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**Comparing National and EC Law:
The Problem of the Level of Analysis**

RENAUD DEHOUSSE

European University Institute, Florence

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DEPARTMENT OF LAW

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RENAUD DEHOUSSE

BADIA FIESOLANA, SAN DOMENICO (FI)

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Comparing National and EC Law: The Problem of The Level of Analysis

Renaud Dehousse*

1. Introduction

While there is no shortage of works devoted to the use of comparative law by European Community institutions, and in particular by the European Court of Justice,¹ reflections devoted to the problems involved in comparisons between national and EC law have remained extremely rare.² Yet, there are well-known examples of this kind of comparative works. Most scholars interested in Community law are familiar with books such as Stein and Sandalow's *Courts and Free Markets* or Cappelletti, Seccombe and Weiler's *Integration through Law*, the primary aim of which is an assessment of the operation of the Community in the light of the American experience. Other studies attempt to import into Community law some of the lessons derived from the analysis of national legal systems.³

Should we then take the relative scarcity of methodological reflexions as a clue that this kind of exercise does not involve specific difficulties? I think not. Indeed, the thrust of this paper is that there *are* methodological difficulties linked to such cross-level comparisons, and that their neglect has been the source of misunderstandings or of hidden bias in quite a few analyses. I shall also argue that these problems are of considerable importance, as there appears to be a growing need for comparisons embracing elements of national and EC law. Before addressing these methodological difficulties, it is therefore

* European University Institute, Florence, Italy.

- 1 See e.g. L.J. Constantinesco, *Traité de droit comparé*, vol. II (1974) at 351, Pescatore, "le recours, dans la jurisprudence de la Cour de Justice des Communautés européennes, à des normes déduites de la comparaison des droits des Etats membres", 32 *Revue internationale de droit comparé* (1980) 337, Koopmans, "The Birth of European Law at the Crossroads of Legal Traditions, 39 *American Journal of Comparative Law* (1991) 493.
- 2 See however Stein, "On Divided-Power Systems: Adventures in Comparative Law", *Legal Issues of European Integration* (1983/1)27.
- 3 See e.g. Lenaerts, *Le Juge et la Constitution aux Etats-Unis d'Amérique et dans l'ordre juridique européen* (1988), Rassmussen, *On Law and Policy in the European Court of Justice: A Comparative Study in Judicial Policy-Making* (1986); Schwarze, *European Administrative Law* (1992), to name but a few.

appropriate to dwell for a moment on the reasons that may lead one to venture into comparisons of this kind.

2. Why Compare?

Most comparative law textbooks devote at least one section to the objectives and functions of comparative legal research. While it would be superfluous to here enter into a detailed examination of this issue, I should point out that most of the reasons traditionally invoked to explain the utility of comparative analysis apply with particular cogency to the study of EC law, and should lead us to compare elements of Community law with national equivalents.

Thus, it is often argued that a comparative approach may enable lawyers to gain a deeper understanding of the problems they face in their own legal system. This seems quite true in the case of the Community, as many Community law rules find their origin in similar provisions of domestic law. The French *contentieux administratif* inspired many EC law remedies,⁴ while antitrust procedures were patterned on the American model.⁵ The European Court of Justice's jurisprudence on basic principles is often informed by national legal traditions.⁶ As is well known, this kind of legal transplant is even mandated by the Treaty itself as regards the Community's extra-contractual liability (Article 215). In all these cases, a comparative analysis may shed interesting light on Community law rules.

The reverse is of course equally true. With the revival of European integration in the 1980s, national policies have become increasingly "communitarized",⁷ and a growing number of national provisions are of Community origin. As a result, in areas like competition law, company law or even tax law, it has become almost impossible to dispense with the study of the relevant Community provisions. Even a discipline like constitutional law, which had been shaped by national history and traditions, has been affected by Community membership. The Maastricht Treaty, with its provisions on electoral rights of European citizens, has only made apparent a process of "rapprochement constitutionnel" which had been initiated by the European Court of Justice.⁸ The national and Community legal systems are now so closely intertwined that one notices many instances of institutional osmosis: principles

4 Lagrange, "La Cour de Justice des Communautés européennes: du Plan Schuman à l'Union européenne", *Revue trimestrielle de droit européen* (1978)2.

5 G. Majone, *Cross-National Sources of Regulatory Policy-Making in Europe and in the United States*, EUI Working Paper SPS N° 90/6.

6 Schwarze, *supra* note 3.

7 Jacqué, "La communautarisation des politiques nationales", *Pouvoirs* n° 48 (1989) 29.

8 The expression is borrowed to C. Tomuschat "Europe - A Common Constitutional Space" in B. De Witte and C. Forster (eds.) *The Common Law of Europe and the Future of Legal Education* (1992) 133 at 135.

and institutions borrowed from national traditions are incorporated in Community rules and at times travel back, be it in a modified form, to the national level, as part of the Court's jurisprudence.⁹

This brings us to another traditional argument in favour of comparative legal research, namely the role of comparison as an instrument of the unification of law. In this context, comparative legal research has been regarded as a prerequisite of the unification process. Comparison was seen as necessary to work out the similarities and differences between national legal structures, and to identify common, or even ideal, solutions. Although quite logical, this approach has only occasionally been followed by national and Community experts, who are traditionally more anxious to strike a compromise between contrasting national interests than to work out an ideal-type solution. Even if it does not play the crucial role in the harmonization process that comparative law theory would recommend,¹⁰ comparative research nonetheless remains a valuable analytical instrument, as the resulting Community norm often borrows elements from national provisions. We will see further that recent developments in harmonization policy have enhanced the practical relevance of such an approach.

