Editorial

Wim Muller[*]

I. Changes in editorial policy: Introducing the 'current developments' section

The theme of the current issue, 'comparing law', marks the opening of the third volume of the *European Journal of Legal Studies*. Although this issue still follows the format taken by the Journal thus far, the Editorial Board has decided to introduce a number of changes, or rather additions in the current volume. In order to take better advantage of the web-based nature of the Journal, we have started to accept submissions in a new 'current developments' section which will be published on a 'rolling' publication schedule, *i.e.* contributions will be published as they are received and reviewed by the Editorial Board. Articles which are part of a thematic unity, such as the current collection of articles on 'comparing law' and future thematic calls for papers, or articles linked to a conference or seminar, are still published together as an issue. The Editorial Board therefore now welcomes submissions on current legal developments in each of the main sections of the European Journal of Legal Studies: international law, European law, comparative law, and theories of law. The new Current Developments section will appear on the website soon.

II. Comparing law

Virtually every analysis involves an act of comparison, if only a comparison of the object of analysis to the author's own subjective framework. Although in legal scholarship one immediately thinks about the field of comparative law when the act of comparison is mentioned, it is also obvious that comparisons are also made all the time in other legal disciplines. When inviting submissions for this issue of the *European Journal of Legal Studies*, the Editorial Board decided to emphasise two specific types of comparison: comparisons between laws, across all kinds of fields and jurisdictions, within jurisdictions, and between layers of multi-level jurisdictions; and laws that compare, and the way scholars and practitioners of law apply them, *i.e.*, the way lawyers compare, and the rules that govern such comparisons.

[*] Ph.D researcher, European University Institute. Editor-in-Chief, European Journal of Legal Studies.

Our first contribution, by Kati Cseres, focuses on comparisons in one eminently suitable area: EU competition law and its application across twenty-seven member states. She examines what the purpose of the comparative efforts is as well as their methodology, and provides a critical analysis of the method of voluntary convergence, and the possibility of further extended harmonisation rules in member states. Interestingly, Cseres finds that the harmonisation of the substantive competition rules and the need to unify them across all EU member states actually led to greater attention to comparative methods, as the specific procedural and institutional settings in the member states in which these uniform substantive rules were applied needed to be examined. Since the European Commission no longer holds the central position in which it almost solely determines the application of EU competition rules and has to accept the reality that national competition authorities apply the same rules, it has had to take a comparative approach to assess the different ways in which the rules were applied domestically. Cseres criticises the way in which this has been done, arguing that the current method presents both practical and legal difficulties. In conclusion, she argues that comparative analysis between competition laws in Europe could benefit from a more objective, transparent and more efficient approach, with less of an emphasis on legal transplants and more on competition between the different legal formants.

By making an argument in favour of trial and error in order to find the best solutions to complex legal problems, Cseres emphasises the importance of the act of comparison in the process of problem-solving, and highlights its practical utility.

The second author in this issue, David Marrani, engages in comparisons for a different purpose. In his article on the symbolic position of the judge in western European legal traditions, he uses comparisons to demonstrate how the legal event "is a process of communication where judges, parties and advocates interact […] through a system of dialogue-monologue in a dialectical relationship". Although there are some differences, this is true both in civil law and common law traditions. Drawing on insights from psychoanalytical theory, he presents three elements which condition the symbolic position of the judge: the perception of the judges' function, the appearance and protection of judges through dress and ceremony, and the identification of the judge with that 'in the name of' which he is seen to do justice. Although the methods of truth-finding and resolution of disputes were very different before, convergence has taken place since the Second World War under the influence of the

European Convention of Human Rights. Marrani's original approach gives new life to a comparison which seemed to have been exhausted, and provides the reader with new ways to reflect on what is actually happening during the legal process, rather than a dry application of the law on the books.

