SANT'ANNA LEGAL STUDIES

STALS RESEARCH PAPER 1/2019

Giuseppe Martinico

Identifying Implicit Reasons?
General Principles of EU Law and Comparative Law

Scuola Superiore Sant'Anna

Pisa

http://stals.sssup.it

ISSN: 1974-5656

This page was intentionally left blank

Identifying Implicit Reasons?
General Principles of EU Law and Comparative Law

Giuseppe Martinico*

Goals of the Research

The aim of this chapter is to explore the subject of the general principles of EU law from a comparative law perspective. In comparative law the idea of general principles is frequently associated with that of openness, being that general principles open norms in at least three senses. First of all principles are characterised by what Betti defined a "surplus of axiological meaning" [eccedenza di contenuto assiologico][1], because of their *vis espansiva* and their indefinite content when compared to the other norms. Second, principles are also open since they often act as a bridge between two different normative systems (law and morality) by connecting positive law and natural law[2]. Finally, they are open because they connect the domestic and international legal systems, especially after World War II. Openness is precisely one of the most evident features that characterises many constitutional texts in Europe[3], and it is possible to find the roots of this phenomenon even earlier, looking back at what, in the thirties, Mirkine- Guetzévitch called the "internationalization of modern constitutions"[4]. In other words, openness seems to belong within the core of the "nouvelles tendances du droit constitutionnel"[5].

However, if general principles have been traditionally connected with the idea of openness, comparative law shows that this was not always the case[6]. The debate on codifications in

* Associate Professor of Comparative Public Law at the Scuola Universitaria Superiore Sant'Anna, Pisa. Visiting Professor at the China School of Political Science and Law, Beijing, Research Fellow at the Centre for Studies on Federalism, Turin. Honorary Professor at the European Law Research Centre of the Henan University. I would like to thank Monica Claes, Egle Dagilyte, Katja Ziegler, Marcus Klamer, Jule Mulder and Clara Rauchegger for their comments.

[1] Emilio Betti, *Teoria generale della interpretazione* (Giuffrè, Milano 1955) II, 850.

[2] On this debate see Ronald Dworkin, *Taking Rights Seriously* (Cambridge, MA, Harvard University Press 1977).

[3] Eric Stein, "International Law in Internal Law: Toward Internationalization of Central-Eastern European Constitutions?" 88 *American Journal of International Law* 427(1994) 429. Alejandro Saiz Arnaiz, *La apertura constitucional al derecho internacional y europeo de los derechos humanos. El artículo 10.2 de la Constitución española* (Consejo General del Poder Judicial, Madrid 1999). Paolo Carrozza, "Constitutionalism's Post-modern Opening", in Martin Loughlin, Neil Walker (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford, Oxford University Press, 2007) 169.

[4] Boris Mirkine- Guetzévitch, *Les Nouvelles tendances du droit constitutionnel* (Paris, Giard 1931) 48 et seq.

[5] Ibidem.

[6] Giorgio Del Vecchio, "Les bases du droit comparé et les principes généraux du droit", 12 *Revue internationale de droit*

Continental Europe clearly shows how there was a period when the general principles were associated with the necessary closure of a legal system, especially in those systems where the Civil Codes were conceived as an expression of legal nationalism[7]. The debate on the general principles of law in the Italian Civil Code (dated 1942 and drafted under the fascist regime) is emblematic from this point of view[8].

The provision of Art. 12 of the preliminary provisions to the Italian Civil Code (listing the interpretative criteria available to the interpreter) was drafted to impede a reference to the principles of natural law[9]. When commenting on this provision Guastini argued that originally the role reserved to systematic interpretation was very limited for the interpreter[10]. Because of that systematic interpretation was seen like a sort of *extrema ratio* exploitable only in exceptional cases. Looking at it, scholars also said that according to the original scheme of the Italian Civil Code systematic interpretation was seen as an act of integration rather than as an act of interpretation *stricto sensu* understood[11]. After the entry into force of the Italian Constitution many of the provisions of the same Civil Code (including Art. 12 of its preliminary provisions) were interpreted in light of the new constitutional principles and this has changed the role of the general principles as well[12]. If once they were seen before as the moment of closure for a legal system (nothing out of the Code, no reference to natural law was allowed), today, the principles are perceived as the moment of openness for a legal order that connects domestic and international law and systematic interpretation (often combined with consistent interpretation[13]) that is no longer seen as a last resort for the interpreter. In the EU context, there is another level of complexity that should be emphasised: as we will see, there are principles that are frequently seen as shared norms which belong to both the national and the supranational legal systems. This explains why frequently the interpretation of a general principle of EU law inferred from the constitutional traditions common to the member states results in creating conflicts due to the interpretative competition existing between the Court of Justice of the EU (CJEU) and the national constitutional courts. *Cordero Alonso* and *Mangold* are emblematic of that (*infra*).

A couple of preliminary clarifications are necessary at this point to clarify what this chapter is not about. First of all, here I am not going to enter into the very old debate about the nature of

---

comparé 493(1960).

[7] Paolo Grossi, *A History of European Law* (Blackwell Malden, MA 2010) 154.

[8] Livio Paladin, "Costituzione, preleggi e codice civile" *Rivista di diritto civile* 19 (1993) 23

[9] Ibidem.

[10] Riccardo Guastini, *Le fonti del diritto. Fondamenti teorici*. (Giuffrè Milano 2010) 347 et seq.

[11] Ibidem.

[12] Livio Paladin, "Costituzione, preleggi" cit.

[13] Roberto Bin, "L'interpretazione conforme. Due o tre cose che so di lei" *Rivista AIC* 1 (2015), http://www.rivistaaic.it/download/1hafJKHFcYv_JgI3rYOwnyoMtsDqwTgP48qIgNjX4t4/1-2015-bin.pdf

comparative law – discussing whether it is a method or an autonomous discipline[14] – in this chapter comparative law will be understood as a critical exercise characterised by a subversive function and serving as an "antidote to uncritical faith in legal doctrine"[15].

Second, although, as we will see later, sometimes it is possible to find reference to the idea of "evaluative comparative law" in the Opinions of some Advocates General (*infra*) here I shall not deal (directly, at least) with the never-ending discussion about the functions of comparative law[16].

Generally speaking comparative law is certainly relevant both for the genesis of the general principles of EU law and for their interpretation[17]. Although this is not a piece on the use of comparative law in the case law of the Court of Justice of the EU (CJEU), the traditional reluctance of the Luxembourg Court to engage in explicit legal comparison[18] will inevitably have an impact on the subject of this chapter. In this sense it has been suggested that the CJEU does a lot of implicit comparison[19], but hardly this will explicitly feature in the final text of its decisions[20]. Another caveat is given by the very well-known style of the decisions of the Court: although the style of its

[14] The literature is massive, see at least: Otto Kahn Freund, "Comparative Law as an Academic Subject" 82 *Law Quarterly Review* 40 (1966). Basil Markesinis, "Comparative Law. A Subject in Search of an Audience" 53 *Modern Law Review* 1 (1990); Otto Pfersmann, "Le droit comparé comme interprétation et comme théorie du droit" 53 *Revue international de droit comparé* 275 (2001). Rodolfo Sacco, "Legal Formants: A Dynamic Approach to Comparative Law, 39 *American Journal of Comparative Law* 1 (Part I) 343 (Part II) (1991).