Comparative analysis may also play a useful role as an instrument of legal reform. Many comparative projects are motivated by the consideration that a given ~~the~~ problem is common to different legal orders, and that an evaluation of their respective solutions may be useful in order to decide which should be given preference. Although it will be argued later that this exercise may give rise to specific problems, there is little doubt that the reasoning is generally valid as regards the Community legal order. To mention but one example, it has become commonplace to refer to the "democracy deficit" that is alleged to exist at the Community level. But the reality of such a deficit, and the potential means to redress it, can only be assessed by reference to the situation that exists in domestic legal systems. Yet, oddly enough, to my knowledge, no such analysis has ever been conducted in a systematic fashion.

This latter example illustrates another advantage of comparative research, namely its potential to test the scholar's working hypothesis. It has often been argued that comparative research plays a function in human sciences similar to that of laboratories in natural sciences.¹¹ This is particularly true of legal research. As no laboratories are available to test the wisdom of lawyers' intuitions, comparative or historical approaches are about the only methods available to those who want to go beyond the level of mere deduction.

⁹ The phenomenon has been described by Koopmans, "European Public Law: Reality and Prospects", *Public Law* (1991) 53.

¹⁰ See the disappointed comments of Constantinesco, *supra* note 1 at 353.

¹¹ Lijphart, "Comparative Politics and the Comparative Method", *American Political Science Review* (1971) 682 at 684-5.

This remark is hardly new. Yet the concern for empirical research does not seem to have played as important a role in Community law as it has in other branches of law. This may be due, at least in part, to the object of the study, as scholarly analyses of European integration are often “burdened with understandably emotive and ideological prejudices”,¹² to which many lawyers more or less consciously adhered – at least until recently. As Martin Shapiro once wrote, in many Community law works,

“the Community [is presented] as a juristic idea; the written constitution as a sacred text; the professional commentary as a legal truth; the case law as the inevitable working out of the correct implications of the constitutional text; and the constitutional court as the disembodied voice of right reason and constitutional theology.”¹³

The charge may seem cruel but it is not unfounded. Many Community law scholars seem to have overlooked that law is not merely a technique, but also a social instrument used to solve a given problem, and that the object of legal analysis is not only to make sense of the technical subtleties of the legal rule, but also to provide, whenever possible, an evaluation of its performance in solving this societal problem. In many respects, the situation of Community lawyers is similar to that of a scholar who would have confined himself to the study of his domestic legal system. Comparative research, with its corollary of relativism, may help him to challenge the assumptions rooted in his own legal system and counteract the “tendency to ultra-sophisticated analysis and quasi-scholasticism which arises when generations of scholars continue to examine the same fundamental documents within a purely national context”.¹⁴ In other words, one could argue that comparative research is indispensable if Community law is to move to a more advanced level of scholarship.

To illustrate this point, let us return for a moment to the example of the democracy deficit. The classical argument is that, because of the limited power enjoyed by the European Parliament, decision-making in the European Community has so far been insufficiently democratic. The whole reasoning therefore rests on two implicit – but nevertheless very clear – assumptions; namely that in other political systems, parliaments do play a central role in decision making, and that in doing so, they effectively act in favor of citizen’s interests. Are these assumptions founded? A glance at Western Europe is sufficient to realize that in quite a few systems, the role of Parliament is largely

12 Cappelletti, Secombe and Weiler, “Introduction”, in M. Cappelletti, M. Secombe, J. Weiler, *Introduction through Law: Europe and the American Federal Experience*, Vol. I (1986) at 6.

13 “Comparative Law and Comparative Politics”, 53 *University of Southern California Law Review* (1980) 537, at 538.

14 De Witte, “The European Dimension of Legal Education”, Draft Report for the Society of Public Teachers of Law Conference on ‘Reviewing Legal Education’, Oxford, All Souls College, 30 April 1994, at 13.

formal – rubberstamping decisions taken in other fora – and parliamentarians appear concerned at least as much about specific interests, be they sectoral or partisan, as they are about some loosely defined public interest.¹⁵ The point I wish to make is that in this as in many other respects, comparative analysis is needed – I should add, urgently needed – both to determine the exact scope of the problem, to assess the options available to decision-makers, and their efficiency in a given context. At all these levels, only a “hard comparative look” will enable us to challenge a number of commonly perceived ideas.

3. The Problem of the Level-of-Analysis

Having stressed the importance of comparative research for our understanding of the European Community, I must now turn to the question of how this comparison should be carried out. Are specific problems to be faced?

My answer to this question is greatly influenced by the reflections of J. David Singer, who, in a seminal essay written more than thirty years ago,¹⁶ argued that there are always several ways to look at a given phenomenon, and that the way which is chosen has clear methodological implications. Although his remarks were primarily concerned with his own field, international relations, the problems he identified are common to a large number of disciplines:

“In any area of scholarly enquiry, there are always several ways in which the phenomena under study may be sorted and arranged for purposes of systemic analysis. Whether in the physical and social sciences, the observer may choose to focus upon the parts or on the whole, upon the components or upon the system. He may, for instance, choose between the flowers or the garden, the rocks or the quarry, the trees or the forest, the houses or the neighborhood, the cars or the traffic jam, the delinquents or the gang, the legislators or the legislative, and so on... [T]he choice often turns out to be quite difficult, and may well become a central issue within the discipline concerned. The complexity and significance of these level-of-analysis decisions are readily suggested by the long-standing controversies between social psychology and sociology, personality-oriented and culture-oriented anthropology, or micro- and macro-economics, to name but a few. In the vernacular of systems analysis, the observer is always confronted with a system, its sub-systems, and their respective environments, and while he may choose as his system any cluster of phenomena from the most minute organism to the universe itself, such choice cannot merely be a function of whim or caprice, habit or familiarity.”¹⁷

Decisions on the level at which to operate should accordingly be based on the scholar’s analytical objectives. Thus, if we choose to focus on the system rather than on its component parts, we should be able to give a fairly comprehensive

15 See e.g. P. Norton, “Parliaments: A Framework for Analysis” 13 *West European Politics* (1990) 1.

16 “The Level-of-Analysis Problem in International Relations”, in K. Norr and S. Verba (eds.), *The International System: Theoretical Essays* (1961) 77. This essay was subsequently reprinted in J. Rosenau (ed.), *International Politics and Foreign Policy* (1969) 20, to which the ensuing citations refer.