Whereas Marrani engages in an old comparison in a new way, Ottavio Quirico, in his article on the new procedure for constitutional review in France, uses two other modes of comparison to shine light on the topic under discussion in his article. In 2008, France introduced a novel system of constitutional review, which incorporated prior verification into review *a posteriori*. Previously, these two forms of review of the constitutionality of a law were separated. After a discussion of the history of constitutional review in French administrative law, Quirico concludes that the new hybrid system will undoubtedly serve as a point of reference for other legal systems, and thus serve as a touchstone for future comparisons. In demonstrating why exactly this system is new, Quirico compares the new system to those exisiting in Italy, Spain, Austria and Germany, and contrasts the models of constitutional review in civil law (modelled after Kelsen) and common law (modelled after Schmitt), comparing them to each other. The new French model is the first to bridge the distinctions existing between these models. The author foresees problems in the French system when a simultaneous review of constitutionality and compliance with international treaties will have to be made. This is solved by separating these two forms of review and to prioritise the review of constitutionality, even though this raises issues under international and European law. Avoiding one comparison, between constitutional review and compliance review, thus leads to an unfavourable comparison at a later stage.

While Quirico is very much concerned with present-day positive law, comparing various forms of administrative law, the first contributor to the Legal Theory section, Michele Mangini, takes the reader into an exploration of more fundamental questions and invites us to reflect on the nature of values in present-day liberalism. Mangini calls for a re-examination of the notion of 'virtues' as described by early liberal philosophers, and argues that the conception of the good conveyed by virtue ethics deserve a more careful treatment than it usually gets from virtue ethics theorists. In particular, there appears to be a certain overlap between agency goods perfectionism and natural law theory in the area of virtues. The author supports this position by presenting the reader with a careful description of current and previous trends in liberal political theory, examining and comparing various visions of

perfectionism before arriving at the linkage between agency goods perfectionism and new natural law. These links may serve to answer a need the author currently perceives within liberal theory for a value orientation that goes beyond a relativistic view of values. He argues that rights theories fall short in connecting the experiences of the good life and well-being to those of the right and justice, and that virtue ethics provides a way out of this impasse. Mangini's analysis and comparison of the various theories ultimately leads him to conclude that the traditional theory of the good from which liberalism developed, is not irreconcilable with liberal pluralism. Comparing the various theories thus leads the author to a conclusion in which room is left for a liberal society to allow its citizens to compare different values.

Our next author, Oles Andriychuk, keeps us in the realm of virtue ethics, but from an altogether different perspective than professor Mangini, although his contribution can at the same time can be read as an application of professor Mangini's conclusions. He proposes to treat economic freedom as a political virtue, and thus attempts to take it beyond the consequentialist framework in which it is usually justified. Instead of justifying the market process only with utilitarian arguments, Andriychuk argues that it should be considered as the 'essence and intrinsic core' of liberal democracy. Economic freedom -and freedom in general- then becomes a right of an ethical and not only practical value. In this perspective, the act of comparison is an essential component of economic freedom as reflected in the market and of freedom in general; the market process is a process of evolution, in which comparisons are constantly made in a dialetical process which helps yield the best result.

One of the core values of a liberal society is freedom of expression, which itself is a prime candidate for comparison because of the divergent developments the interpretation of this value has taken on either side of the Atlantic. In his contribution on "Instrumentalisation of Freedom of Expression in Postmodern Legal Discourses", Uladzislau Belavusau makes various comparisons regarding this right. Aside from an implicit comparison -more pronounced towards the end of his contribution- between the American and European approaches to freedom of expression, the author also contrasts the notions of free speech in critical race theory, feminist jurisprudence, and queer or LGBT legal discourse. The different forms of criticism that arise from these various discourses lead to divergent conclusions. However, what they have in common is their critical approach to the mainstream legal discourse. Belavusau explores these issues and concludes that the European legal scholarship

on free speech should incorporate more of the insights from the historical and literary approaches taken by critical scholars.

III. Book Reviews

Finally, in this issue two books are reviewed by members of the Editorial Board. Guilherme Vasconcelos Vilaça reviews *Rules of Law and Laws of Ruling: On the Governance of Law*, a collection of essays with an interdisciplinary approach to law and governance. The title of his review, 'The Ashes of Law', reflects the contradictions that this paradigm of analysis leaves even in this very collection. David Baez Seara reviews *Making the Law Explicit* by Matthias Klatt under the label of 'The implicit normativity of law'.

IV. Final remarks

Together, the contributions to this issue of the *European Journal of Legal Studies* demonstrate that reflecting on comparison, we are necessarily drawn into reflecting on dialectical processes, convergence and divergence, and evolution, and realise that this is all done in the pursuit of progress. On behalf of the Editorial Board, I hope the reader will find the contributions to this issue insightful and thought-provoking. As always, feedback is welcome on our website as well as at ejls@eui.eu.