the various uses of comparative law by constitutional and supreme courts around the world.<sup>2</sup> This literature analyses citation patterns and practices and mutual influences, but also poses a good number of critical questions concerning the use of comparative law by courts. A basic question is whether comparative law references are relevant at all in deciding a case pending before a national court. What are these

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2. To mention works published in the last twenty years only, *see, e.g.*, THE USE OF COMPARATIVE LAW BY COURTS, XIVTH INTERNATIONAL CONGRESS OF COMPARATIVE LAW, ATHENS 1997 (U. Drobnig & S. van Erp eds., Kluwer 1999); B. Markesinis & J. Fedtke, *The Judge as Comparatist*, 80 TUL. L. REV. 11 (2005); G. F. FERRARI & A. GAMBARO, CORTI NAZIONALI E COMPARAZIONE GIURIDICA (E.S.I. 2006); B. S. MARKESINIS, J. FEDTKE & L. ACKERMANN, JUDICIAL RECOURSE TO FOREIGN LAW: A NEW SOURCE OF INSPIRATION? (UCL Press 2006); B. S. MARKESINIS & J. FEDTKE, ENGAGING WITH FOREIGN LAW (Hart Publ'g 2009); T. H. BINGHAM, WIDENING HORIZONS: THE INFLUENCE OF COMPARATIVE LAW AND INTERNATIONAL LAW ON DOMESTIC LAW (Cambridge U. Press 2010); G. Smorto, *L'uso giurisprudenziale della comparazione*, EUROPA E DIRITTO PRIVATO 223 (2010); V. BARSOTTI & V. VARANO, 1 IL NUOVO RUOLO DELLE CORTI SUPREME NELL'ORDINE POLITICO E ISTITUZIONALE—DIALOGO DI DIRITTO COMPARATO (Edizioni Scientifiche Italiane 2012); M. BOBEK, COMPARATIVE REASONING IN EUROPEAN SUPREME COURTS (Oxford U. Press 2013); M. Gelter & M. M. Siems, *Language, Legal Origins, and Culture Before the Courts: Cross-Citations Between Supreme Courts in Europe*, 21 SUP. CT. ECON. REV. 215 (2013); 1 THE USE OF FOREIGN PRECEDENTS BY CONSTITUTIONAL JUDGES (T. Groppi & M-C. Ponthoreau eds., Hart Publ'g 2013); E. MAK, JUDICIAL DECISION-MAKING IN A GLOBALISED WORLD: A COMPARATIVE ANALYSIS OF THE CHANGING PRACTICES OF WESTERN HIGHEST COURTS (Hart Publ'g 2013); M. Gelter & M.M. Siems, *Citations to Foreign Courts—Illegitimate and Superfluous, or Unavoidable? Evidence from Europe*, 62 AM. J. COMP. LAW 35, 35–86 (2014); R. HIRSCHL, COMPARATIVE MATTERS: THE RENAISSANCE OF COMPARATIVE CONSTITUTIONAL LAW (Oxford U. Press 2014); COURTS AND COMPARATIVE LAW (M. Andenas & D. Fairgrieve eds., Oxford U. Press 2015); A. von Bogdandy, *Comparative Constitutional Law as a Social Science? A Hegelian Reaction to Ran Hirschl's Comparative Matters*, 55 DER STAAT 103–115 (2016), available at <https://perma.cc/3CX3-NMTB>; D. S. Law, *Judicial Comparativism and Judicial Diplomacy*, 168 U. OF PENNSYLVANIA L. REV. 927 (2015); R. Hirschl, *Judicial Review and the Politics of Comparative Citations: Theory, Evidence & Methodological Challenges*, in COMPARATIVE JUDICIAL REVIEW (E.F. Delaney & R. Dixon eds., Edward Elgar 2018); JUDICIAL COSMOPOLITANISM: THE USE OF FOREIGN LAW IN CONTEMPORARY CONSTITUTIONAL SYSTEMS (G. F. Ferrari ed., Brill Nijhoff 2019); C. Lienen, *Judicial Constitutional Comparativism at the UK Supreme Court*, 39 LEG. STUD. 166 (2018). The literature on judicial dialogue, judicial globalization, community of courts, or transnational organizational field of courts, provides further insights on the trends mapped by this literature. For the historical perspective, *see* G. Gorla, *Il ricorso alla legge di un "luogo vicino" nell'ambito del diritto comune europeo*, 89 FORO IT. (1973).

references? A mere puffery by learned jurists, an embellishment of national laws, the mark of a desperate litigator? What else could they be? Another question often posed is to what degree are comparative law arguments made by the courts legitimate? Do they simply fall outside the purview of the judge because they go beyond the local, applicable law? Are they legitimate, if examined under the broad rule of law criteria? In some judgments of the U.S. Supreme Court these questions emerge and are also addressed by some members of that Court in their extrajudicial writings.<sup>3</sup> Personally, I had the pleasure of listening to Justice Ruth Bader Ginsburg on these very issues. The occasion was the World Congress of Comparative Law held in Washington, D.C. by the International Academy of Comparative law in 2010.<sup>4</sup> It was a fascinating lecture, which defended the use of comparative law in constitutional adjudication. Closer to home, the Italian Constitutional Court has increasingly paid attention to comparative law as a subject that is relevant in various ways to the decision of constitutional law cases.<sup>5</sup> A former Italian Constitutional Court Judge, Prof. Sabino Cassese, pointed to the fact that in the late twentieth century the increased relevance of comparative law in this context has been favoured by the demise of the ideology

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3. S. A. Simon, *The Supreme Court's Use of Foreign Law in Constitutional Rights Cases: an Empirical Study*, 1 J. L. CTS. 279 (2013); R.C. Black, R. J. Owens & J. L. Brookhart, *We Are the World: The U.S. Supreme Court's Use of Foreign Sources of Law*, 46 BRITISH J. POLITICAL SCI. 891 (2014); G. F. Ferrari, *Legal Comparison Within the Case Law of the Supreme Court of the United States of America*, in JUDICIAL COSMOPOLITANISM 94 (Brill Nijhoff 2019).

4. The speech was delivered on July 30, 2010. It is now reported on the web site of the Supreme Court of the United States, available at <https://perma.cc/68QJ-XJVV>. An extended version of the speech was delivered on previous occasions; see, e.g., R. Bader Ginsburg, *A Decent Respect to the Opinions of Humankind: The Value of a Comparative Perspective in Constitutional Adjudication*, 64 CAMBRIDGE L. J. 575 (2005).

5. For a recent assessment, see P. Passaglia, *Corte costituzionale e comparazione giuridica: una analisi (molto) sineddotta, una conclusione (quasi) sinestetica*, in 12 I RAPPORTI CIVILISTICI NELL'INTERPRETAZIONE DELLA CORTE COSTITUZIONALE NEL DECENNIO 2006–2016, 12° CONVEGNO NAZIONALE DELLA SOCIETÀ ITALIANA DEGLI STUDIOSI DEL DIRITTO CIVILE (E.S.I 2018). The offices of the Court have produced a document that reflects on this use as well; see R. Nevola, *Corte Costituzionale: Servizio Studi, L'assistenza alla decisione giurisdizionale* (Oct. 2018), available at <https://perma.cc/H5S6-EHN9>.

of nationalism, and by the spreading of the awareness that common problems may yield common solutions, elaborated beyond the nation state, at the international level.<sup>6</sup>

The literature that I have just mentioned is hardly relevant to approach the use of comparative law by the European Court of Justice, however. The use of comparative law reasoning by the ECJ must be understood holistically, in the light of the institutional position of the Court and the nature of EU law. Far from being contested, recourse to the use of comparative law by the ECJ is widely accepted. The legitimacy of recourse to comparative law in the interpretation or application of European law derives, in specific instances, from the texts of the Treaties that are the bulwark of the EU's very existence, as it will be seen. But, beyond those specific cases, comparative law is widely accepted (and practiced) by all the players in the game: members of the Court, litigants, and academic commentators on EU law by and large share the same support for the legitimacy of comparative law in the judicial practice of the ECJ. Eminent members of the Court—including its current President, Koen Lenaerts—writing in their extrajudicial capacity signal the substantial role that comparative law plays in the jurisprudence of the Court.<sup>7</sup> I will

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6. S. Cassese, *Sulla diffusione nel mondo della giustizia costituzionale—Nuovi paradigmi per la comparazione giuridica*, 4 RIV. TRIM. DIR. PUB. 993 (2016).