17 *Ibid.* at 20-21.

account of the situation, as we will be in a position to encompass the totality of interactions which take place within the system and its environment. In contrast, this level of analysis tends to exaggerate the impact of the system upon the actors, as

“there is a natural tendency to endow that upon which we focus with somewhat greater potential than it might normally be expected to have.”¹⁸

Likewise, as the focus is on the whole system, little attention is generally paid to differences of behaviour among component units. This often results in a uniformity postulate: all are deemed to react in a similar fashion to given stimuli. Such a behaviouralist bias has long been apparent in international relations, where it is often assumed in a generic fashion that states pursue their national interest,¹⁹ irrespective of the fact that both substantive interests and the procedure whereby they are defined may vary to a considerable extent from one state to the other. In other words, although the system level has clear advantages in terms of *description*, as many phenomena may be considered, its *explanatory* potential tends to be weaker.

In contrast, the unit level has the great advantage of permitting greater differentiation among the specific features of each unit, as the latter can be examined in greater detail. As more variables may be included, the analysis can be more sophisticated than if one operates at the system level. Singer also argues that the unit level is more congenial to comparative research, the reason being that:

“it is only when the actors are studied in some depth that we are able to make really valid generalizations of comparative nature. Although the systemic model does not necessarily preclude comparison and contrast among the national subsystems, it usually eventuates in rather gross comparisons based on relatively crude dimensions and characteristics.”²⁰

Although the focus on the unit level is less likely to generate the same kind of uniformity bias as the system level, it may give rise to opposite types of distortion, such as a marked exaggeration of the differences among various units, or what Singer labels “Ptolemaic parochialism”, i.e. the tendency to attribute virtues to one’s own country, and weaknesses to others.²¹

Each kind of analysis therefore entails its own swag of problems. Singer’s argument definitely does not postulate that one type would present decisive advantages over the other: each has its own strengths and weaknesses. However,

18 Ibid. at 23.

19 The *locus classicus* here is Hans Morgenthau, *Politics among Nations: The Struggle for Power and Peace*, 6th ed. (1985).

20 Ibid. at 24.

21 Ibid. at 24.

scholars should acknowledge the implications that follow from the decision to operate at either level:

"the problem ... is one of realizing that there *is* this preliminary conceptual issue and that it must be resolved prior to any research undertaking."²²

Lastly, although they may occasionally focus on the same object, propositions worked out at different levels are not readily interchangeable. Being the product of different frames of analysis, they tend to reflect the bias of the level at which research has been conducted. Great caution should therefore be exerted before transferring analytical propositions from one level to another.²³ Although Singer's remark was exclusively concerned with analytical statements, in my view it applies with even greater cogency when it comes to normative conclusion; I shall return to this point below.

4. Some Methodological Issues

The reader who will have followed me thus far may legitimately wonder what relevance, if any, the above remarks may have for comparisons between national and EC law. As a token of gratitude for his patience in enduring such abstract considerations, I will now attempt to illustrate potential applications of Singer's line of thought to the matter at issue. Naturally, my focus will be somewhat different. While Singer claims that shifts from one level to the other should preferably be avoided, because of the difficulties they entail, I would argue that, because of the evolution of Community law, European lawyers are under an increasing pressure to encompass in their analyses elements of national and Community law. However, the fact that they are not able to opt for one level does not mean that they can lightly ignore Singer's methodological warnings. Quite to the contrary: they will face most of the difficulties identified by him.

Several problems seem to deserve special attention: the comparability of institutions operating at two distinct levels (4.1), the dependence relationship that may exist between different variables (4.2), the homogenization pressures that can often be noted in cross-level comparisons (4.3) and the difficulties involved in shifting from one level to the other (4.4). Having reviewed these issues, we will be in a better position to analyze the conflict by national and Community objectives and policies (4.5).

4.1. *The Comparability Issue*

It is often stated that comparisons should make use of comparable units of analysis. What may appear as a commonplace is but an application of a

²² Ibid. at 28.

²³ Ibid. at 29.

fundamental principle, common to several research methods. Scientific explanations consist in the establishment of general relationships among two or more variables, which will only be possible if all other variables are “controlled”, that is to say held constant. As Lijphart has remarked:

“[t]hese two elements are inseparable: one cannot be sure that a relationship is a true one unless the influence of other variables is controlled. The *ceteris paribus* condition is vital to empirical generalizations.”²⁴

The focus on comparable institutions is thus one way to “control” a number of variables that are common to the institutions in question. But how is comparability to be determined? Experience suggests that one should avoid the trap of nominalism. More often than not, commonality will be found in the functions of these institutions: to be sure, institutions that hold similar functions can be termed comparable.²⁵

Although I would not subscribe to the view that these are the only institutions that can possibly be compared,²⁶ I am inclined to believe that comparisons among functional equivalents are the most fruitful ones. The reason should be easier to understand in the light of the above remarks. As functional equivalents have a lot more in common than institutions united simply by a common name or a common origin, the group of controlled variables tends to be larger. As a result, it is relatively easier to isolate a number of variables that account for the differences between the units that are being compared.