[15] Konrad Zweigert, Hein Kötz, *An Introduction to Comparative Law* (Oxford University Press, Oxford 1998) 22.

[16] For instance, Michaels identified seven functions "(1) the epistemological function of understanding legal rules and institutions, (2) the comparative function of achieving comparability, (3) the presumptive function of emphasizing similarity, (4) the formalizing function of system building, (5) the evaluative function of determining the better law, (6) the universalizing function of preparing legal unification, and (7) the critical function of providing tools for the critique of law", Ralf Michaels, "The Functional Method of Comparative Law" in Mathias Reimann and Reinhard Zimmermann (eds.), *The Oxford Handbook of Comparative Law* (Oxford University Press, Oxford 2006) 339, 363.

[17] See for instance the examples provided by Lenaerts and Gutiérrez-Fons with regard to concepts such as "spouse"' or married official" (respectively C-59/85 Netherlands v Reed [1986] ECR 1283 and Joined Cases C-122/99 P and C-125/99 P D and Sweden v Council [2001] ECR I-4319) "apart from the fact that the comparative law method provides an analytical support for the discovery and development of general principles of EU law, it may also be relied upon with a view to clarifying specific provisions of EU law", Koen Lenaerts, José A. Gutiérrez-Fons, "To say what the law of the EU is : methods of interpretation and the European Court of Justice", EUI Working Paper, Distinguished Lecture delivered on the occasion of the XXIV Law of the European Union course of the Academy of European Law, on 6 July 2013. http://cadmus.eui.eu/handle/1814/28339, then published in 64 *Columbia Journal of European Law* 841 (2013).

[18] Koen Lenaerts, Kathleen Gutman, "The Comparative Law Method and the European Court of Justice: Echoes Across the Atlantic", 64 *American Journal of Comparative Law* 841 (2016); Fernanda Nicola, "National Legal Traditions at Work in the Jurisprudence of the Court of Justice of the European Union", 64 *American Journal of Comparative Law* 866 (2016) 869. According to whom: "The absence of a comparative law method in EU law led scholars to rely on a theory of legal origins, based on an economic account of legal systems which is widely criticized among comparative lawyers" See also Hélène Ruiz Fabri, "Principes généraux du droit communautaire et droit compare" 45 *Droits* 127 (2007)

[19] Giuseppe de Vergottini, *Oltre il dialogo tra le Corti. Giudici, diritto straniero, comparazione* (Il Mulino, Bologna 2010)144.

[20] Although something has been changing over recent years Koen Lenaerts, Kathleen Gutman, "The Comparative Law Method" cit. See also Giuseppe de Vergottini, "Tradizioni costituzionali comuni e Costituzione europea", 2006, http://www.forumcostituzionale.it/wordpress/wp-content/uploads/pre_2006/135.pdf; Luigi Cozzolino, "Le tradizioni costituzionali comuni nella giurisprudenza della Corte di giustizia delle Comunità europee", in Paolo Falzea, Antonino Spadaro, Luigi Ventura (eds.), *La Corte Costituzionale e le Corti d´Europa* (Giappichelli, Torino 2003) 3.

judgments has changed over the years[21], even recently the Court exhausted the legal reasoning of very revolutionary cases with pretty short decisions[22]. This makes it very difficult to understand the real importance of the comparative argument in the economy of the judicial outcome and introduces another element of non-transparency in the legal reasoning. Finally, another element to be taken into account is the uncertain content of the general principles, as AG Mazàk beautifully suggested when recalling the criticism directed to the Court after *Mangold*:

"The approach adopted by the Court in Mangold has received serious criticism from academia, the media and also from most of the parties to the present proceedings and certainly merits further comment. First of all, it should be emphasised that the concept of general principles of law has been central to the development of the Community legal order. By formulating general principles of Community law – pursuant to its obligation under Article 220 EC to ensure observance of the law in the interpretation and application of the Treaty – the Court has actually added flesh to the bones of Community law, which otherwise – being a legal order based on a framework treaty – would have remained a mere skeleton of rules, not quite constituting a proper legal 'order'. This source of law enabled the Court – often drawing inspiration from legal traditions common to the Member States, and international treaties – to guarantee and add content to legal principles in such important areas as the protection of fundamental rights and administrative law. However, it lies in the nature of general principles of law, which are to be sought rather in the Platonic heaven of law than in the law books, that both their existence and their substantive content are marked by uncertainty"[23].

Considerations like these allow me to introduce the structure of this work. Instead of offering a descriptive overview of the cases where the CJEU has relied on explicit comparison in its case law concerning the general principles, I shall articulate this chapter as follows: first, I shall recall the reasons why comparative law is on paper of crucial importance to the CJEU when interpreting the general principles[24]. Second, I shall look at the different methodological options possible for the CJEU in this field. Third, I shall look at comparative law as a source of transparency in the legal reasoning of the Court by recalling some problematic cases, where the lack of explicit comparison caused harsh criticism for the case law of the Luxembourg Court.

The analysis proposed is case law based, which means that instead of framing all these issues from a purely theoretical point of view I shall try to deal with them by looking at some concrete cases decided by the CJEU and at the Opinions delivered by the Advocates General.

---

[21] Mitchel Lasser, "Anticipating Three Models of Judicial Control, Debate and Legitimacy: The European Court of Justice, the Cour de cassation and the United States Supreme Court", Jean Monnet Working Paper 1/03, https://jeanmonnetprogram.org/archive/papers/03/030101.pdf; Fernanda Nicola, "National Legal Traditions" cit.

[22] Although it does not much to do with the use of comparative law *Zambrano* is an emblematic example of this trend. C-34/09, Ruiz Zambrano [2011] ECR I-01177. Loïc Azoulai, "'Euro-Bonds' The Ruiz Zambrano judgment or the Real Invention of EU Citizenship" 3 *Perspectives on Federalism* 31 (2011).

[23] C-411/05, Félix Palacios de la Villa, AG Mazàk, [2007] ECR I-08531 par. 83- 86.

[24] For the purpose of this chapter I shall not look at the case law of the General Court.

This chapter focuses on how the Luxembourg Court looks at the domestic legal materials by the Luxembourg Court systems when constructing the general principles of EU Law[25]. *Hauer*[26] was described by Lenaerts and Gutiérrez-Fons as "a paradigmatic example of a case where the CJEU adopted a comparative law method"[27], since in order to respond to the question raised by the referring court the CJEU offered a comparative analysis of the relevant options present at national level:

"It is necessary to consider also the indications provided by the constitutional rules and practices of the nine Member States. One of the first points to emerge in this regard is that those rules and practices permit the legislature to control the use of private property in accordance with the general interest. Thus some constitutions refer to the obligations arising out of the ownership of property (German Grundgesetz, Article 14 (2), first sentence), to its social function (Italian constitution, Article 42 (2)), to the subordination of its use to the requirements of the common good (German Grundgesetz, Article 14 (2). second sentence, and the Irish constitution, Article 43.2.2°), or of social justice (Irish constitution, Article 43.2.1°). In all the Member States, numerous legislative measures have given concrete expression to that social function of the right to property. Thus in all the Member States there is legislation on agriculture and forestry, the water supply, the protection of the environment and town and country planning, which imposes restrictions, sometimes appreciable, on the use of real property" [28].