7. F.G. Jacobs, *Comparative Law and European Union Law*, in OXFORD HANDBOOK OF COMPARATIVE LAW 525 (2d. ed., M. Reimann & R. Zimmermann eds, Oxford U. Press 2019) [hereinafter OXFORD HANDBOOK OF COMPARATIVE LAW]; K. Lenaerts, *The European Court of Justice and the Comparative Law Method*, 25 EUR. REV. PRIV. L. 297 (2017); K. Lenaerts, *The Comparative Law Method and the European Court of Justice: Echoes Across the Atlantic*, 64 AM. J. COMP. L. 841 (2016); K. Lenaerts, *La Cour de Justice de l'Union européenne et la méthode comparative*, in LE DROIT COMPARÉ AU XXI<sup>E</sup> SIÈCLE—ENJEUX ET DÉFIS 35 (B. Fauvarque-Cosson ed. 2015). For previous extra judicial writings by members of the Court on its use of comparative law methods, see P. Mengozzi, *Les principes fondamentaux du droit communautaire et les droits des États membres*, 3 RDUE 435 (2002); W. Van Gerven, *Comparative Law in a Texture of Communitarization of National Laws and Europeanization of Community Law*, in JUDICIAL REVIEW IN INTERNATIONAL PERSPECTIVE—LIBER AMICORUM IN HONOUR OF LORD SLYNN OF HADLEY 433 (Kluwer 2000); C. N. Kakouris, *Use of the Comparative Method by the Court of Justice of the European Communities*, 6 PACE INT'L L. REV. 267 (1994); J. Mertens de Wilmars, *Le droit comparé dans la*

therefore discuss the overall practice of comparative law by the Court, while highlighting some of its specific features. I will then formulate a few observations concerning this practice, to better understand what the Court is comparing when it goes about the business of rendering its rulings.

## II. MULTILINGUALISM, TRANSLATION, AND INTERPRETATION AT THE ECJ

A preliminary point to consider is the specific linguistic regime governing litigation at the ECJ in Luxembourg. This regime mirrors the institutional position of a supranational court that belongs to an integrated multilingual European legal order. The twenty-eight judges of the Court, one for each Member State, and the eleven Advocates General of the Court, are called upon to work as well in a multilingual environment. The European Union's linguistic regime requires the publication of EU law in all the twenty-four official languages of the Member States, bar one, Irish, that, for resource-related reasons, is not as well served.<sup>8</sup> The specific linguistic arrangements governing the procedure of the ECJ need not be presented in detail here,<sup>9</sup> but they surely involve a huge translation and interpretation effort. In the preliminary ruling procedure, used by the

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*jurisprudence de la Cour de justice des Communautés européennes*, JOURNAL DES TRIBUNAUX 37 (1991); Y. Galmot, *Réflexions sur le recours au droit comparé par la Cour de justice des Communautés européennes*, 6 RFDA 255 (1990); P. Pescatore, *Le recours, dans la jurisprudence de la Cour de justice des Communautés européennes, à des normes déduites de la comparaison des droits des États membres*, 32 R.I.D.C. 337 (1980) (with citations to prior contributions on the same topic); for the opinion of a former member of the Commission's legal services, see M. Hilf, *The Role of Comparative Law in the Jurisprudence of the Court of Justice of the European Communities*, in THE LIMITATION OF HUMAN RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW 558 (Yvon Blais 1986).

8. Council Regulation (EC) No 920/2005 of June 13, 2005, amending Regulation No 1 of April 15, 1958 determining the language to be used by the European Economic Community and Regulation No 1 of April 15, 1958 determining the language to be used by the European Atomic Energy Community and introducing temporary derogation measures from those Regulations.

9. For a short explanation of the applicable rules, see Court of Justice of the European Union, *Language arrangements at the Court of Justice of the European Union*, <https://perma.cc/X9H6-FVMD>.

national courts to refer questions relating to the interpretation of the EU to the ECJ, the language of the questions posed to the ECJ determines the language of the case. The preliminary questions formulated by the local court must then be immediately translated in all the other official languages of the Union for their publication in the Official Journal of the European Union. The deliberations and the internal communications of the Court are all in French, which was the language of choice when the Court was established in 1958. French is also the language of the draft judgments deliberated by the Court and of the final judgment. Once more, however, the judgment has to be translated in the language of the original procedure—the language considered authentic—and then in all the official languages of the Union. By itself, this demanding linguistic regime involves considerable comparative law skills. To provide reliable, accurate renderings of meaning across all these languages is a formidable task. One commentator who closely observed the workings of the institution noticed that: “the role of translation at the CJEU goes deeper than ‘simply’ converting judgments from the working language of that Court into the other twenty-three EU official languages. Translation is, in fact, embedded in the process of drafting, reasoning and deciding a case before the CJEU.”<sup>10</sup> Consider, for example, the case of *Webb v. Webb*.<sup>11</sup> This litigation raised a question of jurisdiction over an immovable property located in France that was subject to an English resulting trust. The question referred to the Court required the European judge to be familiar with notions such as legal ownership, beneficial interest, presumption of advancement, and the nature of a resulting trust. To translate these terms into languages other than English, where the trust may be a

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10. K. McAuliffe, *Translating Ambiguity*, 9 J. COMP. L. 65, 66 (2015). For an insider’s view of the process that is involved in the drafting of a judgment, see K. McAuliffe, *Behind the Scenes at the Court of Justice*, in EU LAW STORIES: CONTEXTUAL AND CRITICAL HISTORIES OF EUROPEAN JURISPRUDENCE 35 (B. Davies & F. Nicola eds., Cambridge U. Press 2017) [hereinafter EU LAW STORIES].

11. C-294/92 *George Lawrence Webb v Lawrence Desmond Webb* [1994] ECR, I-01717.



relatively new or even non-existent concept, surely requires comparative law skills. A similar difficulty may arise with purely civilian notions, of course. For instance, can a usufruct over immovable property be compared to the concept of “leasing or letting of immovable property” for tax purposes? In giving a positive answer to this question, Advocate General Francis Jacobs provided an extensive comparative examination of the legal regimes of Europe in relation to time limited rights over immovable property.<sup>12</sup> This is a wonderful example of functional comparative law. It must have also been a formidable challenge for the lawyer-linguists who translated this opinion into all the other official languages of the Union.<sup>13</sup> To facilitate the tasks of the 606 lawyer-linguists employed at the Court,<sup>14</sup> there is a terminology coordination unit that handles the management of (comparative) multilingual legal terminology. This unit defines and coordinates the terminological projects that contribute to the overall quality of the texts; among its tasks there is the terminological and legal pre-processing of the documents to be translated.<sup>15</sup>

### III. COMPARATIVE LAW AND THE SEARCH FOR SHARED MEANING IN EUROPEAN LAW

As discussed in the next pages, recourse to comparative law in the interpretation and application of EU law is expressly warranted

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12. Opinion of Advocate General Jacobs delivered on Feb. 22, 2001, Case C-326/99 *Stichting “Goed Wonen” v Staatssecretaris van Financiën* [2001] ECR I-06831.