Suppose for instance that I am interested in the functioning of second chambers. Even if a comparison between the British House of Lords and the American Senate is certainly possible, it would be likely to lead to conclusions of a high degree of generality, the utility of which might be questioned. For obvious reasons, some typical functions of the US Senate, the representation of smaller States’ specific interests or the defence of the institutional interests of all 50 States of the Union, are without equivalent in the United Kingdom. In contrast, a comparison between second chambers in, say, Australia and the United States, should enable us to better assess the relative importance of variables such as party structures or electoral systems,²⁷ given that we would be focussing on two institutions that have been conceived to fulfil a similar role.

²⁴ *Supra* note 11 at 683.

²⁵ K. Zweigert and H. Kötz, *Introduction to Comparative Law* (198); See also Rose, “Comparing Forms of Comparative Analysis”, *Political Studies* (1991) 445, at 448.

²⁶ See Constantinesco, *supra* note 1 at 81-86.

²⁷ For more detail on these issues, see Dehousse “La paradoxe de Madison: Réflexions sur le rôle des chambres hautes dans les systèmes fédéraux”, *Revue du droit public et de la science politique* (1990) 643.

Returning now to our initial problem, it can legitimately be asked if similar institutions can really be termed “comparable” if one operates at the national, and the other one at the Community, level. Surely, there are a number of such institutions. Yet, Singer’s line of reasoning appears of great relevance here for there seems to be a clear relationship between what he defined as the level-of-analysis problem and the differences, or even the tensions, that one may often note between the objectives pursued by national and Community policies.

Let us take the case of environment policy. Initially, environmental protection was not mentioned among the objectives of the Community. Yet, it has emerged that differences among national policies were likely to hamper free movement, as a good produced in conformity with the regulatory requirements of country X might not satisfy those of country Y. Although the European Court of Justice has ruled that when national regulations had a clear impact on intra-Community trade, they were to be regarded as “measures of equivalent effect” prohibited by Article 30 of the EC Treaty,²⁸ it has admitted that the protection of the environment may under certain conditions justify an exception to this prohibition.²⁹ It has also recognized that it was legitimate for the Community to integrate environmental concerns in internal market directives,³⁰ as the approximation of laws is the only avenue open to deal with the barriers to trade generated by differences among national regulations.

Although environmental policy was raised to the level of a fully-fledged Community objective by the Single European Act, clear differences remain between national and Community policies, both at the level of objectives and at the level of instruments. Whereas the primary objective of national policies is to protect the environment, many Community measures are primarily inspired by another functional concern, namely to avoid that differences between national policies which hamper intra-Community trade. The instruments used by the Community are tailored to its objectives: harmonization of national laws, cooperation among national administrations, financial assistance to national policies, etc. In other words, because the Community happens to operate at a supra-national³¹ or, to use Singer’s terminology, at a systemic level, its primary objectives and its modes of action tend to differ from those of national governments.

Should we then conclude that because of these differences, national and Community policies cannot be compared? I would not think so because, as I indicated above, I do not believe that only functional equivalents can be

²⁸ Case 8/74, *Procureur du Roi v. Dassonville*, ECR [1974] 837.

²⁹ Case 302/86, *Commission v. Denmark*, ECR [1988] 4627.

³⁰ Cases 91 and 92/79, *Commission v. Italy*, ECR [1980] 1099 and 1115. See also case 300/89, *Commission v. Council* (Titanium dioxide), ECR [1991-I] 2867.

³¹ The word is used here in a non-technical sense, to suggest that the Community is acting beyond the national level.

compared. But the exercise presents a number of difficulties, which are generally not perceived fully or handled with sufficient care.

For instance, it has recently been argued that Community law, with its emphasis on market integration, has had a “disintegrative” impact over national insurance policies, in the sense that it had made it difficult for the Member States to retain their traditional mode of regulating the insurance market.³² The criticism is no doubt correct. Yet, for the analysis to be complete, it is important to realize that the conflict is not necessarily due to a clash of political preferences, but that it is rather a direct product of the differences between the regulatory objectives pursued at each level: market integration for the Community, regulation of the insurance market at the national level. The nuance is of some importance: I shall argue below that structural conflicts of this kind can only be solved by trying to reconcile the key functional concerns of each level.³³ At this stage, however, all I wish to note is that this example illustrates both the necessity and the dangers of comparisons between national and Community law. On the one hand, in the area of insurance regulation like in many others, it has become virtually impossible to understand the evolution of national law without taking into account developments at the Community level. On the other hand, insufficient attention to the fundamental structural differences that exist between the two levels is at the root of widespread methodological flaws. Too many analyses seem to take it for granted that objectives are identical or at least similar at both levels, or that normative conclusions can be transferred from one level to the other without resorting to the “translation” process advocated by Singer as a necessary prerequisite to any kind of cross-level comparison.³⁴

4.2. *The Interdependence Issue*

Comparative analyses tend to presuppose the independence of the institutions that are examined. In the words of Richard Rose,

“[a]lthough states are treated as parts of the same universe, they are not seen as interacting with each other. Even if different states follow the same course of action, this is assumed to occur because of common internal characteristics. A country that has achieved certain socioeconomic prerequisites is deemed capable of adopting certain institutions, such as democracy, or certain levels of public expenditure. Whether the prerequisites are regarded as necessary or sufficient, what happens in each country is considered as independent of what happens elsewhere.”³⁵

Just like the focus on comparable elements, choosing units of analysis separated by clear boundaries is but one way of tackling the control problem discussed

32 M. Everson, *Laws in Conflict – A Rationally Integrated Insurance Market?*, PhD thesis on file at the European University Institute, Florence.

