

## **New Challenges for European Comparative Law: The Judicial Reception of EU Non-Discrimination Law and a turn to a Multi-layered Culturally-informed Comparative Law Method for a better Understanding of the EU Harmonization**

By *Jule Mulder*\*

### **Abstract**

This article argues that comparative law needs to explore its critical potential when engaging with the European harmonization process and its effects on the law of the Member States. In the first part, the article evaluates existing comparative law methods and their suitability to identify legal and cultural factors that influence the judicial reception of EU harmonized law on a national level. Using EU non-discrimination law as a case study, it questions to what extent traditional methods are suitable to explain differences in the national judicial reception of EU harmonized law, despite the exclusive competence of the Court of Justice of the European Union to interpret EU law. In doing so, it considers the potential of critical comparative law for the development of a deeper understanding of the national courts' reception of EU harmonized law as a key part of the broader legal harmonization process. In the second part, the article develops an original multi-layered culturally informed method to compare EU harmonized law. The proposal goes beyond the existing methods of comparative law by including critical aspects and stressing the relevance of embedding a general normative framework in any comparative critique. It challenges comparatists to reach deeply into national cultural spheres and to identify key influences on the application of EU rules and EU-national legal 'hybrids'. The method creates room for multi-layered narratives of comparison aimed at gaining a deeper understanding of the national legal and non-legal cultural background that can hinder or facilitate harmonization processes. This enriched comparative critique can offer new insights into the process of legal harmonization in the EU, particularly by focusing on the point of application rather than the previous phases of creation of EU law and its reception by Member States.

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\* Lecturer in Law, University of Bristol Law School, [jule.mulder@bristol.ac.uk](mailto:jule.mulder@bristol.ac.uk), PhD (Leeds, with research excellence). I would like to thank Prof Russell A. Miller, Prof Michele Graziadei, Prof Paula Giliker, Dr Albert Sanchez-Graells, Prof Dagmar Schiek, and Prof Katja Ziegler for very very useful comments on previous drafts. The usual disclaimer applies.

## A. Introduction

This article argues that comparative law needs to explore its critical potential when engaging with the European harmonization process and its effects on the law of the Member States, in particular within politically contentious areas of law that are heavily influenced by moral views and national values, such as equality or labor law. To develop a deeper understanding of the European harmonization process within these areas of law, comparative law needs to be able to explain existing differences in the national judicial reception of EU harmonized law that occur despite its common European origin and despite the exclusive competence of the Court of Justice of the European Union (hereafter, CJEU) to interpret EU law.<sup>1</sup> Thus, there needs to be room to identify and explore national legal and non-legal factors that affect the national courts' application of EU law.

The Europeanization and harmonization of the law of the Member States have invigorated comparative law research and embolden legal academics, judges and practitioners to abandon inward-looking doctrinal approaches.<sup>2</sup> The "multi-layered" or "multi-polar"<sup>3</sup> European legal order influences and is influenced by the laws and legal systems of the Member States.<sup>4</sup> This has encouraged European law and comparative law scholars to focus on the dialogue between the national courts and the CJEU,<sup>5</sup> on European legal transplants,<sup>6</sup>

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<sup>1</sup> Article 267 TFEU.

<sup>2</sup> MARTIJN W HESSELINK, *The New European Legal Culture*, in *THE NEW EUROPEAN PRIVATE LAW* 11, 51-55 (2002); Mathias Reinmann, *The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century*, 50 *AM. J. COMP. L.* 671, 691 (2002); Jen Hendry, *Review Essay: Contemporary Comparative Law*, 9 *GERMAN L. J.* 2253 (2008); Jaakko Husa, *The Tip of the Iceberg or what lies beneath the surface of comparative law*, 12(1) *MAASTRICHT J.* 73, 82 (2005).

<sup>3</sup> Karl-Heinz Ladeur, *Methodology and European law*, in *EPISTEMOLOGY AND METHODOLOGY OF COMPARATIVE LAW* 100-105, 113 (Mark van Hoecke ed., 2004).

<sup>4</sup> Dagmar Schiek *et al.*, *A Comparative Perspective on Non-Discrimination law*, in *CASES, MATERIALS AND TEXT ON NATIONAL, SUPRANATIONAL AND INTERNATIONAL NON-DISCRIMINATION LAW* 1 (Dagmar Schiek *et al.* eds., 2007).

<sup>5</sup> *LABOUR LAW IN THE COURTS: NATIONAL JUDGES AND THE EUROPEAN COURT OF JUSTICE* (Silvana Sciarra ed., 2001); KAREN J ALTER, *THE EUROPEAN COURT'S POLITICAL POWER* (2009); KAREN J ALTER, *ESTABLISHING THE SUPREMACY OF EUROPEAN LAW* (2001); Arthur Dyeve, *Unifying the field of comparative judicial politics*, 2(2) *EUR. POLIT. SCI. REV.* 297-327 (2010).

<sup>6</sup> Alan Watson, *Legal Transplant and European Private law*, 4 *ELECTRONIC J. COMP. L.* (2000), available at [www.ejcl.org/44/art44-2.html](http://www.ejcl.org/44/art44-2.html); Pierre Legrand, *The Impossibility of "Legal Transplants"*, 4 *MAASTRICHT J.* 111-24 (1997); T.T. Arvind, *The "Transplant Effect" in Harmonization*, 59 *INT'L & COMP. L.Q.* 65 (2010); Jan M Smits, *Convergence of Private Law in Europe: Towards a New *Ius Commune*?*, in *COMPARATIVE LAW* 219 (Esin Örüçü & David Nelken eds., 2007). Others have written about the use of comparative law within European law making. See Rob van Gestel & Hans-Wolfgang Micklitz, *Comparative Law and EU Legislation: Inspiration, Evaluation or Justification?*, in *THE METHOD AND CULTURE OF COMPARATIVE LAW* 301 (Maurice Adams and Dirk Heirbaut eds., 2014); Ladeur, *supra* note 3.

on the effects of Europeanization on national legal systems,<sup>7</sup> and on how more-effective harmonization (and cooperation) can be achieved.<sup>8</sup>

In many ways, the study of European law requires a comparative approach. The CJEU relies on a comparative law method for interpretation and judicial law-making. The CJEU may refer to the legal principles common to the legal traditions of the Member States in areas where the Treaties are silent or to consider what interpretation is the most appropriate by reference to the legal orders of the Member States.<sup>9</sup> National courts may also want to engage in comparisons to ensure the law embodies universal or European principles rather than domestic ones.<sup>10</sup> Moreover, it has been emphasized that comparative law becomes relevant for national courts determining the meaning of EU law and the need to refer questions for a preliminary ruling to the CJEU under *CILFIT's*<sup>11</sup> *acte clair* doctrine.<sup>12</sup> Comparative law is also relevant for the study of EU law itself. After all, it is primarily national courts that apply and give effect to EU law. The study of their diverging approaches towards applying EU law is thus very much relevant for a fundamental understanding of EU law and its application.

There is also little doubt that traditional approaches to comparative law have contributed to European legal integration.<sup>13</sup> Primary and secondary EU law have long influenced the law of the Member States and challenged both national legislators and courts to implement and

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<sup>7</sup> Jan M Smits, *The Europeanization of National Legal Systems*, in EPISTEMOLOGY AND METHODOLOGY OF COMPARATIVE LAW 229 (Mark van Hoecke ed., 2004); THE EUROPEAN COURT OF JUSTICE AND THE AUTONOMY OF THE MEMBER STATES (Hans-Wolfgang Micklitz & Bruno de Witte eds., 2012); Mads Andenas and Duncan Fairgrieve, *Intent on Making Mischief: Seven Ways of Using Comparative Law*, in METHODS OF COMPARATIVE LAW 25-60 (Pier Giuseppe Monateri ed., 2012); Reinhard Zimmermann, *Comparative Law and the Europeanization of Private Law*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW 539-78 (Mathias Reimann and Reinhard Zimmermann eds., 2008); PAULA GILKER, THE EUROPEANISATION OF ENGLISH TORT LAW (2014).

<sup>8</sup> Hugh Collins, *Why Europe Needs a Civil Code* 21 EUR. REV. PRIV. L. 907-22 (2013); *CESL, Legal Nationalism or a Plea for Appropriate Governance?*, 8 EUR. REV. CONT. L. 241 (2012).

<sup>9</sup> Koen Lenaerts & Kathleen Gutman, *The Comparative Law Method and the Court of Justice of the EU*, in COURTS AND COMPARATIVE LAW 139-176 (M Andenas & D Fairgrieve eds., 2015); Koen Lenaerts & José A. Gutiérrez-Fons, *To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice*, 20 COLUM. J. EUR. L. 3-61 (2014); Koen Lenaerts, *Interlocking Legal Orders in the European Union and Comparative Law*, 52 INT'L & COMP. L.Q. 873-906 (2003).

<sup>10</sup> Esin Örucü, *Comparative Law in Practice: The Courts and the Legislator*, in COMPARATIVE LAW 432 (Esin Örucü and David Nelken eds., 2007).

<sup>11</sup> Case 283/81, *CILFIT v Ministero della Sanità* EU:C:1982:335, 1982 E.C.R. 3415.

<sup>12</sup> Koen Lenaerts, *The Unity of European Law and the Overload of the ECJ*, in THE FUTURE OF THE EUROPEAN JUDICIAL SYSTEM IN A COMPARATIVE PERSPECTIVE 211-239 (Ingolf Pernice et al. eds., 2006).

<sup>13</sup> Many have written detailed discussions of the use of comparative law and the modern functional method. See Esin Örucü, *Developing Comparative Law*, in COMPARATIVE LAW 43-65 (Esin Örucü & David Nelken eds., 2007); Roger Cotterrell, *Is it so Bad to be Different? Comparative Law and the Appreciation of Diversity*, in COMPARATIVE LAW 133-154 (Esin Örucü & David Nelken eds., 2007).

give effect to new, often foreign, legal concepts, either because EU law is directly applicable within the Member States or because the national legislators had to implement EU directives and thus create new national legislation with a European origin. This process presumably harmonizes the law of the Member States and ensures that, for example, employees or consumers have the same rights, or at least a certain common level of protection, everywhere in the European Union. This harmonization process, together with the closer economic integration of the Member States, encourages further convergence of the legal systems. That process, in turn, can be supported by comparative projects exploring the “common core” of the laws of the Member States.<sup>14</sup>

But the converging effects of EU harmonization have long been viewed with skepticism.<sup>15</sup> The legal transplants introduced via secondary EU legislation, for example, often face significant obstacles once they reach the national legal arena. Comparatists who are more aware of cultural and socio-economic diversity suggest that for it to succeed, the EU legal harmonization project needs to be tolerant of differences and to resist unification.<sup>16</sup> This is not contrary to the European idea. Respect for differences and minorities is a key parameter to assess the eligibility of candidate States to join the Union,<sup>17</sup> and the European motto “united in diversity”<sup>18</sup> emphasizes respect for linguistic, cultural, historic, and political differences that can enrich interaction within the Union. Ultimately, complex legal systems always have to reconcile and sustain contradictory principles and rules within one legal tradition.<sup>19</sup> Yet, such respect for diversity sits uncomfortably with harmonization processes that are not sensible to legal-cultural differences. This has often been recognized regarding public law, which is framed by national constitutionalism and the socio-cultural context related to it. However, the respect for national differences can also become important in areas of private law where EU law reaches deeply into private relationships, personal identity, the family, and the political and economic sphere, such as equality or labor law. This article focuses on this area of law, in particular equality law. However, cultural sensitivities seem to extend beyond these intimate spheres and into legal areas more detached from the individual and with closer links to the market, such as commercial law or public procurement, in which there have been recent calls to maximize regulatory freedom

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<sup>14</sup> Mauro Bussani, *Current Trends in European Comparative Law: The Common Core Approach*, 21 HASTINGS INT'L AND COMP. L. REV. 785-801 (1998); KONRAD ZWEIGERT & HEIN KÖTZ, INTRODUCTION TO COMPARATIVE LAW 27 (Tony Weir trans., 3rd ed. 1998). See Örucü, *supra* note 13, at 51; Günter Frankenberg, *How to Do Projects with Comparative Law, in METHODS OF COMPARATIVE LAW* 120-43 (Pier Giuseppe Monateri ed., 2012).

<sup>15</sup> Pierre Legrand, *European Legal Systems Are Not Converting*, 45 INT'L & COMP. L.Q. 52-81 (1996).

<sup>16</sup> David Nelken, *Comparative Law and Legal Studies*, in COMPARATIVE LAW 31 (Esin Örucü and David Nelken eds., 2007).

<sup>17</sup> *Id.*

<sup>18</sup> The motto was codified in Article I-8 of the failed Constitutional Treaty. The Lisbon Treaty does not refer to any symbols of the European Union.

<sup>19</sup> H. PATRICK GLENN, LEGAL TRADITIONS OF THE WORLD 361-372 (5th ed. 2014).

on a national level.<sup>20</sup> The insights developed in this article may thus be relevant beyond the narrow scope of the case study I conduct with respect to EU equality law.<sup>21</sup>

The critical potential of comparative law would support a harmonization process that is more aware of cultural differences, that allows for more flexibility. This might help to avoid “alienating” large parts of the European populace,<sup>22</sup> which often experience EU harmonization as a top-down process that force them to give up legal concepts and social and commercial conventions that are deeply engrained in their national socio-legal identity and culture. Critical comparative studies can help engage with the national cultural or political differences that limit the success of harmonization via directives and other legal transplants and would support an alternative harmonization agenda that is more aware of legal, cultural, and political differences. While there is a growing number of scholars who propose and engage with critical approaches to comparative law,<sup>23</sup> few have considered the value of critical comparative law in the context of EU harmonization. This is not too surprising given that critical comparison precisely challenges the focus on Western Systems, Western-biased analysis and *legocentrism*,<sup>24</sup> and often rejects European harmonization projects.<sup>25</sup> Still, there is value in considering critical comparative law within the context of real-world phenomena, if only to avoid critical approaches becoming conservative in the sense that they reject or ignore any form of possible change.<sup>26</sup> After all, whether one supports or rejects European harmonization and the convergence of European legal systems, EU directives actually exist, are implemented on a national level, and are subsequently applied and interpreted by national courts. How national legal and non-legal factors influence these processes is of immense practical and theoretical interest.

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<sup>20</sup> Sue Arrowsmith, *The Purpose of the EU Procurement Directives*, 14 CAM. Y.B. EURO. LEGAL. STUD. 1-47 (2012).

<sup>21</sup> JULE MULDER, EU NON-DISCRIMINATION LAW IN THE COURTS: APPROACHES TO SEX AND SEXUALITY DISCRIMINATION IN EU LAW (2017). EU Equality law applies horizontally and primarily focuses on equal treatment within employment and access to good and services. It prohibits discrimination on grounds of specific personal characteristics such as sex, sexuality, race, disability, religion or age. The EU equality directives should thus be distinguished from constitutional equality principles or indeed the EU general principle of equal treatment which have a much broader scope but also often accept justifications.

<sup>22</sup> Dagmar Schiek, *Comparative Law and European Harmonisation*, 21 EUR. BUS. L. REV. 223 (2010).

<sup>23</sup> See, e.g., GÜNTER FRANKENBERG, *COMPARATIVE LAW AS CRITIQUE* (2016).

<sup>24</sup> Günter Frankenberg, *Critical Comparison: Re-thinking Comparative Law*, 26 HARV. INT'L L.J. 411-456 (1985). *Legocentrism* puts the law at the center of the analysis, perhaps to the detriment of other cultural factors that are possibly more influential and that determine the de facto outcome of a dispute. It views law as an autonomous, separate and self-contained system. See Jaakko Husa, *About the Methodology of Comparative Law – Some Comments Concerning the Wonderland...*, (MAASTRICHT FACULTY OF LAW, Working Paper No. 5, 2007); Husa, *supra* note 2, at 73-94.

<sup>25</sup> Pierre Legrand, *Against a European Civil Code*, 60 MOD. L. REV. 44-63 (1997).

<sup>26</sup> Ugo Mattei and Anna Di Robilant, *The Art and Science of Critical Scholarship*, 10(1) EUR. REV. PRIV. L. 29-59 (2002).

Ultimately, methodological approaches engaging with the EU harmonization process need to incorporate the national cultural influences on the implemented law, which are not always obvious at the point of implementation. This article therefore suggests a focus on the judicial reception of EU harmonized law and national-European legal hybrids because national courts are part of an inter-community group of courts and are embedded in their own cultural context.<sup>27</sup> The relevance of those national factors as well as European influences should thus become particularly obvious once one focuses on the national courts' application of EU harmonized law. Secondly, the comparison has to go beyond the legal and consider the wider cultural and political context of the national Member States. This can be done by, for example, considering the engagement of various stakeholders with the subject matter and the protective standard the harmonized law tries to achieve. These overlapping narratives can then provide indications of the national identity, self-understanding and legal consciousness surrounding the application of harmonized law at the national level. Finally, the comparative analysis needs to be able to recognize feedback effects produced by the national courts' dialogue with the CJEU. For example, the concept of indirect discrimination can be traced back to early international law and was pioneered in the US case *Griggs v. Duke Power*.<sup>28</sup> The legal concept was then picked up by UK law and also inspired the CJEU case law on non-discrimination law. The mutual influence is obvious if one follows the legislative development of the equality law directives and the national laws implementing the directives, and if one looks at the case law that has developed around those directives. Recognizing these influences, does not imply that the concepts mean the same in each jurisdiction. The cases pursue distinct meanings and use the concept of indirect discrimination in distinct ways. Legal concepts and the judicial reception of harmonized law develop over time and can be influenced by other national courts, CJEU judgments, and the broader political and social context. It is thus difficult to accept a narrative of 'socially easy'<sup>29</sup> transplant. This however does not mean that influences should not be recognized. Essentially, adequate consideration of these effects on the application of harmonized law requires a reflective analysis that views law within culture and thus allows for a diverse, potentially contradictory, and functioning of law within different and broader cultural contexts.<sup>30</sup> This article aims to consider how some of the insights of critical comparison can contribute to a culturally-informed comparative law method that uncovers the legal and non-legal factors affecting the application of EU harmonized law and national-European hybrids on a national level. In particular, its turn to culture and political underpinning and power relations can be helpful even if critical comparison has been more successful in systematically identifying the methodological weaknesses of traditional comparative law

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<sup>27</sup> SILVANA SCIARRA, *Integration through Courts*, in *LABOUR LAW IN THE COURTS* 1 (2001).