13. On the role of Court’s lawyer-linguists, see K. McAuliffe, *Hidden Translators: The Invisibility of Translators and the Influence of Lawyer-Linguists on the Case Law of the Court of Justice of the European Union*, 3 LANGUAGE AND LAW/LINGUAGEM E DIREITO 3, 5 (2016). McAuliffe notes that the grounding of jurisprudence in the historical French, as dictated by the Court, secures the stable meaning of the terms of art. However, this at times leaves even native French speakers struggling with the interpretation of their own language.

14. COURT OF JUSTICE OF THE EUROPEAN UNION, *Annual report—The Year in Review* 19 (2018).

15. For more information on this unit, see Court of Justice of the European Union, *Projects and Terminological Coordination Unit*, <https://perma.cc/867X-Z7DV>.

by the Treaties in some cases.<sup>16</sup> Beyond those cases, the Court also has recourse to comparative law even when it is not expressly sanctioned by the Treaties. The uniform interpretation and application of EU law throughout the Union requires the establishment of a uniform meaning of the law across the Union's languages. This meaning may be established in clear terms by the European texts, which often provide the relevant definitions and notions. But this is not always the case, and therefore the Court must decide whether, absent a clear indication by those texts, a certain term or expression shall nonetheless have a uniform meaning across the Union, or not. Sometimes the laws of many jurisdictions may converge on a single answer to this question, by providing a shared meaning for a certain term or expression, but this is seldom the case. When the laws of the Member States go in different directions, comparative law helps the Court establish the level of uniformity or divergence that is achieved or should be achieved by EU law on a certain point. To cater to the relevant research and documentation needs, the Court has in place tailored support resources. The Court may thus turn to the services of its Research and Documentation Directorate to acquire a comparative law report on any question that merits an analysis. Sadly, these reports are still not accessible to the public and to researchers. And, in this respect at least, comparative law operates behind the scenes in the workings of the European judiciary.

How does the Court proceed to resolve conflicting interpretations of EU law between the Member States? Here is a simple, illustrative example, provided by a famous package travel case.<sup>17</sup> A girl went on holiday with her parents in Turkey. At the club where they spent their vacation, she got food poisoning. After her return to Austria, she claimed damages for pain and suffering and, most importantly, for her spoiled holiday. The defendant was a German travel agency. Vacation packages in Europe were then governed by

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16. See *infra* Parts VII, VIII.

17. Case C-168/00 *Simone Leitner v TUI Deutschland GmbH & Co. KG* [2002] ECR I-02631.

Council Directive 90/314/EEC (Directive 90/314), implemented by all the Member States.<sup>18</sup> But how does the concept of “damages” play out in EU law under this directive was unclear. The Austrian Court that had jurisdiction over the case rejected the claim for the loss of enjoyment of the holiday. Under Austrian law, this type of non-material loss was not a compensable loss. On appeal, the Court formulated a request for a preliminary ruling by the ECJ. The question referred to the ECJ concerned the concept of “damages” under the applicable package travel directive. Can damages include compensation for the non-material damage suffered by the unlucky young tourist? Without a clear answer in the directive, was the Austrian Court right to simply apply its own law concerning what damage is recoverable in similar circumstances? Or does the Directive require an autonomous notion of “damages” for the purpose of giving effect to its provisions?

In addressing this issue, the ECJ had before itself a variety of solutions prevailing in the laws of Member States: some favouring compensation for the non-material damages, others rejecting it. Advocate General Tizzano, presenting this picture to the Court, spotted a trend prevailing across the Member State favouring the reparation of the non-pecuniary damage for spoiled holidays.<sup>19</sup> Furthermore, to rule out a uniform approach to those losses would have frustrated one of the purposes of Directive 90/314, namely the securing of

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18. Council Directive 90/314/EEC of June 13, 1990 on package travel, package holidays and package tours, OJ L 158, 23.6.1990, p. 59–64. The Directive has been replaced by a new instrument, which is force since 2018; see Directive (EU) 2015/2302 of the European Parliament and of the Council of Nov. 25, 2015 on package travel and linked travel arrangements, amending Regulation (EC) No 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC, OJ L 325, 11.12.2015, p. 1–33. The recitals of the new Directive now make clear that damages for spoiled holidays under the Directive shall: “cover non-material damage, such as compensation for loss of enjoyment of the trip or holiday because of substantial problems in the performance of the relevant travel services.”

19. Opinion of Advocate General Tizzano delivered on Sept. 20, 2001, Case C-168/00 *Simone Leitner v TUI Deutschland GmbH & Co. KG* [2002] ECR I-02631.

undistorted competition in the functioning of the internal market.<sup>20</sup> Following the Advocate General's opinion, the Court thus held that compensation of the non-pecuniary damage asked by the claimant for the non-performance of touristic services should have been allowed, if such damages were proven before the national court.<sup>21</sup>

#### IV. THE KEYWORDS, THE CONCEPTS, THE GENERAL PRINCIPLES

This brings me to highlight two points. First, the methodology to research key sources, namely the case law corpus of the EJC, which can give us a fuller picture of the use of comparative law by the Court. A textual search in the European case law database Eur-Lex to find documents containing the words "comparative law" would have missed the package travel case I have just mentioned. How can this be? The keyword "comparative" is absent from the judgment; the search string "comparative law" is not found in the Advocate General's opinion too, because he uses the expression "comparative analysis" instead. If my tentative count is correct, no more than ten court judgments contain a textual reference to "comparative law." Indeed, this is a rare textual occurrence. The Advocate Generals' opinions present a more encouraging picture. A first tentative count produces 108 opinions containing the search string "comparative law." But, as mentioned above, these numbers cannot be considered reliable if we intend to go into the substance of the matter. Let there be no doubt about this: a deeper investigation would turn out different numbers. How different? This is difficult to say. No study has systematically addressed this precise question so far. In other words, this is a latent reservoir of comparative law exercises that has yet to be tapped for research purposes.

Let me now turn to the second point mentioned above, which concerns the nature of the exercise in which the Court is involved when deciding similar cases. By securing the uniform interpretation

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20. *Id.* at ¶ 44.

21. Case C-168/00.

and application of EU law across Europe, the Court reduces the discretion that is otherwise left to the Member States, as it did in the package travel case discussed above. There can be no uniform interpretation of EU law if the Member States were to enjoy a high degree of discretion, as it happens when the Treaties allow for this diversity, because a certain matter is not attributed to the competence of the Union, or because the Union has not legislated to introduce such uniformity, even though it would have been competent to do so. Nonetheless, when the Court elaborates the autonomous concepts that are needed to establish the uniformity that is required, the Court often consults the laws of the Member States, and draws from them, thus avoiding a top down approach to the interpretation of EU law. Why does this happen?

It is true that the legal order established by the Treaties is autonomous from the laws of the Member States.<sup>22</sup> This is a constitutional feature of EU law. Yet, despite this, the legal order established by the Union is also incomplete in many respects, precisely because it is a new legal order. To put it quite bluntly and in common sense language: in many respects EU law has more holes than a well-aged piece of Swiss cheese. As Luigi Moccia wrote, this reflects an underlying structure in which “being a European lawyer,” “means to be able to be a bridge for communication and the opening of its national (domestic) legal system with other member states’ legal systems and with the Union’s legal system itself, through the development on a comparative basis of a new European *ius commune*.”<sup>23</sup>

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22. Case 26-62 *NV Algemene Transport en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECR, English special edition, 00001; Case 6-64 *Flaminio Costa v E.N.E.L.* [1964] ECR, English special edition, 00585.