33 Below, section 4.5.

34 *Supra*, note 16 at 29.

35 Rose, *supra* note 25 at 458.

above. By choosing independent units, the scholar endeavours to make sure that external variables will not make his analytical work more difficult. In contrast, when boundaries are permeated, the number of variables may become such that it becomes difficult to work out in a verifiable fashion the relationships that exist among them.

However, the focus on separate and independent units may prove problematic. Not only are industrial societies increasingly interdependent, as noted by Rose, but this interdependence has at time taken a structured form. Such is undoubtedly the case of the European Community, which has been created to bring about “an ever closer union among the peoples of Europe”, as suggested in the preamble to the EC Treaty. Considering the fact that over the last few centuries states have become the main producers of legal norms, and that the latter have often been used to erect barriers among European polities, the removal of these barriers has been from the outset one of the primary objectives of the Community. Community law has therefore assumed a central role in the integration process. “Integration Through Law” – which was as will be recalled the title of the Cappeletti/Seccombe/Weiler series – was not simply a catchy label, but also an apt description of the changes under way in Europe.

Leaving aside any corporatist pride, it might be argued that this prominence of law in the integration process is somewhat problematic for the comparative lawyer. The dialectic relationship that exists between Community and national law makes any attempt at a comparative synthesis an arduous task. On the one hand, national laws represent a necessary source of inspiration for the Community, and solutions worked out at European level often embody a compromise between different national traditions. On the other hand, the European Community, like any systemic actor, often tries to directly influence the policies pursued by its Member States, the typical example being the harmonization process, in which it attempts to “approximate” national regulations. Moreover, Community law may occasionally come into conflict with national legislation covering neighbouring, rather than identical situations: national competition rules, for instance, may create obstacles to the free movement of goods,³⁶ while bankruptcy legislation may conflict with basic rules of European company law.³⁷

In such cases, the analyst often finds himself in a difficult situation. There can be no question of keeping separate the units of analysis : on the contrary, cross-level comparisons should be explicitly concerned with their interaction, and try to encompass the two levels within one single analysis.³⁸ Given the

³⁶ Case C-362/88, *GB-Inno-BM*, ECR [1990] 1667.

³⁷ Joined cases C-19/90 and 20/90, *Karella v. OAE*, ruling of 30 January 1991, not yet reported.

³⁸ A similar plea was recently made in relation to the European Court's rulings on private law matters: the Court, it was argued, “must embrace that whole body of law in its

number and the variety of variables involved, the exercise is far from easy. Moreover, as illustrated above, account should be made of the structural differences between the two levels, which increase the difficulty of the comparative exercise. These difficulties notwithstanding, it could be argued that the exercise is indispensable: in a complex situation, the analyst cannot simply assume a degree of simplicity that no longer exists.³⁹

4.3. *The Homogenization Issue*

We have seen that in Singer's view, research carried out at the level of the system is often characterized by a uniformity bias – all units are treated as if they reacted in a similar fashion to identical stimuli – and by a tendency to underestimate the wealth of variables that affect a given situation. This analysis seems borne out by many attempts to describe the complex functioning of the European Community.

There is perhaps no better illustration of this tendency than the widespread use of the concept of national interest in the literature devoted to the Community. One of the most commonly accepted visions of the Community sees in the Member states the principal guardians of national interests, and in the Council of Ministers the forum where such interests are to be voiced and (hopefully) reconciled.⁴⁰ Although apparently unproblematic, this statement hides some highly questionable assumptions.

It is far from clear, for instance, that all arrangements worked out at national level, no matter in what way, in fact correspond to some kind of common good: some categories of interest may have had a greater say than others in the final decision, which may be distorted in favour of their preferences. Think of the position of the French government in the recent Uruguay Round negotiations: the French Government's hard line, largely presented (including by the Government itself) as a fierce defence of the national interest, may have suited the interests of French farmers, who were by far the most vocal constituency, but it is doubtful that a failure of the negotiations would have proven beneficial to French consumers, or to exporting industries. Given the variety of interests involved, to talk of "France's national interest", as some did, is but a gross simplification.

Equally puzzling is the implicit, but widespread assumption that, when acting at Community level, national governments out of necessity act to the best

reasoning, even if this body consists for a large or major part of national law rules." (Samara-Krispis and Steindorff, case note in 29 *CML Rev.* (1992) 615 at 623).

³⁹ See also below, the remarks on the transposition issue.

⁴⁰ See e.g. Pescatore, "L'exécutif communautaire: Justification du quadripartisme institué par les traités de Paris et de Rome", *Cahiers de droit européen* (1978) 387.

of their country's interest. Admittedly, when it refused to endorse the negotiated devaluation of the Sterling in the midst of the September 1992 monetary crisis, the British cabinet was convinced that it was acting in the interest of the country. Whether it actually *did* so is a matter for discussion. Seen in the same light, one might also question the wisdom of the unconditional acceptance by many Member States of the free movement of capital in 1988.⁴¹ Shortly before that crucial decision, it had been argued that in a system where macro-economic policies were not harmonized, an unlimited freedom to move capital from country to country would involve great risks for the stability of exchange rates.⁴² Later developments were to prove how accurate this assessment was; yet it was ignored by national governments.

In other words, it seems somewhat naive to assume that whatever view defended by national representatives in Brussels will out of necessity correspond to some national interest: governments may be captured by specific, rather than general, interests; like any institution, they have preferences and interests of their own; like any individual, they may make mistakes. This notwithstanding, many analyses of Community institutions and policies, being mainly concerned with the interaction among Member States, or between the latter and the EC, are naturally inclined to pay less attention to the way the national position is formed; hence their tendency to take it for granted that governments act in the national interest.