<sup>28</sup> 401 US 424, 91 S Ct 846 (1971).

<sup>29</sup> ALAN WATSON, *LEGAL TRANSPLANTS* 95 (1974).

<sup>30</sup> David Nelken, *Defining and Using the Concept of Legal Culture*, in *COMPARATIVE LAW* 127 (Esin Örücü and David Nelken eds., 2007).

approaches than in providing practical solutions to overcome these challenges.<sup>31</sup> The article will demonstrate how the insights of critical comparison can enrich the comparison by discussing an original culturally-informed method that creates a framework for feasible comparison and allows space for multi-layered cultural and political narratives to shed light on the harmonization process.

With all this in mind, and to explore the potential of critical comparison in this context, this article first evaluates existing comparative law methods and their suitability to identify national legal and cultural factors that influence the judicial reception of EU harmonized law on a national level. It thus assesses how traditional comparative law methods fall short of providing sound methodological approaches to the complexity challenge posed by harmonized law and how critical comparison can help us understand the EU legal harmonization process. The article then considers the alternative approaches advanced within the field of critical comparative law and their potential to develop a deeper understanding of national courts' reception of EU harmonized law, which forms a key part of the broader legal harmonization process. In the second part, the article develops an original multi-layered culturally-informed comparative law method. The proposal goes beyond the existing methods of comparative law by including critical aspects and stressing the relevance of embedding a general normative framework in any comparative critique. It challenges comparatists to reach deeply into national cultural spheres and to identify key influences on the application of EU rules and EU-national legal "hybrids."<sup>32</sup> The method creates room for multi-layered narratives of comparison aimed at gaining a deeper understanding of national legal and non-legal cultural backgrounds that can hinder or facilitate harmonization processes. This enriched comparative critique can offer new insights into the process of legal harmonization in the EU, particularly by focusing on the point of application rather than on the previous phases of creation of EU law and its reception by Member States. This original method has an explanatory and evaluative component. From the explanatory perspective, it identifies national influences that are either conducive or create obstacles for successful harmonization processes, and it explains why certain directives are implemented more successfully in some Member States than others. Additionally, from the evaluative perspective, the method contributes to a critical evaluation of the achievements of specific harmonization processes and, more generally, of whether harmonization processes can contribute to the general aims of the EU, such as peace and well-being (Article 3 Treaty of the European Union, TEU).<sup>33</sup>

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<sup>31</sup> Vernon Valentine Palmer, *From Lerrotholi to Lando: Some Examples of Comparative Law Methodology* 53 AM. J. COMP. L. 261, 265 (2005); Anne Peters & Heiner Schwenke, *Comparative Law Beyond Post-Modernism*, 49 INT'L & COMP. L.Q. 800-834 (2000); Sjeff van Erp, *European Private Law*, 3 ELECTRONIC J. COMP. L. (1999), available at [www.ejcl.org/31/abs31-1.html](http://www.ejcl.org/31/abs31-1.html).

<sup>32</sup> Martijn W Hesselink, *A European Legal Method?*, 15 EUR. L.J. 40 (2009).

<sup>33</sup> This claim may hold only on the meta-sphere. See Schiek, *supra* note 22, at 208.

The article is divided in three main sections. After specifying what is encapsulated in the concept of EU harmonized law and national-European legal hybrids, the article will explore how the specific nature of harmonized law and the Member States' duty to implement directives<sup>34</sup> challenge some of the "epistemic foundations"<sup>35</sup> of the law supported by the functional or common law approach. It will then discuss the challenges that arise in the cross-country comparison of the judicial reception of EU harmonized law and will evaluate the adequacy of other methods of comparative law and their critique from the perspective of the comparison of harmonized law. Both sections thus form the first part of the article and engage with the methodological requirements within the context of EU harmonized law, uncover the weaknesses of traditional comparative law methods and consider the potential of critical comparison. The second part of the article will then discuss possible solutions to the methodological conundrum posed by critical comparison and harmonized law by developing a new method that is culturally-informed and leaves room for multi-layered narratives. Throughout the discussion of the proposed method, the article will draw on examples from the area of EU non-discrimination law, which is selected for the case study. This has a practical as well as a conceptual justification. Firstly, and from a reflective perspective, the use of the proposed method to compare harmonized law is based on a comparative project the author has recently been involved in. It thus draws upon experiences with the application of the method in the area of EU and employment non-discrimination law and allows for an extended illustration of the way the method is to be applied in each of its three steps. More importantly, and from a conceptual perspective, this area of EU law is particularly useful for the consideration of the possible contribution of critical comparison because labor and equality laws are often deeply connected with national politics, social roles, labor relations, and the wider legal and non-legal culture. The national factors influencing these areas of law will thus presumably be significant. The article concludes by bringing the main arguments developed in both parts together and identifying how a changed mind-set advocated by critical comparatists can help us develop a deeper understanding of the harmonization process in practice.

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<sup>34</sup> Article 288 TFEU.

<sup>35</sup> Jaakko Husa, *Farewell to Functionalism or Methodological Tolerance?*, 67 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT [RABELSZ] 430 (2003).



## B. The Comparison of EU Harmonized Law

Multi-level governance theory has long been used to identify how the EU legal order requires entangled and “functionally interdependent”<sup>36</sup> authorities on different national and supranational territorial and jurisdictional levels to negotiate and coordinate their interrelations because of shared competences and dynamic arrangements.<sup>37</sup> Sovereign states may give up power to sub-national authorities, civil-society organizations and supranational or intergovernmental organizations, which then affects policy making.<sup>38</sup> The purpose of this section is not to repeat or engage with the multi-level governance processes that influence decision and policy making on the European and national level. Rather, it aims to clarify what is meant by EU harmonized law throughout this article and why conventional comparative law analysis, such as functionalism, is of limited suitability to uncover the interaction of the EU harmonized law and the broader national context.

Within the national context, primary and secondary EU law may be relevant because both can affect the national legal order and can be applied by national courts. Yet, their integration in the national legal system differs. Primary treaty norms with a direct effect can be directly invoked by individuals in national court,<sup>39</sup> and regulations are generally applicable.<sup>40</sup> There is no need to integrate these rules into national law, which means they can be viewed separately from the national legal order—they are European laws directly applicable within the national context. Directives, on the other hand, have to be implemented into national law.<sup>41</sup> These implemented laws are national laws, since the national legislator and national legislative processes have significant influence on their form, shape and scope. Of course, the level of national discretion depends on the directive’s wording and whether it is a minimum or maximum harmonization directive. Either way, they become part of the national legal system and are very often part of wider statutes or codes that go beyond the directives’ requirement and/or address a wider scope of issues. Still, the implementation process does not free them from their European tail. The original directive and the CJEU interpretation of it can influence the interpretation and application of the national law. National laws with a European origin are thus both national and European laws.

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<sup>36</sup> Simona Piattoni, *Multi-level Governance: Historic and Conceptual Analysis*, 31 J. EUR. INTEGRATION 163, 172 (2009).

<sup>37</sup> See Fabian Amtenbrink, *The Multidimensional Constitutional Legal Order of the European Union*, 29 NETH. Y.B. INT’L L. 3-68 (2008).

<sup>38</sup> *Id.* at 172-176. See Liesbet Hooghe & Gary Marks, *Unravelling the Central State, But How? Types of Multi-level Governance*, 97 AM. POLIT. SCI. REV. 233-243 (2003).

<sup>39</sup> Case 26/62, *Van Gend en Loos v Administratie der Belastingen* EU:C:1963:1, 1963 E.C.R. 3.

<sup>40</sup> Article 288(2) TFEU.

<sup>41</sup> Article 288(3) TFEU.

The word “hybrid” captures this status.<sup>42</sup> The terminology used in the directive and implemented into national law, whether familiar to the national legal order or not, is then subject to national as well as European influences. Hesselink demonstrates this by reference to the Unfair Terms Directive,<sup>43</sup> which foresees a good faith/fairness provision in Article 3. Once implemented, it is questionable whether the term can or should be interpreted depending on the national context or independently as an autonomous European legal concept. On the one hand, determining whether clauses are unfair and contrary to good faith may depend on the national context.<sup>44</sup> On the other hand, there are clear minimum standards set by the directive as interpreted by the CJEU and, in the case of maximum harmonization directives, a maximum standard.<sup>45</sup> This exposes the “hybrid and dynamic multi-level”<sup>46</sup> character of the European legal system, which interacts and harmonizes certain aspects of national law without taking over these areas completely. Throughout this article, any reference to EU harmonized law primarily refers to these laws (that implement directives and are thus embedded in the national context but are also directly connected to the European legal order). This is not to say that directly applicable treaty norms may not also be influenced by the national context when applied by national courts. But, at least in principle, their application could be more separate from the rest of the national legal system even if the principle of equivalence and effectiveness<sup>47</sup> provides for certain inroads into the national system.

The focus on European harmonized law as a hybrid system of norms also demonstrates why traditional approaches towards comparative law are ill-suited to appropriately recognize the interconnection of EU and national law within the multi-layered system. Functionalism, for example, suggests focusing the comparison on functional equivalents.<sup>48</sup> This means that the comparatist should take social conflicts as a starting point, as the common comparative denominator (*tertium comparationis*),<sup>49</sup> and then compare the different national laws that are seen as alternative responses to the same problem.<sup>50</sup> Law is thus seen as reflecting

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<sup>42</sup> Hesselink, *supra* note 32, at 40.

<sup>43</sup> Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L95/29) as amended by Directive 2011/83/EU of The European Parliament and of the Council of 25 October 2011 (OJ 2011 L304/64).

<sup>44</sup> Case C-237/02, *Freiburger Kommunalbauten* EU:C:2004:209, 2004 E.C.R. I-3403.

<sup>45</sup> Hesselink, *supra* note 32, at 41-42.

<sup>46</sup> *Id.* at 42; Christian Joerges, *The Impact of European Integration on Private Law*, 3 EUR. L. J. 378-406 (1997).

<sup>47</sup> PAUL CRAIG & GRÁINNE DE BÚRCA, *EU LAW* 239-251 (6th ed., 2015).

<sup>48</sup> ZWEIFERT & KÖTZ, *supra* note 14.

<sup>49</sup> Esin Örüçü, *Methodology of Comparative Law*, in ELGAR ENCYCLOPEDIA OF COMPARATIVE LAW 560, 561 (Jan M Smits ed., 2nd ed. 2012); Antonios Emmanuel Platsas, *The Functional and the Dysfunctional in the Comparative Method of Law* 12 ELECTRONIC J. COMP. L. (2008, available at <http://www.ejcl.org/123/art123-3.pdf>).

<sup>50</sup> Ralf Michaels, *The Functional Method of Comparative Law*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW 369 (Mathias Reimann & Reinhard Zimmermann eds., 2008).

society's needs, although research on legal transplants has demonstrated that laws are often adopted not because of need or suitability, but rather prestige and authority.<sup>51</sup> This is even more significant within the European context, where Member States are obliged to implement directives, and even if the process of transplantation and possible diffusion of the legal concept is controlled by the adopting system,<sup>52</sup> which means that the national context continues to be important. Functionalism's greatest asset is that it provides a seductively simple solution to the difficult question of how to choose the objects of comparison: one should compare the laws or extra-legal rules that address the same social conflict. The use of social problems as objective parameters outside the comparison requires *a priori* assumptions to create an epistemic foundation of law.<sup>53</sup> But this is problematic within the European context, where national legal systems have limited freedom regarding their legal agenda. Functionalism struggles to identify national influences on the application of harmonized law and the political agenda behind the harmonization process because it focuses on legal solutions to social problems. This has been considered to be reductionist and *legocentric*, as it isolates the law from its "socio-economic and politico-cultural environment."<sup>54</sup> It ignores the political background of a legal and historical development, which turned conflicts into legal questions.<sup>55</sup> This is not to say that directives cannot have those functions or aim at solving certain social conflicts from a European perspective. Rather, these functions are not necessarily the only, or even the predominant, reason why the directives are implemented in the national legal systems. Member States also face obligations of specific transposition even if their national courts' practices already achieve the aim of the directive.<sup>56</sup>

For example, if we view EU equal-pay provisions from a functional perspective, we would assume that they are designed to address the gender pay-gap. But Article 119 EEC (now Article 157 Treaty on the Functioning of the European Union, TFEU) was not introduced to remedy the social ill of pay-discrimination. Instead, it sought to address concerns regarding competitive disadvantages of the Member States establishing the European Economic Community, and it ultimately constituted a political compromise between Germany and

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<sup>51</sup> Alan Watson, *Legal Changes*, 131 U. PA. L. REV. 1132, 1134-1146 (1983); Alan Watson, *Legal Transplants and Law Reform*, 92 L. Q. REV. 79, 81 (1976).

<sup>52</sup> Michele Graziadei, *The Functionalist Heritage*, in *COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS* 118-122 (Pierre Legrand & Roderick Munday eds., 2003).

<sup>53</sup> Husa, *supra* note 35, at 430.

<sup>54</sup> Frankenber, *supra* note 24, at 423; Jonathan Hill, *Comparative Law, Law Reform and Legal Theory*, 9 OXFORD J. LEGAL STUD. 101, 108 (1989); Richard Hyland, *Comparative law*, in *A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY* 184, 187-90 (Dennis Patterson ed., 1999); ROGER MERINO ACUÑA, *COMPARATIVE LAW FROM BELOW* 16 (2012); Pierre Legrand, *Paradoxically, Derrida: For a Comparative Legal Studies*, 27 CARDOZO L. REV. 631, 659 (2005).

<sup>55</sup> Frankenber, *supra* note 24, at 434-340; Hyland, *supra* note 54, at 189; Pierre Schlag, *Normativity and the Politics of Form*, 139 U. PA. L. REV. 801-932 (1991).

<sup>56</sup> Case 96/81, *Commission v Netherlands* EU:C:1982:192, 1982 E.C.R. 1792 at ¶ 12. *See also infra* note 69.

France.<sup>57</sup> Pay-discrimination as such was not necessarily considered a social conflict requiring a legal remedy on national level. Even today European involvement in equality and non-discrimination may be fueled by both an interest to protect citizens from bigotry and sexism *and* the fact that there are few competing national concepts intertwined with the national legal traditions. This leaves space for the EU to demonstrate its commitment to social progress and legitimize further European (political) integration.<sup>58</sup> The functions of the equality-directives are thus not necessarily clear and may be seen differently on national and European level. This, in turn, may explain why the equality directives had a limited effect after their implementation and only slowly gained visibility. In Germany, for example, only 112 cases based on the now annulled § 611a of the German Civil Code (which prohibited sex discrimination within employment) were launched between 1982 and 2004.<sup>59</sup> It may also explain the rather slow adoption of the more current equality directives banning discrimination on grounds of sex, sexuality, religion and belief, race and ethnic origin, age and disability,<sup>60</sup> which are indeed deeply intertwined with national legal traditions.<sup>61</sup> The European legal system may encourage developments along similar lines because European integration requires similar and rational legal solutions (natural processes of convergence).<sup>62</sup> But Member States also face clear legal obligations to implement EU law. Similarities between national harmonized laws are not surprising, particularly when directives leave little discretion to the Member States.<sup>63</sup> Functionalism thus seems ill-suited to compare EU legal systems. This is not only because of its *praesumptio similitudinis* and the presumption of similar social conflict despite different social realities.<sup>64</sup> The high level of abstraction, using the social conflicts as a “theoretical tool for comparison, not an empirically existing fact”<sup>65</sup> disguises that the functional problem itself is a matter of normative perspective.

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<sup>57</sup> ANNA VAN DER VLEUTEN, *THE PRICE OF GENDER EQUALITY* (2007).

<sup>58</sup> FRITZ W SCHARPF, *CRISIS AND CHOICE* (Ruth Crowley & Fred Thompson trans., Cornell University Press 1991); ALEXANDER SOMEK, *ENGINEERING EQUALITY* 51 (2011); C. Barnard, *The Principle of Equality in the Community Context*, 57 *CAMBRIDGE L. J.* 352 (1998); EVELYN ELLIS AND PHILIPPA WATSON, *EU ANTI-DISCRIMINATION LAW* 25 (2nd ed. 2012).

<sup>59</sup> Heide Pfarr, *Sorgen vor Klageflut sind unbegründet* (BÖCKLER IMPULS No. 2, 2005), available at <http://www.boeckler.de/pdf/impuls0502.pdf>.

<sup>60</sup> See, e.g., Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ 2000, L180/22); Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000, L303/16); Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (OJ 2006 L204/23).

<sup>61</sup> MULDER, *supra* note 21.

<sup>62</sup> Peters & Schwenke, *supra* note 31, at 801.

<sup>63</sup> See, e.g., Paula Giliker, *The Transposition of the Consumer Rights Directive into UK law: Implementing a Maximum Harmonisation Directive*, 23 *EUR. REV. PRIV. L.* 5-28 (2015).

<sup>64</sup> Husa, *supra* note 35.

<sup>65</sup> *Id.* at 430.

Consequently, it struggles to identify the hierarchical co-dependencies that exist between the different European and national institutions and that influence legislative agendas within the multi-governmental structure. The aim perused by the norm-giver is not necessarily identical with the abstract function of a given norm. For example, while EU non-discrimination law's abstract function aims at "putting into effect in the Member States the principle of equal treatment"<sup>66</sup>, the institutions involved may view the law as a political compromise and a tool to further harmonization, integration, and the peaceful cooperation between nation States.