23. L. Moccia, *Dalla comparazione alla integrazione giuridica: la via della cittadinanza europea*, 2 LA CITTADINANZA EUROPEA 5 (2015). Moccia’s following works have explored in depth these dimensions of the European order, both from the historical and the current perspective, see L. Moccia, *Prospetto storico delle origini e degli atteggiamenti del moderno diritto comparato. (Per una teoria dell’ordinamento giuridico “aperto”)*, RIV. TRIM. DIR. PROC. CIV 181 (1996); L. Moccia, *Diritto europeo, ordinamento aperto e formazione giuridica*, 1 LA CITTADINANZA EUROPEA 31 (2012); L. Moccia, *Cittadinanza dell’Unione e*

The European Treaties established that the Court must secure the uniform interpretation and application of the law, thus establishing the principle of legality as the Union's cornerstone.<sup>24</sup> But the Treaty itself does not provide a full account of the substantive principles underlying EU law. It also does not provide for the applicable standard of review.<sup>25</sup> This is why in the last two decades or so, with respect to core areas of private law, a legion of European jurists strived to provide a text that would eventually help to fill many of the gaps, by providing an overall frame of reference for those areas.<sup>26</sup> The search for a full set of principles, concepts, and rules covering certain private law matters was driven by the desire to overcome the piece-meal approach of EU law to contract, torts, delictual liability, obligations, and so on. Whether the EU had the competence to enact such a wide-ranging text was a foundational constitutional question,<sup>27</sup> which was often postponed in the debates over this proposal. In the end, the Union decided not to go forward, for disparate reasons, which need not be investigated here. But the challenge posed by this state of affairs remains open<sup>28</sup> and the many lessons linked

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*formazione di un diritto e di un giurista europeo*, European Rights (2013), at <https://perma.cc/3RPF-TNZY>. In the field of constitutional law, this is the approach strongly advocated by A. Von Bogdandy, *The Past and Promise of Doctrinal Constructivism: A Strategy for Responding to the Challenges Facing Constitutional Scholarship in Europe*, 7 INT'L J. CONST. L. 364 (2009), and by the scholars who worked with him to the books published in the series *Handbuch Ius Publicum Europaeum*.

24. Article 19.1 TEU: "The Court of Justice of the European Union shall . . . ensure that in the interpretation and application of the Treaties the law is observed." See also articles 251 *et seq.* Treaty on the Functioning of the European Union.

25. T. TRIDIMAS, GENERAL PRINCIPLES OF EU LAW 20 (Oxford U. Press 2006); T. KOOPMANS, *The Birth of European Law at the Crossroad of Legal traditions*, 39 AM. J. COMP. LAW 493, 493–495 (1991). With regard to private law, see N. REICH, GENERAL PRINCIPLES OF EU CIVIL LAW (Intersentia 2014).

26. C. TWIGG-FLESNER, THE EUROPEANISATION OF CONTRACT LAW: CURRENT CONTROVERSIES IN LAW (2d., Routledge 2013).

27. See, e.g., S.R. Weatherill, *European Private Law and the Constitutional Dimension*, in THE INSTITUTIONAL FRAMEWORK OF EUROPEAN PRIVATE LAW—COLLECTED COURSES OF THE ACADEMY OF EUROPEAN LAW (F. Cafaggi ed., Oxford U. Press 2006).

28. See, e.g., COMMENTARIES ON EUROPEAN CONTRACT LAWS (N. Jansen & R. Zimmermann eds., Oxford U. Press 2018). The books in the Common Core of European Private Law series with General Editors Ugo Mattei and Mauro

to this failure must still be fully digested.<sup>29</sup> To further outline the challenge that the Court must address in interpreting EU law, one has to consider that any comparative law input must anyhow still lead to the application of the rule that fits the aims or purposes of the Union, because the use of comparative law as a means of gap filling and interpretation of EU law is useful only insofar as it advances the purposes of the European legal order and fits coherently into the system of EU law.<sup>30</sup> However, reference to the laws of Member States remains indispensable in the search for a solution that is fully in line with the objectives and basic principles of EU law. This has been recognised by the Court over and over again, from the very inception of its activity. The *Algera* case<sup>31</sup> is an early, much cited illustration of this approach. In the *Algera* case, the Court remarked that the rules of the Treaty did not cover the problem raised by the litigation, namely the possibility of withdrawing an administrative decision, but also found that the same problem was:

familiar in the case-law and learned writing of all the countries of the Community. . . . Unless the Court is to deny justice it is therefore obliged to solve the problem by reference to the rules acknowledged by the legislation, the learned writing and the case-law of the member countries.<sup>32</sup>

The Court is not forced to a lowest common denominator when proceeding in this way. As Advocate General Slynn remarked in a later case with respect to the comparative examination of the various national solutions: “Such a course is followed not to import national

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Bussani, and the *Ius Commune Casebooks for the Common Law of Europe*, started by Walter van Gerven and now directed by Dimitri Droshout, tackle as well the same challenge.

29. For critical reflections on this, see the different remarks of P. Legrand, *Antivonbar*, 1 J. COMP. L. 13 (2006) and H.-W. MICKLITZ, *THE POLITICS OF JUSTICE IN EUROPEAN PRIVATE LAW* (Cambridge U. Press 2018).

30. There is common agreement on this point, which is brilliantly highlighted by S. Rodin, *Constitutional Relevance of Foreign Court Decisions*, 64 AM. J. COMP. L. 815 (2016).

31. Joined Cases 7/56, 3/57 to 7/57 *Dineke Algera et al. v Common Assembly of the European Coal and Steel Community* [1957–58] ECR, English special edition, 00039.

32. *Id.* at ¶ 55.

laws as such into Community law, but to use it as a means of discovering an *unwritten* principle of Community law.”<sup>33</sup> While the International Court of Justice is required by article 38(1)(c) of its statute to apply: “the general principles of law recognised by civilised nations,” there is no general provision like this in the European Treaties.<sup>34</sup> Nonetheless, this has not stopped the Court from elaborating general principles of EU law that are of great importance for the evolution of EU law,<sup>35</sup> putting flesh on the bones of the EU’s legal order to use the metaphor advanced by Advocate General Mazak nearly ten years ago.<sup>36</sup> The principles in question often derive from a comparative examination the laws of the Member States on certain issues. The case law of the Court on this point has recognised on this basis a variety of principles, e.g. the prohibition of unjust enrichment on the part of the Community,<sup>37</sup> the admissibility of “default interests” for sums due under EU law,<sup>38</sup> the recognition of client-lawyer privilege in proceedings opened by the Commission.<sup>39</sup>

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33. Opinion of Advocate General Slynn delivered on Jan. 26, 1982, C-155/79 *AM & S Europe Limited v Commission of the European Communities*. *Legal privilege* [1982] ECR 01575, p. 1649 (emphasis in original).

34. The point is made by F.G. Jacobs, *supra* note 7, at 537. See Opinion of Advocate General Tesaurò delivered on Nov. 28, 1995, C-46/93 *Brasserie du pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte Factortame Ltd and others* [1996] ECR I-01029.