This, actually, is but one example of a general tendency to oversimplify the operation of the Community – a tendency which occasionally leads scholars to treat the Community as a legal system like any other. I shall now turn to this difficulty.

4.4. *The Transposition Issue*

It will be remembered that according to Singer, analyses carried out at different levels focus on different elements, and reflect distinct priorities. By way of consequence, they are not interchangeable: this is the reason for his assertion that one should not move lightly from one level to the other. So far, I have argued that although I found his analysis illuminating, cross-level comparisons are in my view useful, I would even say: necessary, at the current stage of development of our reflexions on the Community. For the demonstration to be complete, I must now deal with what I labelled the “transposition” problem: can one transfer analytical or normative concepts from one level to the other?

⁴¹ Council Directive 88/361/EEC, of 24 June 1988, OJ N° L 178/5 of 8 July 1988.

⁴² T. Padoa-Schioppa (ed.), *Efficiency, Stability and Equity: A Strategy for the Evolution of the Economic System of the European Community* (1987).

The question came to my mind when reading a classic of Community law, i.e. Judge Pescatore's description of the Community's institutional structure as a "quadripartite system".

In this classical piece, Judge Pescatore tries to assess whether the concept of the separation of powers, that is to say the doctrine advocating that a clear line be drawn between the legislative, the executive and the judiciary power, which has inspired the constitution of many Western states since the 18th century, can be of some help in order to understand the institutional structure of the Community. He suggests that the answer to this question ought to be in the negative:

"la doctrine "tripartite" de la séparation des pouvoirs n'est pas un principe d'explication valable pour un ensemble transnational tel que les Communautés européennes".⁴³

Although this statement might be open to objection, I am here more concerned with the treatment of the question than with the actual answer. Let us therefore review step by step the various stages of the reasoning.

The starting point of his analysis is Article 4 of the EC Treaty which lists the institutions of the Community. At the time Pescatore was writing (1978), only four institutions were mentioned: the European Parliament, the Council, the Commission, and the Court of Justice. The learned author faces no difficulty in identifying the role of the Parliament and the Court. Both are entrusted by the Treaty with classical duties: representation of popular will for the Parliament, implementation of legal values ("matérialisation des valeurs juridiques") for the Court of Justice.⁴⁴ In contrast, the task is definitely more arduous as regards the Council and the Commission.

As is well known, the former has elements in common with both legislative and executive bodies: although composed of representatives of the Member States, who in the domestic sphere belong to the executive power,⁴⁵ it has a central part in all law-making procedures. Pescatore tries to combine these two elements by stressing that the Council's primary function is similar to that of a representative in international law:

"[il] introduit dans le système communautaire tout ce que le système de la représentation est capable de donner, c'est-à-dire une expression authentique de la volonté politique et juridique des Etats membres et la capacité de lier ceux-ci en vertu de leur participation ... a la formation des actes du Conseil."⁴⁶

⁴³ Pescatore, *supra* note 40 at 388.

⁴⁴ *Ibid.* at 394.

⁴⁵ Article 146 has since been modified by the Maastricht Treaty to allow for a participation of representatives of subnational governments in the Council of Ministers.

⁴⁶ *Ibid.* at 391.

As for the Commission, he suggests that, in the Community setting, it is the institution that approximates most closely the traditional concept of an executive: although it does not enjoy all the prerogatives of most governments, the Commission, with its power of initiative and its role in the implementation of Community policies, has some of the features that traditionally belong to national executives.⁴⁷

As classical as such a description may seem, one may wonder whether it actually gives a complete account of the Community's institutional setting. Adopting a clearly *functional* reading of the separation of powers *in lieu* of the institutional approach used by Pescatore, and trying to analyse how the traditional functions of government are allotted within the Community system, one might reach different conclusions.

To understand fully the working of legislative procedures, for instance, it ought to be appreciated that although the Commission enjoys a monopoly of legislative initiative in a number of Community policies, the exercise of this right is greatly conditioned both by the existence of the European Council, which can invite the Commission to submit proposals to the Council, and by the pressures exerted by national capitals. A survey recently conducted by the Commission has evaluated that in 1991, some 21% of the proposals put forward by the Commission's were introduced following a direct request from the Council or one member State.⁴⁸ Likewise, if the Commission plays a pivotal role in the implementation of a number of Community policies, such as competition or anti-dumping policies, in many other areas its "executive" powers are significantly constrained by the complex comitology machinery, set up to ensure that Member States do not relinquish all power at this level. Moreover, as a rule, the application of Community law to private persons is generally taken care of by national administrations. Lastly, although the Court of Justice and the Tribunal of First Instance are traditionally depicted as the Community Judiciary, one should not forget that a about half of the cases handled by the Court of Justice are referred to it by national jurisdictions, using the preliminary rulings mechanism established by Article 177 of the EC Treaty. It seems therefore proper to regard national Courts as "ordinary Community jurisdictions" ("juge communautaire de droit commun"), as suggested by a former President of the European Court.⁴⁹

Taken together, the above remarks give a far more complex image of the Community's institutions than the classic framework depicted by Judge Pescatore.⁵⁰ All point to the same fundamental element, that is to say to the

⁴⁷ Ibid. at 393.

⁴⁸ SEC (92) 1879, 8 October 1992.

⁴⁹ R. Lecourt, *L'Europe des juges* (1976).

⁵⁰ See further Cassese, "La Costituzione europea", XI *Quaderni Costituzionali* (1991) 487 for an even more contrasted approach.

central role of national institutions in the Community machinery. How can one explain the fact that such a central element was not given more importance in classical descriptions of the Community's institutions?