Similarly, the common core approach,<sup>67</sup> which adopts a factual starting point, has little to add to the comparison of national legislation that implements European directives. It is unsurprising that different Member States provide similar or identical legal solutions within an area that is legally harmonized. After all, Member States would face infringement procedures if they did not implement the directives.<sup>68</sup> The CJEU has often stressed that proper implementation is necessary to ensure certainty and precision.<sup>69</sup> That, however, does not mean that these legal solutions provided in the statute books are ever used or actually mean the same within the national cultural context. Given the different procedural rules or non-legal matters of substance that can lead to major differences in other, slightly different, cases,<sup>70</sup> a common core approach, like functionalism, is likely to overlook relevant divergences because it tends to exclude a large number of facts that are not strictly legal and only considers their meaning in relation to their effects in operational terms.<sup>71</sup> Diversities in the theoretical and philosophical framework can make legal concepts rather different, even if singular results are similar or lead to similar results.<sup>72</sup> Moreover, the question remains whether we can ever understand sterilized, fabricated, abstract factual scenarios removed from their social, economic, and cultural contexts.<sup>73</sup> After all, directives are binding regarding the result to be achieved.<sup>74</sup> The scenarios envisaged by the legislator should thus

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<sup>66</sup> See, e.g., Article 1 of Council Directive 2000/78/EC, *supra* note 60.

<sup>67</sup> RUDOLF B SCHLESINGER, *COMPARATIVE LAW CASES-TEXT-MATERIALS* 32-35 (4th ed. 1980); *FORMATION OF CONTRACT* (Rudolf B. Schlesinger ed., 1968).

<sup>68</sup> Article 258-260 TFEU.

<sup>69</sup> Adoption of the proper administrative practices (Case 160/82, *Commission v Netherlands* EU:C:1982:443, 1982 E.C.R. 4637) or settled case-law (Case C-144/99, *Commission v Netherlands* EU:C:2001:257, 2001 E.C.R. I-3541), which interprets and applies the national provisions in a manner deemed to satisfy the requirements of a directive, is thus usually insufficient.

<sup>70</sup> Rudolf B. Schlesinger, *The Common Core of Legal Systems*, in *RECHTSVERGLEICHUNG* 262-263 (Konrad Zweigert & Hans- Jürgen Puttfarcken eds., 1978).

<sup>71</sup> Graziadei, *supra* note 52, at 108-112.

<sup>72</sup> *Id.* at 263.

<sup>73</sup> FRANKENBERG, *supra* note 23, at 67.

<sup>74</sup> Article 288 TFEU.

be covered by the directive and the law implementing it, even if alternative solutions are also available. Real-life application is often very different from what was envisaged during the drafting process.

### C. Challenges for Comparison: The Judicial Reception of Harmonized Law

It is not clear how we might capture the different factors influencing the national application of harmonized law in a meaningful and feasible way. Comparative law has long struggled with its own methodology.<sup>75</sup> Post-modernist approaches, originating from legal realism,<sup>76</sup> have challenged traditional approaches such as functionalism because of its lack of cultural awareness and apolitical approach towards law. Still, the “nagging feeling”<sup>77</sup> that it is difficult, if not impossible, to understand different legal systems, has not stopped the discipline from advancing.<sup>78</sup> Consequently, a paradoxical situation arises.<sup>79</sup> On the one hand, there is a growing practice of substantive comparative work on the law of Member States, including harmonized law and legal transplants. On the other hand, there are highly theoretical debates regarding the shortcomings of current comparative law methods and the need to recognize the cultural diversity within which the law is embedded. The goal of this section is not to repeat this criticism or methodological advances. Instead, the section will discuss the usefulness of the different comparative law methods for the purpose of comparing the application of harmonized law. While there is a large tool set of possible approaches within comparative law,<sup>80</sup> the discussion will focus on three approaches: functionalism, structuralism, and the postmodernist critique of comparative law. These approaches dominate current methodological debates and provide different, but potentially overlapping, solutions on how to compare and to what extent non-legal factors can (or should) be included in the comparison. They will be considered in the light of two key challenges posed by the comparison of harmonized law: the triangular relationship among the national courts of the EU Member States and the CJEU, and the integration of the national legal and non-legal context.

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<sup>75</sup> Rob van Gestel & Hans-Wolfgang Micklitz, *Why Methods Matter in European Legal Scholarship*, 20 EUR. L. J. 292, 309 (2014).

<sup>76</sup> Mattei & Di Robilant, *supra* note 26, at 35.

<sup>77</sup> Husa, *supra* note 2, at 92; Hendry, *supra* note 2, at 2262.

<sup>78</sup> Reinmann, *supra* note 2, at 673.

<sup>79</sup> Maurice Adams & Jacco Bomhoff, *Comparing Law*, in PRACTICE AND THEORY OF COMPARATIVE LAW 1 (2012); Palmer, *supra* note 31, at 3.

<sup>80</sup> See, e.g., MATHIAS SIEMS, *COMPARATIVE LAW* (2014); JAAKKO HUSA, *A NEW INTRODUCTION TO COMPARATIVE LAW* (2015); GEOFFREY SAMUEL, *AN INTRODUCTION TO COMPARATIVE LAW THEORY AND METHOD* (2014); *THE OXFORD HANDBOOK OF COMPARATIVE LAW* (Mathias Reimann and Reinhard Zimmermann eds., 2008).

*I. The Triangular Relationship of the National Courts and the CJEU*

The comparison of EU harmonized law is complicated by the relationship between the CJEU and the national courts,<sup>81</sup> their different roles and functions and their shared responsibility regarding the application and interpretation of EU law. The Treaty authorizes the CJEU to interpret Union law.<sup>82</sup> The national courts are in charge of deciding the merits of the case,<sup>83</sup> and the CJEU leaves discretion to the national courts.<sup>84</sup> The national courts retain a substantial responsibility for ensuring that EU law is properly enforced, and they become “decentralized EU courts”<sup>85</sup> with primary responsibility for the “*effect utile* of EU law.”<sup>86</sup> The CJEU depends on the national courts’ cooperation to ensure the effectiveness of EU law, while national courts have to consider the case law of the CJEU when they apply EU law. National courts belong to a trans-national and post-national community of courts, as they are linked to the CJEU and the courts of other Member States.<sup>87</sup> A comparison focusing on the application of EU harmonized law must consider the effect of the relationship—and the consequential interconnection and dialogue—between the national courts and the CJEU.

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<sup>81</sup> PETER DE CRUZ, *COMPARATIVE LAW IN A CHANGING WORLD* 164-65 (3rd ed. 2007).

<sup>82</sup> Art 19 TEU and 267 TFEU.

<sup>83</sup> Case 170/84, *Bilka v Weber von Hartz* EU:C:1986:204, 1986 E.C.R. 1607, at ¶ 36.

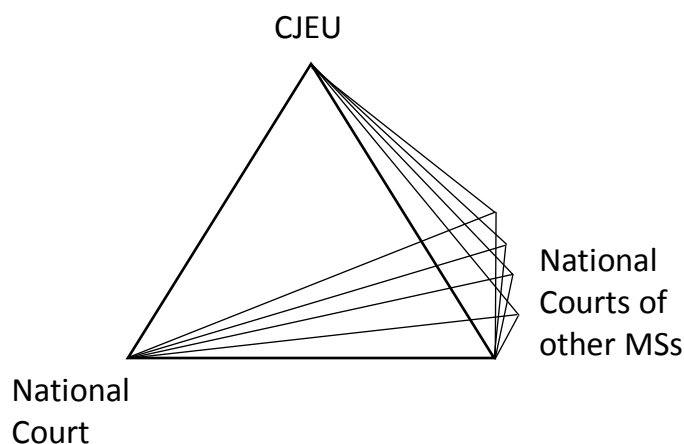
<sup>84</sup> The CJEU’s approach towards objective justification within the concept of indirect (sex) discrimination is an example. See CHRISTA TOBLER, *INDIRECT DISCRIMINATION* (2005); Sacha Prechal, *Combating Indirect Discrimination in Community Law Context*, 20 *LEGAL ISSUES EUR. INTEGRATION* 81, 90 (1993); Philippa Watson, *Equality of Treatment: A Variable Concept?*, 24 *INDUSTRIAL L. J.* 33, 43-48 (1995); Dagmar Schiek *et al.*, *Indirect Discrimination*, in *CASES, MATERIALS AND TEXT ON NATIONAL, SUPRANATIONAL AND INTERNATIONAL NON-DISCRIMINATION LAW* 357 (Dagmar Schiek *et al.* eds., 2007).

<sup>85</sup> Urszula Jaremba, *At the Crossroad of National and European Union Law*, 6 *ERASMUS L. REV.* 191, 192 (2013); Juan A Mayoral *et al.*, *Creating EU Law Judges*, 21 *J. EUR. PUBLIC POLICY* 1120-1141 (2014).

<sup>86</sup> *Id.*

<sup>87</sup> SCIARRA, *supra* note 27.

Primarily, the relationship between the national courts and the CJEU is institutionalized via the preliminary reference proceeding.<sup>88</sup> Accordingly, a national court (of last instance) is required to request a ruling from the CJEU on the interpretation of EU law if it considers that a decision on the question is necessary to enable it to give a judgment.<sup>89</sup> In this way there is direct communication between each national court that asks a question and the CJEU. Yet, the preliminary reference procedure is not limited to this scenario. The additional multilevel and intertwining influences become quite obvious if one depicts the dialogue between the national courts and the CJEU as triangular. Its simplified version,<sup>90</sup> reducing the number of national courts to two, can help in visualizing the interconnection of the courts: the CJEU and the national court asking a preliminary question each sit on one vertex, while the second national court, representative of all the other national courts, sits on the third vertex.



The triangular relationship then demonstrates that the CJEU, when issuing a judgment, influences all national courts beyond the court that has directly referred a preliminary question to the CJEU. This is the case because it's the CJEU's ruling is relevant for all courts of the Member

States.<sup>91</sup> The relevance of a preliminary judgment is never restricted to the requesting court but extends to other national courts regarding the interpretation of EU law. The effect of the preliminary reference procedure is not limited to top-down influences because the national court asking the question influences not only the CJEU but also other national courts. First, if national courts want to give effect to the CJEU's preliminary rulings that originated from other Member States, they have to engage with the referring court's

<sup>88</sup> David O'Keeffe, *Is the Spirit of Article 177 Under Attack? Preliminary References and Admissibility*, 23 EUR. L. REV. 509-536 (1998).

<sup>89</sup> Article 267 TFEU.

<sup>90</sup> In reality, there are 28 Member States (or once the UK leaves, 27), so the triangle would have 28 vertices plus one vertex for the CJEU, a rather confusing construction.

<sup>91</sup> This is the case when, for example, a national court wants to consider previous preliminary rulings that originated in other Member States in order to determine whether it needs to send a question to the CJEU. Case 283/81, *CILFIT v Ministero della Sanità* EU:C:1982:335, 1982 E.C.R. 3415, at ¶¶ 8-15.



argument, interpretation and doctrinal problem to understand the original question and the CJEU's ruling. Second, the European harmonization process encourages national courts to abandon purely internal perspectives on law and consider other national approaches, particularly regarding the application of harmonized law.<sup>92</sup> When applying EU law, a national court is encouraged to consider the doctrinal or other legal problems that arise in different European legal orders in relation to their own national approaches. Other national legal systems, whose courts are not directly involved in the preliminary reference, can also influence the CJEU's reasoning for two reasons: first, because all Member States can participate in the preliminary proceedings on EU level,<sup>93</sup> and, second, because the CJEU has to consider national legal paradigms and the doctrines of the different legal systems if it wants to ensure the effectiveness of EU law in all Member States.<sup>94</sup> The influences go both ways along each side of the triangle, and it is difficult to separate top-down influences from cross-country and bottom-up effects. It is a "multi-layered" or "multi-polar" system that encourages national courts to engage with other national courts' judgments and legal systems as well as communication between the national courts and the CJEU.<sup>95</sup>

National courts being connected and engaging in dialogue with courts from other Member States is of course not unique to the EU. National courts were always able, and some became accustomed, to consider case law from other States. They may also be willing to go beyond the European context by considering the decision-making process of courts from non-European jurisdictions and in legal areas outside the scope of EU law.<sup>96</sup> English courts, for example, are often more willing to engage with other common law courts whose rulings are considered persuasive,<sup>97</sup> while an engagement with the judgments of European civil law courts exist mainly, if at all, within the limits of European law.<sup>98</sup> In the UK, for instance, the Judicial Committee of the Privy Council also goes beyond the national sphere, as it considers appeals from different national legal systems.<sup>99</sup> It can be suggested that English courts

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<sup>92</sup> HESSELINK, *supra* note 2, at 45-50, 55; Smits, *supra* note 7, at 229-45.

<sup>93</sup> Art 96 Rules of Procedure of the Court of Justice (OJ 2012, L 265/1).

<sup>94</sup> Lenaerts, *supra* note 9.

<sup>95</sup> Ladeur, *supra* note 3 100-5.

<sup>96</sup> Martin Gelter & Mathias M Siems, *Citations to Foreign Courts – Illegitimate and Superfluous, or Unavoidable? Evidence from Europe*, 62 AM. J. COMP. L. 35-86 (2014).

<sup>97</sup> Christophe McCrudden, *A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights*, 20 OXFORD J. LEGAL STUD. 499 (2000).

<sup>98</sup> Paula Giliker, *The Influence of EU and European Human Rights Law on English Private Law*, 64 INT'L & COMP. L.Q. 237-265 (2015); Keith Stanton, *Comparative Law in the House of Lords and Supreme Court*, 42 COMMON L. WORLD REV. 269-296 (2013); Örucü, *supra* note 10. Arnull has written about the UK courts' willingness to consider EU law within the national context. See Anthony Arnull, *The Law Lords and the European Union: Swimming in the Incoming Tide*, 35 EUR. L. J. 57-87 (2010).

<sup>99</sup> Paul Mitchell, *The Privy Council and the Difficulty of Distance*, 36 OXFORD J. LEGAL STUD. 26-57 (2016).

already belong to a trans-national community that continues to flourish beyond and besides the European influence. Other international organizations, treaties and courts may encourage a dialogue between different national and international entities in a globalized world. But the preliminary reference procedure, in combination with the supremacy of EU law, further formalizes the process regarding the European context and forces unwilling courts to engage with other national courts' judgments when they apply EU law in the light of the CJEU judgments, even if it is not made explicit in the reasoning of the court. A comparison of the application of EU harmonized law needs to allow space to identify and discuss this, potentially indirect, engagement with other national legal orders of the European Union.

The structural interdependence of the national courts and the CJEU affects the possible framework in which the comparison can take place. Since EU law enjoys primacy over national law,<sup>100</sup> it might be assumed that the CJEU's case law establishes *objective parameters*<sup>101</sup> to which national courts would gradually adapt. Within a comparative analysis the CJEU's case law could then be used as the external common denominator (*tertium comparationis*). As a supranational court the CJEU is supposed to ensure the uniform application and interpretation of Union law. It can do this independent of the political and cultural context of the Member States.<sup>102</sup> The cross-country comparison would then consider how different national courts adopt the CJEU interpretation that is constructed as the best (at least in the European context) solution to a specific problem, to use functionalist terminology. Such an approach presupposes consistency. But the CJEU's interpretation of EU law does not happen in a context-free environment in which the CJEU can objectively pick the "best solution," presuming such a solution exists, which is then gradually adopted by the courts of the Member States. On the contrary, the CJEU's case law is frequently criticized for being incoherent, contradictory, and merely reacting to individual cases.<sup>103</sup> This arises from structural and functional issues.

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<sup>100</sup> Case 26/62, Van Gend en Loos v Administratie der Belastingen EU:C:1963:1, 1963 E.C.R. 3.

<sup>101</sup> Usually referred to as *tertium comparationis*, i.e., the common comparative dominator. See Örüçü, *supra* note 49.

<sup>102</sup> DE CRUZ, *supra* note 81, at 140-1, 151-8, 153; CRAIG & DE BÜRCA, *supra* note 47, at 57-58.

<sup>103</sup> See GUNNAR BECK, THE LEGAL REASONING OF THE COURT OF JUSTICE OF THE EU (2013); GERARD CONWAY, THE LIMITS OF LEGAL REASONING AND THE EUROPEAN COURT OF JUSTICE (2012). See also Clara MS McGlynn, *Equality, Maternity and Questions of Pay*, 21 EUR. L. REV. 327-32 (1996); Evelyn Ellis, *Recent Development in European Community Sex Equality Law*, 35 COMMON MKT. L. REV. 379-408 (1998). But see Annick Masselot, *Pregnancy, Maternity and the Organisation of Family Life*, 26 EUR. L. REV. 239-60 (2001).

The “pre-federal”<sup>104</sup> European structure means that the national courts have to decide how to ask preliminary questions and how much information they provide to the CJEU.<sup>105</sup> In this way national courts can significantly influence the development of EU law and CJEU decision-making processes, particularly if it is in their interest to refuse cooperation or limit the application of EU law at the national level.<sup>106</sup> For example, the German Constitutional Court’s threat to uphold national constitutional standards of human rights in defiance of European law forced the CJEU to engage with human rights and the principles underpinning them.<sup>107</sup> This is not necessarily detrimental to the development of EU law. On the contrary, it has been suggested that the recognition of (national) human rights at the EU level has protected the integrity of the European legal order.<sup>108</sup> Still, the significant pressure national courts can use to influence the CJEU demonstrates that there is no clear hierarchy between them. The CJEU is not a Court of Appeal that can review the principles and interpretations adopted by national courts. Consequently, national courts and national legal systems significantly influence the CJEU, even if only indirectly via preliminary questions.<sup>109</sup> Since courts of 28 (or once the UK leaves, 27) Member States can refer questions to the CJEU, these influences are manifold, diverse, and potentially contradictory. This is not to say that CJEU case law is not important for national applications of harmonized law. But these cases cannot be viewed as an external framework or treated as providing one consistent solution to the interpretation of EU law. Instead, CJEU case law needs to be considered alongside other factors within a “complex network of norms and practices.”<sup>110</sup> The shared responsibility of the CJEU and national courts means that there are continuous national and non-national influences that affect the application of the national law implementing the directives. This further underlines their hybrid character. Unlike other legal transplants,<sup>111</sup> these laws are not freely adopted and the transplantation process and possible diffusion of the legal concepts is not only dependent on the recipient national legal system.