The topic of this chapter is still burning since the binding nature of the Charter of Fundamental Rights of the EU[29] has not made the general principles "*démodé*"[30]. On the contrary, there have been cases where the CJEU has relied on a general principle because of the slightly different

[25] On that see: Anthony Arnull, "What is a General Principle of EU Law? In Stefan Vogenauer (ed), *Prohibition of Abuse of Law A New General Principle of EU Law?*, (Hart. Oxford, 2017) 7, 9 et seq. and Koen Lenaerts, José A. Gutiérrez-Fons, "To say what the law of the EU is" cit.

[26] Case 44/79 Hauer [1979] ECR 3727.

[27] Koen Lenaerts, José A. Gutiérrez-Fons, "To say what the law" cit.

[28] 44/79 Hauer [1979] ECR 372. In light of that the Court stated that: "All the wine-producing countries of the Community have restrictive legislation, albeit of differing severity, concerning the planting of vines, the selection of varieties and the methods of cultivation. In none of the countries concerned are those provisions considered to be incompatible in principle with the regard due to the right to property.", par. 21.

[29] On the complicated relationship between the general principles of EU law and the provisions of the Charter of Fundamental Rights of the EU see also the Opinions of AG Maduro in Case C-305/05 Ordre des barreaux francophones et Germanophone and Others [2007] ECR I-5305, par. 48 and in Case C-465/07 M. Elgafaji, N. Elgafaji V Staatssecretaris van Justitie [2009] I-00921 par. 21. On this see Stefania Ninatti, *Ieri e oggi delle tradizioni costituzionali comuni: le novità nella giurisprudenza comunitaria*, in Giuseppe D' Elia, Giulia Tiberi, Maria Paola Viviani Schlein (eds.), *Scritti in memoria di Alessandra Concaro* (Giuffrè, Milano 2012) 533, 545 and Oreste Pollicino, "Della sopravvivenza delle tradizioni costituzionali comuni alla Carta di Nizza: ovvero del mancato avverarsi di una (cronaca di una) morte annunciata", *Il diritto dell'Unione Europea* 253 (2016).

[30] Takis Tridimas, "Fundamental Rights, General Principles of EU Law, and the Charter", 16 *Cambridge Yearbook of European Legal Studies* 361 (2014). Compare with Frédéric Sudre, "Le renforcement de la protection des droits de l'homme au sein de l'Union européenne" in Joël Rideau (ed.), *De la Communauté de droit à l'Union de droit. Continuité et avatars européens* (LGDJ, Paris 2000) 218. On this see: Gabriela-Adriana Rusu, "Les traditions constitutionnelles communes aux Etats membres, source matérielle des droits fondamentaux dans l'Union européenne", 2011, http://www.umk.ro/fr/buletin-stiintific-cercetare/arhiva-buletinstiintific/203-volumul-mesei-rotunde-internationale-2011/1153-les-traditions-constitutionnelles-communes-aux-etats-membres-source-materielle-des-droits-fondamentaux-dans-lunion-europeenne.html

meaning that is has when compared to the provisions codified in the Charter[31]. Sometimes this can be explained taking into account the limited scope of application of the Charter[32].

The Structure of EU Law: The Importance of Comparative Law (in Theory at Least)

The CJEU has been criticised for not making its sources of inspiration clear when dealing in this and other areas of EU law in spite of the many interpretative opportunities offered by the wording of the Treaties[33]. Indeed, there are "structural" reasons that would suggest a more explicit use of comparative law in the activity of the interpreter of the Treaties, especially considering the open nature of the Treaties.

In this respect, as noticed by Arnull[34], among others, the Maastricht Treaty has been a turning point in clarifying the importance of national constitutional traditions in the genesis and interpretation of the general principles of Union law. Since then the EU Treaties have progressively referred to national legal (sometimes even constitutional) materials, norms such as Art. 6 TEU (in all its versions) and even more recently Art. 4 TEU[35] can be traced back to this trend. can be traced back to this trend. The model of Art. 4 TEU is undoubtedly represented by Art. 6 TEU (pre-Lisbon version[36]), which described the closeness between common constitutional traditions and national fundamental principles. In that provision, in fact, these two kinds of legal sources (common constitutional traditions[37] and national fundamental principles – via the reference to the "national

[31] This is the example of the case law on right to good administration or Right to an effective remedy and to a fair trial: Herwig Hofmann and Bucura Mihaescu, "The Relation between the Charter's Fundamental Rights and the Unwritten General Principles of EU Law: Good Administration as the Test Case", 9 *European Constitutional Law Review* 73 (2013); Xavier Groussot, Jörgen Hettne and Gunnar Thor Petursson, "General Principles and the Many Faces of Coherence: Between Law and Ideology in the European Union" , in Stefan Vogenauer, Stephen Weatherill (eds.), *General Principles of Law European and Comparative Perspectives* (Hart, Oxford 2017) 77.

[32] Marek Safjan, "Areas of application of the Charter of application of the European Union: fields of conflicts?", EUI Working Paper LAW 2012/22, http://cadmus.eui.eu/bitstream/handle/1814/23294/LAW-2012-22.pdf See also Filippo Fontanelli, "The Implementation of European Law by Member States under Article 51(1) of the Charter of Fundamental Rights" 20 *Columbia Journal of European Law* 193 (2014).

[33] Roman Herzog, Lüder Gerken, "[Comment] Stop the European Court of Justice", 2008, https://euobserver.com/opinion/26714

[34] Anthony Arnull, "What is a General" cit. He also noticed the curious wording of Art. F (2) which maintained the formula "general principles of Community Law" instead of declaring them principles of European Union Law.

[35] Armin von Bogdandy, Stephan Schill, "Overcoming absolute primacy: Respect for national identity under the Lisbon Treaty" 48 *Common Market Law Review* 1417 (2011). For a different understanding of this clause see: Gerhard van der Schyff, "The Constitutional Relationship between the European Union and its Member States: The Role of National
Identity in Article 4(2) TEU" 37 *European Law Review* 563 (2012).

[36] See also what AG Maduro said in his Opinion in Arcelor, Case C-127/07 Société Arcelor, par. 17. On Arcelor see: Oreste Pollicino, "Conseil d'Etat: Decision No. 287110 of 8 February 2007, Société Arcelor Atlantique et Lorraine and others", 45 *Common Market Law Review* 1519 (2008).

[37]About the common constitutional traditions as "sources" of EU law, see: Alessandro Pizzorusso, "Common constitutional traditions in Europe as a source of Community law", *STALS (Sant'Anna Legal Studies) Research Paper*, 1/2008, www.stals.sssup.it/files/stals_Pizzorusso.pdf See also: Alessandro Pizzorusso, *Il patrimonio*

identities of its Member States") were mentioned in two subsequent paragraphs, as Ruggeri noticed[38]. It is sufficient here to recall the reference made in Art. 6.2 to the common constitutional traditions, and the reference to the "national identities" of its Member States in Art. 6.3.