In part, the contrast between the two analyses is a product of divergent approaches. The classical analysis rests on the implicit premise that each institution embodies a different function – or, better said, a different “power”, in the sense that Montesquieu would have used this term – whereas the above remarks are inspired by a functional concern, i.e. the desire to analyze by which institutions and how a given function is performed. But one might also argue that the relative weakness of the classical analysis stems from the way it has attempted to transpose at the systemic (Community) level, a concept (the *trias politica*) worked out at national level. As hinted above, I am not of the view that such a transposition is impossible, nor do I believe that it should be avoided. But the difficulty of the operation should not be underestimated; in particular, one should be aware that functional needs may vary greatly from one level to the other.

In liberal constitutions, the principal function of the separation of powers, epitomized by the writings of Montesquieu and Madison, was to protect political freedom. As the latter argued,

“the concentration of [all power] in the same hands is precisely the definition of despotic government”.⁵¹

In contrast, there is little evidence that similar concerns played any meaningful role in the carving of relationships among Community institutions. The division of labour among them, and the various ‘checks and balances’ enshrined in the treaties were motivated by another concern: namely to prevent an excessive drift of power towards an autonomous institution like the EC Commission. A sheer power logic, rather than liberal political philosophy, seems to have guided the drafters of the EC Treaty.

It was even more pervasive in the evolution of the living constitution of the Community, which as is known, saw the development of intergovernmental bodies.⁵²

Returning to Singer’s terminology, one could explain the situation of the European Community by saying that being a “systemic” actor, it had to face a number of systemic necessities unknown in most national systems, like the necessity to somehow associate its component states to the exercise of its various functions. This example clearly shows that when comparing the two

⁵¹ *The Federalist*, ed. by C. Rossiter (1961), n°48, 310.

⁵² Weiler, “The Community System: The Dual Character of Supranationalism”, 1 *Yearbook of European Law* (1981) 267.

levels, a mechanical transposition at Community level of concepts and institutions developed at national level should be ruled out.

Such a *caveat* seems necessary, for cross-level analysis is frequently resorted to unconsciously. Another example can be found in the widespread tendency to depict Community mechanisms as unnecessarily complex. The “pillars structure” established by the Maastricht Treaty, for instance, has been generally criticized for its extreme complexity, especially as regards external relations: why separate trade problems – to be dealt with by the Community – from foreign policy issues or from immigration matters, which will be debated in an intergovernmental framework.⁵³

I am not trying to suggest that such a separation is justified; the system is undoubtedly complex – so much so that one may question its viability. But my point is another one: when attempting to evaluate Community mechanisms, sight should not be lost of the fact that the Community, because it is a systemic body, has to accommodate a number of requirements which are without equivalent in national systems. Should one turn to other divided-power systems like federal states, one would frequently notice a similar level of complexity, brought about by similar necessities. This by no means precludes a negative evaluation, for federal systems too have often been criticized for the high degree of complexity and rigidity they display.⁵⁴ But whatever their outcome, both comparison and evaluation should be carried out keeping in mind that the same yardsticks should not lightly be used for the Community as for classical nation-states. *A fortiori*, even greater caution is required for normative judgments derived from our study of national systems.

4.5. Comparison and Conflict

So far, my concerns have been mainly analytical; I have tried to make sense of the difficulties involved in cross-level comparisons. I have argued that this kind of exercise differs from “ordinary” comparisons, in that the Community and the national levels could not be treated as water-tight compartments: very often, Community policies aim at shaping the behaviour of the Member States.⁵⁵ We have also seen that the Community, being a systemic actor, has functional requirements that are unknown in national legal systems. Put together, these two elements suggest that there may be instances of conflicts between the two levels.

⁵³ See “Editorial Comments – Post Maastricht”, 29 *CML Rev.* (1992) 199.

⁵⁴ See e.g. the classical criticism of H.Laski, “The Obsolescence of Federalism”, *The New Republic*, May 3, 1939, 367.

⁵⁵ *Supra*, section 4.2.

Let us return for a moment to the tension between national and Community regulatory objectives, to which I referred earlier. Being primarily concerned with market integration, the Community has tried to eliminate obstacles to trade created by national regulations. In some areas the emphasis has been laid on harmonization as a means of eliminating divergences among national laws; in other areas, the Treaty rules prohibiting discriminatory behaviour have been construed broadly, so as to remove barriers to free movement.⁵⁶

In all these cases, whenever Community objectives conflicted with national priorities, the supremacy doctrine has ensured the prevalence of the former over the latter. And the Court has made abundantly clear that supremacy is an essential structural requirement of the Community. To quote *Costa v. ENEL* :

"The executive force of Community law cannot vary from one State to another in deference to subsequent domestic laws, without jeopardizing the attainment of the objectives of the Treaty... The obligations undertaken under the Treaty would not be unconditional, but merely contingent, if they could be called in question by subsequent legislative acts of the signatories".⁵⁷

Thus, using Singer's terms, one could say that the functional concerns of the systemic level (market integration and supremacy) have been given precedence over that of the unit (Member State) level. Such a formulation has the merit of stressing the dangers involved in this kind of situation. Indeed, it could be argued that what we have are instances of conflicts between two legal orders solved with a conflict rule – the supremacy principle – borrowed to one of them. Yet, one could ask, why should the concerns of one level prevail over that of the other? It seems clear that such a situation bears in itself the seeds of future conflicts. The problem of legitimacy is particularly acute when expansionist interpretation of Community law collide with areas of national law that have not been harmonized.⁵⁸ Lack of attention for the legitimate concerns of national societies may lead them to challenge the supremacy rule if the latter is perceived as a factor of disruption of national traditions and interests.⁵⁹

Naturally, this is not to say that the priority should simply be reversed, and an absolute preference given to the regulatory concerns of the Member States. Why think in binary terms? If one accepts that the functional concerns of both levels are equally legitimate, the key question then becomes how they can be

⁵⁶ See e.g. the *Inno* case, *supra* note 36. The Court of Justice has however adopted a more cautious position in the *Keck* case (jointed cases C-267 and C-268/91, *Keck and Mithouard*, ruling of 24 November 1993, not yet reported).