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<sup>104</sup> SCIARRA, *supra* note 27, at 8; DE CRUZ, *supra* note 81, at 140.

<sup>105</sup> Article 94 Rules of Procedure of the Court of Justice (*supra* note 93); Claire Kilpatrick, *Gender Equality: A Fundamental Dialogue*, in *LABOUR LAW IN THE COURTS* 31-130 (Silvana Sciarra ed., 2001).

<sup>106</sup> Dyevre, for example, analyzes national courts’ behavior from a game theory perspective and argues that the “non-compliance threat” can be sufficient to influence CJEU case law. Arthur Dyevre, *The German Federal Constitutional Court and European Judicial Politics*, 34 *WEST EUR. POL.* 346-361 (2011).

<sup>107</sup> BUNDESVERFASSUNGSGERICHT [BVERFG] [FEDERAL CONSTITUTIONAL COURT] May 29, 1974, 2 BvL 52/71, BVerfGE 37, 271; Oct. 22, 1986, 2 BvR 197/83, BVerfGE 73, 339.

<sup>108</sup> Fabian Amtenbrink, *The European Court of Justice’s Approach to Primacy and European Constitutionalism*, in *THE EUROPEAN COURT OF JUSTICE AND THE AUTONOMY OF THE MEMBER STATES* 35-63 (Hans-Wolfgang Micklitz & Bruno de Witte eds., 2012).

<sup>109</sup> ANTHONY ARNULL, *THE EUROPEAN UNION AND ITS COURT OF JUSTICE* 100-101 (2nd ed. 2006).

<sup>110</sup> Husa, *supra* note 2, at 85.

<sup>111</sup> Text accompanying *supra* note 51.

A comparative method that engages with the application of harmonized law needs to mirror the dialogue of structural interdependence between the national courts and the CJEU. How to integrate this multi-layered transnational dialogue between the courts into a traditional cross-country comparison is far from clear, particularly because of the political dimension of the dialogue, which goes beyond simply developing and understanding the “correct” interpretation of European law. Modern functionalists recognize that there are areas of law where “adequate conceptual tools which are both common to the various legal systems and teleologically satisfactory” do not yet exist.<sup>112</sup> Consequently, politically influenced areas of law may not be comparable and the focus of comparatists’ efforts should be on private “apolitical” law.<sup>113</sup> Alternatively, comparative labor lawyers have emphasized the need for interdisciplinary cooperation. Accordingly, it is necessary to consider a specific element’s interaction with all the other elements of the specific system to discover the true function.<sup>114</sup> The consideration of “extra-legal”<sup>115</sup> elements is not sufficient to properly integrate the political dimension of the courts’ dialogue, which often has very little to do with the particular harmonized rule in question and its purpose or function. Regardless of whether law can ever be apolitical,<sup>116</sup> at least the dialogue between the courts, if not EU law in general, is highly politicized.<sup>117</sup>

The CJEU, on the one hand, reflects the general character of the European Union, which is essentially a political project focused on integration.<sup>118</sup> The Court is thus generally recognized to be driven by a pro-integrationist agenda.<sup>119</sup> Additionally, the involvement of the European Commission, the European Parliament, and interest groups (including NGOs) has implications for EU governance.<sup>120</sup> For example, individual activists and interest groups have successfully advanced gender equality via strategic litigation. Because of the direct

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<sup>112</sup> Zimmermann, *supra* note 7, at 578.

<sup>113</sup> ZWIEGERT & KÖTZ, *supra* note 14, at 45; DE CRUZ, *supra* note 81, at 239.

<sup>114</sup> Manfred Weiss, *The Future of Comparative Labour Law as an Academic Discipline and as a Practical Tool*, 25 COMP. LAB. L. & POL’Y J. 169, 172-3 (2003); Paul Davies & Mark Freedland, *The Role of EU Employment Law and Policy in the De-marginalisation of Part-time Work*, in EMPLOYMENT POLICY AND THE REGULATION OF PART-TIME WORK IN THE EUROPEAN UNION 63, 67 (Silvana Sciarra *et al.* eds., 2004).

<sup>115</sup> Weiss, *supra* note 114, at 173.

<sup>116</sup> *But see* Legrand, *supra* note 54, at 631, 644; Mark van Hoecke & M Warrington, *Legal Cultures, Legal Paradigms and Legal Doctrine*, 47 INT’L & COMP. L. Q. 495, 535 (1997); Alessandro Somma, *At the Patient’s Bedside?*, 13 CARDOZO ELECTRONIC L. BULLETIN (2007), available at <http://www.jus.unitn.it/cardoza/Review/2007/somma2.pdf>.

<sup>117</sup> Schiek has written about European human rights, equality and labor law. *See, e.g.,* Schiek *et al.*, *supra* note 4, at 13-14; Dagmar Schiek, *Critical Comparative Law from a Labour Law Perspective*, in EUROPEAN COMPARATIVE LAW 197-221 (Dagmar Schiek *et al.* eds., 2003).

<sup>118</sup> Article 3 TEU.

<sup>119</sup> CONWAY, *supra* note 103, at 53-84.

<sup>120</sup> ELLIS & WATSON, *supra* note 58, at 25.

effect of Article 157 TFEU (Article 141 EC), the national courts were forced to refer an increasing number of preliminary questions. This enabled the CJEU to develop its rather broad interpretation of sex equality, including issues related to pregnancy and gender, which in many Member States were part of national social policies and not employment law.<sup>121</sup> The rigidity of the EU treaties does not encourage the CJEU to moderate its jurisprudence, as it does not need to fear amendments regarding its own jurisdiction.<sup>122</sup> The successful implementation of new principles in Member States may also depend on the persuasiveness of the CJEU's reasoning within the broader national context. The CJEU uses various methodological approaches when interpreting Union law,<sup>123</sup> but it also faces several problems different from those at the national level. For instance, it has to negotiate and interpret multilingual legal texts that differ from each other.<sup>124</sup> It also faces different interpretations in the national legal orders of the Member States.<sup>125</sup> If it wishes to create a persuasive coherent legal order and horizontal coherence between the Member States,<sup>126</sup> the Court has to argue purposively and doctrinally.

National courts, on the other hand, may have an interest in giving effect to EU law. Within the system of supremacy national courts are able to follow the CJEU without waiting for their national parliaments or higher national courts to become active. This leads to the paradoxical situation where "lower" national courts or even quasi-judicial bodies gain new powers by sharing their power with a supranational entity.<sup>127</sup> It is not surprising that this

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<sup>121</sup> RACHEL A CICHOWSKI, *THE EUROPEAN COURT AND CIVIL SOCIETY* 73-118 (2007); Rachel A Cichowski, *Women's Rights, the European Court, and Supranational Constitutionalism*, 38 *LAW & SOC'Y REV.* 489-512 (2004); Karen J Alter & Jeannette Vargas, *Explaining Variation in the Use of European Litigation Strategies European Community Law and British Gender Equality Policy*, 33 *COMP. POL. STUD.* 452-82 (2000).

<sup>122</sup> KAREN J. ALTER, *Who are the 'Masters of the Treaty'?: European Governance and the European Court of Justice (1998)*, in *THE EUROPEAN COURT'S POLITICAL POWER* 109, 135 (2009); Geoffrey Garrett *et al.*, *The European Court of Justice, National Governments, and Legal Integration in the European Union* 52 *INT'L ORG.* 149-76 (1998); Dyevre, *supra* note 5, at 305; ALEC STONE SWEET, *THE JUDICIAL CONSTRUCTION OF EUROPE* 25-26 (2004).

<sup>123</sup> GILKER, *supra* note 7, at 18; Reinhard Zimmermann, *Statuta Sunt stricte interpretanda? Statutes and the Common law: a Continental Perspective*, 56 *CAMBRIDGE L. J.* 315, 320 (1997); Robert Alexy & Ralph Dreier, *Statutory Interpretation in the Federal Republic of Germany*, in *INTERPRETING STATUTES, A COMPARATIVE STUDY* (Neil MacCormick and Robert S. Summer eds., 1991) 73-121; DE CRUZ, *supra* note 81, at 171-72; Albertina Albors Llorens, *The European Court of Justice, More Than a Teleological Court*, in 2 *THE CAMBRIDGE YEARBOOK OF EUROPEAN LEGAL STUDIES* 374-82 (Alan Dashwood & Angela Ward eds., 2000).

<sup>124</sup> Albors Llorens, *supra* note 123, at 375-9.

<sup>125</sup> Oreste Pollicino, *Legal Reasoning of the Court of Justice in the Context of the Principle of Equality*, 5 *GERMAN L. J.* 283, 317 (2004); Zimmermann, *supra* note 123; *INTERPRETING STATUTES, A COMPARATIVE STUDY* (Neil MacCormick & Robert S. Summer eds., 1991).

<sup>126</sup> As opposed to the vertical coherence of the individual Member State. See Michael W Schröter, *European Legal Reasoning: A Coherence-based Approach*, 92 *ARCHIV FÜR RECHTS- UND SOZIALPHILOSOPHIE [ARSP]* 82, 86-89 (2006).

<sup>127</sup> JOSEPH H H WEILER, *THE CONSTITUTION OF EUROPE* 197 (1999); SCIARRA, *supra* note 27, at 3-4; KAREN J. ALTER, *The Europeans Court's Political Power: The Emergence of an Authoritative International Court in the European Union (1996)*, in *THE EUROPEAN COURT'S POLITICAL POWER*, *supra* note 122, at 92-108.

doctrine of supremacy became widely accepted and that many landmark decisions of the CJEU originated from the preliminary questions of the lower national courts.<sup>128</sup> National courts may also be concerned with preserving the integrity of the perceived coherence of the national system. In particular, higher national courts' authoritative role interpreting national law may make them skeptical toward the influence of EU law. Consequently, they are more likely to refuse or limit cooperation with the CJEU. For example, the German Constitutional Court did not refer any preliminary questions to the CJEU until recently,<sup>129</sup> and this has been interpreted by many as a step towards protecting the German prerogative rather than a "surrender of sovereignty."<sup>130</sup> Higher court referrals are often very technical in an attempt to block the CJEU from "judicial activism."<sup>131</sup> Their participation seems generally focused on protecting both their own authority<sup>132</sup> and national influences on European legal developments.<sup>133</sup> These concerns regarding EU law are not only relevant to national courts drafting and sending preliminary questions to the CJEU but also to the national application of EU law and national legislation implementing the directives. These political motivations that accrue out of a desire to ensure influence, power, and effectiveness, and that influence the dialogue between the courts, have to be considered within a comparative analysis of the application of harmonized law. This political dimension has to be considered when analyzing the national judicial reception of EU harmonized law, which goes beyond considering certain terminology or concepts within the "context of its structure and its functioning."<sup>134</sup>

## II. The National Legal and Non-legal Context

While national courts are part of a post-national judicial community, they are also embedded in their national legal and non-legal economic, cultural, linguistic and political contexts. These contexts influence the courts' dialogue with the CJEU,<sup>135</sup> and they affect the courts' application of EU harmonized law at the national level. National legal concepts and the cultural background thus remain important even if national courts will often be encouraged

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<sup>128</sup> ALTER, *supra* note 127, at 100-105; ALTER, *supra* note 122, at 122.

<sup>129</sup> BUNDESVERFASSUNGSGERICHT [BVERFG] [FEDERAL CONSTITUTIONAL COURT] January 14, 2014, ECLI:DE:BVerfG:2014:rs20140114.2bvr272813, BVerfGE 134, 366. See, e.g., *Special Issue: The OMT Decision of the German Federal Constitutional Court*, 15 GERMAN. L. J. (2014).

<sup>130</sup> Peter Lindseth, *Barking vs. Biting: Understanding the German Constitutional Court's OMT Reference...And Its Implications for EU Reform*, (Eutopialaw, 03 June 2016), available at <http://eutopialaw.com/2014/02/10/barking-vs-biting-understanding-the-german-constitutional-courts-omt-reference-and-its-implications-for-eu-reform>.

<sup>131</sup> ALTER, *supra* note 127, at 98-99.

<sup>132</sup> WEILER, *supra* note 127, at 32-33.

<sup>133</sup> ARNULL, *supra* note 109, at 100.

<sup>134</sup> Weiss, *supra* note 114, at 174.

<sup>135</sup> Kilpatrick, *supra* note 105.

to adopt the CJEU reasoning rather than the national methods, particularly when directives are implemented rather literally.<sup>136</sup> A method to compare harmonized law needs to recognize the national courts' application of harmonized law within the national sphere. While national laws implementing the directives have the same EU origin and often use similar terminology and wording, and while the CJEU retains responsibility to interpret EU law, it is national courts that primarily apply harmonized law. The national courts' legal approaches and reasoning determine the substantive meaning of the legislation at the national level and can either support or undermine a successful harmonization process. It is also within the application of the law on the national level where national legal, historic, cultural or political factors are particularly influential.

While the dialogue itself is important, special attention has to be drawn to the national factors that influence the dialogue and the reception of the CJEU's interpretation of EU law. This dialogue includes an exchange of messages as well as many "symbolic implications ... hidden between the lines of national references and the CJEU decisions."<sup>137</sup> National courts are more likely to integrate the CJEU's approach if its reasoning is persuasive and does not contradict national legal concepts and paradigms.<sup>138</sup> Due to the different socio-political and legal contexts of the Member States, there are variations in the effectiveness of EU law, as national courts choose different approaches when they adopt EU law, even though EU law, including CJEU case law, aims at ensuring a certain degree of harmonization.<sup>139</sup> Yet, the CJEU's persuasiveness is insufficient for the effective implementation and application of EU law at the national level. National courts are likely to hold on to their national approaches, whether focusing on doctrinal and positive law or taking for themselves a more persuasive approach.<sup>140</sup>

Supranational aims are important at the national level. But the effectiveness of the CJEU's case law also depends on the national (legal) background.<sup>141</sup> National courts are less likely to integrate European concepts that are foreign into the national legal system. This can create problems for an effective harmonization process. For example, the EU may be particularly active in non-discrimination law because it faces little competition with national concepts in national legal traditions.<sup>142</sup> The lack of similar legal institutions applying to

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<sup>136</sup> Smits, *supra* note 7, at 244.

<sup>137</sup> SCIARRA, *supra* note 27, at 2.

<sup>138</sup> Kilpatrick, *supra* note 105, at 47, 54; SCIARRA, *supra* note 27, at 2-3; Pollicino, *supra* note 125.

<sup>139</sup> Art 288 TFEU; CRAIG & DE BÚRCA, *supra* note 47, at 106.

<sup>140</sup> Hannes Rösler, *Auslegungsgrundsätze des Europäischen Verbraucherprivatrecht in Theorie und Praxis*, 71 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT [RABELSZ] 495, 504-5 (2007); Zimmermann, *supra* note 123.

<sup>141</sup> SCIARRA, *supra* note 27, at 27.

<sup>142</sup> Text surrounding *supra* note 58.

national social or labor law may also hinder the adoption of the approaches developed by the CJEU, as they may be perceived as unnecessary, unconstitutional or poorly reasoned. For example, national legal systems with strong labor law protection often address issues related to equality by other protective measures or address them collectively without creating individual rights.<sup>143</sup> The CJEU is in a dilemma. On the one hand, once asked by a national court to provide a certain interpretation,<sup>144</sup> the CJEU needs to go beyond the classical teleological approach in order to ensure Union law is effective within the Member States.<sup>145</sup> The Court must consider the meaning and development of the legal rules within the different Member States in order to develop persuasive interpretations.<sup>146</sup> This includes cultural developments in Member States and approaches taken by national (constitutional) courts.<sup>147</sup> The structure of and influences on Union legislation combined with the cooperation between national courts and the CJEU<sup>148</sup> may make it difficult for the Court to be less bold and still fulfill its task to provide a dynamic interpretation of EU law and foster harmonization.<sup>149</sup> On the other hand, the Court is criticized for going beyond a teleological interpretation of Union law in a supposed pursuit of legal activism.<sup>150</sup> Progressive interpretations that enhance the rights of citizens but limit the “Member States prerogatives”<sup>151</sup> can lead to the rejection of the ruling at the national level. Whether the CJEU’s reasoning is considered persuasive in a particular case still depends on the national context. To ensure a unified application and interpretation of Union law in all Member States, the CJEU needs to find a compromise that takes into account the different national legal systems and social developments in the Member States, as well as the aims of the Union legislation. These compromises will be imperfect, as it is extremely difficult to develop

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<sup>143</sup> KAREN J ALTER, *Explaining Variation in the Use of European Litigation Strategies*, in *THE EUROPEAN COURT’S POLITICAL POWER*, *supra* note 122, at 159, 174 (2009).

<sup>144</sup> ARNULL, *supra* note 109, at 98.

<sup>145</sup> Pollicino, *supra* note 125, at 283, 284-90.

<sup>146</sup> Albors Llorens, *supra* note 123, at 373-9; Alexy & Dreier, *supra* note 123, at 73, 87.

<sup>147</sup> Amtenbrink, *supra* note 108, at 35-63; DE CRUZ, *supra* note 81, at 171-2; Albors Llorens, *supra* note 123, at 373, 380.

