18 Europeanization of Public Law
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18 Europeanization of Public Law

A. Introduction and Three Examples 631
B. Europeanization: What is in the Name? 634
C. Europeanization, the Narrow View: How Much ‘Europe’ is There? 637
   1. Europeanization of Legislation 638
   2. Europeanization of Judiciaries 640
   3. Measuring Europeanization: The Method 645
   4. Europeanization: The Outcomes and the Paradoxes 649
D. Europeanization, Writ Large: A Study in Complexity 652
   1. The Directions: A Multifaceted Traffic? 654
   2. The Types: Beyond Rules and Procedures 657
   3. The Actors: Of Synergies and Networks 659
E. Europeanization, Comparative Law, and Legal Scholarship 661
F. Europeanization, Fast-track: The Experience of a New Europe 665
G. Conclusions 670
A. Introduction and Three Examples

Imagine the three following examples. First, the Citizens’ Rights Directive provides for free movement, residence, and connected rights of EU citizens as well as their family members. It has been implemented in all the Member States of the Union. The Directive, together with other EU law provisions, be it primary law in Articles 20–23 TFEU, or further secondary law and the case law of the Court of Justice, can be said to have Europeanized selected segments of national rules relating to the rights of non-nationals, who are nonetheless EU law citizens, as well as some third country nationals. National laws on this matter have thus been to some part replaced, to other part supplemented, by the European ones.

Second, the new Article 255 TFEU introduced by the Lisbon Treaty established an expert panel that is called to give an opinion on candidates’ suitability to perform the duties of Judge and Advocate General of the Court of Justice of the EU. In its annual reports, the Article 255 Panel, similarly to the statements issued by the Council of Europe institutions with respect to the selection of judges to the European Court of Human Rights (ECtHR), has shown its preference for the national selections of judicial candidates to be made subject to an open procedure, initiated by a public call for applications. Somewhat indirectly and incrementally, but still: the national procedure for selecting Europe’s judges has started being gradually Europeanized. More on the side of soft pressure than binding laws, both European systems, the EU and the Council of Europe, have started transforming the way in which national nominations to the European courts are made.

Third, over the last two decades, judicial councils emerged as the institutional design for administration of judiciaries in Europe. Originating in Latin European countries, notably Italy, but also Spain and France, the idea that there should be an institutional representation of judges in the form of a judicial council with wide self-administrative powers has gradually imposed itself through both European levels, the Council of Europe and the EU, as the ‘European standard’. Under the European lead, the model has been diffused and widely embraced in Central and Eastern Europe, mostly in the EU pre-accession period as a part of the EU related reform package. Today, the status of this model as the ‘European model’ becomes evident when even states from Western Europe that remain without a judicial council are being put under political pressure on the international level for not having embraced such ‘European’ institutional design.

The three cases outlined can be seen as instances of Europeanization of national laws, procedures, and institutions respectively. Naturally, other examples could be added, in particular those relating to the Europeanization of public laws or procedures. Any area of public law may be in fact open to the process of Europeanization, even the more elusive elements of principles, notions, methods and legal reasoning, as well as legal scholarship as such.

This chapter introduces the notion of Europeanization of public law and its various perceptions in legal scholarship and research. It outlines the structures and issues within which we tend to think of the process and outcome of a phenomenon called Europeanization. It ought to be stressed at the onset that ius publicum europaeum, as understood throughout the IPE project and in this volume, perceives European public law quite broadly. It is not limited to the study of top-down EU-induced changes at the national levels, which would most commonly be the first and intuitive understanding of the notion of Europeanization. Such broader notion of Europeanization and of a European legal space acknowledges the multi-directional and the multi-layered nature of the legal ‘traffic’ in Europe. For that reason, in addition to the vertical exchange going on in both directions between the EU, the ECHR, and their Member States, the horizontal dimension of European public law is also embraced, which is represented by comparative analysis and comparative exchange in and among the Member States. Moreover, the notion of ius publicum
europaeum includes also European comparative legal scholarship in its creative dimension: a genuine European public law whose discourse transcends national borders and generates common European categories freed of posited law of any individual Member State.

This chapter proceeds as follows. Section two (B) outlines the different ways in which the notion of Europeanization may be understood and conceptualized. Subsequently, three different streams of potential approaches to Europeanization are discussed in turn. Section three (C) critically examines the empirical, top-down study of Europeanization, focussing on the key questions of such quantitative measuring of impact of the EU on the national legal systems. Section four (D), while remaining still more on the empirical side as to its approach, outlines the complex picture of the traffic in legal solutions and ideas in Europe today, suggesting that the study (p. 634) of Europeanization yields only very approximate results if it is reduced to the study of top-down impulses sent by the EU. Section five (E) retains the broader vision of Europeanization, but changes the approach: from the empirical to a normative and constructive vision of what European public law ought to become. The section also stresses the importance of comparative legal scholarship for such vision of European public law. Section six (F) briefly outlines the vexing issues arising out of the condensed and massive case study in Europeanization in the form of Eastern enlargement of the EU. Finally, section seven (G) concludes.

B. Europeanization: What is in the Name?

Notions are embedded in time and context. They convey messages. Looking back at the past agendas of studies of the EU and EU law, the same is true also of the notion of Europeanization. After the initial focus on the new supranational institutions and their description, which was the dominant stream in the European legal studies up until the 1980s, came the enhanced interest in the EU’s actual impact onto the national levels since the 1990s, referred to as Europeanization. First in political science, but then also in other social sciences as well as in law, Europeanization has generated a notable stream of research over the past two decades. A particular additional impetus for the use of the notion came with the looming 2004 EU eastern enlargement. Notwithstanding the exponential growth in terms of its use, what exactly is to be understood by the notion of Europeanization remains strikingly vague even in political science, which arguably employs this notion most frequently and could thus be believed to have an advanced understanding of it. On the level of a maximum common denominator, it could be simply said that research on Europeanization is concerned with the impact that Europe, i.e., the European Union and/or Council of Europe and/or other European institutions, have on their Member States. However, (p. 635) Europeanization rather denotes an area of research than any theory of its own. It is the study of changes in policy, politics, and polity brought about by the European or rather just the EU’s influence. Some studies focus on the process itself, others more on its concrete outcome, still others seek to single out the factors of determining the (non-)implementation of EU law on the national level.

With such background present in other social sciences, it will not come as a surprise that the notion of ‘Europeanization’ of (public) law is similarly elusive. Its author-dependent understanding and definition will be linked to the author-dependent understanding of the notion of ‘European public law’. Is ‘European public law’ just the EU public law, i.e., rules governing the activity of EU institutions and agencies? Or is it a composite system of (still) posited law, but including both, the EU side as well as its national implementation on the level of the Member States? Or should such a composite vision also include bifurcation on the European level itself, taking on board also the law of the European Convention and the case law of the ECtHR, which claims to be, after all, a ‘constitutional instrument of European public order’? Or, in its broadest understanding, is ‘European public law’ all of
these as well as the comparatively established principles of European public law and European legal scholarship?

All of these as well as other perceptions are conceivable. The individual understanding of the notion of ‘European public law’ is then naturally bound to define the scope of the individual Europeanization notion.

There are nonetheless two key variables that are crucial for the understanding of the notion of Europeanization. First, it is the definition of the object of study, i.e. what is being studied under the heading of Europeanization. Second, it is the choice regarding the approach to the chosen object, i.e. how is it to be studied. The individual combinations established with regard to these two categories explain the potentially strikingly different understandings of what is supposed to be studied under the title of ‘Europeanization’. Both these variables will now be outlined.

With regard to the first variable, the definition of the object of study, Europeanization might be understood in narrow or broad terms. In its narrow dimension, Europeanization is conceived of as a top-down one-dimensional study of EU action and national reactions. The EU institutions send incentives or impulses and national law or institutions react in one way or another. Thus, a classic study of similar fashion would entail, for example, a comparative assessment of the way a set of Member States (non-)implemented a directive, X. The type of questions addressed would include knowing how a directive was implemented (by a statute, by a mere statutory instrument, by an amendment to existing laws, or by a new law, etc.); a review of (p. 636) cases in which the directive has been applied domestically, with what success; identification of problematic aspects, conflicts of the notions and procedures introduced by the directive with notions of national law; and ensuing comparative discussion of the individual samples chosen with the evaluation of elements that contribute to (in)correct national implementation of EU law.

The notion of Europeanization becomes broader once we diversify any of the directions in question. This may happen with regard to the directions of exchange, by acknowledging that the European traffic in ideas and influence is not composed of only one-sided top-down impulses, but necessarily also includes the bottom-up original creation of a European common model and its later repetitive interactions with national laws. Alternatively, the broader notion may also recognize and embrace the plurality of actors. It will see the process of Europeanization as not being restricted to just the exchange between the EU and the national level but as also including the law and practice established under the ECHR and the case law of the ECtHR as well as the horizontal comparative dimension among the individual Member States.

The latter, broader understanding of Europeanization is not limited, in contrast to the previously outlined narrow one, to one-dimensional top-down influence of the EU on the national level(s). It is still concerned with the process of change and adaptation following external impulses or inspiration coming from within Europe. The vision of the Europeanization traffic in laws and ideas becomes, however, much more multi-actor, multi-directional and accordingly multi-dimensional.

Can both of these visions, the narrow and the broad one, be called ‘Europeanization’? This is a matter of definition. Each of them has its virtues and also considerable difficulties. The advantage of the narrow definition is its relative manageability in terms of research design and scholarly debate. The allures of reductionism inevitably inherent in such a definition are, however, at the same time its pitfalls. By singling out one source of pressure or inspiration for domestic change in law or in policy, the richer, more fascinating levels of what might have really happened will remain hidden. Conversely, the broader understanding of Europeanization faces a twofold problem, certainly in the context of an empirical study. First, in terms of research design, it can hardly be employed in more than one or few qualitative case studies. All the threads of the one case will be carefully
disentangled, but no further regard can be paid to the other ropes hanging around. Second, in heuristic terms, the broader vision suffers from a lack of definitional sharpness. It is simply too broad. For a notion to be useful, it must entail a precise connotation that makes it unique and distinguishable from other notions and terms. The broader vision of Europeanization can be in fact replaced with a number of other terms, most notably simple ‘influence’, with the single requirement that the influence in question come from within (a geographically defined?) Europe.

The second variable relates to the approach to Europeanization: it can be either empirical or normative. This well-known differentiation, applicable virtually to any legal research, gains renewed importance with regard to propositions concerning the interaction between legal layers in Europe. Empirical research is primarily concerned with factual claims of causal explanations for (mostly) past events. In terms of research design in relation to Europeanization, it is typically carried out either quantitatively, on the basis of a coded data set, or it proceeds with an empirical case study/studies of the impact certain EU policies have had on the selected national levels. For example, questions would be: ‘How did the implementation of selected labour law directives affect the social policy choices and/or debates in France, Germany, and the UK in the 1990s?’ or ‘What was the degree of misfit and non-implementation and why?’ On the basis of such an empirical case study, claims about Europeanization, its process, outcome, and problematic spots would be made.

Conversely, normative research on Europeanization is likely to be more concerned with normative, largely doctrinal, and prospective claims about interdependence or commonality. Thus, for example, similar strands of research would, while looking at the same set of labour law directives, but also beyond, suggest that there are certain commonalities (or differences) which will (or will not) warrant the conclusion that there are some common principles of European labour law.

Both of the approaches have their virtues and purposes. They remain, however, slightly different endeavours as to the type of knowledge assembled. Problems may arise if the doctrinal, normative legal scholarship starts making essentially factual claims. In writings on Europeanization of law, this occasionally happens when ideas about norms and their proper interpretation become intertwined with empirical claims about EU law having certain effects on the laws or practices of the Member States, without much empirical support being offered for such assertions. Put into a simple metaphor, a cat is as interesting and valuable as a dog. They are just different animals. And cats should not be barking.

In summary, this section has suggested that the notion of Europeanization of law might be perceived rather differently, depending on the individual definition of its scope and approach. The key variables in need of explicit definition are situated along the axes of narrow versus broad scope of research and empirical versus normative approach to the research. This chapter restrains from singling out one of the approaches as the ‘best’ one. As already discussed, the usefulness of each of the approaches depends on the desired research aims. Instead, the following sections of this chapter will demonstrate the differences in types of study carried out on the basis of such differentiated definition and provide some critical remarks on each of them: the narrow-empirical approach will be discussed in section three (C); the broader-empirical in section four (D); and finally the broader-normative approach will be introduced in section five (E).

C. Europeanization, the Narrow View: How Much ‘Europe’ is There?
Within its narrow understanding, Europeanization research examines how and to what degree the laws, procedures, legal institutions, or approaches and methods of Member States change under the influence of the EU. This section first provides two examples of such quantitative approach to measuring top-down EU-induced (p. 638) change with regard to the Europeanization of national legislation and the degree of Europeanization of judicial work in national courts. It then moves on to critically examine potential results of such numerical studies, both in terms of method as well as the quality of the outcome.