Another example of the openness the EU legal system is given by the Charter of the Fundamental Rights of the EU (EUCFR) and by those clauses of the Charter that refer to "national laws and practices"[39]. This confirms the open nature of EU law, an element already stressed by Häberle who defined the national and EU legal systems as provided with two partial constitutions[40].

There are of course other provisions in the Treaties which *expressis verbis* refer to national legal materials, this is the case of former Art. 215 ECT which was recalled in *Brasserie du Pecheur* and *Factortame*[41]. This confirms the openness characterising the EU Treaties, since all these norms offer proof of the decision to open up the Treaties to the influence of national legal systems.

Also, current and former members of the Luxembourg Court confirmed the importance of comparative law in the activity of the CJEU[42]. Nevertheless, in spite of all these references to national legal materials, the CJEU has been traditionally reluctant to engage in explicit comparison and this has affected the transparency of its legal reasoning as we will see. Indeed, while the idea of "the general principles of comparative laws of the Member States" has been frequently employed by the CJEU in its case law[43], the Luxembourg Court rarely shows its cards, by making these comparative references explicit, with very few exceptions such as the very well-known *Algera*[44] and

---

costituzionale europeo (Il Mulino, Bologna 2002).

[38]Antonio Ruggeri, "'Tradizioni costituzionali comuni' e 'controlimiti', tra teoria delle fonti e teoria dell'interpretazione", *Diritto pubblico comparato ed europeo* (2003) 101.

[39]See, for instance, Art. 9, 10(2), 14(3), 27, 28, 30, and 34–36. Title IV, devoted to "Solidarity", is particularly rich in such references and perhaps that is no coincidence, since in this field the EUCFR is more innovative than in other cases compared with the ECHR.

[40] Peter Häberle, "Dallo Stato nazionale all'Unione europea: evoluzioni dello Stato costituzionale. Il Grundgesetz come Costituzione parziale nel contesto della Unione europea: aspetti di un problema", *Diritto pubblico comparato ed europeo* 455 *(*2002).

[41]46 and 48/93 Brasserie du Pecheur and Factortame [1996] ECR I-01029.

[42]Hans. Kutscher, "Methods of Interpretation as Seen by a Judge at the Court of Justice" in *Reports of a Judicial and Academic Conference held in Luxemburg on 27-28 September 1976*, http://aei.pitt.edu/41812/1/A5955.pdf, 1. See also Koen Lenaerts, José A. Gutiérrez-Fons, "To say what the law" cit: "The ECJ also interprets EU law in light of the legal principles common to the Member States by applying a comparative law method. In so doing, the ECJ does not try to find the "lowest common denominator", but rather those national solution(s) that would best fulfil the objectives pursued by the EU or that would best give expression to a growing trend in the constitutional laws of the Member States where such a trend can be identified." On this see also: Patrick Kelly, *Law in a law-governed union (Recht in einer Rechtsunion): The Court of Justice of the European Union and the free law doctrine*. PhD thesis, Birkbeck, University of London, 2015, p. 44, http://bbktheses.da.ulcc.ac.uk/136/1/cp_Fullversion-2014KellyPphdBBK.pdf

[43]Especially to justify the protection of fundamental rights. See also the case law of the CJEU on social rights: among others Laval, C-341/05, Laval un Partneri Ltd contro Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan e Svenska Elektrikerförbundet. [2007] I-11767, par. 91. On this Stefania Ninatti, "Ieri e oggi" cit., 546.

[44] Algera 7/56, 3/57 to 7/57 [1957- 1958] ECR 00039, p, 55: "The possibility of withdrawing such measures is a problem of administrative law, which is familiar in the case-law and learned writing of all the countries of the Community, but for the solution of which the Treaty does not contain any rules. Unless the Court is to deny justice it

Hauer[45] cases and, more recently, some cases dealing with plurilingualism in European law [46]. A good example of this implicit comparative approach is *Berlusconi*[47], where the CJEU – in the words of his current President- has "implicitly relied on the comparative study undertaken by AG Kokott who stressed the fact that "[that principle is] established in the (…) legal systems of almost [all Member States]".[48]

The same can be said with regard to *Audiolux* in spite of the excellent (from a methodological point of view) Opinion of AG Trstenjak.

As recalled by Arnull, this implicit comparison and the consequent lack of transparency gives wide margins of manoeuvre to the Court and provokes "scepticism about how conscientiously the Court of Justice has actually examined national and international law and expose it to criticism that it is, in reality, pursuing an agenda of its own".[49]

The Methodology Followed by the CJEU When Dealing with General Principles

As pointed out by Rusu, it is possible to notice a certain variety of terminology in this field[50] and in theory the CJEU embarks on comparative law every time it uses formulae like "constitutional traditions common to the Member States"[51], "principles and concepts common to the laws of the States"[52], and "principle[s] common to the laws of the Member States"[53]. However, the lack of transparency in the case law of the CJEU makes it very difficult to understand how the Luxembourg Court proceeds when coming up with a general principle of EU law. Which legal orders should the CJEU consider? Are the national materials sources of EU law? Is it necessary to have a sort of

---

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. It emerges from a comparative study of this problem of law that in the six Member States an administrative measure conferring individual rights on the person concerned cannot in principle be withdrawn, if it is a lawful measure; in that case, since the individual right is vested, the need to safeguard confidence in the stability of the situation thus created prevails over the interests of an administration desirous of reversing its decision. This is true in particular of the appointment of an official".

[45] Case 44/79 Hauer [1979] ECR 3727.

[46] Tadas Klimas, Jurate Vaiciukaité "Interpretation of European Union Multilingual Law" *International Journal of Baltic Law* 1 (2005)

[47] Joined Cases C-387/02, C-391/02 and C-403/02 Berlusconi and Others, EU:C:2005:270.

[48]Koen Lenaerts, The Court of Justice and the Comparative Law Method, 2016, available at: https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/General_Assembly/2016/K._Lenaerts_ELI_AC_2016.pdf (accessed 24 May 2018). Even before, it is interesting to see how in Orkem the Court relied on the comparative analysis carried out by AG Darmon (374/87, Orkem v Commission of the European Communities. [1989] ECR 3283, par. 29) as noticed by Stefania Ninatti, "Ieri e Oggi" cit, 539.

[49] Anthony Arnull, "What is a General Principle" cit?, 10. See also Adelina Adinolfi, "I principi generali nella giurisprudenza comunitaria e la loro influenza sugli ordinamenti degli Stati membri" *Rivista Italiana di Diritto Pubblico Comunitario* 521 (1994).

[50] Gabriela-Adriana Rusu, "Les traditions constitutionnelles communes" cit.

[51] 4/73 J. Nold, Kohlen- und Baustoffgroßhandlung [1974] ECR 49, par. 13.

[52] 155/79 AM & S Europe Limited v Commission of the European Communities. Legal privilege [1982] 01575, par. 18.