⁵⁷ Case 6/64, *Costa v. ENEL*, [1964] ECR 585.

⁵⁸ Samara-Krispis and Steindorff, *supra* note 38 at 662.

⁵⁹ See e.g. Everson, *supra* note 32. In this respect, it is worth noting that in a recent opinion poll, only a minority (23%) of the persons asked answered that they would be willing to comply with a decision of the European Court of Justice if it would hurt their convictions. Gibson and Caldeira, "The European Court of Justice: A Question of Legitimacy", *Zeitschrift für Rechtssoziologie* 2/93, 205 at 218.

Would they be willing to comply a decision of national court working their course

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reconciled. It is suggested that this result will be achieved only if both concerns are given equal importance at the systemic level, i.e. through the development at Community level of policies that give due consideration to the regulatory concerns of the Member states.⁶⁰ The difficulties of this approach should not be underestimated: national priorities may differ greatly, and the Member States have given ample evidence of their growing uneasiness in the face of the growth of Community powers. Yet this seems to be the only way to avoid a clash between the concerns of both levels.

Assuredly, comparative analysis will have an important part to play in this reconciliation process. Attention will have to focus on the objectives pursued by national regulations, and on the techniques used to reach these objectives. The coherence of national legal systems will have to be preserved. The same could be said about judicial interpretation. Commenting upon recent rulings of the European Court of Justice in the field of company law, Samara-Krispis and Steindorff have suggested that

"[w]here provisions of a directive collide with institutions of national law which have not been harmonized, interpretation should not be satisfied with the argument that Community law *supersedes* national law. It should aim at a *reconciliation* of the directive with national law in order to safeguard the coherence of legal institutions. This presupposes that the interpretation of directives must be handled with great care and on the basis of an exhaustive study of national... law.⁶¹

Likewise, it has been suggested that, having regard to the growth of tensions between Community law and national constitutional values, the Court should draw its inspiration from national rules whenever it must intervene in such a conflict.⁶² Thus, both at the level of law-making and of judicial interpretation, comparative analysis seems to be called upon to play an increasing part.

4. Conclusion: Towards a Comparative Era in Community Law?

So far, the study of the European Community has been greatly influenced by its origin as an international organization. The first to turn their attention to the new structure were international lawyers in law faculties and international relations scholars in political science departments. Even now, in most universities, the teaching of Community law is often associated with international law. It is beyond doubt that this intellectual background has influenced our understanding of the Community. The attention devoted to the relations between the national and the Community legal orders, for instance, is

⁶⁰ I have developed this argument in "Integration v. Regulation? On the Dynamics of Integration in the European Community" *XXX Journal of Common Market Studies* (1992) 383.

⁶¹ *Supra* note 38 at 622; emphasis in the original.

⁶² "Droit communautaire et valeurs constitutionnelles nationales", *Droits* n° 14 (1991) 87 at 95.

clearly linked to its origin as an international organization, even if it was rapidly perceived as an atypical creature.

The Community has now developed its activities in an ever-growing number of fields. National and Community law have become intertwined in a complex web of relationships. This evolution is reflected in the academic sphere: scholars specialized in economic law have long known that they could not ignore developments at Community level; labour lawyers have rapidly followed suit; civil lawyers have recently become aware of the creeping 'Europeanization' of their discipline; constitutional lawyers have been provoked by the Maastricht Treaty to ask to what extent traditional concepts such as the state or national sovereignty still hold some currency.

As the Community has enlarged the scope of its activities, it has come across new problems. Nowhere is this trend clearer than in the field of internal market legislation. Conceived initially to eliminate barriers to trade, it has been gradually called upon to address problems ranging from health, to the environment, and consumer protection. However, as Community intervention in these areas developed, the limits of the harmonisation model, largely based on a legislative approach, have appeared more clearly.⁶³ If the Community has to address effectively regulatory problems of this kind, new techniques will have to be worked out to provide a framework for the cooperation between the Community and the Member States. Concepts such as direct effect and supremacy, which played a crucial role in the infant stage of the Community,⁶⁴ do not offer a satisfactory response to these new kinds of problem. Nor do they hold a solution to hot political issues such as the democracy deficit, or the waning of State sovereignty which have emerged in response to the revival of the integration process.

In contrast, comparative analysis can make an important contribution to our understanding of the Community and to the solution of many problems it is currently faced with. It can also help Community lawyers, which have rarely been inclined to question commonly received ideas, to adopt a more distanced stance. There are therefore reasons to believe – and to hope – that comparative research will play an increasing role in reflexions on the Community. This evolution may be seen as a sign of maturity, a corollary of the Community's transformation from an international organization into a more elaborate form of political system. Yet it is not devoid of problems. This article has argued that cross-level comparisons gave rise to a number of methodological difficulties. It is only by addressing these difficulties that scholars will be able to improve our understanding of the Community.

⁶³ R. Dehousse, C. Joerges, G. Majone and F. Snyder, in collaboration with M. Everson *Europe after 1992 – New Regulatory Strategies*, EUI Working Paper Law n° 92/31.

⁶⁴ The metaphor is borrowed from Pescatore, "The Doctrine of "Direct Effect": An Infant Disease of Community Law", 8 *European Law Review* (1983) 155.

To my view, you contradict yourself, above all in page 17 where you say that

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