1. Europeanization of Legislation

How much national legislation ‘comes from Europe’ today? Measuring the impact of EU legislation onto the national legislative production yields strikingly divergent results, depending on the computing method employed. In addition, in recent years, it ceased to be a somewhat tedious exercise in statistics, reserved to few devotees of quantitative analysis. It has become an imminently political issue, invoked more and more in some national political debates, while neglecting any seriously meant academic discussion about the degree or Europeanization of national legislations.

True, what lies at the roots of this debate is a political statement. It was announced in July 1988 by the former president of the European Commission, Jacques Delors, who stated in the European Parliament that ‘in ten years 80 per cent of the legislation related to economics, maybe also to taxes and social affairs, will be of Community origin’. 24 Never verified empirically, the statement soon turned into a deeply rooted belief about the genuine impact EU law has, held not just by the UK tabloid press or the various Euro sceptic circles. Quantitative academic studies that seek to empirically (dis)prove the Delors 80 per cent myth started emerging only in recent years. 25 Their results diverge vastly. Depending on the method of calculation and the relevant data sets used, they suggest that the portion of national laws that are implementing EU law may lie anywhere between 6.3 per cent and 84 per cent. 26 Some would even claim that the Delors prediction from later 1980s is in fact true. 27

The striking differentiation in results is due to the difference in calculation methods. Some studies focus only on certain sectors, thus following more closely the original Delors prediction that concerned just legislation ‘related to economics’. Other studies (p. 639) operate only with specific data sets as far as EU sources are concerned (e.g. including only directives or other acts expressly requesting their transposition but leaving aside other acts that might in fact also require some national legislative intervention, such as regulations, case law of the Court of Justice, or various forms of soft law) or focusing only on specific types of legal instruments on the national side (e.g., only looking at statutes, i.e., acts of the national parliament, but leaving outside derived legislation or statutory instruments).

Recent studies restricting their data sets to the laws passed by national parliaments following European impulses place the same figures somewhere between 6.8 per cent and 26 per cent. 28 They exclude national legislation accompanying regulations as well as implementing case law of the Court of Justice of the EU or European soft law. Equally, the entire sub-statutory level is omitted, i.e., all the national implementing legislation that does not pass through the national parliament. It has been suggested that if the latter were to be included as well, any figure between 15 per cent and 50 per cent would be justifiable, at least with respect to the UK. 29

In view of such considerable spread of result figures, a critical reader might harbour serious doubts about the utility of similar research. There are nonetheless three points relating to the quantitative aspect of Europeanization of national legislations that might be of interest for the Europeanization debate in general. First, the degree of Europeanization is heavily sector-dependent. It comes as no surprise that the amount of EU law instruments is very unequally spread across the various areas of law. There are masses of legislation
relating to the common agricultural policy, together with EU rules applicable to foreign trade and macroeconomics. In other areas, the amount of EU legislative activity is much more limited. Such quantitative differences are then naturally reflected on the national level, where for example national rules relating to agriculture would be much more heavily Europeanized than those on public health for instance. Thus, sector-specific studies of Europeanization might achieve very different results, even within the same country. Such repartition of EU law gives some credence to the claims that in terms of incoming European legislation, it is indeed national administrative law, in particular substantive or sector specific administrative legislation, that is likely to be most heavily Europeanized.

Second, the study of different countries renders surprisingly different figures, even if roughly the same methodology is used. This may be largely due to the fact that some countries, as for example France, hide the European origins of statutes adopted, whereas others, such as Austria, always acknowledge the European origin of the proposal made. Some systems might even have an in-built ‘disclosure obligation’ in this regard. For example, Article 48 of the Czech Legislative Council (Legislativní pravidla vlády) obliges all governmental departments submitting bills to the Parliament to state clearly in the first footnote of the bill whether the bill is implementing an EU measure. If yes, a full reference to the EU measure being implemented must be provided. Naturally, such differentiated ‘openness’ in acknowledging the EU influence in particular cases in parliamentary law-making may yield different numerical results across different Member States. At the same time, such differentiated practice of systematic (non-)disclosing the European origins of national legislation might hint at a different degree of broader openness and willingness to engage with the EU level in the further process of interpretation and application of national laws, be it by administrative authorities or by courts.

Third, there are considerable diachronic variations in the EU sources themselves, i.e., in the quantity and also the overall composition of EU legislation over the years. In contrast to popular beliefs, the overall amount of EU secondary legislation might not be constantly increasing, in some years even to the contrary. Additionally, the mix and quality of sources differs. For example, it has been noted that since its peak—connected to the efforts to complete the common market in late 1980s and early 1990s—the amount of adopted directives has been, in fact, decreasing. This may be also due to the changed ways in which they are adopted, requiring now by default the involvement of the European Parliament, hence including a greater number of actors that need to agree. The simultaneous increase in the adoption of regulations and other measures adopted by the Commission acting alone might account for apparently less EU-related legislative activity on the national levels, since regulations would not need to be, as a rule, implemented. Thus, the amount of Europeanized national laws might be changing not only with respect to a specific sector, but also over time within the same sector.

2. Europeanization of Judiciaries

The previous section suggested that assessing the degree of Europeanization of national legislation is a problematic exercise rendering very approximate and therefore questionable results, heavily dependent on the relevant data sets chosen. With respect to the Europeanization of national judiciaries, even that cannot be suggested. The degree of (non-)Europeanization of national judiciaries remains an unexplored black box. This is striking. In the past, national courts have been praised as the key players in European legal integration, as the powerhouses of EU law, fuelling the legal side of the integration process, cooperating with the Court of Justice via the preliminary ruling procedure and thus building up EU law. Empirical research that would (dis)prove such normative assumptions is, however, very rare or non-existent. The exceptions confirming the rule are country-reports studies focussing on the (non-)reception of notable primary or

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other key constitutional doctrines in the Member States, looking qualitatively into selected constitutional cases. The worlds below the grand battles of constitutional supremacy and quarrels for the Kompetenz-Kompetenz remain nonetheless covered in obscurity. What about the life of EU law in the national courts beyond the few glamorous constitutional cases? What about the tens of thousands of consumer protection cases, environmental disputes, tax cases, civil cooperation in judicial matters, especially those in the lower and appellate courts? Is EU law genuinely applied in day-to-day judicial business? Moreover, have judicial decision-making, the judicial institutions, judicial thinking been ‘Europeanized’ in any discernible way?

The life of EU law in the Member States beyond a few selected peaks into the black box, typically limited to one Member State, still remains to be explored. Needless to say that such empirical research may have considerable implications for the legitimacy of the entire EU judicial structure. What if, purely hypothetically, large scale quantitative research carried out across a number of Member States disclosed that the majority of national judges remain blissfully ignorant of EU law and never apply them in their judicial practice? Moreover, if the majority of national judges do not even know the substance of EU law, one can hardly assume any Europeanization of other elements of judicial function, especially the ‘softer’ ones, such as judicial style, thinking, or reasoning.

The quantitative side of the research on the national courts often is, for understandable reasons of the need for a manageable research scope, limited to the establishment and evaluation of preliminary rulings patterns. For example, how many requests for preliminary rulings have been made by which courts in which Member States? Such figures are then analysed and interpreted: Why do some Member States’ courts refer more questions than others? Why is it that particular types of questions tend to be referred from specific courts in a Member State?

Apart from the search for similar patterns, the numbers of preliminary rulings submitted by national courts could be used also as a rough and indirect indicator of the degree of Europeanization of the national judicial decision-making. Article 267 TFEU states that requests to the Court of Justice for a preliminary ruling may be asked by lower courts and must be asked by courts of last instance when there is doubt with respect to correct interpretation of EU law. Moreover, any national court must make a request for a preliminary ruling if it harbours doubts about the validity of a secondary EU measure. Furthermore, it is safe to assume that the considerable amounts of EU laws produced each year in all the official languages of the EU are, despite the best of the efforts of their drafters and translators, quite far from clear. Thus, it might be assumed that there is some correlation between the amount of cases involving EU law elements decided at the national level and the number of requests for preliminary rulings lodged every year before the Court of Justice.

With this assumption in mind, let us look at the respective figures. Every year, national courts in the European Union decide tens of millions of cases. There are hundreds of thousands of appellate court decisions and tens of thousands of decisions rendered by national supreme courts. All supreme courts are, by definition, courts of last instance. It is impossible to state with any precision in how many of these national cases EU law issues are raised. What can be estimated, however, are two other figures, which indirectly suggest that there is a considerable discrepancy between when national courts should take EU law into account according to the Court of Justice and when they actually do. First, what portion of national judicial decisions is being rendered materially within the scope of EU law today? Second (and in contrast), how many requests for a preliminary ruling does this mass of national cases generate?
In how many of the cases decided every year by national courts is EU law applicable? This estimate is partially connected to the question discussed in the previous section: how much legislation that is to be applied by national judges is nothing but the domestic implementation of EU law? If the applicable national law is just implementing EU legislation, then the case is materially within the scope of EU law. Moreover, in the views of the Court of Justice, even if the Member State has implemented EU legislation, national courts are still bound to take the original piece of EU legislation as well as any new court’s case law into account for the purpose of confirming interpretation (indirect effect).

Whatever figure we take from the previous section as a starting point, it needs to be adapted with respect to judicial application of EU law in the Member States. On the one hand, one has to downgrade the potential figure for the purpose of real life cases. In any national legal system, there are obviously far more national judicial decisions applying, for instance, the national criminal code (largely outside EU law) than there are instances of judicial application of provisions falling within the scope of EU legislation in the area of, for instance, agriculture. Thus, the percentage for judicial application of EU law is likely to be lower than the percentage of the overall amount of implementing legislation. On the other hand, the above named potential percentage span of national implementing measures tends to include only implementation of directives and other EU legislation in need of transposition into the national legal system. It does not reflect the national judicial application of regulations and other potential sources of EU law which need not be implemented. At the same time, some of these regulations, especially those relating to judicial cooperation in civil and commercial matters, tend to be applied frequently by national courts. In addition, it also does not take into account the second classical way in which EU law becomes applicable in a national dispute: the situation of conflict, in which national rules enter into conflict with EU law, typically with EU primary law (one of the four freedoms).

What then can be the final estimate? If we were to take as a starting point the lowest available percentages suggested, which would lie around 10 per cent, thus also accounting for the sector-specific differentiation in legislative versus judicial use of national implementing laws, and were to slightly increase this figure to account for instances of direct application of regulations and potential other sources of EU law at the national level, then even on a very sober estimate, one still lands in the area of approximately (p. 644) 10 to 15 per cent. In other words, it may be suggested that, roughly, at least one in eight cases decided at national level is a case in which EU law is applicable and the national law can thus be assumed to be, at least to some degree, Europeanized. In all these instances, the case is materially within the scope of national application of EU law, and EU law should be taken into account.

Let us therefore assume that EU law is applicable in at least one in every eight cases decided at the national level. If computed against the figures already mentioned relating to the number of cases decided annually by national courts in the Member States, this amounts to several millions of cases in all the courts of Member States and tens of thousands of decisions in courts of last instance. The former have the opportunity to submit requests for preliminary rulings to the Court of Justice, the latter are under an obligation to do so, provided none of the exceptions to the duty to make a reference under Article 267(3) TFEU are applicable. Against such assumptions, a look at the annual statistics of the Court of Justice tells us that in 2010, the Court received 385 requests for a preliminary ruling submitted by national courts; in 2011 it was 423; in 2012 it was 404; and in 2013 the figure was 450.
Where are the zeros behind the figures for preliminary rulings? Even when allowing for the (very unlikely) assumption that the existing EU legislation and previous case law of the Court of Justice are both absolutely clear and understandable, providing seamless guidance in all areas and issues already adjudicated upon, so that national courts are well able to apply it flawlessly by themselves, and also accepting an extremely generous understanding of when an issue of interpretation of EU law is clear and obvious, there still remains a sheer discrepancy in the order of magnitude of the numbers presented. Millions of EU cases in all national courts, and tens of thousands of cases in courts of last instance, generate just few hundred requests for preliminary rulings annually.

Two approaches can be taken to interpreting these numbers. First, reverting to the traditional constructionist wave of institutional optimism, a number of weak spots (p. 645) in the very rough calculation just carried out may be easily identified in order to discard it as mistaken and reaffirm the orthodoxy. National courts have embraced their mandate as Union courts and the flourishing dialogue within the preliminary ruling procedure is the evidence of this success. The long overdue explanation within the orthodoxy is, however, how it is possible amongst other things that such an unremitting success has generated such a meagre docket for the Court of Justice over the years and that a considerable number of these docket cases essentially come from the same ‘usual suspects’ within just some Member States. To push the same line of institutional optimism even further, it could even be suggested that it is in fact because national courts have mastered EU law and understand the special character of the preliminary ruling procedure that they refrain from using it with respect to interpretative problems of lesser importance. However, a quick look at the types of cases submitted to the Court renders such a position untenable, not to speak of a skim through national decisions involving EU law.

Second, one might accept that although such an illustrative calculation has a number of flaws, it nevertheless, in a way, reflects a genuine issue: namely, that the often invoked ‘Europeanization’ of the national courts might be more assumed than real. If the latter explanation is embraced, then one cannot therefore but join in the conclusion that: ‘The future of the European judiciary very much depends on what we know about the effects of Europeanization on domestic courts ... The time is ripe for in-depth, comparative investigation on Europe’s most dynamic hybrid, Euro-domestic courts. Scholars wanted.’