<sup>148</sup> Zimmermann, *supra* note 123, at 315, 321; Mauro Cappelletti, *Is the European Court of Justice “Running Wild”?*, 12 *EUR. L. REV.* 3-17 (1987); Albors Llorens, *supra* note 123, at 373-98; Walter Mattli & Anne-Marie Slaughter, *Law and Politics in the European Union*, 49 *INT’L ORG.* 183-190 (1995).

<sup>149</sup> Jürgen Basedow, *The Judge’s role in European Integration*, in *THE EUROPEAN COURT OF JUSTICE AND THE AUTONOMY OF THE MEMBER STATES* 65-79 (Hans-Wolfgang Micklitz & Bruno de Witte eds., 2012).

<sup>150</sup> Hjalte Rasmussen, *Between Self-restraint and Activism: A Judicial Policy for the European Court*, 13 *EUR. L. REV.* 28-38 (1988); Trevor C. Hartley, *The European Court, Judicial Objectivity and the Constitution of the European Union*, 112 *LAW QUARTERLY REV.* 95-109 (1996); Anthony Arnall, *Judicial Activism and the Court of Justice: How Should Academics Respond?*, in *JUDICIAL ACTIVISM AT THE EUROPEAN COURT OF JUSTICE* 211 (Mark Dawson et al. eds., 2013).

<sup>151</sup> Dagmar Schiek, *Fundamental Rights Jurisprudence between Member States’ Prerogatives and Citizens’ Autonomy*, in *THE EUROPEAN COURT OF JUSTICE AND THE AUTONOMY OF THE MEMBER STATES* 219-43 (Hans-Wolfgang Micklitz & Bruno de Witte eds., 2012).



an approach that will be accepted by all national systems. The CJEU's success regarding the effectiveness of EU law thus varies widely between domestic jurisdictions. Functionalism has, of course, not been blind to cultural influences: Rabel emphasized the need to encompass countries' histories, cultures and religions,<sup>152</sup> to name a few. But the subsequent request to be "realistic"<sup>153</sup> and to strip the solutions from their "conceptual context" and "national doctrinal overtones so they may be seen purely in the light of their functions"<sup>154</sup> begs the question of how important context really is within the functionalist analysis. Thus, functionalism's focus is often on legal concepts that are detached from the wider context of law and subjected to "cognitive control."<sup>155</sup> Overall, the focus on similarities, which is expressed in functionalists' *praesumptio similitudinis* and assumes that legal systems often produce very similar results even if by different means,<sup>156</sup> seems ill-suited to uncover these different national influences that affect the application of EU harmonized law.

### III. Methodological Responses to the Complexity

Structuralism, usually associated with Sacco and the "Trento Manifesto,"<sup>157</sup> takes into account various elements that influence legal rules and the interpretations given by national judges in its comparative approach. Borrowing from linguistics,<sup>158</sup> Sacco called these influences *legal formants*. They include visible influences, such as academic writing and the legislator's intent, and less-visible crypto-types (i.e., non-verbalized factors<sup>159</sup>), such as political or philosophical views and legal paradigms. *Legal formants* are thus the elements at work, and the "relationship between these elements [...] makes the structure of the system."<sup>160</sup> This approach seems to be useful for a focus on the judicial reception of national rules because it emphasizes the difference between doctrine and operative rules,<sup>161</sup> on the one hand, and analysis of the "elements at work," on the other hand. It also seems to

<sup>152</sup> ERNST RABEL, *AUFGABE UND NOTWENDIGKEIT DER RECHTSVERGLEICHUNG* 3 (1925).

<sup>153</sup> ZWEIGERT & KÖTZ, *supra* note 14, at 36.

<sup>154</sup> *Id.* at 37.

<sup>155</sup> FRANKENBERG, *supra* note 23, at 53-54.

<sup>156</sup> ZWEIGERT & KÖTZ, *supra* note 14, at 34.

<sup>157</sup> Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law (Instalment I of II)*, 39 AM. J. COMP. L. 1, 30 (1991); Elisabetta Grande, *Development of Comparative Law in Italy*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW 107, 118 (Mathias Reimann & Reinhard Zimmermann eds., 2008).

<sup>158</sup> Ugo Mattei, *The Comparative Jurisprudence of Schlesinger and Sacco*, in RETHINKING THE MASTERS OF COMPARATIVE LAW 236, 251 (Annelise Riles ed., 2001).

<sup>159</sup> Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law (Instalment II of II)*, 39 AM. J. COMP. L. 343, 385 (1991).

<sup>160</sup> Mattei, *supra* note 158.

<sup>161</sup> Sacco, *supra* note 157, at 30; Mauro Bussani & Ugo Mattei, *The Common Core Approach to European Private Law*, available at [www.jus.unitn.it/cardozo/common.core/insearch.html](http://www.jus.unitn.it/cardozo/common.core/insearch.html); Hyland, *supra* note 54, at 193.

recognize exactly how jurists deal with “specific rules and general categories.”<sup>162</sup> It can expose the creative power of judges to interpret, apply or circumvent legislation<sup>163</sup> and illuminate the limits of legislation in general and the harmonization process in particular. The approach emphasizes that the persuasiveness is not only relevant regarding the CJEU’s interpretation of EU law but also regarding the law itself, which needs to be experienced as a “great social breakthrough.”<sup>164</sup>

Structuralism draws from linguistics, history, politics, culture, sociology and economic differences in order to reveal how “*legal formants*” are in constant competition with each other. These influences, which may be independent from social needs, are not always obvious, and they usually survive substantive law reforms. They are intrinsic to the legal system.<sup>165</sup> By including such explicit and implicit influences, structuralism provides reasons *why* national legal regimes function differently even though their wording is similar or when, in the case of EU law, they originate from the same set of rules. Its focus on diverse influences on the law is very useful because it challenges the monolithic understanding of law as a unitary structure, without inconsistencies and long-lasting diversions.<sup>166</sup> Still, structuralism poses some challenges. It aims at uncovering those influences, their interdependence, and their different weights. Within the intra-European context, where legal systems are relatively similar at least relative to non-European systems,<sup>167</sup> this means that formants that are specific to each system can be more easily revealed than those that Member States have in common. Once identified, the question is how to analyze, weight, or interpret the formants and connect them in a meaningful way. It has been suggested, for example, that it is extremely difficult to establish a “retraceable relationship” between them.<sup>168</sup> Moreover, diversity is not assumed for all aspects of the law. Sacco suggests that conceptual or descriptive differences between legal systems do not necessarily extend to “operational rules.”<sup>169</sup> The questions for comparatists remain: How can these differences and similarities be explained, and are there areas of law that are apolitical? Finally, structuralists assume it is possible to objectively assess foreign legal orders without being biased by their own cultural background. Similar to functionalism, they stress the scientific

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<sup>162</sup> Sacco, *supra* note 157, at 25.

<sup>163</sup> Sacco, *supra* note 159, at 344-345.

<sup>164</sup> *Id.* at 345.

<sup>165</sup> Sacco, *supra* note 159, at 385; Hyland, *supra* note 54), at 194-5; Bussani & Mattei, *supra* note 161.

<sup>166</sup> Graziadei, *supra* note 52, at 115-116.

<sup>167</sup> Cotterrell, *supra* note 13, at 144-154; Mathias M Siems, *Variations of Legal Systems*, 12 J. INST’L ECON. 579-602 (2016).

<sup>168</sup> FRANKENBERG, *supra* note 23, at 64.

<sup>169</sup> Rodolfo Sacco, *Diversity and Uniformity*, 49 AM. J. COMP. L. 171, 188 (2001).

nature of the method and its objectivity.<sup>170</sup> This assumption has been challenged by post-modernist or critical comparatists. If structuralism includes unspoken legal rules in its comparative analysis, critical comparison emphasizes the existence of unconscious rules.<sup>171</sup> The post-modernist approach emphasizes the different socio-historic and socio-cultural influences and analysis of the legal system as a whole in order to uncover “epistemological assumptions” and deep differences between the legal systems.<sup>172</sup> It challenges comparative studies to identify “cognitive limitations,”<sup>173</sup> to turn “the gaze of comparison back on itself,”<sup>174</sup> and to abandon familiar legal terms. As such, it aims to challenge both the idea of a politically neutral normative structure of the law and the rational application of doctrines and provisions by judges.<sup>175</sup> It asks us to recognize power structures and consider sociological theories, self-reflection, and critical evaluations to appreciate law as a part of, not separate from, social reality and the national legal *mentalité*.<sup>176</sup> It challenges us to question the way we construct reality to subject it to “cognitive control,”<sup>177</sup> and it suggests that cultural immersion is necessary for a comparison.<sup>178</sup> Eventually, what is needed is “reflexivity”<sup>179</sup> or “reflexive comparison.”<sup>180</sup> These insights are not all completely new. Comparatists have long emphasized the relevance of geography, history, religion, language and other aspects of culture and social reality.<sup>181</sup> Yet, a comparison of the judicial reception of European harmonized law needs to engage with differences, rather than reduce or diminish their relevance, if it wants to understand some of the reasons for the perceived diversity. The focus on legal and non-legal cultural contexts advocated by critical comparatists can help alter this mind-set.<sup>182</sup> The emphasis on unspoken and unconscious rules,<sup>183</sup> which encourages reflective comparison, can help detect differences within the

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<sup>170</sup> Mattei & Di Robilant, *supra* note 26, at 49-50; Somma, *supra* note 116, at 8.

<sup>171</sup> BERNHARD GROSSFELD, *THE STRENGTH AND WEAKNESS OF COMPARATIVE LAW* 9 (Tony Weir trans., 1990).

<sup>172</sup> Pierre Legrand, *How to Compare Now*, 16 *LEGAL STUD.* 232, 235-6 (1996).

<sup>173</sup> *Id.* at 239; Legrand, *supra* note 6, at 114.

<sup>174</sup> Brenda Cossman, *Turning the Gaze Back on Itself*, 41 *UTAH L. REV.* 525, 536, 538 (1997); GROSSFELD, *supra* note 171.

<sup>175</sup> Frankenberg, *supra* note 24, at 445-7.

<sup>176</sup> Legrand, *supra* note 172, at 238; Legrand, *supra* note 54, at 707.

<sup>177</sup> FRANKENBERG, *supra* note 23, at 54.

<sup>178</sup> Vivian Grosswald Curran, *Cultural Immersion, Difference and Categories in U. S. Comparative Law*, 46 *AM. J. COMP. L.* 43-92 (1998).

<sup>179</sup> Nelken, *supra* note 30.

<sup>180</sup> FRANKENBERG, *supra* note 23, at 229.

<sup>181</sup> ERNST RABEL, *AUFGABE UND NOTWENDIGKEIT DER RECHTSVERGLEICHUNG* 3 (1925).

<sup>182</sup> Schiek, *supra* note 22, at 208.

<sup>183</sup> GROSSFELD, *supra* note 171.

legal system and encourages culturally-sensitive comparison, thus avoiding the urge to favor unification over differences.

Of course, culture is a broad term. If it describes the “whole way of life”<sup>184</sup> and “occupies a middle ground between what is common to all human beings . . . and what is unique to each individual”<sup>185</sup> it covers a wider range of diverse features. It is doubtful whether culture can be understood as homogeneous and static, something you can immerse into, rather than diverse and dynamic.<sup>186</sup> The heterogenic nature of modern culture is prevalent within every, not just multi-cultural, societies and combines contradictory features that are difficult to comprehend.<sup>187</sup> Moreover, culture changes and develops just like law and legal culture have changed and developed overtime.<sup>188</sup> Studies in legal culture can also cover a wide range of issue including the role of law in culture and law as culture. It looks at how people engage with the law and use it for their own benefit,<sup>189</sup> cultural legal consciousness,<sup>190</sup> as well as the legal system’s culture including issues of how law is approached, communicated, and techniques of interpretation.<sup>191</sup> What I am interested in is the “social unconscious”<sup>192</sup> which influences the rapprochement and interpretation of law and written rules. This related to the “collective mental programmes, that is, *Weltanschauungen*, that have formed not on account of the fact that we live on this planet or because of our uniqueness, but as a function of the community to which we belong”.<sup>193</sup> This should include linguistic, “cultural, historical,

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<sup>184</sup> Raymond Williams, *Culture is Ordinary* [1958], in THE EVERYDAY LIFE READER 91-100 (Ben Highmore ed., 2002). See TERRY EAGLETON, CULTURE 95 (2016) (“Culture can be a model of how to live, a form of self-fashioning or self-realization, the fruit of a coterie or the life-form of a whole people, a critique of the present or an image of the future.”).

<sup>185</sup> Pierre Legrand, *European Legal Systems Are Not Converging*, 45 INT’L & COMP. L.Q. 52, 56 (1996).

<sup>186</sup> Graziadei, *supra* note 52, at 115; Franz von Benda-Beckmann & Keebet von Benda-Beckmann, *Why Not Legal Culture*, 5 J. COMP. L. 104–117 (2010); Cotterrell, *supra* note 13; Annelise Riles, *Comparative Law and Socio-legal Studies*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW (Reimann and Zimmermann eds., 2006) 776-804.

<sup>187</sup> H Partick Glenn, *Legal Cultures and Legal Traditions*, in EPISTEMOLOGY AND METHODOLOGY OF COMPARATIVE LAW 7, 15-16 (Mark Van Hoecke ed., 2004).

<sup>188</sup> Michele Graziadei, *Comparative Law, Legal History and the Holistic Approach to Legal Culture* 7 ZEUP 531-543 (1999).

<sup>189</sup> Erhard Blankenburg, *Civil Litigation rates as Indicators for Legal Culture*, in COMPARING LEGAL CULTURES 41-68 (David Nelken ed., 1997).

<sup>190</sup> For example the study how of “legal hegemony, particularly how the law sustains its institutional power despite a persistent gap between the law on the books and the law in action.” Susan Silbey, *After Legal Consciousness*, 1 ANN. REV. L. & SOC. SCI. 323, 323 (2005).

<sup>191</sup> David Nelken, *Using Legal Culture: Purposes and Problems* 5 J. COMP. L. 5 (2010).

<sup>192</sup> EAGLETON, *supra* note 184, at viii.

<sup>193</sup> Legrand, *supra* note 185, at 56.

social or economic discourse[s]”.<sup>194</sup> These discourses can be contradictory and multilayered within different culture and ensure that the legal traditions differ *inter se*, even if they possibly not as “irreducible” than the differences between the common and civil law *mentalité*.<sup>195</sup> The following discussion will consider how some of these cultural insights can be integrated in a comparison of the judicial reception of EU harmonized law, with a focus on the area of non-discrimination within employment and equality law.

#### **D. How Should the Judicial Reception of Harmonized Law be Compared?**

Critical or post-modernist,<sup>196</sup> comparatists like Frankenberg<sup>197</sup> have emphasized the need to be culturally aware, provide room for multi-layered legal and non-legal influences on the law, and consider the individual biases of the comparatists and the framework in which the comparison takes place. The following will discuss how these insights may be included in a comparison of the judicial reception of harmonized law, with a focus on the area of non-discrimination within employment and equality law. The method proposed here tries to achieve a sound analysis by taking a three-step approach. The first step determines the theoretical and normative framework of the comparative field and identifies the boundaries of the case law analysis. Philosophical and normative considerations are included here. The second step assesses some aspects of the legal, historical and cultural background of the countries under comparison, focusing on those that are relevant to the development and application of the harmonized law at the national level and the European influences upon it. The last step is the case law analysis *itself*, potentially including decisions of quasi-judicial bodies where such is warranted by the judicial and enforcement architecture of the respective legal systems. This analysis of domestic case law incorporates the different influences identified in the earlier steps and the relevant case law of the CJEU in order to provide a comprehensive picture of the application of the harmonized law within the national context. This multi-layered three-step approach makes it possible to draw sound conclusions that recognize normative and political considerations, the national courts’ relationship with the CJEU and national influences on case law. These three steps will now be discussed in more detail.

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<sup>194</sup> *Id.* at 59

<sup>195</sup> *Id.* At 63.

<sup>196</sup> Nelken, *supra* note 16, at 4.

<sup>197</sup> FRANKENBERG, *supra* note 23.

*I. The First Step: The Normative Framework*

The first step defines the theoretical and normative framework in which the comparison takes place. Thus, it does not undertake a comparison but defines the focus and the framework for the comparison. As such, it is not neutral but can provide some critical foundation. For example, comparing national approaches toward pregnancy discrimination would require theorizing pregnancy discrimination (as direct or indirect); the concept of formal equality and broader, more-substantive approaches;<sup>198</sup> and sex and gender discrimination and the critical assessment of it within feminist and queer theory. But equality law could also be analyzed, for example, from an economic perspective, which would require a choice of normative standard, such as social welfare, reduction of economic inequality, or redistributive efficiency. Other areas of harmonized law may invite the consideration of other theoretical and normative aspects. Thus, consumer protection law may require the consideration of consumer theory, behavioral economics, or psychology. Specific areas of commercial law and regulation, such as procurement law, may require the consideration of other types of economic theories, such as trade theory or macroeconomic interventions. The choice of theoretical framework ultimately depends on the research focus of the comparison.

The purpose of providing a theoretical framework is twofold. Firstly, it creates an external common comparative denominator (*tertium comparationis*) for the comparison and thus provides an alternative for the functional approach. The great contribution of functionalism is that it challenged comparative law to go beyond black-letter comparison of similar rules that used the same terminology and classification.<sup>199</sup> The focus on rules with the same function is supposed to ensure that one does not miss legal or non-legal mechanisms that are alternative relevant for the comparison simply because they look different. However, as discussed above, this indicated starting point is problematic because of its *a priori* assumptions about law and its functions.<sup>200</sup> Nevertheless, a *tertium comparationis* seems nevertheless necessary as it determines the scope and focus of the comparison. Thus, the legal comparison can be reduced to certain aspects, depending on the comparatist's interest and research question.