[53] 46/87, Hoechst AG v Commission of the European Communities [1989] ECR 02859, par. 17.

unanimous consensus over a given norm in order to qualify it as common constitutional tradition? If this is not the case, how should the CJEU decide?

In theory there are different approaches recalled by AG Maduro in his Opinion in the *Fiamm and Fedon* case:

"Can the discovery of a 'general principle common to the laws of the Member States' stem only from the almost mechanistic superimposition of the law of each Member State and the retention of only the elements that match exactly? I do not think so. Such a mathematical logic of the lowest common denominator would lead to the establishment of a regime for Community liability in which the victims of damage attributable to the institutions would have only a very slim chance of obtaining compensation. Although the Court of Justice must certainly be guided by the most characteristic provisions of the systems of domestic law, it must above all ensure that it adopts a solution appropriate to the needs and specific features of the Community legal system. In other words, the Court has the task of drawing on the legal traditions of the Member States in order to find an answer to similar legal questions arising under Community law that both respects those traditions and is appropriate to the context of the Community legal order. From that point of view, even a solution adopted by a minority may be preferred if it best meets the requirements of the Community system"[54].

This quotation reveals a kind of "functional approach"[55] followed by the AG when selecting the sources of inspiration for a general principle of EU law. On that occasion the CJEU excluded the existence of a convergence "as regards the possible existence of a principle of liability in the case of a lawful act or omission of the public authorities, in particular where it is of a legislative nature"[56]. This is something that somehow finds confirmation in what some former judges of the Luxembourg Court wrote in some academic articles many years ago:

"There is complete agreement that when the Court interprets or supplements Community law on a comparative-law basis it is not obliged to take the minimum which the national solutions have in common, or their arithmetical mean or the solution produced by a majority of the legal systems as the basis of its decision. The Court has to weigh up and evaluate the particular problem and search for the 'best' and 'most appropriate' solution. The best possible solution is the one which meets the specific objectives and basic principles of the Community […] the most satisfactory way"[57].

---

[54]Opinion AG Maduro in the Joined Cases C-120/06 P and C-121/06 P Fabbrica italiana accumulatori motocarri Montecchio SpA (FIAMM), Fabbrica italiana accumulatori motocarri Montecchio Technologies Inc. (FIAMM Technologies) v Council of the European Union, Commission of the European Communities and Giorgio Fedon & Figli SpA, Fedon America, Inc. v Council of the European Union, Commission of the European Communities, [2008] ECR I-06513, par. 55.

[55] On the so-called functional method in comparative law see Konrad Zweigert, Hein Kötz, *An Introduction cit*, 32. See also: Ralf Michaels, "The Functional Method of Comparative Law" cit.

[56] Joined Cases C-120/06 P and C-121/06 P Fabbrica italiana accumulatori motocarri Montecchio SpA (FIAMM), Fabbrica italiana accumulatori motocarri Montecchio Technologies Inc. (FIAMM Technologies) v Council of the European Union, Commission of the European Communities and Giorgio Fedon & Figli SpA, Fedon America, Inc. v Council of the European Union, Commission of the European Communities, [2008] ECR I-06513, par.175.

[57] Hans Kutscher, "Methods" cit, 1.

Another evidence of this functional approach can be found in the words of AG Roemer in the *Wilhelm Werhahn Hansamühle* case:

"What is important in ascertaining the law under Article 215, second paragraph, is not the unanimity of the legal systems of all Member States, nor a kind of vote ending in a majority finding; no, it is rather a matter of looking at what eminent legal writers (e.g., Zweigert) have called evaluative comparative law ('Wertende Rechtsvergleichung'). In this connexion — as has already been argued in the Opinion in Case 5/71 — what may be highly relevant is to ascertain which legal system emerges as the most carefully considered (Vide — Zweigert, cited by Heldrich in 'Europarecht' 1969, 346)"[58].

Even before, also AG Lagrange had noticed something similar by arguing that:

"In this way the case law of the Court, in so far as it invokes national laws (as it does to a large extent) to define the rules of law relating to the application of the Treaty, is not content to draw on more or less arithmetical 'common denominators' between the different national solutions, but chooses from each of the Member States those solutions which, having regard to the objects of the Treaty, appear to it to be the best or, if one may use the expression, the most progressive. That is the spirit, moreover, which has guided the Court hitherto"[59].

What is interesting to us here is to notice how this approach also opens the door for a non-perfect correspondence between the way in which a certain principle is understood in domestic law and the meaning given to it by the Court of Justice. In this respect, as AG Slynn wrote in his Opinion in the *AM v. Commission*: "Such a course is followed not to import national laws as such into Community law, but to use it as a means of discovering an unwritten principle of Community law"[60]. This is consistent with the traditional approach of the Court which tends to treat concepts and principles borrowed from national legal systems as autonomous concepts of its own law. This is also what Tridimas meant when he wrote the general principles were "children of national law, but as brought in front of the Court, they became enfants terribles"[61]. A clear example of that is the development of the EU principle of proportionality. The principle of proportionality was clearly "extracted" from

[58] Opinion AG Roemer in Joined Cases 63/72 to 69/72 Wilhelm Werhahn Hansamühle and others v. Council of the European Communities [1973] ECR 1255, 1259-1260. See also the Opinion AG Roemer in Case 5/71 Zuckerfabrik Schöppenstedt v Council [1971] ECR 975.

[59] Opinion AG Lagrange Case 14/61 Hoogovens v High Authority [1962] ECR 253, 283-284.

[60] Opinion AG Slynn in 155/79 AM & S Europe Limited v Commission of the European Communities. Legal privilege. [1982] ECR 1642, p. 1649.

[61] Takis Tridimas, *The General Principles of EC Law* (Oxford University Press, Oxford 1998) 4. As Ninatti (Stefania Ninatti, "Ieri e oggi" cit., 553) this is also connected to the" transformative function" of the common constitutional traditions, on this see also: Francesco Belvisi, "The "Common Constitutional Traditions and the Integration of the EU", *Diritto e Questioni Pubbliche* (2006), http://www.dirittoequestionipubbliche.org/page/2006_n6/mono_02_Belvisi.pdf

the German legal tradition, although the classic three-step partition (*Geeignetheit, Erforderlichkeit, Verhältnismäßigkeitsprüfung im engeren Sinne*) elaborated by the German judges is rarely respected by the CJEU[62].

Now, the risk of collision when handling these common sources (indeed general principles could be defined as "multi-sourced equivalent norms")[63] is evident as more recent judgments like *Cordero Alonso*[64] show and this perhaps explains one of the most ambivalent judgments in the history of EU law, namely[65] *Internationale Handelsgesellschaft*. In that decision the CJEU first stated its understanding of absolute primacy (primacy even over national constitutional norms) and later added that some of these constitutional norms may inspire the general principles of EU law:

"Recourse to the legal rules or concepts of national law in order to judge the validity of measures adopted by the institutions of the Community would have an adverse effect on the uniformity and efficacy of Community law. The validity of such measures can only be judged in the light of Community law. In fact, the law stemming from the Treaty, an independent source of law, cannot because of its very nature be overridden by rules of national law, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called in question. Therefore the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principles of a national constitutional structure. However, an examination should be made as to whether or not any analogous guarantee inherent in Community law has been disregarded. In fact, 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. It must therefore be ascertained, in the light of the doubts expressed by the Verwaltungsgericht, whether the system of deposits has infringed rights of a fundamental nature, respect for which must be ensured in the Community legal system" [66].