3. Measuring Europeanization: The Method

Even within the narrowly defined top-down category of Europeanization, measuring implementation and compliance remains difficult. Carrying out larger empirical studies similar to those outlined in the previous two sections carries with it a number of methodological problems. This section sets out five of them.

First, is the study of Europeanization to be limited to the national reception of mandatory EU law, or is it to also include voluntary adoption of EU rules outside of what is strictly required? This issue might be of particular importance when looking at the Europeanization of institutions, procedures, or methods and know-how, which are (p. 646) unlikely to be imposed by a decree, but rather gradually taken on following a non-mandatory inspiration and exchange between the levels.

Second, is Europeanization supposed to be the result of an advised choice of the recipient, or may it include also accidental, not pre-meditated, inspiration and copying? Seemingly similar results might come about not as the outcome of an intentional choice, but rather as the result of mimetic process, brought about naturally by similar external pressures and environment, or even pure accidents.
Both of these problems arise, even within the narrow, top-down Europeanization category. Their taking into account is capable of eliminating false positives, i.e., instances of ‘Europeanization’ when there is in fact none or it is just very tenuous and distant. To provide one example: assume that a regional administrative court in a Member State X starts one day structuring its decisions in numbered paragraphs. On the face of it, the observer could assume that the administrative court just copied the style of the Court of Justice of the EU that has been structuring its decisions in this way since late 1970s, or the style of the ECtHR in fact, which structures its decisions in a similar way. On this basis, the observer might suggest that the judicial style in the Member State X has become more ‘Europeanized’.

However, a putative instance of voluntary and intentional Europeanization of similar sort might be quickly proven wrong once it becomes apparent that the change at the regional administrative court was in fact imposed by the national supreme administrative court via a new practice statement, applicable to all administrative courts in the country, and that the judges at the regional administrative court hardly ever read any EU law or the case law of the ECtHR. Moreover, when the supreme administrative court was drafting the relevant practice statement, it did so because the entire system of publications of decisions in administrative justice was being put online into a central electronic database. In order for a decision to be uploaded into the database, each decision must have the same format with pre-defined fields. Cross-references are possible only with paragraph numbers. Thus, what appeared to be an instance of ‘Europeanization’ at first sight, is in fact an independent choice of the national court in question brought about by similar functional needs, namely the establishment of electronic court reports, not an advised choice to copy from the European level.

Third, connected to the previous example is the establishment of causality in Europeanization research. Again, seeming similarity in outcomes without deeper analysis of causes might be quickly mistaken for influence, particularly in the multi-actor and multi-level nature of the European exchanges. The third example made in the introduction to this chapter can be used as an example here: the judicial council model was indeed promoted by the EU as part of the pre-accession conditionality and (p. 647) ‘Europeanization package’ for the Central and Eastern European candidate countries. However, the model itself was initially elaborated and promoted by the Council of Europe’s institutions. Equally, there was also some horizontal inspiration going on, with the countries contemplating the adoption of such a model getting inspired from comparative studies and influence coming from Italy or France. Establishing causality in such a bundle of influences might therefore be extremely difficult in practice, further enhanced by the fact that the national rhetoric accompanying such changes may often limit itself to the universal argument ‘Brussels wills it’, even if Brussels wishes nothing of the (exact) sort.

Fourth, what does it mean precisely that a Member State has transposed or implemented an impulse from the European level? The cases used in the introduction to this chapter provide again ample examples in this regard. What if Member State A introduces a judicial council following the European recommendation and best practices, but considerably adapts the original model while doing so? What if it provides only for a weak judicial council, i.e., a sort of a council ‘light’, perhaps even one in which the judges are in the minority? Similarly, what if Member State B starts advertising all vacancies arising at the European Courts, but because it wishes to send only top judges to Luxembourg or Strasbourg, it allows only for applications coming from within the national supreme jurisdictions, and not for open calls?

Can both of these cases still be labelled as ‘implementing’, even if the institutional structure on the recipient side is altered considerably, so that there might eventually be just a label left? In similar cases, implementation is always a matter of degree and to some extent subjective judgment, hardly a binary exercise in deciding just implemented/non-
implemented. However, if establishing the scale in the degree of implementation is allowed, where is the boundary? How much or how little is (not) enough?

Even if zooming in on the implementation of the most frequent EU law source studied, the directives, the same type of assessment does not become much easier. Starting with the mere *procedural* side of the transposition process, the ways in which a directive is implemented may be strikingly different. The Citizens Rights Directive outlined in the introduction to this chapter might provide an example in this regard. As far as its transposition is concerned, it would appear that, for example, Portugal has implemented the entire directive by only one national legislative instrument, whereas other Member States used a number of national instruments. Lithuania, for example, indicates as many as fifty-three various national legislative instruments that are said to be implementing (p. 648) the directive. Can such a striking diversity in procedure ever produce the same outcomes?

Fifth, as far as the substance is concerned, whether or not a directive or any other EU measure was duly transposed on the national level might be approached formally or functionally. The *formal* assessment focusses on the more or less literal transcription of all the mandatory provisions of a directive into the national law. Certainly necessary as a starting point, such an exercise may nonetheless quickly degenerate into mechanical ticking of boxes, with the reviewer being satisfied if each provision of a directive put into a box in the left column (EU law) has a corresponding match in a box at the right (national law), without checking the genuine state of the law in the Member State. The *functional* assessment is more concerned with the operation and effects of the rules and perhaps more relaxed as to whether or not each individual provision has been meticulously transcribed into the national law. In sum, the difference is one of ‘law in books’ as opposed to ‘law in action’.

It is no secret that because of the inherent complexity and difficulty of a comparative study of ‘law in action’, a number of implementation studies remain a ‘law in books’ exercise. Intriguingly, perhaps for not dissimilar reasons, the same can be also said of the approach of the European Commission when monitoring the (non-)implementation of directives and other EU law. Judging at least from the type of cases the Commission has been bringing to the Court of Justice in recent years under Article 258 TFEU—i.e., in the framework of the infringement procedure—the majority of these cases are a purely formal exercise, based on the absence of transposition and its notification. Or, put more diplomatically in the Commission’s own terms, the Commission’s priority is reducing late transposition, with the question of transposition quality and application reality of those measures nominally transposed not being in the limelight.

To mention just one example of this ‘formal’ approach: by an action lodged at the Court of Justice on 14 November 2007, the Commission brought the Czech Republic before the Court, seeking the declaration that ‘in so far as Czech domestic legislation reserves the exercise of the post of captain of a ship flying the Czech flag to persons with Czech nationality, the Czech Republic has failed to fulfil its obligations under article 39 of the EC Treaty’. The action stirred quite some interest, since the Czech Republic is a land-locked country without any maritime fleet and with no discernible desire of having one in the future. There is no doubt that formally, the Commission was entirely correct: national laws must be in compliance with EU provisions, even if they are in fact not applicable. However, that is precisely the point: is the formal checking of transposition status of similar kinds of legislation the key problem of the (p. 649) internal market which the Commission should really be spending its time and energy on? In a similar vein, the formal and perhaps somewhat lost spirit of the Article 258 TFEU procedure has also been critically commented upon recently by AG Sharpston in her Opinion in *Commission v Lithuania*.63
In sum, genuine implementation and corresponding real Europeanization of national laws might be something different than mechanical transcription into the national law, whether examined academically or administratively. Measuring and assessing Europeanization is by necessity an exercise in reductionism. It should nonetheless not be allowed to degenerate into a purely formal, mechanical checking of whether or not the relevant EU rules have been mirrored on the national level. It ought to be concerned also with their genuine operation and application.

4. Europeanization: The Outcomes and the Paradoxes

Finally, in conclusion to the discussion of the Europeanization in its narrow sense, three overarching issues concerning the outcome of the process will be discussed in this section. First, there is the implicit assumption concerning convergence. Ever since the narrative of ‘integration through law’ had taken root in EU legal studies, but arguably even before in the context of comparative law and international law debate, Europeanization, in this dimension close to the notions of harmonization or at least approximation of laws, has implied convergence of national laws. It represents, in a way, the quintessence of the EU, its mandate, its operation: to establish common rules and thereby bring its members together. The impact of the EU on the national level is supposed to be the convergence, the gradual approximation of the laws of the Member States.

The reality, however, might be more varied. If assessed empirically, the greatest degree of convergence that is apparently being achieved could be classified as mixed results: there is some convergence but the results on the ground are more diverse than expected. What is the same are the European impulses. There is one and the same EU measure being applied. But, the same central EU stimulus may bring about strikingly different legal regimes on the national level. Naturally, there will always be some convergence, if approached at a sufficient level of abstraction. But, if going (p. 650) deeper, what might be observed is rather a phenomenon of ‘clustered’ convergence or ‘differential Europeanization’.

This is not that surprising perhaps: simply put, the same impetus will cause different reactions in different environments. But this differentiate reaction might occasionally drive the individual recipients even further apart than before, by creating further differentiation. Complex environments react differently to the same impetus. They are non-linear: the smallest difference matters. On the level of an abstract statement, this is hardly surprising. What remains open and unsettled is, however, how much de facto disparity and differentiation there can be in order to still be able to talk of ‘convergence’ and ‘Europeanization’. This is not a normative challenge of the possibility of Europeanization, suggesting that such a degree of convergence of national laws is per se impossible. It is an empirically driven question: at what stage can Europeanization be no longer called Europeanization, since there is so little commonality and convergence? Or, back to the original question: is the notion of Europeanization inextricably linked with convergence so as to say that if the European influence is only causing reactions, without there being, however, any reasonable degree of convergence, then there is no Europeanization of law at all?

Second, connected to the first point and already surfacing in the previous discussion in this section is the issue of depth and surface of the genuine Europeanization. In sum, laws and procedures are certainly changing under the influence of the EU, even massively in administrative law. However, what about their genuine application and enforcement? Moreover, what about the notions, thinking, reasoning, and other elements of legal cultures lying beneath? The more sceptical voices might suggest that such deeper-level elements of national legal cultures are those of real importance. But these are unlikely to change dramatically under the European influence. In this regard, a parallel to the comparative law debate on the required depth of (proper) comparative law research could be made, which ideally ought to encompass not only the formal (p. 651) letter of the rules studied,

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but also their genuine life and application within a legal system. Much of the same debate
and concerns expressed therein applies to comparative implementation research on EU law.

Third, the notion of Europeanization implies transfer of decision-making powers from the
national to the European level. It is believed that more and more issues are bound to be
decided either via positive harmonization in Brussels or via the negative one in
Luxembourg, thus disempowering the national level. To this connect new forms of
governance, based on a network vision of the administration or others, the effect of which
is again dislocating influence and decision-making from the traditional state structures
elsewhere. If pushed to an extreme, one may almost feel the old Marxist prophecies coming
back, with perhaps only the (nation) state withering away, without the corresponding dying
away of the law as well.

It is certainly true that there has been a considerable competence transfer from the
national toward the European or other levels, challenging our late nineteenth century
constitutional vision of the state. However, it does not appear that the state would be
ready to wither away; quite to the contrary. It seems to have gained some new powers and
functions too. The enhanced European and international complexity appears to be in fact
(re)empowering the nation state instead of dissolving it. This suggestion is not based on any
elaborate visions of international negotiations and politics, but focusses more on the life
of the law on the national level in normal day cases. Within those, the last decade or so
witnessed a subtle but powerful change in perception and roles. Today, the EU is no longer
just the empowering institution that allows the interested individuals to dismantle the ‘bad’,
protectionist Member State and thus enhance their individual freedom. Nowadays, it may
be more and more often the ‘old good’ Member State that positions itself as the protector of
its citizens against the ‘evil’ EU, which for instance insists on extraditing (surrendering)
them into another Member State; which wishes to monitor any electronic communication
of any individual; which contemplates other inroads into their privacy; which
believes that having secret EU legislation is a good idea; and so on. It is perhaps no
accident that in a more recent significant case litigated before the Court of Justice,
the more traditional roles have either mixed or reversed, with the Member States positioning
themselves as protecting their citizens against Europe.

Thus, the roles and perceptions might be changing. Far from withering away, a nation state
appears to in fact be prospering in the process of Europeanization. Power transfers also
brought about increased complexity of the legal environment that may eventually give new
functions to the nation state, making it the ‘manager’ of legal complexity, assuming the role
of a ‘filter’ protecting its citizens against the less and less understandable but nonetheless
intrusive European and international rules. Such perception and self-positioning refuels the
nation state’s legitimacy, although perhaps on a different level than traditionally assumed.