A detailed engagement with the theoretical framework makes it also possible to identify trends within the courts' case law. For example, the CJEU has recognized the link between pregnancy and sex discrimination, because only women can become pregnant.<sup>201</sup> This

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<sup>198</sup> See, e.g., Hugh Collins, *Discrimination, Equality and Social Inclusion*, 66 MOD. L. REV. 16-43 (2003); Hugh Collins, *Social Inclusion: A Better Approach to Equality Issues?*, 14 TRANSNAT'L L. & CONTEMP. PROBS. 897-18 (2005); SANDRA FREDMAN, *DISCRIMINATION LAW* 25-33 (2nd ed. 2011).

<sup>199</sup> Graziadei, *supra* note 52, at 104.

<sup>200</sup> See *supra* heading B.

<sup>201</sup> Case C-177/88, *Dekker v Stichting Vormingscentrum voor Jong Volwassenen* EU:C:1990:383, 1990 E.C.R. I-3941.

demonstrates that EU non-discrimination law is capable of supporting substantive sex equality because it imposes a duty to treat women and men equally or to ensure equal opportunities despite biological differences. But the Court has not been consistent in its approach and has not extended the same logic to pregnancy-related illnesses after childbirth.<sup>202</sup> The focus on special protection for pregnant women thus remains, and it limits the potential substantive value of the law. Pregnancy discrimination can then be conceptualized within the broader issue of gender equality, as it helps theorize the causes of pregnancy discrimination and can be reflected in the national courts' adoption of the CJEU's approach or alternative approaches. After all, women do not just suffer pregnancy discrimination because they may be temporarily absent from or unable to perform certain work during pregnancy, they also suffer discrimination because of their presumed gender role once they are mothers. Theorizing the legal area of comparison (here, pregnancy discrimination) and placing EU law (here, EU sex discrimination law) within that context can provide a critical framework for and limit the scope of further comparison.

Furthermore, the theoretical considerations can possibly be adopted (or rejected) by the courts. It can thus inform the courts' judgments and analysis of the national courts and/or the outcomes of the cases, as it would provide a theoretical underpinning of the harmonized law and the likely substantive aims of the directives. National courts would be able to refer to the theoretical concepts to underpin their understanding of the legislation and its scope even if traditionally a different concept or approach towards equality has been dominant within the national legal context.

This is also connected to the second reason why the establishment of a theoretical and normative framework is necessary. Critical comparatists have challenged the assumption of neutral or objective comparison; this move places the comparatist at the center of criticism. For example, Frankenberg identifies four different dimensions of comparative law with distinctive ethics, politics, and methods placed on a larger grid. The grid's horizontal axis marks the polar extremes of *detachment* and *commitment*; the vertical axis marks the polar extremes *similarity* and *differences*. Functionalism, for example, falls within the dimension that favors "cognitive control and focuses on Country and Western Styles," which include ideas of detachment and similarity.<sup>203</sup> Functionalism assumes a priori the similarity of social conflicts, legal solutions and the role of law within society. It often engages in positivist methods of comparison that separate the comparatist from the comparison, exercise cognitive control by preventing self-reflection, create global typologies, and absorb limited data. Its western focus favors assimilation and marginalizes the other.<sup>204</sup> Other dimensions he identifies are the following: Universalist approaches, which combine ideas of similarity and commitment; approaches which combine ideas of commitment and difference by

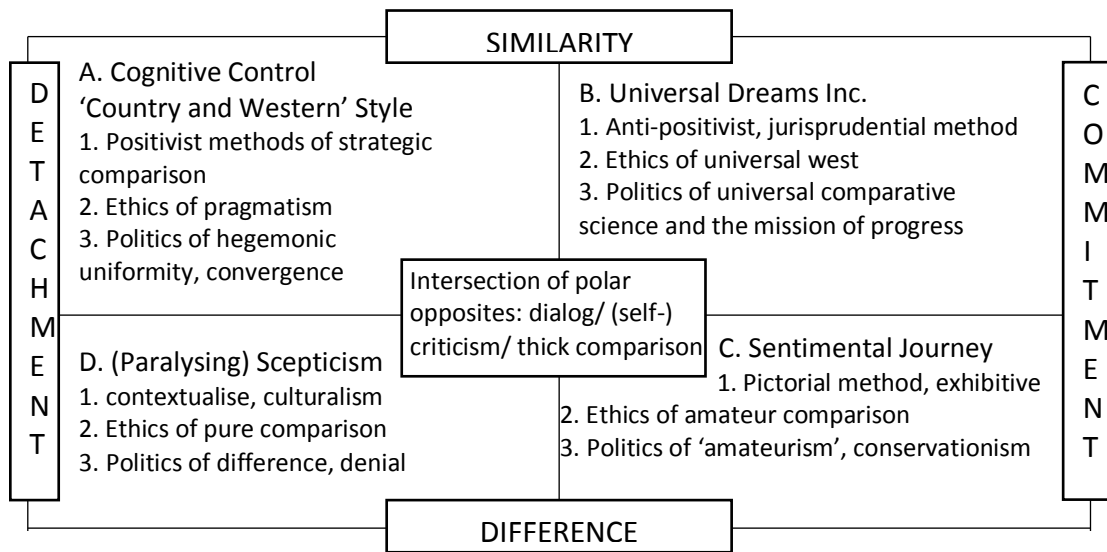
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<sup>202</sup> Case C-191/03, McKenna EU:C:2005:513, 2005 E.C.R. I-7631.

<sup>203</sup> FRANKENBERG, *supra* note 23, at 84-85.

<sup>204</sup> *Id.* at 79-96.

engaging into ‘sentimental journeys’ into the foreign; and skeptical approaches, which combine ideals of difference and detachment.<sup>205</sup> The comparison is thus not “politically agnostic,”<sup>206</sup> and the ethics and ideals of the comparatist color the comparison. Frankenberg then suggests that at the center square of the grid, where the vertical and horizontal axes meet, the usual pitfalls might be avoided by encouraging a dialogue among the different counter-pulls and (legal) ideals and remaining self-critical and self-aware.<sup>207</sup> This posture calls for reflexivity.<sup>208</sup>



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<sup>205</sup> *Id.* at 96-112.

<sup>206</sup> *Id.* at 90.

<sup>207</sup> *Id.* at 225-227.

<sup>208</sup> *Id.* at 229.



Determining the theoretical framework can help in this task. It recognizes that methodological choices are not neutral and it enables the comparatist to reflect on the ethical and political agenda behind the comparatist's own project, which is not necessarily limited to the four key dimensions mentioned above. European harmonization projects strive towards similarity and assimilation. Comparative studies within that field thus often fall within the Western-focused cognitive control dimension. Harmonization through directives separates the legal rules from the socio-economic context and suggests that it can be easily transplanted without recognition of the broader historic and cultural context of the different legal systems. But directives also aim to achieve certain substantive legal standards. These standards have to be the subject of the comparative dialogue. The discussion of a theory underpinning the law and the concepts used exposes the comparatist's own normative point of view, which is the starting point of the comparatist's analysis. For example, if one wants to compare non-discrimination law, it is important to reflect on and disclose how one theorizes group and individual disadvantages linked to the protected characteristics, and what constitutes and includes formal and substantive equality.

## *II. The Second Step: The National Context*

The second step engages with the national context and aims to identify national legal and non-legal cultural factors that potentially influence the judicial reception of EU harmonized law on a national level. It ends with the hypotheses that can be tested in the third step. Structuralism has taught us that there is no black letter rule but that case law is always influenced by visible and crypto-typical "*legal formants*." Any comparative analysis requires an awareness of the different influences on the law and their importance. Structuralism takes a formal approach towards legal formants referring to linguistics to underline the scientific value of structuralism as an empirical method.<sup>209</sup> It does not clearly explain how these *formants* can be identified and structured objectively.<sup>210</sup> References made by critical comparatists to the need for "cultural immersion"<sup>211</sup> and recognition of "*legal mentalité*"<sup>212</sup> emphasize the need to consider the cultural context within which the application of the law takes place. There is thus a need for contextual sensitivity, to go beyond the "surface of law

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<sup>209</sup> Somma, *supra* note 116, at 7-8; Mattei & Di Robilant, *supra* note 26, at 50.

<sup>210</sup> There has been similar criticism referring to the Trento project on the Common Core of European Private Law. See Nik J. De Boer, *The Theoretical Foundations of the Common Core of European Private Law Project*, 17 EUR. REV. PRIV. L. 841-51 (2009); Frankenberg, *supra* note 14, at 120, 137-41.

<sup>211</sup> Grosswald Curran, *supra* note 178.

<sup>212</sup> Legrand, *supra* note 176.

and court rulings.”<sup>213</sup> This is relevant, even if one rejects the idea that national (legal) culture is homogeneous as such and believes instead in cross-cultural influences and developments. But deep engagement with the national cultural context yields a number of difficulties. First, it is unclear what the scope of the cultural investigation should be, conceding that it is probably only possible to be truly “immersed” in a limited number of foreign cultures, if that is possible at all.<sup>214</sup> Second, it is unclear how the sheer endlessness of information should be addressed. Overload can make information meaningless, and a feasible method certainly needs to allow for some limitations. Accordingly, I propose a flexible approach to allow space for dialogue between different cultural narratives and layers influencing the national application of harmonized law.<sup>215</sup> The engagement with the cultures in question should thus not be general but only focus on specific features which seem relevant in relation to the harmonized law. Obviously, this will add a certain degree of subjectivity to the comparisons. Still, explicitly highlighting and explaining the choices made can increase the transparency of the comparison and further define its scope and what aspects to consider.

To uncover the relevant cultural, historic and legal differences, it makes sense to engage with a number of parallel narratives on the harmonized law that emerge on a national level. One needs to go beyond the purely legal debate. Historic evidence can expose the number of narratives. The harmonized law in question may have been rejected or favored by the Member State’s government, academics or the wider public for specific legal or cultural reasons. The adoption and implementation process of the harmonized law on a national level and the public discourse around it can reveal much about national political and cultural self-understanding and the role of certain legal concepts within that discourse.<sup>216</sup> These diverse perceptions and perspectives should become obvious if one engages with the historic development and commentary on the harmonized law and the implementation process. Evidence for that can be found in newspaper articles, parliamentary debates, and academic commentary, all of which should expose problems and obstacles regarding the legislation in question and shed light on how the harmonized law is conceptualized in the broader national debate.

Once commentary related to the legislation in question is considered, the comparatist should feel invited to go beyond the legal focus and consider the substantive protection aimed at by the harmonized law from a non-legal angle. It could, for example, be relevant to investigate how the wider social movement interprets and supports the aims set out in

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<sup>213</sup> FRANKENBERG, *supra* note 23, at 227.

<sup>214</sup> See Günter Frankenberg, *Stranger than Paradise*, 41 UTAH L. REV. 259, 266 (1997); Günter Frankenberg, *Comparative Constitutional Law*, in CAMBRIDGE COMPANION TO COMPARATIVE LAW 171, 177 (Mauro Bussani & Ugo Mattei eds., 2012).

<sup>215</sup> Günter Frankenberg, *Constructing Legal Traditions: Introductory Remarks on the Public/Private-distinction as Traditions*, 2 COMP. L. REV. 1-12 (2011); Somma, *supra* note 116, at 36; Mattei & Di Robilant, *supra* note 76, at 48.

<sup>216</sup> Anna van der Vleuten, *Princers and Prestige*, 3 COMP. EUR. POL. 464-488 (2005).

the directives. For that, the substantive standards set by the directive and the theoretical underpinning of the legislation becomes relevant. For example, regarding the sex-equality directives, it is relevant to stress how the feminist movement has engaged with the issue, how much support such legislation enjoyed within groups of different stakeholders and how influential they have been. It matters whether the national feminist movement predominantly considers non-discrimination law as ensuring and protecting women's economic independence or as imposing the male standard on women.<sup>217</sup> Perhaps law has not featured highly in the movement's consciousness at all. Other non-legal solutions, such as collective agreements diverse forms of (legal) protection and special social support, rank highly in the Scandinavian socio-economic and legal system.<sup>218</sup> For this reason employment standards are not always ensured by legislation, and the national discourse regarding the need and the possibility to ensure a certain substantive level of protection may not be a predominantly legal debate. Similarly, it matters whether the social movement acts within the existing legal frameworks and tries to achieve wider access to the available protection or whether there is a dominant interest to challenge the legal institutions. These priorities within the movement can inform us about the status and recognition of the substantive aim the directives try to achieve within the national context. For example, there is a difference in priorities if the LGBT movement predominantly tries to gain access to the institution of marriage to enjoy the special and often constitutional protection afforded the traditional heteronormative family or whether there is a focus on challenging the existence of the institution itself.<sup>219</sup>

Engaging with these different debates can tell us what other legal or non-legal mechanisms that may also tackle the same subject matter rank high in the national consciousness. All of this historical evidence can further expose how a broad number of stakeholders interested in the standards and protection aimed at by the harmonized law view the law itself and the usefulness of law in general or that law in particular for the wider purpose. These narratives can then allow us to draw more-general conclusions about the national identity and consciousness in relation to the legal area in question. They are relevant even if these social movements and stakeholders have indirect or only limited influence on the implementation

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<sup>217</sup> Different feminist schools have viewed this differently. While liberal feminist often champion non-discrimination law as ensuring equal treatment of men and women, radical feminists like MacKinnon have criticised liberal approach towards non-discrimination law, because they allow the male standard to define the extent to which women are different, and only grant equal treatment to the extent that women are equal to men. She asks why women can only expect equal rights if they are like men? Alternatively, material feminists often emphasis the need to consider the lived practice as starting point of any critical analysis. Catherine MacKinnon, *Reflections on Sex Equality under Law*, 100 YALE L. J. 1287-1291 (1991); Joanne Conaghan, *Intersectionality and the Feminist Project in Law*, in INTERSECTIONALITY AND BEYOND: LAW, POWER AND THE POLITICS OF LOCATION 21-48 (Emily Grabham *et al.* eds., 2008).

<sup>218</sup> Jonas Malmberg, *The Collective Agreement as an Instrument for Regulation of Wages and Employment Conditions*, in STABILITY AND CHANGE IN NORDIC LABOUR LAW 189-213 (Peter Wahlgren ed., 2002).

<sup>219</sup> MULDER, *supra* note 21, chapter 3.

process or the application of EU harmonized law. In particular, engaging these overlapping and multi-layered narratives can help us understand our own position in relation to the other and may lessen the effect of cultural bias because it helps translate concepts and the role of law within society.<sup>220</sup> The second step should thus engage with the discursive character of law within the broader society. Referring to Derrida,<sup>221</sup> Legrand asks us to engage with the relationship between text and meaning. The use of similarly sounding terminology or concepts in different legal systems does not imply that they actually mean the same thing. Rather, they are incommensurable, because both are embedded within one's own cultural context.<sup>222</sup> For the current purposes, this means that the directives, once they reach the national sphere and are implemented, ultimately adopt a national coloring. While it may not be possible to overcome this cultural subjectivity, a focus on legal culture or *mentalité* is necessary to appreciate each legal system as unique and to uncover differences regarding the role of law, how people think about law and how this may differ from one's own conception of law in general and the harmonized law in particular.<sup>223</sup> But one has to be careful not to reach solutions too quickly. This is also significant because law implementing EU directives is not necessarily congruent with society.<sup>224</sup> *Mentalité* alone may not be sufficient to explain the national application, as different and possibly contradictory forces or formants affect the legal application and interpretation. This step should not be considered a concluding verdict on the different legal cultures but simply the development of a hypothesis regarding the factors influencing the national reception of the harmonized law in question. This hypothesis can then be tested in the third step.

Once a comparative study leaves the doctrinal legal arena and attempts to consider the "richness of law" by considering its cultural context and ramifications,<sup>225</sup> the challenge becomes how to limit the information to keep the analysis feasible. This work proposes a pragmatic approach that accepts that the comparative analysis always engages only a limited number of aspects anyway. It is thus a choice made by the comparatist that needs to be communicated in clear terms. For example, within the comparison of national approaches towards pregnancy discrimination one may want to include national cultural, legal and historical factors linked to the legal area, but exclude other areas such as economic

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<sup>220</sup> As advocated by Frankenberg. See Frankenberg, *supra* note 24, at 441.

<sup>221</sup> Legrand, *supra* note 54.

<sup>222</sup> Pierre Legrand, *Citing Foreign Law: How Derrida can help*, 21 DUKE J. COMP. & INT'L L. 595-629, 614-619 (2011).

<sup>223</sup> Legrand, *supra* note 54, at 707.

<sup>224</sup> The implementation of EU directives has often been viewed through the lens of a legal transplant analysis. This is sensible since directives may introduce new, foreign legal concepts into national law. These concepts can then irritate the legal system. Gunther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences*, 61 MOD. L. REV 11-32 (1998). But there are also clear differences between EU directives and classic legal transplants in the Watsonian sense. See WATSON, *supra* note 29. After all, Member States consent to the supranational law making and participate in it.