The risk of conflict between national systems and EU law and the need to reserve the autonomy of EU law are also recalled by AG Maduro in Opinion in *Arcelor*:

[62] C-96/03 and C-97/03, *A. Tempelman* and *Coniugi T.H.J.M. van Schaijk v. Directeur van de Rijksdienst voor de keuring van Vee en Vlees* [2005] ECR, I-1895.

[63] For this concept in international law see: T. Broude, Y. Shany (eds), *Multi-Sourced Equivalent Norms in International Law* (Hart, Oxford 2011).

[64] C-81/05, *Cordero Alonso* [2006] ECR I-7569. "Since the general principle of equality and non-discrimination is a principle of Community law, Member States are bound by the Court's interpretation of that principle. That applies even when the national rules at issue are, according to the constitutional case-law of the Member State concerned, consistent with an equivalent fundamental right recognised by the national legal system", par. 41.

[65] 11/70 Internationale Handelsgesellschaft mbH contro Einfuhr- und Vorratsstelle für Getreide und Futtermittel. [1970] 01125

[66] 11/70 Internationale Handelsgesellschaft mbH contro Einfuhr- und Vorratsstelle für Getreide und Futtermittel. [1970] 01125, par. 3- 4.

"In that connection, the Conseil d'État is correct in assuming that the fundamental values of its constitution and those of the Community legal order are identical. It must be pointed out, however, that that structural congruence can be guaranteed only organically and only at the Community level, through the mechanisms provided for by the Treaty. It is that organic identity which is referred to in Article 6 TEU and which ensures that national constitutions are not undermined, even though they can no longer be used as points of reference for the purpose of reviewing the lawfulness of Community acts. If they could, in so far as the content of the national constitutions and the instruments for protecting them vary considerably, the application of Community acts could the subject of derogations in one Member State but not in another. Such an outcome would be contrary to the principles set out in Article 6 TEU and, in particular, to the understanding of the Community as a community based on the rule of law. In other words, the effect of being able to rely on national constitutions to require the selective and discriminatory application of Community provisions in the territory of the Union would, paradoxically, be to distort the conformity of the Community legal order with the constitutional traditions common to the Member States"[67].

In *Audiolux* the CJEU denied the existence of a general principle of equal treatment of shareholders. While, as usual, the CJEU did not make its comparative analysis explicit, the Opinion of AG Trstenjak[68]is really important, since there the AG recognised the ambiguity of the case law of the Court in this ambit[69] and offered some clarifications about the methodology to be followed by the Court when ascertaining the existence of a general principle, the relevant sources to be taken into account ("primary law", "international guidelines", "acts of EU institutions"), the functions of the general principles[70], the status of the general principles in the hierarchy of EU legal sources, among other things.

In her Opinion, AG Trstenjak made an interesting distinction between two categories of general principles:

[67] Opinion AG Maduro in C-127/07 Société Arcelor Atlantique et Lorraine Société Sollac Méditerrannée Société Arcelor Packaging International Société Ugine & Alz FranceSociété Industeel Loire Société Creusot Métal Société Imphy Alloys Arcelor SA V Premier ministre Ministre de l'Écologie et du Développement durable Ministre de l'Économie, des Finances et de l'Industrie [2008] ECR I-09895, par. 16.

[68]Opinion AG Trstenjak in C-101/08, Audiolux SA e.a v Groupe Bruxelles Lambert SA (GBL) and Others and Bertelsmann AG and Others [2009] ECR I-09823.

[69] "However, even today the concept of general principles is a thorny issue. The terminology is inconsistent both in legal literature and in the case-law. To some extent there are differences only in the choice of words, such as where the Court of Justice and the Advocates General refer to a generally-accepted rule of law, a principle generally accepted, a basic principle of law, a fundamental principle, a principle, a rule, or a general principle of equality which is one of the fundamental principles of Community law", Opinion AG Trstenjak cit, par. 67.

[70] "There is agreement in any case that the general principles have considerable importance in the case-law in filling gaps and as an aid to interpretation, not least because the Community legal order is a developing legal order which inevitably has gaps and requires interpretation on account of its openness in respect of integrational development. On the basis of such recognition the Court also appears to have opted not to undertake a precise classification of the general principles in order to retain the flexibility it needs in order to be able to decide on substantive matters which arise regardless of terminological discrepancies." Opinion AG Trstenjak cit, par. 68.

"In principle, a distinction can be drawn between general principles of Community law in the narrow sense, namely those which are developed exclusively from the spirit and system of the EC Treaty and relate to specific points of Community law, and those general principles which are common to the legal and constitutional orders of the Member States. Whereas the first category of general principles can be derived directly from primary Community law, the Court essentially uses a critical legal comparison in order to determine the second category, which does not, however, amount to using the lowest common denominator method. Nor is it regarded as necessary for the legal principles developed in this way in their specific expression at Community level always to be present at the same time in all the legal orders under comparison"[71].

With regard to the second group of general principles, AG Trstenjak rejected the lowest common denominator method. After a detailed analysis AG Trstenjak concluded that "there is no general principle of equal treatment of shareholders which protects a company's minority shareholders in the event of acquisition of control by another company, in such a way that they are entitled to dispose of their securities on conditions identical to those of all other shareholders"[72].
These considerations resurfaced in another Opinion of AG Trstenjak given in the *Dominguez* case:

"Finally, the law of the Member States themselves has to be considered. Recourse to the comparative law approach often taken by the Court could shed light on whether, according to constitutional traditions or in any event the core provisions of national employment law, such a right is afforded a pre-eminent place in national legal systems […] The comparative law review set out above does indeed show that the idea that an employee is entitled to periodic rest time permeates the legal systems of both the EU and its Member States. The fact that this idea has constitutional status both at EU level and within several Member States is indicative of the prominent position afforded to that right, which suggests its classification as a general principle of EU law. The fact that not all Member States grant it constitutional status within their legal systems is not detrimental, however, as it is in any event considered a core element of national law irrespective of whether an employment relationship is one governed by private or public law; this has also been recognised in the Court's case-law"[73].