D. Europeanization, Writ Large: A Study in Complexity

A qualitative look at the examples presented in the introduction shows that the neat vision
of top-down, one dimensional Europeanization induced by the EU may start cracking, once
more complex cases are analysed in detail. The second introductory example of the
Europeanization of administration of courts in Member States in the form of judicial
councils proves the point. The original institutional ‘template’ was not created on the level
of the EU at all. It was uploaded from some national levels, notably Italy, but also Spain and
France, and taken up by the institutions of the Council of Europe. Once the judicial council
model emerged within the Council of Europe bodies, it was also embraced by the European
Union institutions. The latter started using it as the recommended template for its
candidate countries in Central and Eastern Europe. It became part of the EU pre-accession
reform package for the candidate countries. However, during the time that the ‘European
model’ was being advanced by both European organizations—the Council of Europe as well
as the EU—it has been also further promoted by the countries from where it came, in the
form of horizontal, (p. 653) comparative inspiration. Moreover, the narrative of the judicial council model being the ‘proper’ European model for the administration of justice was also promoted by numerous non-governmental and other civil society actors. In a similar vein, the example of Europeanized procedures for the selection of judges to the European courts also reveals a more complex, multi-actor, and multi-directional picture. True, the most visible novelty in the past years in this regard was the Article 255 Panel introduced by the Treaty of Lisbon that started operating in 2010. However, the requirement that nominations to the ECtHR were to be made subject to open and transparent competition on the national level had been advanced years before also by the bodies of the Council of Europe. Moreover, a number of Member States have already established such open or semi-open competitions before the creation of the Article 255 Panel, either independently, or because they would have tied both processes—i.e., nominations to the CJEU and the ECtHR—together in the same type of national procedure. The examples made thus far offer a broader picture of Europeanization. Such broader notion of Europeanization is not limited, in contrast to the previously outlined narrow one, to one-dimensional top-down influence of the EU on the national level(s). It acknowledges also its bottom-up dimensions, i.e., the influence the national level exercises on the creation of European rules; the horizontal one, i.e., exchanges between the horizontal levels of the Member States; and also various diagonal variations that may be exercised by the effective influence of the European Convention, the case law of the ECtHR, as well as other European or even international bodies. The vision thus becomes multi-actor, multi-directional, and accordingly multi-dimensional.

However, as already explained in section B., what changes with regard to such a notion of Europeanization is the definition of the object of the study and its scope, not the approach, which remains primarily empirical. The narrow vision is more suited for quantitatively analysing outcomes, whereas the broader one for in-depth qualitative studies of the process itself. The narrow definition of Europeanization may not be able to fully account for the process-inherent complexity. It is able to evaluate, in a reductionist and simplified way, the outcomes. On the other hand, the broader definition may be more appropriate for in depth, qualitative, single case studies. Within those, it is able to track down the process of mutual dependency and influence, but precisely because of the multi-directional and multi-inspirational complexity, it has difficulties capturing overall results beyond single cases.

The following parts of this section focus on the three, already outlined, elements of complexity in the broader notion of Europeanization. First, the multi-directional nature of traffic of ideas and influence in Europe today is analysed. Second, the types or areas of potential Europeanization will be revisited, in particular those reaching (p. 654) beyond mere legislation or policy research. Third, few remarks on the actors engaged in the broader vision of Europeanization will be made, stressing the significance of actors other than the EU.

1. The Directions: A Multifaceted Traffic?

In its broader vision, Europeanization may take into account the multi-directional traffic in legal ideas in Europe, accounting not just for their top-down downloading, but also uploading or circulation.87 There is no doubt that the elaboration of the European ‘commonality’ follows more complex patterns than just its ‘immaculate birth’ and announcement at the EU level and later projection into the national sphere. However, if viewed diachronically, it could be assumed that with gradual maturing of the EU legal system and the increase in the amount of legislation and case law, the use of truly comparative inspiration becomes less frequent.88 A system with a sufficient amount of internal authority and inspiration is more likely to become more self-referential.89 In addition, in contrast to the early days of the European integration, carrying a truly
comparative exercise across twenty-eight legal systems is logistically more difficult than studying six or nine of them, as was the case up until 1980s.

In its *vertical* dimension, uses as well as misuses of Europeanization going in either direction (top-down or bottom-up) can be observed. A Member State may *use* the European level for projecting its own laws, policies, or visions onto the others. If a Member State is able to secure the support of other states as well as the institutions of the EU, it will be able to translate its own vision into a piece of EU legislation and thereby effectively impose its legal preferences onto others through Europe. In similar cases, Europeanization in terms of elaboration of a common standard or position will entail both: the uploading for the state or states that already had certain rules, coupled perhaps with some minor modifications, and the downloading for the rest.

The instances of *misuse* of the Europeanization rhetoric for advancing particular causes are perhaps more intriguing. On the national level, they entail either considerable gold-plating or overshooting of the national implementation of measures that are required by Brussels, but not in the precise scope or kind as introduced on the national level.\(^90\) For example, a Member State may introduce national legislation (p. 655) transposing EU consumer protection legislation aimed at restricting certain types of doorstep-selling activities. While doing so, however, the same Member State expands the applicability of the new legislation to not just those specific types of doorstep-selling contracts, but to all consumer contracts, stating that this is required by the EU. Naturally, that is only partly true. More problematically, however, questionable uses of the ‘Brussels wills it’ argument may not only entail considerable ‘over-shooting’, but also instances of the national governments advancing questionable measures that have nothing to do with any EU requirements at all.\(^91\)

However, it is fair to admit that similar questionable uses of ‘Europeanization’ rhetoric cannot be identified only by and in the Member States. On the EU level, the reversed guard of the same rhetoric of ‘common constitutional traditions’ or ‘principles common to the Member States’ might also be occasionally used for advancing ideas or solutions that have little support in any European ‘commonality’. For example, in its decision in *Mangold*, the Court of Justice suggested that the principle of prohibition of discrimination on the basis of age ‘must thus be regarded as a general principle of Community law’, since it flows from ‘constitutional traditions common to the Member States’;\(^92\) while being conspicuously silent as to which exact Member States the Court had in mind in this regard. Following up on the Court’s suggestion, AG Mazák drily remarked in his subsequent Opinion in *Palacios de la Villa* that the only country that expressly provides in its constitution for the principle of prohibition of discrimination on the basis of age appears to be Finland.\(^93\) Certainly, a quintessentially qualitative comparative inspiration in norm creation is not to be controlled by a headcount of the number of Member States in which certain provisions or principles exist. At the same time, the ‘commonality’ rhetoric to justify a result unwarranted by the formal argument invoked might be questioned as an extreme heading in the other direction.

There is, however, also a significant *horizontal* dimension to the process of creation of ‘Europeanized’ solutions that tends to be underestimated. First, there has always been a fair degree of horizontal traffic in ideas in Europe, perhaps somewhat hidden under the heading of comparative rather than European law. It may be considerable even today, in particular in a number of European countries that are in a ‘periphery-centre’ relationship to some larger jurisdictions.\(^94\) Naturally, whether such type of horizontal inspiration may eventually lead to Europeanization, or rather to ‘clusterization’ within Europe, may be discussed with regard to individual examples or areas of public law.
Second, the horizontal dimension to the implementation or realization of EU law itself has always been present and it is becoming increasingly important. Often, EU rules set just minimal (substantive) requirements to be achieved, but leave the procedure or institutional structures largely untouched. When difficulties in designing procedural or other frameworks in realizing EU requirements arise, the first natural direction of an advised Member State to look is into another Member State(s) that has already successfully implemented the same directive or other source of EU law.\footnote{95}

Furthermore, in the course of the last decade or so, there has been a veritable spree of horizontal enforcement mechanisms in administrative, criminal, and civil matters. Since the Amsterdam Treaty, secondary law ‘flesh’ started being added to the Treaty bones of ‘an area of freedom, security and justice without internal frontiers’ (today Article 3(2) TEU), in which not only goods and other means of productions can circulate freely, but also judgments and administrative decisions. It may be open to debate whether a number of horizontal enforcement mechanisms in administrative\footnote{96} or criminal matters\footnote{97} have lived up to this ideal. For example, in recent decisions relating to the common asylum (international protection) system, both the ECtHR\footnote{98} as well as the Court of Justice\footnote{99} were forced to conclude that some Member States do not live up to that expectation, thus negating the very idea on which a system of horizontal mutual trust is to be built. Be that as it may, it is clear that the rise of the mutual enforcement regimes in the past years brought the horizontal dimension of implementation of EU law very much to the fore.

Finally, in some cases, a diagonal process of Europeanization could also be envisaged. This type covers hybrid situations in which one of the two European systems (or, as a matter of fact, any other European or international organization) is ‘promoting’ the solution or approaches adopted in the other one. They both act in synergy in order (p. 657) to bring about certain change at the national level. The already discussed examples of Europeanization of judicial councils or the selection of judges to European courts hint at such effects. Furthermore, the voluntary adaptation of national legal systems to either of the European systems, the EU or the ECHR, outside the scope of application of the respective system could also be labelled as a type of top-down, but not strictly speaking vertical, type of Europeanization.\footnote{100}

2. The Types: Beyond Rules and Procedures

More in-depth qualitative analyses are needed in order to access Europeanization in terms of principles, approaches, reasoning styles, or legal thinking. Such ‘deeper level’ Europeanization appears to be much more limited.\footnote{101} To provide a succinct illustration: the French constitutional law scholarship might be said to be more open to comparative studies and intellectual exchange today,\footnote{102} but that certainly does not mean that such increased substantive exchange would have any discernible impact on its institutions, culture, or internal thinking about constitutional law, including for example the rather rigidly perceived obligation of structuring scientific texts in public law in a very peculiar way (the (in)famous ‘\textit{plan en deux parties}’).\footnote{103}

Moreover, Europeanization of legal institutions, notions, and thinking defies in most cases the logic of a clear trajectory, the passing on of a neat model, be it top-down or in whatever other direction. What is being passed on is, at the same time, being modified, amended, and contextualized, often to the extent that a critical observer might start wondering whether the ensuing ‘product’ received is still a copy of the original model or already a new creature in its own right. For example, one of the well-known examples of ‘Europeanized’ way of thinking and reasoning in law is the principle of proportionality. It is now believed to have even transcended the European stage and have become a ‘global’ principle of constitutional law.\footnote{104} When looking, however, at the proportionality principles in greater detail, we note considerable differences in the way it is spelled out and applied: in some jurisdictions, it is just a two-prong test bordering on mere rationality or reasonableness,\footnote{105} in others, it is the
heavy three-prong German-style weighting that any contested piece of legislation has difficulties (p. 658) surviving.\textsuperscript{106} Are all these in fact just variations of the same principle? Moreover, can the principle be said to be ‘Europeanized’ if the European courts (the CJEU and the ECtHR) themselves use differently worded tests of proportionality, with the CJEU occasionally diverging even internally on whether proportionality is supposed to be a two or three prong test?\textsuperscript{107}

A deeper Europeanization of legal method or thinking would ideally be accompanied by the emergence of a truly European legal scholarship. However, with regard to the contemporary European public law scholarship (constitutional and administrative law), there appear to be just occasional hints of a genuinely European, transnational scholarship, rather far from a genuine science of European public law. The situation in legal education is similar, if not even worse. Both constitutional and administrative law keep being taught as distinctly national subjects in law schools across Europe.\textsuperscript{108} Although a number of national reports in the same volumes provided indication of some degree of national openness to a comparative exchange in both constitutional and administrative law, ‘Europeanization’ of the national scholarship may not be welcomed universally. It can be observed also, with some regret, as amounting to the dilution or even to the abandonment of national constitutional and intellectual specificity. Thus, for example, with regard to the Austrian constitutional scholarship, Alexander Somek noted that the ‘Europeanization’ of Austrian constitutional law scholarship meant rather intellectual Germanization. It was marked by taking over the German expansionist vision of a ‘total constitution’, in which any case will end up in a post-positivist balancing exercise of individual cases, and by abandoning efforts for a distinctly Austrian positivist alternative, the germs of which could be said to be previously present.\textsuperscript{109}

Finally, it is only logical that the state of the European public law scholarship is intertwined with the personal and institutional dimension of contemporary European legal science. Article 179(1) TFEU foresees the establishment of a ‘European research area in which researchers, scientific knowledge and technology circulate freely’. Empirically speaking, however, the contemporary reality in legal scholarship lags behind this normative ideal, certainly with regard to the free circulation of researchers (p. 659) and law teachers. With the notable exceptions of the UK, Ireland, and partially the Netherlands, with some further isolated islands of ‘positive deviation’ in terms of individual institutions in other European countries, most of the national law faculties remain in fact closed to foreign professors. Naturally, with the discrimination on the basis of nationality being prohibited within the Union, the closure is never nationality-based. The reasons for such seclusion tend to be indirect and structural, relating to the way university or research personnel is being hired, the sets of qualifications required, the nationally defined ‘merit’ and expectations in a candidate, and naturally, also the issue of language, even if the latter factor might be becoming less important in some systems.