35. GENERAL PRINCIPLES OF LAW: EUROPEAN AND COMPARATIVE PERSPECTIVES OXFORD (S. Vogenauer & S. Weatherill eds., Hart Publ’g 2017); T. Tridimas, *The General Principles of Law: Who Needs Them?*, 52 CAHIERS DE DROIT EUROPÉEN 419 (2016); K. Lenaerts & J.A. Gutiérrez-Fons, *The Constitutional Allocation of Powers and General Principles of EU Law*, 47 COMMON MKT. L. REV. 1629 (2010).

36. Opinion of Advocate General Mazak delivered on Feb. 15, 2007, C-411/05 *Félix Palacios de la Villa v Cortefiel Servicios SA* [2007] ECR I-08531, ¶¶ 83–86. For the relevance of comparative law in this context, see G. Martinico, *Exploring the Platonic Heaven of Law: General Principles of EU Law from a Comparative Perspective*, 3 NORD. J. EUR. LAW 1 (2020).

37. C-47/07 *Masdar (UK) Ltd v Commission of European Communities* [2008] ECR I-09761, ¶¶ 44–50.

38. For a summing up of the relevant law, see Opinion of Advocate General Bot delivered on Sept. 4, 2014, Case C-336/13 P *European Commission v IPK International - World Tourism Marketing Consultants GmbH* [2014] EU:C:2014:2170, ¶¶ 62–67.

39. Case 155/79 *AM & S Europe Limited v Commission of the European Communities* [1982] ECR 01575, ¶¶ 18–21. See C-550/07 P *Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd v European Commission* [2010] ECR I-08301,



V. THE EXTRATERRITORIAL REACH OF EU LAW AND THE  
COMPARISON OF DIFFERENT LAWS

So far, I have discussed how the comparative examination of laws of the Member States play out in the interpretation and application of EU law by the Court. At the core of the European Union lies the establishment of the internal market. This drives a multitude of harmonizing efforts, targeting the laws of the Member States, which stand in a dialectical relationship with the principle of mutual recognition, first affirmed in the *Cassis de Dijon* case.<sup>40</sup> But comparisons among the laws of the Member States are not the only ones that the Court develops within this framework. The Court draws comparisons between EU law and U.S. law as well; they are important too, to understand what type of comparisons the ECJ develops in fulfilling its tasks.

The world we live in is a highly interconnected world. To cope with previously unknown coordination problems, we need more, rather than less, comparative law expertise.<sup>41</sup> As far as EU law is concerned, this means an openness to comparisons involving the laws of non-Member States as well, and first and foremost with the U.S., the other major trading block among capitalist economies.<sup>42</sup>

A dispute now pending before the ECJ is a wonderful illustration of the increasing demand for the coordination of regulatory regimes at the international level and of how comparative law becomes relevant in this respect. The case concerns *inter alia* the validity of the agreement between the EU and the U.S. known as “Privacy

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¶¶ 40–51 (no common trend among Member States concerning the recognition of legal privilege over correspondence for in-house lawyer).

40. Case 120/78 *Rewe-Zentral v Bundesmonopolverwaltung für Branntwein* [1979] ECR 00649.

41. See S. BREYER, *THE COURT AND THE WORLD: AMERICAN LAW AND THE NEW GLOBAL REALITIES* 4 (Knopf 2015): “judicial awareness can no longer stop at the border.”

42. This was the intuition which led to the pioneering study of M. CAPPELLETTI, M. SECCOMBE & J. H. WEILER, *INTEGRATION THROUGH LAW EUROPE AND THE AMERICAN FEDERAL EXPERIENCE* (De Gruyter 1986).

Shield.”<sup>43</sup> The agreement governs the safeguards to be provided in the transfer of EU citizens’ personal data from the EU to the U.S. Companies conducting business in Europe and North America need to transfer data across the Atlantic, but such transfers are regulated by EU law as well. The story behind this litigation begins in 2010, when Mr. Maximilian Schrems, a law student from Austria aged 23, went for his semester abroad at Santa Clara University in the Silicon Valley. During his stay at that law school, Mr. Schrems participated in a seminar where the guest speaker was Ed Palmieri, Facebook’s privacy lawyer. Schrems related that he was shocked by the speaker’s limited grasp of the severity of data protection laws in Europe. Once back at home in Austria, he launched a first lawsuit to challenge the status quo. The litigation ended up at the ECJ. In 2015, a first judgment was, thus, handed down by the ECJ in this matter.<sup>44</sup> The judgment proclaimed that the so-called Safe Harbour agreement—the predecessor of the Privacy Shield agreement—was based on an invalid decision of the Commission.<sup>45</sup> The ECJ found that the decision of the Commission on Safe Harbour agreement was invalid because it failed to state, as required by EU law, that the U.S. ensures an “adequate level of protection” of the fundamental rights and freedoms of EU citizens after their data was transferred to the U.S., as required by the applicable EU legislation and fundamental rights law.<sup>46</sup> The Court explained that governments may interfere with personal data “only in so far as is strictly necessary.”<sup>47</sup> Along the lines

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43. Commission Implementing Decision (EU) 2016/1250 of July 12, 2016 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the EU-U.S. Privacy Shield, OJ 2016, L 207, p. 1–112.

44. Case C-362/14 *Maximilian Schrems v Data Protection Commissioner* [2015] EU:C:2015:650.

45. The decision that was thus declared invalid was the following: Commission Decision 2000/520/EC of July 26, 2000 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the safe harbor privacy principles and related frequently asked questions issued by the U.S. Department of Commerce, OJ L 215, 25.8.2000, p. 7–47.

46. *Id.* at ¶¶ 96–97.

47. Case C-362/14, ¶ 92.

already announced in *Digital Rights Ireland*,<sup>48</sup> it further held that: “legislation permitting the public authorities to have access on a generalised basis to the content of electronic communications must be regarded as compromising the essence of the fundamental right to respect for private life. . . .”<sup>49</sup>

This means that surveillance operations conducted through bulk access to data are not compatible with the European fundamental rights regime.<sup>50</sup> Furthermore, EU law requires “effective judicial protection” and access to legal remedies for privacy violations. The ECJ found that the European Commission had failed to assess whether the U.S. approach to data protection was satisfactory in this respect too.<sup>51</sup> Both in Brussels and in Washington, the judgment was a bombshell.<sup>52</sup> The EU Commission and the U.S. government were sent back to the drawing board. They, thus, rushed to strike a new agreement. However, the new agreement, known as Privacy Shield, has already been hit by a fresh request for a preliminary ruling by the ECJ.<sup>53</sup> Again, the question is whether the fundamental rights and freedoms relating to personal data, guaranteed in Europe, are being respected when personal data are transferred to the U.S. The Court will also have to decide whether alternative approaches based on “standard contractual clauses”—that is, contract templates that are pre-approved by the European Commission for data transfers,<sup>54</sup> are

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48. Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources et al.* [2014] EU:C:2014:238.

49. Case C-362/14, ¶ 94.

50. *Id.* at ¶¶ 92–93.

51. *Id.* at ¶ 95.

52. The U.S. House of Representatives Subcommittee on Communications and Technology (Committee on Energy and Commerce) hearing on “Examining the EU Safe Harbor Decision and Impacts for Transatlantic Data Flows” held on Nov. 3, 2015 gives an idea of the U.S. reactions to the ECJ ruling, <https://perma.cc/44CH-6G2P>.

53. Case C-311/18 *Facebook Ireland Limited and Schrems*, case in progress.

54. Commission Decision 2010/87 of Feb. 5, 2010 on standard contractual clauses for the transfer of personal data to processors established in third countries under Directive 95/46/EC of the European Parliament and of the Council, OJ L 39/6, 12.2.2010, p. 5–18, as amended by Commission Implementing Decision (EU) 2016/2297 of Dec. 16, 2016, OJ L 344, 17.12.2016, p. 100–101.

adequate or not, a vital point for the firms that are currently using this technique in day-to-day operations.