Finally, it is interesting to recall an Opinion given by AG Kokott in the *Akzo Nobel* case where the AG argued that "such recourse to common constitutional traditions or legal principles is not

[71] Opinion AG Trstenjak in Audiolux cit, par. 69.
[72] Opinion AG Trstenjak in Audiolux cit, par. 115. "In the light of that conclusion, I do not think it necessary to examine the judgment in Mangold. For that case-law to be applied to the present case it would be necessary to identify beyond doubt a general principle of Community law, which would enable that general principle to be applied even before the entry into force of a specific provision of secondary law with essentially the same normative content. Thus, in Mangold the Court found that Directive 2000/78 does not itself lay down the principle of equal treatment in the field of employment and occupation. The Court based that conclusion on the finding that the source of the prohibition of discrimination on grounds of age is found in various international instruments and in the constitutional traditions common to the Member States. However, that condition is not satisfied in the present case", Opinion AG Trstenjak in Audiolux, par. 115.
[73] Opinion AG Trstenjak in C-282/10, Maribel Dominguez v Centre informatique du Centre Ouest Atlantique and Préfet de la région Centre, ECLI: EU:C:2011:559, par. 111- 112.

necessarily subject to the precondition that the practice in question should constitute a tendency which is uniform or has clear majority support. It depends rather on an evaluative comparison of the legal systems which must take due account, in particular, not only of the aims and tasks of the European Union but also of the special nature of European integration and of EU law"[74].
This reveals that comparative law and teleological interpretation have been sometimes used in a combined manner, since comparison is sometimes used to detect the existence of a consensus at national level on a certain issue[75]. It should not come as a surprise, since as I mentioned at the beginning of the chapter comparative might serve different functions.

Lack of Explicit Comparison as Cause of Criticism: The Mangold case and its follow up

So far, we have seen how the Court frequently relies on implicit comparison. In this section I shall deal with the consequences of such a lack of transparency. The *Mangold*[76] case offers an example of the problematic use of comparative law by the Court. On that occasion the CJEU concluded by recalling the duty to disapply of the national judge:

"It is the responsibility of the national court, hearing a dispute involving the principle of non-discrimination in respect of age, to provide, in a case within its jurisdiction, the legal protection which individuals derive from the rules of Community law and to ensure that those rules are fully effective, setting aside any provision of national law which may conflict with that law […] It is the responsibility of the national court to guarantee the full effectiveness of the general principle of non-discrimination in respect of age, setting aside any provision of national law which may conflict with Community law, even where the period prescribed for transposition of that directive has not yet expired"[77].

Haztopoulos, one of the first commentators of the judgment, read it together with other cases like *Carpenter*[78] and *Karner*[79]: all these cases are characterised by the material reference to the legal material of the ECHR and to the general principles. The conclusion reached by Hatzopoulos is that the reference to the general principles sometimes risks affecting the quality of the legal reasoning of

[74] Opinion AG Kokott in C-550/07 P Akzo Nobel Chemicals and Akcros Chemicals v Commission and Others [2010] ECR I-8301, par. 94.
[75]As Koen Lenaerts, José A. Gutiérrez-Fons, "To say what the law" cit . pointed out: "Accordingly, for the Advocate General, even if a principle is only recognised in a minority of Member States, it may still constitute a general principle of EU law in so far as it reflects a mission with which the authors of the Treaties have entrusted the EU, or mirrors a trend in the constitutional law of the Member States. However, AG Kokott found that those two elements were missing in Akzo"
[76] C-144/04 Mangold [2005] ECR, I-9981. See Roberta Calvano, "Il caso "Mangold": la Corte di giustizia afferma (senza dirlo) l'efficacia orizzontale di una direttiva comunitaria non scaduta?" 2006 http://archivio.rivistaaic.it/cronache/giurisprudenza_comunitaria/mangold/index.html
[77] C-144/04 Mangold [2005] ECR, I-9981, par. 77- 78.
[78] C-60/00, *Carpenter* [2002] ECR I-6279.
[79] C-71/02, *Karner* [2004] ECR I-3025.

the CJEU. In Mangold this problem was even increased by the mix between hard and soft law sources:

"Since EC hard legislation will be rare in fields in which some EU coordination takes place, the Court will be obliged to control national measures by reference to general principles and fundamental rights, in order to effectively protect the latter. This, however, is not a commendable development, at least by currently applicable legal standards, and all the judgments above have been strongly criticised"[80].

What it is interesting to us is the way in which the CJEU took inspiration from the national constitutional materials in order to construct this general principle.
Some German scholars harshly reacted to Mangold by questioning the possibility to infer such a principle from the constitutional traditions common to the Member States:

"This 'general principle of community law' was a fabrication. In only two of the then 25 member states namely Finland and Portugal is there any reference to a ban on age discrimination, and in not one international treaty is there any mention at all of there being such a ban, contrary to the terse allegation of the ECJ. Consequently, it is not difficult to see why the ECJ dispensed with any degree of specification or any proof of its allegation. To put it bluntly, with this construction which the ECJ more or less pulled out of a hat, they were acting not as part of the judicial power but as the legislature"[81].

Mangold is thus emblematic of an "octroyée methodology of construing common constitutional traditions"[82] according to which the CJEU has been jeopardizing the interpretative sovereignty of national constitutional courts. As Arnull pointed out: "The Court of Justice itself was initially rather coy about mentioning Mangold or the general principle of equality"[83].
However, later on the CJEU recalled Mangold in *Kücükdeveci*[84], confirming the existence of a general principle of non-discrimination based on age and conceiving this general principle as its parameter, although the term for implementing the directive had already expired at that time and

[80] Vassilis Hatzopoulos, "Why the Open Method of Coordination is Bad for You: A Letter to the EU" 13 *European Law Journal* 309 (2007) 337.
[81] Roman Herzog, Lüder Gerken, "[Comment] Stop the European" cit.
[82] Marco Dani, "Tracking Judicial Dialogue The Scope for Preliminary Rulings from the Italian Constitutional Court" 16 *Maastricht journal of European and comparative law* 149 (2009).
[83] Anthony Arnull "What is a General" cit .,15. Arnull refers to Chacon Navas (C-13/05, Sonia Chacón Navas v. Eurest Colectividades SA [2006] ECR I-06467) and Palacios de la Villa (C-411/05 Palacios de la Villa [2007] ECR I-08531), Lindorfer v. Council (227/04 P Maria-Luise Lindorfer v. Council of the European Union [2007] ECR I-06767) and Bartsch (C-427/06, Bartsch [2008] I-07245). See also the Opinion AG Mazák in C-411/05, Félix Palacios de la Villa [2007] ECR I-08531, par. 88- 94; Opinion AG Trstenjak in Case C-282/10, Maribel Dominguez v Centre informatique du Centre Ouest Atlantique and Préfet de la région Centre, ECLI:EU:C:2011:559, par. 140-141
[84] C-555/07, Kücükdeveci [2010] ECRI-365.

recalling the EU Charter of Fundamental Rights only to "prove" the later codification of this general principle despite the fact that the EU Charter was already in force at that time.
More recently the CJEU recalled Mangold also in his *Dansk Industri* case[85] where the Court reiterated the duty of disapplication in case of violation of the general principle of non-discrimination on grounds of age:

"In order to answer that question, it is appropriate first of all to note that the source of the general principle prohibiting discrimination on grounds of age, as given concrete expression by Directive 2000/78, is to be found, as is clear from recitals 1 and 4 of the directive, in various international instruments and in the constitutional traditions common to the Member States (see judgments in Mangold, C-144/04, EU:C:2005:709, paragraph 74, and Kücükdeveci, C-555/07, EU:C:2010:21, paragraphs 20 and 21). It is also apparent from the Court's case-law that that principle, now enshrined in Article 21 of the Charter of Fundamental Rights of the European Union, must be regarded as a general principle of EU law (see judgments in Mangold, C-144/04, EU:C:2005:709, paragraph 75, and Kücükdeveci, C-555/07, EU:C:2010:21, paragraph 21)"[86].