To provide an illustration of the phenomenon: in its comprehensive report entitled ‘Perspektiven der Rechtswissenschaft in Deutschland. Situation, Analysen, Empfehlungen’ of November 2012, the German Wissenschaftsrat (an advisory body to the Federal Government and the governments of the states) was bound to note that ‘When compared to other disciplines, the number of foreign professors [in German universities and in law—note author] appears particularly small: While more than 2 per cent of law professors are foreign nationals, they account for almost 7 per cent of professors in the subject group languages, literatures and cultural studies, and 6 per cent across all disciplines’.\textsuperscript{110} What the report is silent on is how many of these already few foreign professors would have in fact studied in Germany and just kept their foreign (perhaps just even Austrian or Swiss) passport. Such figures appear to be in dissonance with the proclaimed ‘Europeanization’ and ‘internationalization’ of the law and legal science, stressed and repeated throughout the
leading the Wissenschaftsrat to conclude that greater internationalization of the German law faculties is needed.

However, it is fair to add that compared to some other European countries, the German academia is ‘relatively’ open. Germany was used as an illustrative example simply because of the availability of solid recent data. The original proposition and the general conclusion of this section thus remain very simple: genuine European public law scholarship is unlikely to emerge if the academia that is supposed to generate it is not truly European.

3. The Actors: Of Synergies and Networks

Finally, the broader conception of Europeanization also acknowledges the diversity of actors that participate in inducing the change on the national level, sometimes (p. 660) even more efficiently than the EU institutions themselves. Given the numbers of such actors, no comprehensive list can be naturally provided at this point. Only three general observations will be made in this regard.

First, even the traditional, classic actors may proceed in a non-traditional way. They may start issuing different types or quality of impulses than before. For example, in recent years, a distinct preference of the EU institutions for adopting and coordinating policies through soft law instead of binding legal instruments has been noted, with the Open Method of Coordination becoming the buzzword of the day.

Second, the synergic, concomitant way of various European or international policies or rules on the national level is worthy of greater recognition and exploration. Zooming in, for example, on to the relationship between the ECtHR and CJEU, legal scholarship frequently portrays their relationship as one of tensions, one of conflict. Even the slightest divergences in the case law of the two courts are dissected with great precision, coupled with gloomy announcements of judicial battles over the last word, inconsistencies, and gaps in the fundamental rights protection in Europe and so on. What if, however, in reality, both European courts as well as other European institutions work much more often in synergy, jointly bringing about change on the national level, mutually reinforcing each other? Again, the example of the judicial council model of administration of the judicaries, introduced in the introduction to this chapter, is a prime example in this regard. The Council of Europe institutions elaborated a model, whereupon the EU institutions took it up and started pushing forward, coming with money and the pre-accession conditionality.

Third, a distinct rise of networks as an actor in a bottom-up type of Europeanization might be noted in the past decade or two. Such networks, often built up as horizontal ones—with, but sometimes even without, the EU institutions participating—influence policy or practice alignment amongst their members. If establishing commonality of some degree might be understood as the process of Europeanization, then networks of a similar kind are de facto its proponents and actors.

The recent spree of judicial networks might provide an example in this respect. There are, broadly speaking, two types of judicial networks. First, there are the EU-sponsored and created ones that emerged as a bi-product and instrument of establishing various mutual recognition and horizontal enforcement regimes. Second, perhaps more interestingly, there are those bottom-up networks generated (p. 661) by national judges themselves. They define themselves by a given type of jurisdiction, or more specifically by a given field of law.

The latter kind of bottom-up networks are turning into important players. Previously disparate national voices unite. Their operation may, furthermore, go in either direction: enhancing as well as resisting Europeanization in terms of top-down imposed changes from the EU institutions. With regard to the former direction, i.e., the Europeanization enhancement effect, networks of one’s peers generate a strong socializing potential, a feeling of commonality. They may also be of assistance in fleshing out, at first sight, the
perhaps minor but certainly important details that may often be lacking in the new rules or policies coming from Brussels or Luxembourg, which are however vital for their sensible operation on the national level. More importantly, however, similar networks are also agenda setters in their own right. Their interests may be articulated independently or even run against those of the EU institutions.

E. Europeanization, Comparative Law, and Legal Scholarship

Within the previous two sections, our understanding of Europeanization and the notion of a European public law was different in its scope (narrow versus broad), but largely similar as to its approach: the study of the process of Europeanization was carried out primarily empirically, as tracking down of mutual influence and change between the European and the national levels. The notion of Europeanization may, however, also be understood differently, as an essentially normative, constructive endeavour, whereby European public law is created. The key question thus becomes not primarily ‘what is already out there’, but rather what ought to be put in place and how it should look.

In this latter perception, European public law may be understood as a composite system, including not just EU law in the narrower sense, but also the ECHR and the case law of the ECTHR, the laws, at least those ‘Europeanized’, at the level of the Member States, and, above all, European legal scholarship. The latter one, however, needs to be transformed, in order to fulfil its creative role Europe-wide: a mental and methodological transformation has to take place, with the focus shifting from a largely dogmatic and descriptive study of national public law to a deeper, comparative, and trans-European study. Similar types of legal scholarship ought to be able to generate a renewed ius commune in and for Europe. The latter would then be taught at law schools, in a way not unlike the top US law schools, in which it is primarily the common principles and not the posited law of any one state that is being studied.

There is no doubt that for such a vision of a European public law and the overall Europeanization of the law, comparative analysis of the existing laws, structures, and legal thinking becomes of primordial importance. Such bottom-up direction of Europeanization lends it credibility and legitimacy, as well as a reservoir of tried and tested ideas. In a way, such normative goal for a ‘return back’ to the common European whole, whatever it might be called, had always formed a part of the modern comparative law. The birth of modern comparative law by the end of the nineteenth century, at and around the 1900 Paris Congress, is portrayed as an effort to recover from the blow that the nationalization of the law at the beginning of the nineteenth century dealt to the idea of a common whole. One of the key roles (if not the key role) of comparative law was to keep alive the belief that law is an international science, even after the legal universe on the European Continent became divided up along national lines. This division, following the changes in political authority and also the national codifications, impacted all dimensions of legal life: legal scholarship, legal education, and also the judicial application of the law.

The idea of comparative law as a constructive tool of legal unification and the belief that there can be a ‘ius commune’ of some sort that is independent of the state has been, for historical reasons, particularly strong in the German scholarship. The reason for it might not be only the outspoken idealism and theory-oriented thinking, but also experience: the tradition of (comparative) law as a constructive scholarly enterprise became further entrenched in the nineteenth century before German unification, where intra- as well as extra-German comparison was a tool for laying the foundations of later federal German law after 1871.
For a fair part of its modern history, comparative law in Europe has had, however, a distinct private, not public law orientation. Leaving aside for the moment the definitional issues of where precisely the public/private law divide lies in what European system, and reducing ‘public law’ to, arguably, its core areas of constitutional and administrative law, this belief might have some real foundations. One of the defining elements of the modern comparative law dating back to 1900 Paris Congress already is its private law orientation. Conversely, in the traditional comparative law debates, public law was said to be unique and hardly transferable. Public law arrangements are designed in dialogue with the past and with the future and thus heavily politicized. They reflect the history, the values, and choices of each society. They are therefore likely to be nationally specific and not prone to assimilation or transfers. On the other hand, private law has been believed to be rather governed by non-political, economic, and pragmatic problem-solving logic, catering for needs that are largely similar in all industrialized, Western societies. As has been suggested, it is highly unlikely that there would be one nation-specific form of civil liability insurance; but it is highly likely that there would be nation-specific regimes of social insurance and welfare schemes.

Thus, stated in a nutshell, ‘Societies largely invent their constitutions, their political and administrative systems, even in these days their economies: but their private law is nearly always taken from others.’

It is interesting to observe that in EU law and in the process of Europeanization of national laws launched within the European structures, the opposite visions and rhetoric has been prevailing for a long time. The majority of legal acts produced within the (p. 664) early EEC as well as the Council of Europe and later to be implemented by its various Member States or signatory parties functionally fall into the area of public, often administrative law. This fact even generated the sometimes still represented belief that EU law is just administrative law relating to trade and it is the private law which represents the safe harbour for national legislative choices and national autonomy. In the context of EU law, the opposite arguments for the national specificity of public and private law are being advanced, with private law being nation-specific and public law being Euro-harmonized.

Assessing the contemporary balance in comparative law scholarship in Europe remains difficult. On the one hand, it is true that most of extant EU law on the national level, functionally falls within the areas that would be referred to as public law in most Member States’ legal systems. Thus it is, in particular, administrative law that is likely to be most Europeanized. On the other hand, the administrative law scholarship in Europe remains largely dogmatic and national, oriented more on the solving of practical day-to-day problems than larger comparative works of deeper-reaching systemization of European administrative law in the broader sense. From this point of view, it could be argued that in some respects, European private law scholarship is further ahead, in particular when taking into account larger scale trans-European academic projects on the common principles of the law of contract, tort, and European private law in general.

In sum, for the prospective realization of a genuinely European legal space, the contribution of comparative legal scholarship is indispensable. It is true that empirically speaking, the realization of such an idea remains quite distant. At the same time, however, the evolution of the European scholarship over the last decade or more harbours already a gift of promise: new journals, new textbooks, new societies, and networks are being established, both in public as well as in private law, which do no longer perceive ‘European law’ as being just EU institutional law, and the process of ‘Europeanization’ the faithful implementation of individual EU law measures. In institutional terms, a number of universities or research institutions have put up serious efforts for transforming their approach from national oriented exegesis to genuine (p. 665) places of European learning and study, in which more
general, comparative work and knowledge is valued more than the flawless and quick listing of defining elements of the (naturally, national) administrative act.

This evolution certainly does not mean that the national constitutional or administrative practice would no longer need the help and guidance of a solid layer of national positivistic, and to a certain extent naturally dogmatic, public law scholarship.\textsuperscript{137} The assistance of such scholarship for the legal practice is crucial, at least in those European countries that (openly)\textsuperscript{138} value it. This does not prevent, however, an internal differentiation among the universities or research institutions within a state or even within one and the same university. As there might be an internally differentiated ‘multi-speed Europe’, there can certainly be also ‘multi-speed’ universities, or rather universities and research institutions aiming at different audiences: the one engaging more within the European discourse, whereas the other more attentive to the national one.\textsuperscript{139}

**F. Europeanization, Fast-track: The Experience of a New Europe**

No comprehensive introduction into the process of Europeanization could be attempted without briefly mentioning its most significant example of the past decades, recently turning more and more into its challenge: the massive legal and social change induced by Europe and in the name of Europe in the candidate countries in Central and Eastern Europe (CEE), which joined the EU in 2004, as well as in 2007 and 2013.\textsuperscript{140} (p. 666) There have of course been EU enlargements before the ‘big bang’ enlargement in 2004. What was different with respect to the 2004 and 2007 enlargement, in which ten and subsequently two new Member States mostly from the former Eastern bloc joined, was the sheer scope and breadth of the need for adaptation on the part of the candidate countries, as well as, eventually, the EU itself. In terms of Europeanization as the study of impact of the EU on domestic rules, institutions, or society, the 2004 enlargement can be seen as a condensed case study for the entire process as such. The difference was therefore not of one kind, but intensity and speed. The EU induced changes—that the old Member States have had the chance to ‘digest’ gradually for decades—to be carried out and implemented within just several years in the candidate countries. In addition, since most of the new Member States belonged to the former Eastern Bloc, the amount of the adaptation and changes necessary were further multiplied by the fact that these countries were changing not merely sizeable amounts of ‘technical’ rules within essentially capitalist and liberal market democracy, as would be the case if for example Norway, Switzerland, or Iceland decided to join the EU: the post-Communist countries were, a few years before or even simultaneously to the EU approximation process, changing their entire social and political structures and institutions.

Such profound changes have of course generated a considerable amount of literature, in particular discussing and testing the degree of Europeanization as the product of legal approximation and the pre-accession conditionality in various areas.\textsuperscript{141} It remains to be seen, however, how (un)successful the process of ‘fast-track Europeanization’ has genuinely been in these countries and how far it produced durable change that may last even after the carrots and sticks of the pre-accession conditionality have been removed. The more recent signals coming from the Central and Southern-Eastern European region are not overwhelmingly optimistic. The Hungarian sliding toward authoritarianism has been identified and widely discussed from various angles.\textsuperscript{142} Within the ado created around Hungary, however, it might be less apparent that the recent state of Slovenia might be qualified as a ‘failed democracy’;\textsuperscript{143} that Bulgaria and Rumania, the countries that arguably joined a bit too early, are not really improving in terms of institution and rule of law building;\textsuperscript{144} and that across the region generally, (p. 667) including the Czech Republic and Slovakia, questionable populism is gaining ground, often involving challenges or outright
rejections of the EU and the already accomplished ‘Europeanization’. Finally, most recent developments in Poland are deeply troublesome.

More than ten years since the 2004 accession, the time might be ripe for deeper comparative studies in genuine Europeanization within the CEE region, critically and empirically revisiting the beliefs and convictions about the ‘transformative power of the EU’ voiced before and around 2004 in view of genuine results on the ground. Similar comparative research exercise in ‘Europeanization as applied’ might not be of interest only to the ‘new’ Member States, as far as the division between ‘old’ and ‘new’ Member States can still be employed after ten years. Such research would further help considerably in understanding the EU of today. The joinder of the new Member States has not only meant that the EU might have transformed those states somewhat, but that it has been itself considerably transformed by the enlargements and the new Member States. For example, how has EU legislative activity changed since 2004? How did the decision-making and voting patterns change in the European Parliament, in the Council, or even more interestingly in the Court of Justice after 2004 and 2007, once the number of the members of the latter institution almost doubled?