Advocate General Henrik Saugmandsgaard Øe's opinion in this case holds that the Commission's decision on standard contractual clauses is valid, provided that there are sufficiently sound mechanisms to ensure that transfers based on the standard contractual clauses are suspended or prohibited where those clauses are breached or impossible to honour. In his view, that is the case in so far as there is an obligation—placed on the data controllers and, where the latter fails to act, on the supervisory authorities—to suspend or prohibit a transfer when those clauses cannot be complied with. With respect to the Privacy Shield decision, the Advocate General expressed criticism in the light of the right to respect for private life and the right to an effective remedy, although he also held that the dispute in the main proceedings does not require the Court to rule on the validity of the privacy shield.

We will soon learn the outcome of the request for a preliminary ruling in this case. What is already clear is that the litigation has brought about an unprecedented wave of comparative law research about privacy laws on the two sides of the Atlantic. If the ECJ finds that the new agreement is inadequate, some form of harmonisation between the EU and U.S. approach to privacy and data protection is much more likely to occur in the future.<sup>55</sup>

#### VI. THE TRANSATLANTIC DIMENSIONS OF THE COMPARATIVE EXERCISE

In the Privacy Shield litigation, a comparison of laws is implicitly mandated by EU fundamental rights law and the relevant data protection legislation. But the ECJ may go for outward looking comparisons concerning U.S. law, as opposed to inward looking comparisons concerning the laws of the Member States, for a variety of

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55. C-311/18. On June 20, 2020, the Court handed down its decision, holding that the privacy shield is indeed invalid.

reasons. The Court may conduct these comparisons because of the relative novelty of some issues coming up before the Court. However, the same issues may be not so new in a wider perspective. Sometimes it is tempting to turn to the U.S. to elaborate solutions for Europe, or at least to make informed decisions benefitting from the experience and lessons learnt in the U.S., as it has happened in a variety of fields, including, *inter alia*, antitrust, intellectual property (and trademarks in particular), federal-state relations in connection with the regulation of interstate commerce, and gender-based anti-discrimination law.<sup>56</sup> Once more, the precise numbers of the ECJ cases that have carried out such a comparison for one of the reasons mentioned above is difficult to establish. Here, I will only mention two cases that have brought about important developments in EU law and that are illustrative of this practice.

The first is *Jenkins v. Kingsgate*,<sup>57</sup> dating back to 1981. This ruling is the first to ban indirect discrimination based on sex in equal pay cases under EU law. Jenkins was a woman employed as a part-time worker, to do the same work as her full-time colleagues, in a small textile company based in England. Her hourly pay was 10 per cent less than the pay of the full-time workforce. In her factory, nearly all the part time workers were women, while nearly all the full-time workers were men. The Advocate General's opinion in *Jenkins* relied explicitly on the U.S. Supreme Court decision in *Griggs v. Duke Power*<sup>58</sup> to establish a parallel between the condition of African Americans in the U.S. and women in Europe, with respect to indirect discrimination. The Advocate General knew, of course,

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56. Three important studies have explored this theme; see P. Herzog, *United States Supreme Court Cases in the Court of Justice of the European Communities*, 21 HASTINGS INT'L & COMP. L. REV. 903 (1998); L. F. Peoples, *The Use of Foreign Law by the Advocates General of the Court of Justice of the European Communities*, 35 SYRACUSE J. INT'L L. & COM. 219 (2007); L. F. Peoples, *The Influence of Foreign Law Cited in the Opinions of Advocates General on Community Law*, 28 YEARBOOK OF EUR. L. 458 (2009).

57. Case C-96/80 *J.P. Jenkins v Kingsgate Ltd.* [1981] ECR 00911. See I. Tourkochoriti, *Jenkins v Kingsgate and the Migration of the US Disparate Impact Doctrine in EU Law*, in EU LAW STORIES, *supra* note 10, at 418.

58. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

that in the U.S. the disparate impact doctrine, first affirmed with respect to racial discrimination cases under the Civil Rights Act of 1964, was applied to fight sex discrimination in the workplace as well:

As has been observed more than once, the Supreme Court of the United States and this Court often find themselves confronted with similar problems. Although of course the provisions of the United States Civil Rights Act of 1964 that were in question in the *Griggs* case were worded differently from Article 119 of the Treaty, their essential purpose was the same, except in so far as the provision in question in the *Griggs* case was about racial discrimination, not sex discrimination. Indeed in *Dothard v. Rawlinson* (1977) 433 US 321 the Supreme Court applied similar reasoning to sex discrimination. I draw considerable comfort from finding that my conclusion accords with the conclusions of that court in those cases.<sup>59</sup>

An English barrister with a Harvard LL.M., Anthony Lester, who had contributed to the elaboration of U.K. Race Relations Act by managing to persuade the Labour Government to insert a reference to indirect discrimination in it, pleaded the *Jenkins's* case before the ECJ. The Advocate General's opinion reveals that this English barrister argued that the U.S. disparate impact doctrine announced by Chief Justice Burger in *Griggs* should have guided the ECJ's decision on pay discrimination as well. The argument, thus, first advanced in the defendant's brief is reflected in a couple of lines of the ECJ judgment, though without any reference to U.S. civil rights law. A pay differential between full and part-time workers is not in itself prohibited under the Treaty: "unless it is in reality an indirect way of reducing the pay of part-time workers on the ground that that group of workers is composed exclusively or predominantly of women."<sup>60</sup>

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59. Opinion of Advocate General Warner delivered on Jan. 28, 1981, Case 96/80.

60. Case C-96/80, ¶ 15.

The second case of an outward looking use of comparative law between U.S. and EU Law is provided by the *Ruiz Zambrano* litigation.<sup>61</sup> Here, the ECJ concluded that denying a residence and work permit in Belgium to a Colombian father would impermissibly interfere with the substance of the European citizenship of his Belgian-born children. There is no need to ponder the full details of the case. Let us just note that it is also a landmark decision because the right of the plaintiff is recognised with respect to a situation that is purely internal to one of the Member States. And yet, despite this, the case is brought under the umbrella of EU law. What deserves a closer examination here is the opinion of Advocate's General Sharpston, now a judge on the Court. She explores the idea whether the question put to the Court should be addressed purely on the basis of the protection of fundamental rights under the Charter of Fundamental Rights of the European Union.<sup>62</sup> Citing the U.S. Supreme Court, in *Gitlow v. New York*,<sup>63</sup> Sharpston argues that a step in this direction would bring the EU law approach in line with how the U.S doctrine of incorporation, as first outlined:

[W]hen the US Supreme Court extended the reach of several rights enshrined in the Constitution's First Amendment to individual states. The 'incorporation' case-law, based since then on the 'due process' clause of the Fourteenth Amendment, does not require an inter-state movement nor legislative acts from Congress. According to the Supreme Court, certain fundamental rights are so significant that they are 'among the fundamental personal rights and liberties protected by the due process clause . . . from impairment by the states.'<sup>64</sup>

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61. C-34/09 *Gerardo Ruiz Zambrano v Office national de l'emploi* [2011] ECR I-011177. On this case, see the instructive contribution by F. Strumia, *Ruiz Zambrano's Quiet Revolution*, in EU LAW STORIES, *supra* note 10, at 224.

62. Opinion of Advocate General Sharpston delivered on Sept. 10, 2010, Case C-34/09, ¶¶ 172–173 [hereinafter Opinion AG Sharpston, Case C-34/09].