Mangold still creates mixed feelings. Looking at the national level it is no coincidence that after *Mangold*, the German Constitutional Court has indirectly responded to the CJEU with the famous Lisbon decision[87] and then directly with the *Honeywell*[88] decision before raising its first preliminary question ex Art. 267 TFEU in the famous *Gauweiler* case[89].
More recently, a decision of the Danish Supreme Court rejected the Mangold doctrine by using the *ultra vires* doctrine by arguing the law covering the Danish law on accession to the EU does not cover the general principles of EU law which cannot have a horizontal direct effect on the domestic legal system [90]. In that decision the Danish Supreme Court also extensively recalled the Opinion of AG in Dominguez[91]. Although the lack of transparency in its legal reasoning does not represent the only ground for criticism to this decision, Mangold and its legacy are also an example of the harsh reactions that have been caused by a decision characterised by a questionable use of the comparative method. As we saw the fact that the CJEU has not followed the "mathematical logic of the lowest common denominator" in the reconstruction of a general principle does not represent *per*

[85] C-441/14, Dansk Industri (DI) ECLI:EU:C:2016:278. See also the distinguishing made by the CJEU in Bartsch, C-427/06, Bartsch [2008] I-07245, par. 24
[86] C-441/14, Dansk Industri (DI) ECLI:EU:C:2016:278 par. 22.
[87] *BVerfGE 123, 267* – Treaty of *Lisbon*, 2009
[88] 2 BvR 2661/06, www.bundesverfassungsgericht.de/entscheidungen/rs20100706_2bvr266106.html.
[89] 2 BvR 2728/13, par. 29. C-62/14, Gauweiler, available at www.curia.europa.eu
[90] Nicole Lazzerini, *La Carta dei diritti fondamentali dell'Unione europea: I limiti di applicazione* (Franco Angeli, Milano 2018) 131
[91] Zaccaroni argued that on that occasion the Danish Supreme Court basically asked "the Court of Justice to withdraw from its Kücükdeveci and Mangold case law and to go back to its Dominguez decision", Giovanni Zaccaroni, "Is the horizontal application of general principles ultra vires? Dialogue and conflict between supreme European courts in Dansk Industri", 2018, federalism.it. Rivista di diritto pubblico italiano, comparato, europeo, www.federalismi.it

se an issue, but the lack of transparency in revealing the domestic sources considered for that purpose triggered tensions and conflicts with national courts.

Final Remarks

In this chapter I tried to present an overview of the relationship between general principles of EU law and comparative law. The importance of comparison in the activity of the Luxembourg Court is on paper universally recognised by scholars, practitioners and former members of the Court, but except for some cases it hardly emerges as an explicit element of the legal reasoning.

Lanearets and Gutiérrez-Fons[92] have recalled the merits of comparative analysis (both synchronic and diachronic), it being very helpful not only for the creation of general principles and, more in general, for the interpretation of EU law. Comparative analysis is also crucial in order to have a proper dialogue with national courts, to explain why the CJEU sometimes departs from a particular solution chosen at national level or even why it departs from its own case law in light of the changed circumstances that are normally taken into account to detect the existence of a consensus at state level. However, if such a comparative exercise is performed only in an implicit manner there will be no margin for proper dialogue[93], since the reasons and arguments employed by one of the potential interlocutors will remain hidden and the legal reasoning will not be transparent. That is why problematic decisions such as Mangold should be avoided. It is not only a matter of transparency, however, since it also risks increasing the distance between national (especially constitutional and supreme) courts and the CJEU itself. In this respect, even traditionally cooperative constitutional courts - such as the Austrian one- have been sending warnings lately, as I recalled when mentioning *A. v. B.* case [94]:

[92] Koen Lenaerts, José A. Gutiérrez-Fons, "To say what the law" cit. "First, by embarking on a comparative analysis of the laws of the Member States, the ECJ favours a judicial dialogue with national courts. If the ECJ decides to depart from the solution used by a particular national legal system, it must explain why that solution does not fit well with the needs of the EU or, as the case may be, why the solution favoured by the legal systems of the other Member States is better suited to the problem with which EU law is confronted. Second, where the solution adopted by the ECJ mirrors that set out in the laws of the Member States, the effectiveness of EU law is better achieved.260 In such a case, national courts and authorities will fully agree with the approach embraced by the ECJ and will have no difficulties in following it. Third, the use of the comparative law method gives rise to a constructive interaction between the legal order of the EU and those of its Member States. Initially, the dialogue between the ECJ and national courts may serve to highlight the advantages and disadvantages of the different solutions adopted at national level, thus enabling the ECJ to choose the approach that seems most appropriate. Subsequently, by highlighting, in appropriate cases, the fact that the approach adopted by the ECJ has not achieved the results that it had expected, national courts may invite the ECJ to reconsider its approach. This illustrates how the comparative law method and judicial dialogue may go hand in hand".

[93] According to the examples offered by Aida Torres Pérez, *Conflicts of Rights in the European Union A Theory of Supranational Adjudication* (Oxford University Press, Oxford 2009) 118 et seq.

[94] C-112/13 A v. B and others ECLI:EU:C:2014:2195. See also Italian Constitutional Court, judgment 269/2017, on that.

"In light of the fact that Article 47(2) CFR recognizes a fundamental right which is derived not only from the ECHR but also from constitutional traditions common to the Member States, it must be heeded also when interpreting the constitutionally guaranteed right to effective legal protection (as an emanation of the duty of interpreting national law in line with Union law and of avoiding situations that discriminate nationals).
Conversely, the interpretation of Article 47(2) CFR must heed the constitutional traditions of the Member States and therefore the distinct characteristics of the rule of law in the Member States. This avoids discrepancies in the interpretation of constitutionally guaranteed rights and of the corresponding Charter rights"[95].

Constitutional courts (with very few exceptions) have accepted the preliminary ruling mechanism lately, but they want to be fully involved and in order to have them on board it is necessary to do "something more". In this sense the CJEU should finally accept playing fair, showing the interpretive cards used for its decisions.

Daniel Sarmiento, *Adults in the (Deliberation) Room. A comment on M.A.S.*, *Quaderni costituzionali* 228 (2018).

[95] U 466/11-18, U 1836/11-13 14.03.2012, par. 59, https://www.vfgh.gv.at/downloads/VfGH_U_466-11__U_1836-11_Grundrechtecharta_english.pdf . On this see: Giacomo Delledonne, "Carta di Nizza e corti costituzionali nazionali: quali prospettive?", *Rivista trimestrale diritto pubblico* 449 (2013) and Andrea Guazzarotti, "Rinazionalizzare i diritti fondamentali? Spunti a partire da Corte di Giustizia UE, A c. B e altri, sent. 11 settembre 2014, C-112/13.", 2014, http://www.dirittocomparati.it/rinazionalizzare-i-diritti-fondamentali-spunti-a-partire-da-corte-di-giustizia-ue-a-c-b-e-altri-sent/