Understanding the newcomers means better understanding the new Union, its views, visions, and values. Europeanization of the ‘East’ brought about not only changes on the national level in the East, but gradually also changes in the ‘West’, where the introduction of common rules on the European level is bound to backfire eventually. This suggestion might be supported by examples drawn from the case law of the ECTHR following its ‘Eastern Enlargement’ that had already occurred in the 1990s. The Court that needs to set the same requirements for very different cultural settings might, for example, scrutinize judicial or legal institutions with a more demanding eye, as far as their external appearance and solid institutional safeguards are concerned, than would have been necessary beforehand. However, once the more stringent requirements with regard to, for example, institutional separation and the external appearance of institutions are imposed on the East, they will apply (p. 668) also to the West. They make it politically and diplomatically difficult to explain why certain institutions are ‘allowed’ in the West but are ‘not allowed’ in the East. It is in this way that the incoming East first modifies the European level and later the West.

Zooming in on the level of the new Member States, what were the parameters of the Europeanization processes there? Naturally, this short introduction to the theme can hardly offer any deep reaching study. However, as far as can be generalized, in particular with regard to structural elements of the process of Europeanization on the ground some ten years after the 2004 enlargement, three tentative suggestions might be offered, with one caveat: the results of the degree of Europeanization are likely to be different in individual new Member States, largely dependent on the pre-existent legal and administrative culture that pre-date the EU accession, often even the Communist rule. Even if Central and Eastern Europe is portrayed as a block, it most certainly is not.

First, examining the results of the massive societal change before and at the moment of the 2004 enlargement puts into focus the limits of ‘absorption capacity’ of any legal order or society. If the influx of new rules, new procedures, and new institutions becomes too frequent, the novelty no longer stimulates excitement and curiosity, but leads to disregard and norm skepticism. Europeanization in terms of the incorporation of all the acquis communautaire in the few years before the 2004 accession (p. 669) meant the obligation to implement at least some 80,000 pages of EU secondary law, together with primary law, the case law of the Court of Justice, and soft law. In practical terms, this meant that before and around the accession, in the candidate countries or by then already new Member States, all the key laws or codes have been amended several times a year, sometimes even more. In the opinion of the former vice-president of the Czech Ústavní soud (Constitutional Court), Pavel Holländer, the speed and frequency of the new legislation and amendments to
the new legislation amounted to a ‘deconstruction’ of the legal order and information suffocation.

Second, in view of the previous point, it will not come as a surprise that such ‘fast-track Europeanization’ yields only limited and rather superficial results, with the new rules often remaining on paper only. As the reality in some CEE countries vividly reminds us, adopting laws and regulations is something rather different, sometimes even worlds apart, from embracing their spirit, culture, and true meaning. Thus, EU rules on, for example, gender equality and equal pay for equal work, or public participation in environmental matters, may have been formally transposed and the appropriate transposition box ticked off following the submission of the relevant concordance or transposition tables to the European Commission. This says, however, little about the enforcement of such rules on the ground. The same phenomenon is even more clearly visible when nominally ‘Europeanized’ institutions that look like the European blueprint on paper are to be assessed as to their genuine operation. The real internal culture of such institutions might be quite different from the original model, ranging from varieties of amusing but still rather harmless ‘cargo cults’ to outright hijacking and misuse of the new institution.

Third, all this leads to an extreme and acute variety of rule cynicism, and an instrumental understanding of the law, still prevailing in a number of CEE countries. This becomes translated onto the most basic ontological level. With similar cultural and historical ‘baggage’, CEE lawyers or judges are bound to have a rather different vision of even basic notions like ‘law’, ‘statute’, or even ‘justice’ compared to their West European counterparts.

All the previous three points have recently also become visible with regard to the backsliding problem on the already achieved ‘Europeanization’ in a number of the new Member States. They open a number of significant questions about the entire process. Was it indeed wise to rush the process that much, achieving certain political momentum for Europe, but at the cost of producing a rather raw ‘Europeanized semi-product’ at its best? Can the EU and the ‘West’ now play at being surprised about the state of the state in some of these countries, pretending they expected more after few years of often superficial pre-accession reforms, or even rather hasty repaint? Can one be really that surprised that paint put over a half corroded fence in a hurry starts peeling off soon? However, on the more positive side, the backsliding of some of its members forces the entire club to think anew about the rules of the club. What are the minimal standards for membership? How can they be enforced?

Whatever the answer to such vexing questions, it is clear that the massive legal and societal transformation under the European lead in the CEE European countries is now over. Leaving aside the rather theoretical question as to when a transition can be said to be over, in terms of social reality, the transformative momentum becomes lost at a certain moment. Regrettably perhaps, the transition in the broader sense is not over once ‘we get there’, but rather when larger scale, often painful legal and other reforms become unfeasible, and the transformation reformist momentum is lost. Arguably, in CEE Europe, this moment came at or soon after the accession to the EU in 2004. At the latest, any remnants of further reformist zeal were effectively terminated with the advent of the economic crisis in 2007–08. Since then, remaining system deficiencies, including those within the judiciaries, simply became the normality. They turned into permanent features of a system. This does not preclude the possibility of remediying one or more of the outstanding deficiencies. These would be, however, individual legal reforms arduously piercing the overall inertia of any system, but no more large scale systemic change driven by the force of the momentum.
G. Conclusions

This chapter outlined and critically discussed three different visions of the notion of Europeanization: narrow-empirical, broader-empirical, and broader-normative. It has shown how these definitions and approaches differ, generating different types of scholarship and research agendas. It was equally suggested that at the heart of the varying perceptions of Europeanization lie different visions of what is European public law and scholarship.

In its broader-normative vision, Europeanization may be seen as a quest for coherence and commonality within a given political unity and community—Europe. Such quest is, in a way, universal to legal scholarship in general. Europeanization is just one of its expressions at a given level. On a smaller scale, the same effort has been carried out for many years by the ‘national’ legal scholarship. Although adherents to broader visions of European public law might look down at some strands of national legal scholarship as being too parochial, good national scholarship may be said to share the same goals: to bring some coherence and unity within often rather disparate and accidental regimes of administrative law created by the national legislator; divergent case law of various administrative courts, might be equally challenging. The goals might be therefore similar. It is just the reference framework that differs.

On a bigger scale, Europeanization might be seen as embedded in a larger picture of ‘internationalization’ or ‘globalization’ of administrative or general public law. If a similar process of the study of commonalities and differences is launched at that level, suggestions for the emergence of ‘international administrative law’, ‘global administrative law’ can be made. Equally, suggestions concerning the existence of international constitutional law or even global constitutionalism may emerge. How far the use of such notions at the present state of the law is justified is open to debate. Yet again, the basic underlying idea may be said to have remained the same—a quest for coherence, this time around, however, on the international or global level, with the reference framework changing again.

Notion-building and their perceptions bear imprints of their time and context. Returning to the European level and looking back at past agendas of studies of the EU and EU law, following the initial focus on the new supranational institutions and their description that was the dominant stream in European studies up until the 1980s came the enhanced interest in the EU’s actual impact on the national levels since 1990s called Europeanization. The interest remains until today. Occasionally, today perhaps more frequently than before, it also comes with negative undertones. Studies in Europeanization or various implementation or impact studies may not appear for understanding and further developing the process, but also for demonstrating how the EU fails, how the ‘common’ is not being established. In addition, national or local differences may be no longer perceived as the ‘temporal noise’ that shall be eventually replaced by the common European. Increasingly, they tend to be jealously guarded and even cherished.

Comparative law and comparative legal scholarship assumes an intriguing dual role in these processes. Traditionally, comparative law has been portrayed as the positive ally and a bit of a servant of EU law. Through comparative analysis, EU law and EU law scholarship generates common principles, the common law of Europe, whatever it might be called. However, as it becomes more and more apparent today, instead of comparative law (in its intra-European dimension) being either superseded or swallowed by EU law, it can also be revived as a tool for defying EU law and the Europeanization in its narrow sense. The purpose of comparative argument changes. In mutual horizontal exchanges or studies,
comparison of national laws is not a tool for creating commonality, but for the re-affirmation of the diversity.164

Finally, why should we care about the empirical study of Europeanization of (public) law within the EU at all? Why is studying the degree of (non-)Europeanization important? Any legal system is normative in its nature. There is, however, a considerable difference between the national legal orders and EU law in terms of what lies beneath this normativity. In national legal orders, the normativity is buttressed up with recognizable constitutional authority on the one hand and hierarchy and coercion on the other. Thus, a positivistic national legal order does not need to be that concerned with non-compliance and the divergence between normativity and factuality. With respect to positivistic and state-centred normative systems, these two levels may be fairly disconnected. Even if the legal ‘should’ says A and real ‘is’ is in fact non-A, the diverging social reality does not affect the validity of the norm. How far can the ‘should’ nonetheless be allowed to deviate from the ‘is’? Of course, any sensible legal system ought to ensure that there are no large gaps between the normative and the real. But sociological challenges to the law based on non-compliance and irresponsiveness of the law are less severe, as there is the ultimate instrument of coercion.

The problem of EU law, but at the same time its nobility and uniqueness, is that in the absence of clear constitutional authority and coercive mechanisms, it is compliance that fuels normativity. The assumed acceptance of EU law in the Member States became part of the normative narrative of what EU law is and why it is. EU law has incorporated Member States’ acceptance of and compliance with EU law into its (p. 673) normative narrative and legitimacy. In other words, at the root of EU law’s ‘should’ is not an original constitutional normative idea, but the actual ‘is’. Thus, where a positivist national legal order relying on a normative underpinning in terms of constitutional authority and ultimate coercion is allowed not to care that much about compliance, EU law faces a dual void: constitutional and coercive. That is why acceptance and compliance ‘on the ground’ matters far more for EU law than it matters for national legal systems. That is also why the genuine life of public law in the Member States and its study in terms of knowing the genuine state of ‘Europeanization’ matter. And who else ought to be engaged in gathering such type of knowledge by comparatively engaging with national legal orders than European public law scholarship worth the name?(p. 674)

Footnotes:

1 I am much obliged to Armin von Bogdandy, Michele Chang, Jeremias Prassl, and Robert Zbíral for their stimulating comments on the draft of this chapter. The usual disclaimer, however, fully applies: all opinions expressed are strictly personal to the author.


3 See, e.g., the recent national reports in Ulla Neergaard and others (eds), Union Citizenship: Development, Impact and Challenges. The XXVI FIDE Congress Publications, Vol 2 (DJOF, Copenhagen, 2014).


Recently see, e.g., the individual contributions in Ulla Neergaard and others (eds), European Legal Method: Paradoxes and Revitalization (DJØF, Copenhagen, 2011) and Ulla Neergaard and Ruth Nielsen (eds), European Legal Method: In a Multi-Level Legal Order (DJØF, Copenhagen, 2012).

Further see earlier in this text, e.g., § 6 in this volume and other chapters/introduction in the volume.


See, e.g., Martin Conway and Kiran Klaus Patel (eds), Europeanization in the Twentieth Century: Historical Approaches (Palgrave Macmillan, Basingstoke, 2010); Gerard Delanty and Chris Rumford, Rethinking Europe: Social Theory and the Implications of Europeanization (Routledge, Oxford, 2005).

For a diachronic overview with regard to the German-speaking legal space, see, e.g., Anna Katharina Mangold, Gemeinschaftsrecht und deutsches Recht (Mohr Siebeck, Tübingen, 2011) observing, at 21–3, the exponential growth of the use of the notion ‘Europäisierung’ in the German legal literature since the 1990s (from 1 instance in 1989 to 81 in 2007).

In detail see F of this chapter.

Kevin Featherstone ‘Introduction: In the Name of Europe’ (n 15) 12; Claudio M Radaelli, ‘The Europeanization of Public Policy’ in Kevin Featherstone and Claudio M Radaelli (eds), The Politics of Europeanization (n 15) 29–32; Paolo Graziano and Maarten P Vink (eds), Europeanization: New Research Agendas (Palgrave Macmillan, Basingstoke, 2007) 7–12, 36–39; Sabine Saurugger, Theoretical Approaches to European Integration (Palgrave Macmillan, Basingstoke, 2014) 124–9.

Or primarily on its Member States; there is also a significant amount of literature that shall be left out of this chapter and that is concerned with the external impact the EU has on its non-members and how (un)successful it is in projecting its norms, values, and legislation outside the internal market, be it in a structured, institutionalized way (through various neighbourhood policies, association agreements, partnerships and so on) or as a ‘soft-power’ by its existence and practices.


Notably Grand Chamber of the ECtHR in Bosphorus Hava Yollari Turizm v Ireland App no 45036/98 (30 June 2005) 156.

For a comprehensive recent introduction see Peter Cane and Herbert M Kritzer (eds), The Oxford Handbook of Empirical Legal Research (OUP, Oxford, 2010).