<sup>225</sup> FRANKENBERG, *supra* note 23, at 228.

factors. The CJEU has identified several purposes with regards to EU non-discrimination law, and it originally stressed its economic and social aims. The economic aim was “to avoid a situation where undertakings established in [Member] States which have [...] implemented [non-discrimination law] suffer a disadvantage in the intra-union competition as compared with undertakings established in States which have not yet eliminated discrimination.”<sup>226</sup> The field’s economic aim would be to prevent the distortion of competition.<sup>227</sup> Contemporary case law views the economic aim as secondary and instead stresses the social rights and the right of equal treatment consonant with the human rights framework.<sup>228</sup> Nevertheless, one may be inclined to consider economic aims because it is difficult to conceptualize European integration without economic considerations.<sup>229</sup> On the national level, the main economic concern related to gender equality and non-discrimination law is that of cost. National legislators may want to reduce protection to ensure that the national market is competitive or has a competitive advantage. Beyond that, national non-discrimination law belongs to social and labor law. It is not implemented because of competitiveness *per se*. Therefore, it should thus be possible to consider non-discrimination law without including considerations related to the European aim of economic competitiveness. This is not to suggest that the economic context may not be relevant but rather that limitations can be justified depending on the aims of the comparison. After all, there is value in accepting “responsibility for [the] strategic decisions [taken] rather than reflexively implementing a given methodological agenda.”<sup>230</sup>

Beyond that it is helpful to consider the development of national legislation and the academic and public debate on the substantive issues the directives try to achieve and to uncover cultural, legal, or historic factors that influence the debate and possibly the application of the harmonized law. The following will demonstrate how the possibly different narratives can be picked apart and limited using the Dutch and German context in relation to EU non-discrimination law as examples. When sex discrimination law first appeared on the European political and legal agendas neither the Netherlands nor the Germany supported substantive gender equality legally or culturally. Both countries celebrated the breadwinner concept, which presumed the mother’s and wife’s place to be in the home. But, with the rise of the feminist movement, the question of sex equality was soon conceptualized in rather different terms. While the Dutch movement particularly emphasized the need for equal pay and equal treatment and referred to the Anglo-Saxon approach towards equality, the German movement framed the right to equality within the

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<sup>226</sup> Case 43/75, *Defrenne v SABENA* EU:C:1976:56, 1976 E.C.R. 455, at ¶ 9.

<sup>227</sup> ELLIS & WATSON, *supra* note 121, at 25.

<sup>228</sup> Case C-270/97, *Sievers* EU:C:2000:76, 2000 E.C.R. I-929, at ¶¶ 53-57; 149/77, *Defrenne v Sabena* EU:C:1978:130, 1978 E.C.R. 1365, at ¶¶ 26-27.

<sup>229</sup> PHIL SYRPIS, *EU INTERVENTION IN DOMESTIC LABOUR LAW* 10-75 (2007).

<sup>230</sup> Simone Glanert, *Method?*, in *METHODS OF COMPARATIVE LAW* 61, 81 (Pier Giuseppe Monateri ed., 2012).

national constitutional sphere and emphasized the need for special protection and equal recognition of “typical female work.”<sup>231</sup> This indicates that different national paradigms and cultural understandings of equality influence the debate. Within these debates, repeated references to certain concepts of national identity and consciousness can be identified. Thus, repeated references to constitutional principles and values or the need for tolerance and equal protection despite different life choices can indicate common social and cultural values, which can then be further explored by considering the sociological and historic research on the subject. Once one notices the repeated reference to constitutional values within the German discourse on equality, one may want to consider the role of the constitution within society in more general terms. This will quickly direct the comparatist towards the concept of “constitutional patriotism” usually associated with Habermas,<sup>232</sup> which provides further indication of the German post-war society and identity. Similarly, once it is noted that tolerance and consensus traditionally ranked high in the Dutch political debate, one may start to look at the development of the political system and will quickly identify the political pillarization<sup>233</sup> and the development of the “polder model,” as well as the consequent importance of tolerance within the national cultural identity.<sup>234</sup> These concepts can then be analyzed regarding their possible effect on equality law in general and the EU non-discrimination law in particular.

A second strand of inquiry may be the consideration of national and international legal paradigms on equality and non-discrimination that may compete with the European version imposed by the harmonized law and the wider national legal context. This includes

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<sup>231</sup> VAN DER VLEUTEN, *supra* note 57.

<sup>232</sup> Jürgen Habermas, *Citizenship and National Identity 1990*, in BETWEEN FACTS AND NORMS 491-515 (William Rehg trans., 1996).

<sup>233</sup> Pillarization (*verzuiling*) is the term used to describe the Dutch political system in beginning of the 20th century. Pillarization describes the cultural segregation of the state, traditionally divided into Catholic, Protestant, Socialist and Liberal pillar. The presumption is that these groups could mainly act freely within their group but needed to reach consensus at the top-level. Those agreements reached by the elites were then assumed to permeate down to the lower levels of society, who generally accept the elites' compromises. Presumably, the separation of pillars then ensured a great deal of conformity within the groups but also institutionalised pluralism by ensuring unity despite diversity and accommodating different (religious) life-styles. Consequently, Dutch society could integrate diverse life-styles, homosexuality, and new progressive ideologies, despite Christian influences on politics. This understanding of Dutch society is important, because, although the Pillarization Theory has been challenged in recent years it influenced how (political) identity was perceived as self-evident and continues to influence national identity, social consciousness and political processes. MULDER, *supra* note 21; Niek van Sas, *The Netherlands*, in 5 DUTCH CULTURE IN A EUROPEAN PERSPECTIVE 41 (D. Fokkema & F. Grijzenhout eds., 2004); Arend Lijphart, VERZUILING, PACIFICATIE EN KENTERING IN DE NEDERLANDSE POLITIEK 13 (3rd ed. 1979); Kees Schuyt, *Tolerance and Democracy*, in 5 DUTCH CULTURE IN A EUROPEAN PERSPECTIVE 113 (D. Fokkema & F. Grijzenhout eds., 2004); Jet Bussemaker, *Gender and the Separation of Spheres in Twentieth Century Dutch Society*, in GENDER, PARTICIPATION AND CITIZENSHIP IN THE NETHERLANDS 28-29 (Jet Bussemaker & Rian Voet eds., 1998); PETER VAN DAM, STAAT VAN VERZUILING (2011); Harm Kaal, *Appealing to the Female Vote*, 23 WOMEN'S HIST. REV. 1-33 (2014).

<sup>234</sup> Kees Schuyt, *Tolerance and Democracy*, in 5 DUTCH CULTURE IN A EUROPEAN PERSPECTIVE 113 (D. Fokkema & F. Grijzenhout eds., 2004).

constitutional protection, ILO conventions, and other legal concepts. Functionalism can be helpful in choosing the legal concepts for consideration. Thus, one may want to look at other national concepts that also protect equality and prohibit non-discrimination and can thus possibly have a similar function or aim as the harmonized law in question. Other laws that may have a different function but can be affected by the harmonized law are also relevant. For example, German labor law has long recognized a general equal treatment principle within employment law (*arbeitsrechtliche Gleichbehandlungsgrundsatz*), which in some situations achieves the same result as the EU directives but is conceptually rather different because, for example, it accepts economic justifications and does not apply to recruitment.<sup>235</sup> Similarly, Dutch courts have addressed some pay discrepancy via the concept of the “good employer and employee,”<sup>236</sup> which imposes duties of reasonableness, fair dealing, and good faith on employment relationships.<sup>237</sup> Similarly, the constitutional equality principle, along with its scope and effect on private relationships, needs to be considered as well as other dominant legal concepts. For example, the protection of marriage, family, and motherhood also provides some protection to women, particularly regarding maternity and pregnancy, although often in quite different ways than the equality directives.<sup>238</sup> The more general legal attitude towards EU supremacy and the effect of international agreements may be relevant too. For example, German dualism and Dutch monism (regarding the impact of international law, which also colors the application of EU law) can affect the application of EU harmonized law. Moreover, national (doctrinal) paradigms, such as the hierarchy of the law or the distinction between public and private law may also merit consideration.<sup>239</sup> But these concepts should not be considered separately from the cultural discourse. To appreciate the richness of law the concepts need to be linked to the broader social and cultural implications.<sup>240</sup> It is important to recognize what these laws can tell us about the cultural framework and what their social ramifications are. There is a need to go beyond the legal analysis when considering legal concepts.

A third strand of inquiry should be the legal academic discourse on the implemented law and the relevant directives, as this can reveal real obstacles for the application of the harmonized law at the national level as well as the legal consciousness or mentality of the compared countries. Here, legal consciousness does not refer to “legal hegemony ...or... how

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<sup>235</sup> Dagmar Schiek, *Gleichberechtigungsrichtlinien der EU-Umsetzung im deutschen Arbeitsrecht*, 21 NEUE ZEITSCHRIFT FÜR ARBEITSRECHT [NZA] 873, 878 (2004).

<sup>236</sup> Article 7:611 Dutch Civil Code.

<sup>237</sup> HOGE RAAD DER NEDERLANDEN [HR] [SUPREME COURT OF THE NETHERLANDS], April 08, 1994, ECLI:NL:HR:1994:ZC1322, JAR 1994, 94, at ¶¶ 3.4-3.5 (*Agfa*-decision).

<sup>238</sup> Article 6 German Constitution.

<sup>239</sup> Schiek *et al.*, *supra* note 4, at 17-19.

<sup>240</sup> FRANKENBERG, *supra* note 23, at 228.

the law sustains its institutional power,”<sup>241</sup> which would be a more general analysis of the legal cultures. Instead, it refers to cultural factors (i.e., cultural identity, which is influenced by national history and common cultural values) that influence the legal reasoning and application of the harmonized law. For example, factors such as the cultural role of the German constitution or the Dutch “culture of tolerance”<sup>242</sup> can clearly affect the application of harmonized non-discrimination law, giving clues to the general mentality of the national (legal) system, cultural self-understanding, and, subsequently, the role of non-discrimination law within it. It can also determine the framework in which national debates on EU non-discrimination law are framed. Thus, unsurprisingly, both supporters and opponents of horizontal equality law in Germany consider themselves defenders of the constitution and its conceived values and concept of equality.<sup>243</sup>

A fourth strand of inquiry could be the *de facto* influence of the social movement and other stakeholders promoting equality in the political discourse and legal development. This includes, for example, the role of trade unions and other parts of civil society and groups of activists. For example, the Dutch feminist movement had significantly more influence on the political agenda than the German political movement because of being included in the political debate via consultations, procedures, and committees.<sup>244</sup> Such factors reveal common cultural values, the overall status of the legislation, and the influences on the implementation process.

Finally, the implemented law itself needs to be considered. In that regard, it is relevant how the law is implemented (e.g., via primary or secondary legislation) and whether it is in a separate statute or integrated in a wider piece of legislation or code. Discrepancies between directives and implemented national legislation as well as the extent to which the national legislator used its discretion in case of minimum harmonization directives need to be considered. This is not to overemphasize the focus on written law or invite a legocentric analysis. A detailed comparison of the implemented law would indeed be meaningless because it tells us little about the judicial application or the status or socio-economic context of the implemented law. Directives can be implemented but never applied or invoked.<sup>245</sup> But legislation cannot be ignored, as national courts, despite their creative power of interpretation and even if they have taken a more flexible approach in earlier decisions, may later return to a literal interpretation of the rules due to a new set of circumstances.<sup>246</sup> Legal definitions matter. For example, the Dutch General Equal Treatment Act (*Algemene wet*

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<sup>241</sup> Silbey, *supra* note 190.

<sup>242</sup> van der Vleuten, *supra* note 216, at 464-88.

<sup>243</sup> MULDER, *supra* note 21, chapter 4.

<sup>244</sup> *Id.*

<sup>245</sup> See text surrounding *supra* note 59.

<sup>246</sup> Sacco, *supra* note 157, at 23-24.



gelijke behandeling, AWGB) refers to “making a difference” (*onderscheid*) rather than discrimination because the Dutch legislator felt that the term “discrimination” implies a serious moral wrong that would limit the law’s effectiveness and it has been argued that this terminology inflates its meaning,<sup>247</sup> taking it beyond the scope of discrimination.<sup>248</sup> On the other hand, one could also argue that the term “discrimination” as such only determines that one has made a distinction based on specific criteria and is thus not a moral wrong *per se*. Rather, only a distinction based on specific criteria, such as race and sex, is socially undesirable. Differences in terminology, definition of legal concepts, and the meaning attached to them may very much be relevant for effective implementation and successful judicial reception. The national legislation to consider is that which implements the directives, but it may also go beyond if the directives’ influence goes beyond what had to be implemented. For example, the UK introduced equality law long before it faced EU obligations to do so; nevertheless, the Equality Act 2010 is influenced by the EU equality directives.<sup>249</sup> Similarly, the Dutch AWGB from 1994 already prohibited discrimination on grounds of civil status, sexual orientation and race and thus went beyond the EU scope of protection. Germany, which only implemented the General Equal Treatment Act in 2006 and after significant EU pressure,<sup>250</sup> also provides a broader scope of protection than the EU equality directives by providing protection from discrimination outside employment for all protected characteristics. Nevertheless, the legal development and the legal reasoning regarding the protection of all grounds is influenced by the EU law on sex discrimination even if there was no direct EU obligation.

The national debate regarding the legislation and equality should then be considered for their ethical and political dimensions. Thus, once the different dimensions of the national debate on non-discrimination law are considered, they can be structured by different ethical or political points of view. Frankenberg demonstrates this by considering different arguments concerned with the public use of Muslim veils, which he analyzes within the above-mentioned grid of detachment/commitment (horizontal axis) and

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<sup>247</sup> Kammerstukken II, 2001/2002, 28187, no 1-2; 2002/2003, 28770, nr A, 13; Janneke H. Gerards, *Implementation of the Article 13 Directives in Dutch Equal Treatment Legislation*, 13 MAASTRICHT J. 291, 301-303 (2006).

<sup>248</sup> Rikki Holtmaat, *Stop de inflatie van het discriminatiebegrip!*, 78 NEDERLANDS JURISTENBLAD [NJB] 1266-1276 (2003); Klaus Adomeit, *Diskriminierung - Inflation eines Begriffs*, 55 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1622 (2002).

<sup>249</sup> Bob Hepple, *Race and Law in Fortress Europe*, 67 MOD. L. REV. 1-15 (2004); VAN DER VLEUTEN, *supra* note 57.

<sup>250</sup> Allgemeines Gleichbehandlungsgesetz [AGG] [General Equal Treatment Act], legislative proposal, BT Drs [Papers of the German Parliament] 16/1780 (08.06.2006); final bill (2006) BGBl [Federal Gazette] I Nr. 39, 1897, available at:

[http://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/EN/publikationen/agg\\_in\\_englischer\\_Sprache.pdf?\\_\\_blob=publicationFile](http://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/EN/publikationen/agg_in_englischer_Sprache.pdf?__blob=publicationFile); Susanne Hoentzsch, *Discrimination in Individual-Related Employment – A View from Europe and Germany to Canada, analyzing the Requirements and the Background of the European Anti-Discrimination Directives*, 7(10) GERMAN. L. J. 795-864 (2006); Joachim Wiemann, *Obligation to Contract and the German General Act on Equal Treatment (Allgemeines Gleichbehandlungsgesetz)*, 11(10) GERMAN L. J. 1131-1146 (2010).

similarity/difference (vertical axis).<sup>251</sup> Such an analysis can then expose different perspectives and disrupt the “stereotypical image” of Muslim veils, illuminate legal “implications of intervention,” and consider how “veiled women are represented in the normative and comparative discourse.”<sup>252</sup> An analysis focusing on the public use of Muslim veils can certainly deconstruct the Western bias and identity superiority.<sup>253</sup> As a heuristic device, however, the grid and the different forms and arguments that emerge regarding a given, socially contentious and controversial area with legal and cultural implications can also be used in the European context. This is certainly true considering racial and religious discrimination but also regarding other areas where there is not such a clear conflict between what one may call Western and non-Western ideologies and lifestyles. For example, discussion around sex and sexual equality can also be framed in terms of traditional versus modern lifestyles that need to be tolerated; the universal need to protect women from oppression, which can be defined in certain terms; the celebration of different (fe)male choices and traits, which need to be protected; or skepticism regarding the meaning of sex equality, choice and control of these. The second step of the analysis can identify the different arguments emerging within the national discourse on the area of harmonized law. This seems particularly fruitful for areas of harmonized law that are politically contentious and reach deep into the national cultural identity, such as equality and labor law.

Once these different relevant strands of inquiry are followed, the comparatist should be able to develop hypotheses regarding factors that influence the judicial reception of the harmonized law. These hypotheses can then be considered in the last step of the comparison, considering the extent to which these national debates and factors are reflected in judicial reasoning.

### *III. The Third Step: Case Law Analysis*

The final step, focusing on case law (including courts and possibly quasi-judicial bodies’ decisions), reveals how different factors influence legal decision-making and remain dominant despite pressure to adopt approaches that conform to European law. Case law analysis demonstrates how courts come to conclusions and the factors they deem relevant.<sup>254</sup> Focusing on the judicial reception of harmonized law, that is, on case law, is one way to consider the effectiveness of harmonized law. Of course, a focus on case law is not new. In fact, functionalism insists that one needs to go beyond the law-in-the-books and instead consider the law-in-action,<sup>255</sup> which then often means a focus on courts’ decisions.

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<sup>251</sup> See text around *supra* note 203; FRANKENBERG, *supra* note 23, at 117-161.

<sup>252</sup> *Id.* at 161.

<sup>253</sup> *Id.* at 162.

<sup>254</sup> Legrand, *supra* note 15, at 60-64.

<sup>255</sup> Reinmann, *supra* note 2, at 675.

Critical scholars have suggested that comparative law should go beyond the focus on case structure and methods of legal interpretation employed by the courts.<sup>256</sup> But, within the area of harmonized law, it still makes sense to consider case law because it is one indicator of how EU directives, once implemented, function within the national legal context.

Critical insights may, however, be valuable for the evaluation of case law. In particular, the analysis should go beyond the comparison of the application of specific concepts or legal reasoning in particular situations. After all, given the CJEU's influences on the interpretation of harmonized law, it is not surprising that certain concepts are interpreted and applied in similar fashion. This is particularly true regarding issues where the CJEU has given a clear ruling. For example, it is clear that under EU law, women may keep secret their pregnancy during the job application process<sup>257</sup> because pregnancy discrimination constitutes sex discrimination.<sup>258</sup> National courts ignoring such clear statements of the CJEU would be hard pressed to justify such an open rebellion. However, that does not mean that national courts do not recolor the implemented law and put their national spin on it. To see these national and European influences at work, I propose taking a step back and considering broader court narratives that are not concerned with details of abstract legal concepts or categories.