63. *Gitlow v. New York*, 268 U.S. 652 (1925). R. Schütze, *European Fundamental Rights and the Member States: From 'Selective' to 'Total' Incorporation?*, 14 CAMBRIDGE YEARBOOK OF EUR. LEG. STUD. 337 (2012).

64. Opinion AG Sharpston, Case C-34/09, ¶ 172.

The Advocate General thinks that when the relevant facts occurred in *Zambrano* no such doctrine was yet established. But Advocate Sharpston maintains that this change may come sooner rather than later:

[T]he Court should not, in the present case, overtly anticipate change. I do suggest, however, that (sooner rather than later) the Court will have to choose between keeping pace with an evolving situation or lagging behind legislative and political developments that have already taken place. At some point, the Court is likely to have to deal with a case – one suspects, a reference from a national court – that requires it to confront the question of whether the Union is not now on the cusp of constitutional change (as the Court itself partially foresaw when it delivered Opinion 2/94). Answering that question can be put off for the moment, but probably not for all that much longer.<sup>65</sup>

The case that Advocate Sharpston foreshadowed has now come to the Court, not just in one dispute, but in several ones, and in various proceedings, namely as a reference for a preliminary ruling, but also in the context of infringement procedures.

For the first time in 2016, when dealing with the Portuguese judges' case,<sup>66</sup> the Court announced a common standard concerning judicial independence. This standard is applicable to sanction violations of the right to an effective judicial remedy and to judicial independence by the Member States. The case concerned the salary reduction measures applied to the judges in Portugal, as well as to all other public employees in Portugal in response to the 2008 financial crisis. These measures were challenged under EU law, but the Court upheld their validity. The Court held that the pay reduction measures applied in Portugal did not undermine judicial independence, which is an essential component of the right to an effective judicial protection, because these measures affected the entire public sector.

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65. *Id.* at ¶¶ 172–173, 177.

66. Case C-64/16 *Associação Sindical dos Juizes Portugueses v Tribunal de Contas* [2018] EU:C:2018:117.



Although this conclusion could be easily taken for granted in that context, in its ruling the Court affirmed a general obligation for Member States to guarantee and protect judicial independence, which is an essential part of the principle of effective judicial protection of individual's rights: "[A] court or tribunal's independence is essential, as confirmed by the second subparagraph of Article 47 of the Charter, which refers to the access to an 'independent' tribunal as one of the requirements linked to the fundamental right to an effective remedy."<sup>67</sup> According to the Court:

The principle of the effective judicial protection of individuals' rights under EU law, referred to in the second subparagraph of Article 19(1) TEU, is a general principle of EU law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, . . . and which is now reaffirmed by Article 47 of the Charter.<sup>68</sup>

This is why some commentators have considered this judgment as a first step in the development of a European version of the incorporation doctrine announced by the U.S. Supreme Court in *Gitlow v. New York*, as foreshadowed by Advocate General Sharpston.<sup>69</sup> The Portuguese judges' ruling was followed by other decisions handed down by the Grand Chamber of the ECJ in 2019. In *Commission v. Poland*,<sup>70</sup> at issue were the measures taken by the Polish government to lower the retirement age of judges. The question raised was whether these measures violated the obligations flowing from primary EU law to secure judicial independence and the right to an effective judicial remedy. The precedent set in the Portuguese

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67. *Id.* at ¶ 41.

68. *Id.* at ¶ 35.

69. L. Pech & S. Platon, *Judicial Independence Under Threat: The Court of Justice to the Rescue in the ASJP Case*, 55 COMMON MKT. L. REV. 1827 (2018). According to the authors, the case "comes close to being the EU equivalent of the US Supreme Court case of *Gitlow* as regards the principle of effective judicial protection."

70. Case C-619/18 *European Commission v Republic of Poland* [2019] EU:C:2019:531.

judges' case already made clear that the traditional material criterion that separated the respective spheres of EU and national law cannot and do not govern questions of such fundamental importance for democracy and the rule of law as judicial independence. The claim of the Polish (and Hungarian) government that the rules governing the judiciary fall within the exclusive competence of the Member State was flatly rejected by the ECJ. In *Commission v. Poland*, the ECJ made the principle of effective judicial protection (including the principle of judicial independence) subject to federal standards of review—to use the language that would be used in the U.S. Therefore, to quote the words of the judgment in this case:

[A]lthough, as the Republic of Poland and Hungary point out, the organisation of justice in the Member States falls within the competence of those Member States, the fact remains that, when exercising that competence, the Member States are required to comply with their obligations deriving from EU law.<sup>71</sup>

The ECJ ruling in this case, as in the previous case concerning the Portuguese judges, held that effective judicial protection is a general principle of EU law stemming from the constitutional traditions common to the Member States.<sup>72</sup> The same holding has also been affirmed in *Commission v. Republic of Poland*<sup>73</sup> and underlies the judgment of the Court in the *Joined Cases C-585/18, C-624/18 and C-625/18, A. K. and Others v Sąd Najwyższy*<sup>74</sup> The latter of these decisions makes clear that the principle of the primacy of EU law requires the referring court to disapply national law and reserves jurisdiction to a court that does not meet the requirements of judicial independence. As such, the case would need to be heard and decided by a court that meets the articulated requirements.

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71. *Id.* at ¶ 52.

72. *Id.* at ¶ 49.

73. C-192/18 *European Commission v Republic of Poland* [2019] EU:C:2019:924.

74. *Joined Cases C-585/18, C-624/18 and C-625/18, A. K. and Others v Sąd Najwyższy* [2019] EU:C:2019:982.

## VII. EU LAW AND THE EXTRACONTRACTUAL LIABILITY OF THE EUROPEAN INSTITUTIONS

The reference to the common constitutional traditions of the member states in the *Commission v. Poland* judgment brings me to consider what I have until now postponed. There are provisions of the Treaties that call, in rather explicit terms, for a comparative law foundation of the applicable law. A first well-known example of this kind, going back to the origins of the law of the European institutions, is the law applicable to the extracontractual liability of the EU. A second example of more recent, but ever growing, importance is provided by the reference to the notion of “constitutional traditions common to the Member States.”<sup>75</sup> Together with the European Convention for the Protection of Human Rights, these traditions provide a grounding of fundamental rights as general principles of EU law, as now proclaimed by article 6.3 TEU and article 52.4 of the Charter of Fundamental Rights of the European Union.

Already in the first version of the Treaty, dating back to 1957, the extracontractual liability of the European institutions was established on the basis of the general principles common to the laws of the Member States. In its present version, article 340 of the Treaty on the Functioning of the European Union provides that: “[T]he Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties.”

According to the same article, a similar provision now governs the liability of the European Central Bank, which does not, however, involve the liability of the Union; this is treated as an autonomous institution in this respect as well. With the entry into force of the

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75. O. Pollicino, *Transfiguration and Actual Relevance of the Common Constitutional Traditions: Past, Present and Future*, 18 GLOBAL JURIST 1 (2018); O. Pollicino, *Common Constitutional Traditions in the Age of the European Bill (s) of Rights: Chronicle of a (Somewhat Prematurely) Death Foretold*, in THE FRAGMENTED LANDSCAPE OF FUNDAMENTAL RIGHTS PROTECTION IN EUROPE—THE ROLE OF JUDICIAL AND NON-JUDICIAL ACTORS 42, 49, 51–52 (Edward Elgar 2018) [hereinafter *Common Constitutional Traditions*].