EU Law on National Legislation: Comparison of the Czech Situation with Other Member States’) (2011) 150 Právník 1049.


28 The House of Commons Library Research Paper 10/62 ‘How Much Legislation Comes from Europe’ (n 25) 24 with respect to the UK; Sylvain Brouard, Olivier Costa, and Thomas König (eds), The Europeanization of Domestic Legislatures (n 25) 224 with respect to Austria, France, Germany, Italy, Luxembourg, Netherlands, and Spain.


30 Thomas König and others, ‘EU Legislative Activities and Domestic Politics’ in Sylvain Brouard, Olivier Costa, and Thomas König (eds), The Europeanization of Domestic Legislatures (n 25) 26–7, suggested that 67.8 per cent of all binding EU legislation adopted between 1984 and 2007 relates to agriculture and fisheries.

31 Sylvain Brouard and others ‘Delors’ Myth: The Scope and Impact of the Europeanization of Law Production’ in Sylvain Brouard, Olivier Costa, and Thomas König (eds), The Europeanization of Domestic Legislatures (n 25).


33 Sylvain Brouard, Olivier Costa, and Thomas König (eds), The Europeanization of Domestic Legislatures (n 25) 23–6.

34 For an overview of the literature see, e.g., Stacy A Nyikos, ‘Courts’ in Paolo Graziano and Maarten P Vink (eds), Europeanization (n 19).


These order of magnitude figures have been obtained by adding up data from tables 4, 8, 10, 16, 24, and 27 contained in the Appendix to the ‘Evaluation of European Judicial Systems’ 4th Report (Edition 2012) collated by the Council of Europe Commission for the Efficiency of Justice on the basis of statistics submitted by its Member States (available at http://www.coe.int/t/dghl/cooperation/cepej, last accessed 15 February 2015).

In the sense of Article 267(3) TFEU. It is, however, clear that the set of national courts, against whose decision there is no judicial remedy under national law in the concrete case in the meaning of Article 267(3) TFEU, is considerably greater. It may also include first or second instance courts if, in the particular proceedings, no further appeal is possible. See further Morten Broberg and Niels Fenger, Preliminary Reference to the European Court of Justice (n 39) 224–30.


One might even add that in contrast to these figures based on computation for 1990s and early 2000s, the Union’s legislative activity of the last decade has considerably expanded further into civil, commercial, and criminal law and thus multiplied its own application in the areas of ‘normal’ judicial business. It can therefore be suggested that the final figure used (10–15 per cent) in respect to the year 2013 is in fact a considerable

From: Oxford Constitutions (http://oxcon.ouplaw.com). (c) Oxford University Press, 2015. All Rights Reserved. date: 07 June 2020
under-estimate. Yet again, what is sought here is just the overall order of magnitude, not exact units.

47 Compare the very varying estimates made by the national supreme administrative courts with respect to the amount of cases involving EU law in their proceedings every year in Annex II to the General Report to the colloquium ‘The Preliminary Reference to the Court of Justice of the European Communities’, organized by the Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union on 20 and 21 May 2002 in Helsinki (available at www.juradmin.eu), including figures like 20 per cent (Germany); 25 per cent (Sweden); or even 33 per cent (Finland) of all cases, on the one hand, and figures like 15 out of 5,000 cases (Greece) or 20–40 out of 3,500 cases (Portugal) decided annually, on the other. It may be submitted that for a national supreme administrative jurisdiction, the more likely estimate is bound to lie in the realm of 20 per cent or more.


53 Stacy A Nyikos, ‘Courts’ (n 19) 194.


55 Further see, e.g., Theofanis Exadaktylos and Claudio M Radaelli (eds), Research Design in European Studies: Establishing Causality in Europeanization (Palgrave Macmillan, Basingstoke, 2012).


57 Contrast, e.g., Opinion no. 10 (2007) of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on the Council for the Judiciary at the service of society of 23 November 2007, categorically
stating in paragraph 18 that within the judicial council model ‘a substantial majority of the members should be judges elected by their peers’.

58 For a general discussion, see, e.g., Sacha Prechal, Directives in EC Law (2nd edn, OUP, Oxford, 2005) ch 1 and 6; G Hohloch (ed.), Richtlinien der EU und ihre Umsetzung in Deutschland und Frankreich (Nomos, Baden-Baden, 2001); or generally Ulf Sverdrup, ‘Implementation’ in Paolo Graziano and Maarten P Vink (eds), Europeanization (n 19).


60 A problem not limited just to directives, but present also in the (less expected) cases of regulations—see further Michal Bobek, ‘Uniform Rights? The Nature of Regulations Revisited’ in Michal Bobek and Jeremias Prassl (eds), Air Passenger Rights: Ten Years On (Hart Publishing, Oxford, 2016).


65 Ever since the 1900 Paris Congress, the idea has been convergence of national laws through comparison that was bound to create differently denoted ‘droit commun’. Further see, e.g., Léontin J Constantinesco, Rechtsvergleichung: Band I (Carl Heymanns, Köln, 1971) 161ff or Reinhard Zimmermann, Die Europäisierung des Privatrechts und die Rechtsvergleichung (De Gruyter, Berlin, 2006) 10ff.

66 See, e.g., Tanja A Börzel and Thomas Risse, ‘Conceptualizing Domestic Impact of Europe’, in Kevin Featherstone and Claudio M Radaelli (eds), The Politics of Europeanization (n 15) 71.

67 For example, in relation to national definition of legal notions under the influence of EU law, Auby and Azoulai distinguish three types of context-dependent reactions: clarification, transformation, or addition to the previously existing notion: Jean-Bernard Auby and Loïc Azoulai, ‘Conclusion générale’ in Jean-Bernard Auby and others (eds), L’influence du droit européen sur les catégories du droit public (Dalloz, Paris, 2010) 987.

68 Ulrich Sedelmeier, ‘Europeanization’ (n 21) 833 generally with respect to policies or, e.g., Peter Bursens, ‘State Structures’ in Paolo Graziano and Maarten P Vink (eds), Europeanization (n 19) 119 with respect to state institutions.

69 See, e.g., Edward N Lorenz, The Essence of Chaos (University College London Press, London, 1993) or James Gleick, Chaos: The Amazing Science of the Unpredictable (Vintage, London, 1998). In contrast to its name— suspicious sounding to a positivist mind—the Chaos Theory does not suggest that there are no rules or no predictability of action. Rather, it maintains that the defining characteristics of complex systems are extreme sensitivity to initial conditions, non-linearity, and the disproportionate relationship between cause and effect. In other words, small things matter a lot: at first sight insignificant differences can have an unpredictable and disproportionate impact.
Notably, e.g., Pierre Legrand, ‘European Legal Systems are not Converging’ (1996) 45 International and Comparative Law Quarterly 52, advancing the argument that the European undue convergence optimism is mistaken since it only superficially focusses on the rules and legislation without taking into account the underlying legal cultures that remain strikingly different. For an introduction into the debate, see e.g., Bruno De Witte, ‘Editorial: The Convergence Debate’ (1996) 3 Maastricht Journal of European & Comparative Law 105.

For examples see illustrative list given earlier (n 9).

E.g., Michel Troper, ‘L’influence du droit européen sur le concepts structurels du droit public français: Introduction’ (n 11) or Matthias Ruffert, ‘Common Principles and National Traditions: Which Perspective for European Administrative Scholarship?’(n 11).


Further, e.g., Loïc Azoulai, ‘L’État’ in Jean-Bernard Auby and others (eds), L’influence du droit européen sur le catégories du droit public (Dalloz, Paris, 2010) 153, inquiring into how much of the traditional definition of state still remains in place under the influence of the EU.


Such as obliging national authorities to disclose the incomes of agricultural subsidies beneficiaries—see Commission Regulation (EC) No 259/2008 of 18 March 2008 laying down detailed rules for the application of Regulation No 1290/2005 as regards the publication of information on the beneficiaries of funds deriving from the European Agricultural Guarantee Fund (EAGF) and the European Agricultural Fund for Rural Development.

Recently, e.g., Case C-399/11 Melloni (ECLI:EU:C:2013:107) or Case C-617/10 Åkerberg Fransson (n 43) and C-293/12 Digital Rights Ireland (n 79) which was preceded by a full-scale revolt in a number of states against the implementation of the Data Retention Directive.


In detail Michal Bobek and David Kosař, ‘Global Solutions, Local Damages: A Critical Study in Judicial Councils in Central and Eastern Europe’ (n 8) 1274–78.


For a review see Tomáš Dumbrovský, Bilyana Petkova and Marijn Van der Sluis, ‘Judicial Appointments: the Article 255 TFEU Advisory Panel and Selection Procedures in the Member States’ (n 7) 466–81.


But critically already, e.g., Francette Fines, ‘General Analytical Perspective on Community Liability’ in Ton Heukels and Alison McDonnell (eds), The Action for Damages in Community Law (Kluwer Law International, The Hague, 1997) 33, suggesting that the Court of Justice was not genuinely using the mandate it received under the ECT for elaborating rule on extra-contractual liability of the EU on the basis of a comparative study of the traditions common to the Member States. A qualitative study in this regard provides Wolfgang Wurmnest, Grundzüge eines europäischen Haftungsrechts: eine rechtsvergleichende Untersuchung des Gemeinschaftsrechts (Mohr Siebeck, Tübingen 2003).

See Michal Bobek, Comparative Reasoning in European Supreme Courts (OUP, Oxford, 2013) 42–44.

For further examples and illustrations, see, e.g., Angus Johnston, “Spillovers” from EU Law into National Law: (Un)intended Consequences for Private Law Relationships’ in Dorota Leczykiewicz and Stephen Weatherill (eds), The Involvement of EU Law in Private Law Relationships (Hart Publishing, Oxford, 2013).

The UK (not just tabloid) press appears to be the most prolific chronicler (or rather generator) of similar ‘news’ items. For a representative selection, see, e.g., the blog of the European Commission’s Representation in the UK collecting the UK ‘Euro-myths’, available at http://blogs.ec.europa.eu/ECintheUK (last accessed 18 August 2016) or the BBC’s ‘Guide to the best euromyths’ available at http://news.bbc.co.uk/2/hi/europe/6481969.stm (last accessed 16 August 2016).

For example, a number of (not only) Central European countries like Poland, the Czech Republic, or Hungary could be said to be under a distinct German legal influence, getting inspired and copying German legislation and case law en masse. Further see Michal Bobek, *Comparative Reasoning in European Supreme Courts* (n 89) 157-68; 255-57; 269-72.

An illustration in this regard might be provided by the judgment of the Czech *Nejvyšší správní soud* (Supreme Administrative Court) of 27 September 2006, 1 Ao 1/2005, which concerned the transferability of mobile numbers between various operators and in which the court sought inspiration in the German, French, and Belgian implementation of Directive 2002/22/EC on universal service. Similarly, in the judgment of 19 June 2007, 5 As 19/2006-59, the same court looked into how the EU Directive 2003/35/EC concerning the access to justice in environmental matters was implemented in Germany and in Austria. In both, and other, cases what is being looked is inspiration for specific problems of national implementation for which EU law itself does not provide any answer.


Suffice it perhaps to mention the most prominent example of the Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States (OJ 2002 L 190/1).

*M.S.S. v Belgium and Greece* App No 30696/09 (Grand Chamber judgment of 21 January 2011).

Joined Cases C-411/10 and C-493/10 *N. S. (C) and M. E. and others* [2011] ECR I-13905 (ECLI:EU:C:2011:865).

I.e., situations in which a Member State voluntarily adapts to European standards outside their personal, material, or territorial scope of application. An example from national practice are situations in which the courts of the Contracting Parties apply by analogy the case law of the ECtHR relating to the standards required under Art 6(1) of the European Convention for criminal proceedings to national proceedings not falling under the ‘criminal limb’ of Art 6(1), such as imposition of administrative sanctions and penalties or disciplinary proceedings against state officials.

See earlier (nn 11 and 12).


Alec Stone Sweet and Jud Mathews, ‘Proportionality, Judicial Review, and Global Constitutionalism’ (n 10).


Alexander Somek, ‘Wissenschaft vom Verfassungsrecht: Österreich’ in Armin von Bogdandy, Sabino Cassese, and Peter M Huber (eds) IPE vol II (n 13) § 37–43.


Report ‘Prospects of Legal Scholarship in Germany: Current Situation, Analyses, Recommendations’ (n 110) 11, 13, 15.

Followed by a lively discussion within Germany on the virtues and advantages of the traditional ‘German’ approach and teaching in law faculties. See, for a sample of discussion in English, the entries at the http://www.verfassungsblog.de, label ‘Legal Scholarship’, published since October 2013.