Case law narratives can, for example, be structured by focusing on case-sagas that involve a number of preliminary rulings on the related legal issues. For example, German courts have repeatedly asked preliminary questions regarding the rights of part-time workers to equal treatment in respect of rules based on the standard full-time employee. This has included issues related to trade union activities that allowed the employee to be absent from work<sup>259</sup> and to what constitutes overtime for the purpose of overtime pay.<sup>260</sup> In addition to cases that have triggered preliminary references, courts on all levels have applied the EU law in question and potentially given effect to the CJEU's interpretation. A critical analysis could consider how the national courts engage with the CJEU via the preliminary rulings to shed light on the triangular relationship<sup>261</sup> as well as how the cultural context and factors identified in the previous step resonate in the courts' reasoning, application and interpretation of national law implementing EU harmonized law. Thus, the analysis would consider how the national courts attempt to reconcile the potentially conflicting national

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<sup>256</sup> FRANKENBERG, *supra* note 23, at 228.

<sup>257</sup> Case C-109/00, *Tele Danmark* EU:C:2001:513, 2001 E.C.R. I-6993; C-438/99, *Jiménez Melgar* EU:C:2001:509, 2001 E.C.R. I-6915.

<sup>258</sup> *Dekker*, *supra* note 201.

<sup>259</sup> *Kilpatrick*, *supra* note 105.

<sup>260</sup> Case C-399/92, *Stadt Lengerich and Others v Helmig and Others* EU:C:1994:415, 1994 E.C.R. I-5727; C-300/06, *Voß* EU:C:2007:757, 2007 E.C.R. I-10573; C-285/02, *Elsner-Lakeberg* EU:C:2004:320, 2004 E.C.R. I-5861.

<sup>261</sup> *See supra* heading C.

and European influence on the judicial reception of EU harmonized law by reference to the courts' dialogue as well as national context.

But the case law does not need to be limited to disputes that involve preliminary references. The CJEU's consideration of pregnancy discrimination under the scope of sex discrimination can be explored within connected national narratives that are played out in court even if there was no direct preliminary reference from that Member State. Dutch courts and quasi-judicial bodies adopted the CJEU logic that pregnancy discrimination constitutes sex discrimination because only women can become pregnant. They then extended the same logic to areas that had not been conclusively decided by the CJEU yet, such as the treatment of women who suffer pregnancy-related illnesses after childbirth. They again modified their approach after the CJEU decision in *McKenna*, where the CJEU deviated from such a logic.<sup>262</sup> The consideration of how these disputes play out over time and potentially invite the national courts to adopt different approaches at different times can reveal the power struggles of the competing influences on the national level as well as the courts' difficulties with the CJEU's interpretation—particularly in cases where it does not follow their expectations of logical or consistent development.

Other dominant case-sagas concerning the application of the national law implementing EU directives can also be considered, even if there is no CJEU judgment on the matter, as it can still reveal something of the status of these directives and how national factors discussed in the previous step resonate in the courts' case law. One example of this is the German case law on the so-called *AGG-Hopper*. This term has been used within German academia and the wider public to describe people who abuse the rights under the German General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz*, AGG) for financial purposes. A typical example would be a man who replies to a job advertisement for a female secretary even though he is neither qualified for the work nor has any intention of taking the position. As the narrative goes, these people only apply for the work so they can claim compensation once they are rejected, and national courts have repeatedly debunked such claims.<sup>263</sup> Within these cases, national influences on the judicial reception of the harmonized law can become particularly obvious, since there is little CJEU interference. The reasoning and justification for the specific interpretation within the cases should reflect some of the national concerns regarding the law and may further reveal how the previously discussed national factors, such as cultural background, and political or ethical stances, are adopted within the legal reasoning. The previous discussion of the national context in the second step makes it more likely that these factors are considered and identified once the case law is analyzed.

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<sup>262</sup> *McKenna*, *supra* note 202; Jule Mulder, *Pregnancy Discrimination in the National Courts: Is There a Common EU Framework?*, 31 INT'L COMP. LAB. L. 67-90 (2015).

<sup>263</sup> The Federal German Labor courts only sent a preliminary ruling regarding this interpretation of the equality directives in 2015: Case C-423/15, Kratzer EU:C:2016:604 (31 July 2015).

Overall, the choice of the national case law that should be considered depends on its relevance regarding the harmonized law that is compared. This obviously includes cases that directly apply the harmonized law. But it can go beyond that and consider cases addressing issues that could have been assessed under the scope of the law but instead were dealt with under the scope of related legal instruments. For example, it has been demonstrated that German courts are much more comfortable dealing with cases on religious freedom, while English courts address similar cases under the scope of religious discrimination.<sup>264</sup> This, *inter alia*, can demonstrate the dominance of the Constitution within the broader discourse around equality and discrimination. It suggests that national courts privilege constitutional values over harmonized law, even if the latter is not contrary to the constitutional principles. Such insights can only be gained once the comparatist broadens the scope of consideration and includes cases that do not directly refer to the law in question. The choice of cases, thus starting with the consideration of the case law on the harmonized law, can still benefit from the learning of functionalism, as it considers cases that may fulfill a similar function but by different means. But it should not be limited to that. After all, it is highly uncertain what functions the harmonized law itself fulfills. Rather, the choice of cases may be better determined by the theoretical and normative framework defined in the first step. Supporters of critical functionalism have suggested that the search for the functionalist equivalent should go beyond the legal and avoid legocentric analyses by considering a multitude of legal and non-legal mechanisms that may all serve a specific aim.<sup>265</sup> Functional equivalents to ensure sex equality could include non-discrimination law and rights to equal treatment, but it could also include related legal protections, such as the right to maternity leave, child care facilities and welfare law, as well as social and cultural programs that foster a more equal society. The methodological approach developed in this article does not aim to identify functional equivalents. Rather, I try to engage the mind-set of critical comparison to identify how the harmonized law is situated within the national context and how it functions under national as well as European influences upon its interpretation and application. The choice of case law to be compared should be determined by what it tells us about the position of harmonized law within the national context. This, of course, does not mean that there are other legal or non-legal mechanisms that may also support the aims stipulated or implied in the directives.

In this third stage, the aim is to identify and address the legal formants that affected the national application of the law as well as critically reveal how non-legal concepts, social reality, power dimensions, and general cultural self-understanding shape the law and how contradictory approaches make alternative conclusions possible. Both questions can only be addressed and answered by a deep understanding of the socio-cultural and socio-political

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<sup>264</sup> Tobias Lock, *Religious Freedom and Belief Discrimination in Germany and the United Kingdom: Towards a Common European Standard?*, 38 EUR. L. REV. 655-676 (2013).

<sup>265</sup> Kirsten Scheiwe, *Was ist ein funktionales Äquivalent in der Rechtsvergleichung?*, 83 KRITISCHE VIERTELJAHRSSCHRIFT FÜR GESETZGEBUNG UND RECHTSWISSENSCHAFT [KRITV] 30, 33-34 (2000).

context of the legal systems (the second step) and their subsequent identification and modification within the case-law analysis. While most EU Member States' legal orders exist within similar paradigms and parameters or may even belong to the same "folk culture,"<sup>266</sup> the cultural differences that affect the legal consciousness must not be underestimated, despite possible convergence within some areas of Member States' law.<sup>267</sup> I propose identifying some of these national factors by engaging with national cultural and political discourses linked to the harmonized law and a deep engagement with national case law and courts' reasoning to identify whether these factors resonate within the courts' case law. It is a "bottom-up" approach, or an inductive method, that first engages with the national cultural context and then considers how this context influences the legal reasoning and legal application. The separate consideration of both should make it possible to identify implied cultural and political considerations that would not be obvious by the sole consideration of the national case law and implemented legislation. The analysis should go beyond the question of whether and how national courts actually *recognize* the CJEU preliminary rulings<sup>268</sup> by considering what other visible and invisible influences (including non-legal concepts within society) actually determine the judgments, behaviors and attitudes of the judges (toward the legal concepts and the CJEU interpretation) revealed within the case law.

## E. Conclusion

There is an old and often repeated saying that one cannot compare apples and oranges,<sup>269</sup> which could be applied to the incommensurability of legal systems<sup>270</sup> and the need to compare like traditions with like. However, for a comparison to be fruitful, there also needs to be some difference between national legal systems.<sup>271</sup> Structuralism is certainly determined to reveal national *legal formants* by comparing different legal systems, but whether a comparison is meaningful depends on the research question. Just as it is possible to compare apples and oranges regarding, for example, their vitamin levels, color or taste, it is possible to compare very different as well as very similar legal systems<sup>272</sup> as long as there is a clear articulation of the aim of the comparison and what personal and extrinsic factors<sup>273</sup> affect it. Ultimately, there is no need to develop one universally applicable method to

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<sup>266</sup> Blankenburg, *supra* note 189.

<sup>267</sup> Mathias Siems, *The End of Comparative Law*, 2(2) J. COMP. L. 133, 145 (2007).

<sup>268</sup> Kilpatrick, *supra* note 105.

<sup>269</sup> See CHRISTINE AMMER, *THE AMERICAN HERITAGE DICTIONARY OF IDIOMS* (1997) (arguing that the metaphor originally referred to "apples and oysters," which much more clearly highlights the problem of dissimilarity).

<sup>270</sup> GLENN, *supra* note 19, at 45 (rejecting the incommensurability).

<sup>271</sup> Siems, *supra* note 267, at 145.

<sup>272</sup> Platsas, *supra* note 49, at 6-7.

<sup>273</sup> Örucü, *supra* note 49, at 571.

compare law. Instead, it is far more important to make strategic decisions regarding the comparison itself<sup>274</sup> and to consider the methodological implications of these decisions and the limitations of the comparatist's own ability to understand the foreign and appreciate the law within each broader cultural context.

The main submission of this article is that it is necessary to focus on domestic contextual influences in the comparison of harmonized law to understand why this law is applied differently by the courts of the Member States even though hybrid legislation has the same European origin and the national courts are required to respect the CJEU's competence in interpreting Union law. As demonstrated below, traditional comparative law methods are incapable of uncovering these differences because of their *a priori* assumptions regarding social problems. This creates an 'epistemic foundation' for the law, and it limits the ability to recognize the national legal and non-legal contexts that influence the judicial reception of EU harmonized law. The method proposed here is helpful not only in revealing the differences concerning the application of harmonized law but also in identifying some of the reasons for those differences. It is thus mainly explanatory. However, the culturally-informed mind-set may also highlight the possibility of a critical evaluation of harmonization processes that allows for diversity within the Member States and recognition of alternative mechanisms that can achieve similar aims but compete or contradict the directives' approach. Current discussion on legal standards within the Member States certainly falls short of such deep and diversity-sensitive comparison by mainly focusing on textual analysis alone.<sup>275</sup> Essentially, the proposed approach encourages a deep engagement with the national legal systems. Similarities between national orders as a result of the harmonization process and the national implementation of the directives can reveal deep, underlying differences between national legal systems that differently affect harmonized law once it reaches the national arena. Once national systems superficially converge because of the harmonization process, comparative studies can focus on these deeper differences underpinning the national legal systems, as there is less distraction because of similar or different legislative approaches.

The multi-layered culturally informed method proposes a cross-country comparison between the Member States by focusing on national influences on the courts' application and their engagement in the triangular relationship. It does so by proposing the consideration of overlapping but diverse cultural, political and legal narratives surrounding the harmonized law. Fundamentally, the method attempts to address three interconnected arguments. Firstly, that to evaluate the successes and limits of European legal transplants, they need to be considered at the (final) point of their interpretation and application within the national context. The comparison of national law implementing EU law (i.e., directives) is of special interest here because these laws create a bridge between the European and the

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<sup>274</sup> Glanert, *supra* note 230.

<sup>275</sup> Schiek, *supra* note 22, at 218.

national context.<sup>276</sup> Legislation harmonizing the Member States' legal systems and their implementation process transforms EU law into national law and is, therefore, governed by national paradigms, doctrine and the wider national (legal) culture. At the same time, directives remain part of the European legal framework, and the CJEU is able to provide binding interpretations of the directives.<sup>277</sup> Moreover, directives addressing social issues such as equality, labor law standards or consumer protection often address traditionally separate areas of private and public law. They embody principles recognized by international and national constitutional law as well as primary EU law. The multi-layered influences on the national application are thus particularly obvious. These influences can, however, only transpire at the stage of application. Secondly, a meaningful comparison of the application of harmonized law requires the consideration of the legal and non-legal contexts that can influence the success or failure of the European transplant on a national level. Laws implementing directives, being national *and* European law ('legal hybrids'),<sup>278</sup> are specially situated within the national legal system and face multi-layered national influences and beyond. Meaningful comparison of harmonized law needs to capture these contextual influences on legal application. This goes beyond the considerations of different legal traditions (such as monism and dualism, or common and civil law), but it requires the consideration of social, cultural, historic, economic and political factors. A comparative law method should thus challenge us to go beyond the legal to allow political and cultural narratives to emerge. Thirdly, the comparison needs to be aware of feedback effects. Thus, while concepts are developed in one context, they can influence other contexts and then feedback to the original source of the concepts while simultaneously changing throughout the process. A comparative method to compare harmonized law needs to be able to encapsulate these developments by allowing space for multi-layered narratives and dialogue between the national courts and the CJEU as well as other social partners and stakeholders.

The proposed three-step approach aims at providing room for multi-layered narratives concerning the application of harmonized law, including international, European, and national influences as well as cultural and political dimensions. In the first step, normative and theoretical considerations regarding the chosen area of comparison provide space for considering the possible aims of the harmonized law, as well as the possibility of the accomplishment of these aims within the existing legal frameworks, including the CJEU's. The first step thus primarily focuses on the European vertex of the triangular relationship, but it also provides a general theoretical framework. The second step focuses on the national vertices and looks at what happens to the European law once it reaches the national arena. This includes the consideration of the national legal context and other cultural and historical factors relevant to the application of harmonized law. The third step uses case law analysis to explore the dialogue between the CJEU and the national courts and how this differs

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<sup>276</sup> See *supra* heading B.

<sup>277</sup> Art 267 TFEU.

<sup>278</sup> Hesselink, *supra* note 32, at 40.



between the different national systems. The comparison explores which CJEU judgments have been particularly influential at the national level and which national factors have shaped the national courts' interpretation and have potentially overridden European influences.

The proposed method does not aim at reaching *absolute truth*. Nonetheless, it seeks to make a significant contribution based on *workable objectivity* towards a better understanding of EU law and its reception and enforcement at the national level and, thus, to influence the harmonization process. Cultures and traditions are hybrids involving various, often contradictory, 'objective truths'. These different and potentially conflicting views are all elements within one diverse legal culture or tradition.<sup>279</sup> Even when all relevant information is provided for the comparison, a selection needs to be made according to various limitations. Limitations may be temporal (limited time available) or psychological because no human mind is able to remember and consider all relevant factors at once.<sup>280</sup> 'There is just too much diversity to come to any single answer.'<sup>281</sup> This selection is consequently suboptimal and depends on our way of viewing the world.<sup>282</sup> Consequently, it can always be criticized, and there is no single best solution to assess reality.<sup>283</sup> It has thus been argued that comparative studies can 'never be conclusive, but only suggestive.'<sup>284</sup>

However, this does not mean that methodological concerns do not need to be recognized. Contemporary researchers and comparative lawyers have to work within the framework of contemporary discourse and recognize the shortcomings of the used approaches.<sup>285</sup> The comparative process requires the scholar to be self-critical and recognize his or her own cultural context as well as the other.<sup>286</sup> It requires an understanding of the law as an institution with multiple functions and that is affected by a 'deeper culture' underpinning the legal concepts and their applications.<sup>287</sup> Comparison of the judicial reception of harmonized law can be achieved by engaging in overlapping cultural and political narratives that do not focus on the legal alone and in the subsequent investigation of how these

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<sup>279</sup> GLENN, *supra* note 19, at 34-35, 361-85.

<sup>280</sup> DANIEL DENNETT, *DARWIN'S DANGEROUS IDEA* 502-5 (1996); HESSELINK, *supra* note 2, at 32.

<sup>281</sup> GLENN, *supra* note 19, at 361.

<sup>282</sup> BERNARD WILLIAMS, *ETHICS AND THE LIMITS OF PHILOSOPHY* 139 (1985).

<sup>283</sup> DENNETT, *supra* note 280, at 501-5

<sup>284</sup> Cotterrell, *supra* note 13, at 133,151.

<sup>285</sup> Jaakko Husa, *Research Design of Comparative Law –Methodology or Heuristics?*, in *THE METHOD AND CULTURE OF COMPARATIVE LAW* 53-68 (Maurice Adams & Dirk Heirbaut eds., 2014).

<sup>286</sup> Frankenberg, *supra* note 214, at 260.

<sup>287</sup> Gary Watt, *Comparing as deep appreciation*, in *METHODS OF COMPARATIVE LAW* 82, 84-85 (Pier Giuseppe Monateri ed., 2012).

narratives resonate within the legal reasoning. The result of such critical progression is what one might call *workable objectivity*. It is not absolute. That would only be possible in a theoretical model that disregards parts of reality.<sup>288</sup> Within a theoretical *a priori* determined framework, a model has an inherent logic that makes it possible to receive absolute answers within it. However, once one steps outside this model and into reality, it is impossible to consider all influential factors and reach an 'absolute truth'. Any solution will thus be open to criticism and counter-evidence. This is especially true within social science, in which it is impossible to separate the observer and the object of research, since the object is too complex.<sup>289</sup> In that sense, methodological considerations are not necessary to develop one universal method but to consider the implications of the methodological choices the researcher unavoidably has to make and to ensure the transparency of the comparative analysis.

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<sup>288</sup> Geoffrey Samuel, *Taking Methods Seriously (Part One)*, 2 J. COMP. L. 94, 105-8 (2007).

<sup>289</sup> *Id.* at 99.