Charter of Fundamental Rights, the duty of the Union to make good any damage caused to third parties has acquired a further dimension. The Charter now establishes as a binding fundamental right of every person: “to have the Union make good any damage caused . . . , in accordance with the general principles common to the laws of the Member States.”<sup>76</sup>

The reference to the general principles common to the laws of the Member States in these articles require the Court to conduct a comparative examination of those laws, to establish what is actually common to them, as far as their principles are concerned. Essential concepts such as damage, loss, injury, negligence, causality, fault, and so, on are still given different meanings in the Member States so that to determine to what extent one can find commonalities across the Member States is not a simple task.<sup>77</sup> This explains why the jurisprudence of the Court on this matter has been examined more than a few times in works dedicated to European private law. Authors seek to answer the following question: “How does the Court do it?”<sup>78</sup> In turn, these works have been cited by the Court—as usual, the citations are mostly in the Advocates General’s opinions.<sup>79</sup> In terms of effectiveness, the jurisprudence of the Court on this matter attracts some critical remarks because claims brought against European institutions on this basis have had a very low rate of success. A recent study prepared for the European Parliament highlights this outcome.<sup>80</sup> From the time that the Community was

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76. Article 41.3 Charter of Fundamental Rights of the European Union.

77. See K. Gutman, *The Evolution of the Action for Damages Against the European Union and its Place in the System of Judicial Protection*, 48 COMMON MKT. L. REV. 695, 700 (2011); Gutman notes that “the case law on the Union’s non-contractual liability is littered with concepts – e.g. damage, loss, injury, causal link, fault, negligence, etc. – that are interpreted differently in the Member States.”

78. TORT LAW OF THE EUROPEAN COMMUNITY (H. Koziol & R. Schulze eds., Springer 2008).

79. See Advocate General Mengozzi delivered on Jan. 11, 2007, C-282/05 P *Holcim (Deutschland) AG v Commission of the European Communities* [2007] ECR I-02941, ¶¶ 58, 115.

80. R. Mańko, European Parliamentary Research Service, *Action for Damages Against the EU* (Dec. 2018), available at <https://perma.cc/M4YX-BKLG>.

founded up to the year 2000, only twenty actions for damages were successful. The number is similar between 2000 and 2014: Nineteen plaintiffs have won against European institutions. It is not quite “mission impossible” but these are very low numbers indeed. The average success rate is a mere 8%. More recent data do not change this picture. The case law of the Court thus makes “only a modest contribution to breaking down the immunities of public bodies.”<sup>81</sup> This is somewhat ironic, considering the importance that the Court attributes to the principle of effective judicial protection.

#### VIII. THE “CONSTITUTIONAL TRADITIONS COMMON TO THE MEMBER STATES” AS AN INVITATION TO COMPARATIVE LAW

As mentioned above, article 6.3 TEU establishes fundamental rights as general principles of the Union’s law: “as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States . . .” Article 52.4 of the Charter of Fundamental Rights further provides that: “In so far as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions.”<sup>82</sup> These are once more norms that explicitly require a determination of what is common among the Member States. Obviously, this is more than invitation to adopt a comparative stance to ascertain the general principles of European law in the area of fundamental rights.

Those who are familiar with the evolution of European law will quickly draw attention to the absence of similar provisions from the text of the original Treaties. They are right, of course. A first version

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81. C. VAN DAM, *EUROPEAN TORT LAW* 533 (Oxford U. Press 2013).

82. There is a reference to the same notion in the Preamble of the Charter of Fundamental Rights of the European Union:

This Charter reaffirms, with due regard for the powers and tasks of the Union and for the principle of subsidiarity, the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the European Convention for the Protection of Human Rights and Fundamental Freedoms. . . .

of this provision was incorporated in the Treaties only after the European Court of Justice recognized the necessity of containing the potentially disruptive dynamics originating in the inevitable collisions between the norms of national constitutions of Member States and European law.<sup>83</sup> The way out of the problem was to proclaim that the validity of EU law could not be challenged on the basis of the constitutions of Member States. And yet, at the same time, to elaborate a doctrine of EU fundamental rights that draws from the constitutional traditions common to the Member States.<sup>84</sup> As the Court first held in *Internationale Handelsgesellschaft*<sup>85</sup>:

Respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community.

The Court, thus, asserted the autonomy and the independence of the Community legal order *vis-à-vis* the Member States, but it also recognized that this order presents a constitutional dimension “inspired”—this was the original expression—by the constitutional traditions common to the laws of the Member States. This formula has been subsequently refined and now it is featured in over one hundred decisions rendered by the ECJ according to research conducted by Riccardo de Caria and myself in 2017.<sup>86</sup> The constitutional traditions of the Member States are not stand-alone sources of law in this framework. Under article 4.2 TEU, the European Union has

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83. S. Cassese, *The “Constitutional Traditions Common to the Member States” of the European Union*, 4 RIV. TRIM. DIR. PUB. 939 (2017).

84. B. Davies, *Internationale Handelsgesellschaft and the Miscalculation at the Inception of the ECJ’s Human Rights Jurisprudence*, in EU LAW STORIES, *supra* note 10, at 155.

85. Case 11-70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 01125, ¶ 14.

86. M. Graziadei & R. De Caria, *The “Constitutional Traditions Common to the Member States” in the Case-law of the European Court of Justice: Judicial Dialogue at its Finest*, 4 RIV. TRIM. DIR. PUB. 949 (2017). Meanwhile, the number of decisions featuring a reference to the notion has grown. For a study on the raise and the impact of this notion, see Cassese, *supra* note 83.

undertaken the obligation to respect the constitutional identity of the Member States,<sup>87</sup> which is also a means to diffuse the tensions that can and do arise in the adjudication of EU law.<sup>88</sup> At the national level, a reference to the notion of “constitutional identity” should also reflect “a palpable commitment to the European project” by the national constituency.<sup>89</sup> Nonetheless, a tendency to take a confrontational approach to this matter is emerging, not only in some eastern countries like Hungary, but also at the centre of Europe, as the controversial judgment of the German *Bundesverfassungsgericht* on the expanded asset purchase program of the European Central Bank shows.<sup>90</sup>

Clearly, an assessment of what is common among the Member States, as far as the respective constitutional traditions are concerned, should involve a serious comparative effort by the Court, to give substance to the bottom up approach represented by this reference to the laws of the Member States. The European Charter of Fundamental Rights and the European Convention of Human Rights show what has been achieved so far and what is already common to the Member States in the field of fundamental freedoms and rights. But we should not underestimate the power of unwritten law represented by the general principles of EU law, built upon the

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87. Article 4.2 TEU:

The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.

88. CONSTITUTIONAL IDENTITY IN A EUROPE OF MULTILEVEL CONSTITUTIONALISM (C. Calliess & G. van der Schyff eds., Cambridge U. Press 2019).

89. T. Drinóczi, *Constitutional Identity in Europe: The Identity of the Constitution. A Regional Approach*, 21 *German Law Journal* 105, 129 (2020).

90. See BVerfG, 2 BvR 859/15, May 5, 2020. The original version of the judgment goes as far as to charge Mario Draghi, former head of the Bank of Italy, of partiality towards his country in launching the OTM programme. This ugly remark is, however, omitted in the English version of the judgment provided by the Court itself. As the insightful study by Drinóczi shows, the approach of constitutional courts on this matter is far from uniform in Europe.

foundations provided by the constitutional traditions of the Member States. They are an immense normative reservoir to be tapped,<sup>91</sup> especially when EU law falls short of providing a specific rule, or textual reference. Reference to those traditions is also a reminder of the fact that EU law can seldom afford the luxury of starting from scratch.

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91. Pollicino, *Common Constitutional Traditions*, *supra* note 75, at 42, 71.