With respect to Europe, at least six key judicial associations should be mentioned. For administrative justice, it is the Association of the Councils of State and Supreme Administrative Jurisdictions of the EU (http://www.aca-europe.eu) and the International Association of Supreme Administrative Jurisdictions (www.aihja.org). The associations grouping the supreme courts of general jurisdiction are the Network of Presidents of the Supreme Judicial Courts of the Member States of the EU (http://www.network-
presidents.eu) and Association des Hautes Juridictions de cassation des pays ayant en partage l’usage du français (http://www.ahjucaf.org). The latter association, which defines itself, as its name indicates, through the medium of the usage of the French language, also has as members European countries where the level of knowledge (not to speak of usage) of French in the supreme jurisdictions is rather hypothetical, such as the Czech Republic, Slovakia, or Hungary. Finally, the organizational platform for the cooperation of the European constitutional jurisdictions is the Conference of the European Constitutional Courts (http://www.confcoconsteu.org). An additional forum for information exchange in constitutional matters is also provided by the Venice Commission (http://www.venice.coe.int). All websites last accessed on 18 August 2016.

116 Such as, for example, the European Union Forum of judges for the Environment (http://www.eufje.org) or the Association of European Competition Law Judges (http://www.aeclj.com).

117 In the sense of horizontal intra-EU comparisons with regard to questions not expressly provided for by EU law—see earlier (n 95).


120 Armin von Bogdandy, ‘Deutsche Rechtswissenschaft im europäischen Rechtsraum’ (2011) 66 JuristenZeitung 1, 4 refers to the need for a ‘methodische Europäisierung’.

121 Armin von Bogdandy, ‘Wissenschaft vom Verfassungsrecht: Vergleich’ (n 108) § 96.

122 See earlier (n 65).

123 See notably Randall Lesaffer, European Legal History: A Cultural and Political Perspective (Jan Arriens tr, CUP, Cambridge, 2009) 356ff or S Romano, L’Ordre juridique (Dalloz 1975) 77ff.

124 With Jhering famously stating that legal science seemingly ‘degenerated into the jurisprudence of states’, which appeared to be ‘a discouraging and unseemly posture for a science’—in ‘Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung’, as translated in Konrad Zweigert and Hein Kötz, Introduction to Comparative Law (Tony Weir tr, 3rd edn, Clarendon, Amsterdam, 1998) 46.

125 See, e.g., Helmut Coing, ‘Die ursprüngliche Einheit der europäischen Rechtswissenschaft’ in Helmut Coing, Gesammelte Aufsätze zu Rechtsgeschichte, Rechtsphilosophie und Zivilrecht: Band 2 (Vittorio Klostermann, Frankfurt am Main, 1982). Coing further demonstrates (in ‘Das juristische Vorlesungsprogramm der Universität Padua im XVII. und XVIII. Jahrhundert’, in the same volume) how the European unity of legal thinking gradually split on the changes made in the curricula in European universities in the seventeenth to nineteenth centuries.
Further Michal Bobek, *Comparative Reasoning in European Supreme Courts* (n 89) 9–13.


For a succinct (and amusing) expression of such traditional views, see, e.g., the open letter of some forty French professors of law to the (then) President of the French Republic, Mr Jacques Chirac, claiming that the transformation of the 1980 Rome Convention applicable to contracts into an EU regulation (in similar fashion as was done before with the Brussels Convention, which became Brussels I Regulation) lacks legitimacy. The letter provoked a reply by some eighty other French professors. See the blog entry at http://bruxellesblogs.liberation.fr/coulisses/2007/01/ne_dites_pas_ma.html of 14 January 2007 entitled ‘Ne dites pas à ma mère que je suis militant souverainiste, elle me croit professeur de droit’, last accessed on 15 February 2015.

Armin von Bogdandy ‘Verwaltungsrecht im europäischen Rechtsraum—Perspektiven einer Disziplin’ (n 108) § 52 and § 59–60.


136 See in previous sections, in particular D.2.


138 The strong and constructive role of the scholarship in creating common rules could be said to be influenced by the German tradition, which recognizes the key role of legal scholars in forming the legal system. Conversely, in English law and French law, the role of law professors in shaping public law was traditionally perceived as a more limited one. For such a traditional account, see Raoul C Van Caenegem, *Judges, Legislators and Professors* (CUP 1987) 53–65; for a more recent comparative assessment, see Stefan Vogenauer, ‘An Empire of Light? II: Learning and Lawmaking in Germany Today’ (2006) 26 Oxford Journal of Legal Studies 627. Intriguingly, whereas in English law, the situation might be changing considerably in the course of two decades or so—see Alexandra Braun, ‘Burying the Living? The Citation of Legal Writings in English Courts’ (2010) 58 American Journal of Comparative Law 62, 77, the French administrative judiciary represented by the powerful and omnipresent *Conseil d’Etat* appears to display an ongoing ostentatious disinterest in the works of ‘*les universitaires*’—see Bruno Latour, *La fabrique du droit: une ethnographie du Conseil d’Etat* (La Découverte 2004) 23, 26, 132.

139 The German ‘*Exzellenzinitiative*’, with considerable funding increases for selected few research-intensive universities that are believed to have the potential for international excellence, may be seen as a structural change in this direction. It has been vividly debated and contested in the German educational circles, since it breaks a number of long-standing taboos. Further see, e.g., the individual chapters in Stephan Leibfried (ed.), *Die Exzellenzinitiative: Zwischenbilanz und Perspektiven* (Campus Verlag, Frankfurt, 2010) or Michael Hartmann, ‘Die Exzellenzinitiative—ein Paradigmenwechsel in der deutschen Hochschulpolitik’ (2006) 34 *Leviathan* 447, but also Richard Münch, ‘Wissenschaft im Schatten von Kartell, Monopol und Oligarchie. Die latenten Effekte der Exzellenzinitiative’ (2006) 34 *Leviathan* 466 or Eva Barlösius, ‘“Leuchttürme der Wissenschaft”‘ (2008) 36 *Leviathan* 149.

140 Namely Poland, the Czech Republic, Slovakia, Hungary, Slovenia, and the three Baltic states (Estonia, Latvia, Lithuania). Although Cyprus and Malta also joined the Union in 2004, they do not belong, geographically as well as historically, in the category of Central and Eastern European countries. Conversely, on a broader understanding of the category, the 2007 and 2013 newcomers, namely Romania, Bulgaria, Croatia, might also be included.


The reports issued by the European Commission over the past eight years under the 2006 established Cooperation and Verification Mechanism (a diplomatic euphemism for a rather unprecedented step within the Union which means ongoing monitoring of an EU Member State as to its compliance with the rule of law) are certainly not too optimistic in this regard. The latest two reports of 28 January 2015—‘Report from the Commission to the European Parliament and the Council on Progress in Bulgaria under the Cooperation and Verification Mechanism’ [COM(2015) 36 final] and ‘Report from the Commission to the European Parliament and the Council on Progress in Romania under the Co-operation and Verification Mechanism [COM(2015) 35 final]—are, together with the previous reports, available at http://ec.europa.eu/cvm, last accessed 15 February 2015.

According to the Council of Europe Treaty Office (http://conventions.coe.int), the European Convention was ratified in 1992 by Bulgaria, Hungary, Czech Republic, and Slovakia (in 1992 still Czechoslovakia, but from 1993 two independent states with two judges); in 1993 by Poland; in 1994 by Romania and Slovenia; in 1995 by Lithuania; in 1996 by Estonia and by 1997 by Latvia. Furthermore, a number of post-Soviet and Balkan countries also ratified the European Convention in the second half of the 1990s, namely Albania (1996); Croatia (1997); Georgia (1999); Moldova (1997); Russia (1998); The Former Yugoslav Republic of Macedonia (1997); and Ukraine (1997).

Another example in this regard might the uncompromising quest of the ECtHR against ‘non-judicial members’ of high courts representing public interest, such as advocates general or public procurators, which was launched in 1990s. Further see Michal Bobek, ‘A Fourth in the Court: Why Are There Advocates-General in the Court of Justice?’ (2012) 14 Cambridge Yearbook of European Legal Studies 529, 546–47, or generally David Kosař, ‘Policing Separation of Powers: A New Role for the European Court of Human Rights?’ (2012) 8 European Constitutional Law Review 33.

See in this regard the concurring opinion of Judge Myjer in Sanoma Uitgevers B.V. v the Netherlands Application no 38224/03, Judgment (GC) of 14 September 2010, where he explicitly acknowledges this by stating at para 5: ‘What would your answer have been if a similar case, with a comparable show of force by the police and the prosecution service, had been brought before us from one of the new democracies? … Would you still have allowed yourself to be satisfied by the involvement, at the eleventh hour, of a judge who has no legal competence in the matter? … That was ultimately the push I needed to be persuaded to cross the line and espouse an opinion opposite to that which I held earlier.’

For a further evaluation of the EU induced changes in judicial institutions in the new Member States, see the individual contributions in Michal Bobek (ed.), Central European Judges Under the European Influence: The Transformative Power of the EU Revisited (Hart, Oxford, 2015).

From: Oxford Constitutions (http://oxcon.ouplaw.com). (c) Oxford University Press, 2015. All Rights Reserved. date: 07 June 2020
Legal and administrative cultures are strikingly resilient. Thus, even in the early twenty-first century, it might still matter if and what kind of foundations, what kind of legal culture a state built in this regard in the course of the nineteenth and early twentieth century. It would be most intriguing if a time traveller from late nineteenth-century Austria could be sent, for example, to a lower administrative authority in the Czech countryside today in order to observe how much had really changed, in particular in terms of administrative culture: how is a file assembled; how does it circulate; how is an administrative decision supposed to look; and so on.

Although typically perceived as one block from the outside, there was quite some internal differentiation within the Eastern bloc, especially in the 1970s and 1980s. The difference with regard to Central Europe was between, on the one hand, the more ‘liberal’ Poland and Hungary and, on the other hand, the ‘hard-line’ Czechoslovakia and the DDR, with former Yugoslavia being a completely different story altogether. For a case study of this internal differentiation in the context of the universities, see, e.g., John Connelly, *Captive University: the Sovietization of East Germany, Czech, and Polish Higher Education, 1945-1956* (University of North Carolina Press, Chapel Hill, 2000). For a more personal comparative account of the different atmosphere and openness in each of the Central European countries in the late 1980s, see Timothy G Ash, *The Uses of Adversity: Essays on the Fate of Central Europe* (2nd edn, Penguin, London, 1999).

This is the lowest estimate, generated by the European Commission itself. Other sources have indicated even greater, perhaps double the amount of pages, see The House of Commons Library Research Paper 10/62 ‘How Much Legislation Comes from Europe’ (n 25) 8.


Cargo cult is a known metaphor of natives, who do not understand much of the content of an activity they have seen before being carried out by the more advanced societies, but keep mimicking it in the hope it might produce the desired effects. It was used metaphorically for describing some areas of (social) science, which allegedly instead of producing real science just plays at it (see famously Richard P Feynman, ‘Cargo Cult Science’ (1974) 37 (7) *Engineering and Science* 10, 11).


A legal transformation may be conceived of at different levels. In the narrow sense, it just means the shift from one regime to another; a mere change in the constitutional structure. In the broader sense, it means much more: not just a constitutional shift, but also a change in values, their enforcement, and the real life of the new institutions. See, e.g., Csaba Varga, *Transition to Rule of Law: On the Democratic Transformation in Hungary* (Loránd Eötvös University/Institute for Legal Studies of the Hungarian Academy of Science, Budapest, 1995) 74. Varga quotes the former president of the Hungarian Constitutional
Court, Lászlo Sólyom, who claimed that for him, the ‘transition’ was, from the legal point of view, finished in October 1989. From then on, Hungary has been a law-governed state and there is no further stage to transit to.

158 In a similar vein, nobody would be referring to, for example, Greece or to some of the other EU Member States, as ‘countries in transition’ today, even though they might still be plagued by recognized problems in terms of legal protection. Compare the examples mentioned earlier at nn 98 and 99.

159 See generally, e.g., Christoph Möllers, Andreas Voßkuhle, and Christian Walter (eds), *Internationales Verwaltungsrecht* (Mohr Siebeck, Tübingen, 2007) or Eberhard Schmidt-Aßmann, ‘Die Herausforderung der Verwaltungsrechtswissenschaft durch die Internationalisierung der Verwaltungsbeziehungen’ (2006) 45 Der Staat 315. It would appear that in general, the notion of ‘international administrative law’ would be more widely used within the German scholarship, whereas the ‘global international law’ in the English speaking one.


161 See, e.g., Mattias Kumm and others, ‘How large is the world of global constitutionalism?’ (2014) 3 Global Constitutionalism 1.


163 For a similar vision, see, e.g., Koen Lenaerts, ‘Interlocking legal orders in the European Union and Comparative Law’ (2003) 52 ICLQ 873.

164 Which may not be reserved to just scholarly discussion: cf. the use of ‘intra-EU comparative’ argument in paragraph 30 of the Order of the German Federal Constitutional Court of 14 January 2014, 2 BvR 2728/13, available at http://www.bverfg.de/e/rs20140114_2bvr272813en.html (referring to various decisions of other national constitutional courts concerning the limits of the transfer of sovereign powers to the European Union) or the references by the UK Supreme Court in its judgment of 22 January 2014 in *HS2 Action Alliance Ltd, R (on the application of) v The Secretary of State for Transport & Anor* [2014] UKSC 3 to the case law of the German Federal Constitutional Court suggesting how to interpret case law of the Court of Justice touching on the identity of the national constitutional order (paras 111 and 202).